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Productivity Commission

Workplace Relations Framework

Productivity Commission
Inquiry Report
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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, written in a cursive style, reading 'Patricia Scott'.

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 Commission's report is in two volumes. Volume 1 contains the overview, recommendations and findings and chapters 1 to 16. **This volume 2 contains chapters 17 to 34, appendixes A to J and references.** Below is the table of contents for both volumes.

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Abbreviations and explanations

Abbreviations

ABCC	Australian Building and Construction Commission
ABS	Australian Bureau of Statistics
ACAS	Advisory, Conciliation and Arbitration Service
ACCC	Australian Competition and Consumer Commission
ACCI	Australian Chamber of Commerce and Industry
ACOSS	Australian Council of Social Service
ACREW	Australian Centre for Research in Employment and Work
ACTU	Australian Council of Trade Unions
AHA	Australian Hotels Association
AHRI	Australian Human Resources Institute
AIRC	Australian Industrial Relations Commission
ALAEA	Australian Licenced Aircraft Engineers Association
AMMA	Australian Metal and Mines Association
AMWU	Australian Manufacturing Workers' Union
ANAO	Australian National Audit Office
ANZSIC	Australian and New Zealand Standard Industrial Classification
APPEA	Australian Petroleum Production & Exploration Association
APS	Australian Public Service
APSC	Australian Public Service Commission
AWA	Australian Workplace Agreement

AWALI	Australian Work and Life Index
AWRS	Australian Workplace Relations Study
AWU	Australian Workers Union
BCA	Business Council of Australia
BOOT	Better Off Overall Test
BRICS	Brazil, Russia, India, China and South Africa
BRIT	Bendigo Regional Institute of Technical and Further Education
CEPU	Communications, Electrical, Electric ,Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
CFMEU	Construction, Forestry, Mining and Energy Union
CGE	Computable General Equilibrium
CMS	Case Management System
COAG	Council of Australian Governments
COAT	Council of Australasian Tribunals
COSBOA	Council of Small Business Australia
CPI	Consumer Price Index
CPSU	Community and Public Sector Union
CURF	Confidentialised Unit Record File
DEEWR	Department of Education, Employment and Workplace Relations
DET	Department of Education and Training
DFAT	Department of Foreign Affairs and Trade
DIBP	Department of Immigration and Border Protection
EA	Enterprise Agreement
EBA	Enterprise Bargaining Agreement
EITC	Earned Income Tax Credit
EPL	Employment Protection Legislation

FWA	Fair Work Australia
FWAFB	Fair Work Australia Full Bench
FWBC	Fair Work Building and Construction
FWC	Fair Work Commission
FWCFB	Fair Work Commission Full Bench
FWO	Fair Work Ombudsman
GDP	Gross Domestic Product
HILDA	Household, Income and Labour Dynamics in Australia
HR	Human Resources
HSU	Health Services Union
IFA	Individual Flexibility Arrangement
ILO	International Labour Organization
IR	Industrial Relations
IRC	Industrial Relations Commission
LITO	Low Income Tax Offset
MBA	Master Builders Australia
MUA	Maritime Union of Australia
NAIRU	Non-Accelerating Inflation Rate of Unemployment
NATSEM	National Centre for Social and Economic Modelling
NBER	National Bureau of Economic Research
NCC	National Competition Council
NCOSS	Council of Social Service of New South Wales
NES	National Employment Standards
NTEU	National Tertiary Education Union
OECD	Organisation for Economic Cooperation and Development

OLS	Ordinary Least Squares
PAYG	Pay As You Go
PC	Productivity Commission
PIR	Post-Implementation Review
PISA	Programme for International Student Assessment
PPP	Purchasing Power Parity
QUT	Queensland University of Technology
RBA	Reserve Bank of Australia
SACES	South Australian Centre for Economic Studies
TCF	Textile, Clothing and Footwear
TCFUA	Textile, Clothing and Footwear Union of Australia
TRYM	Treasury Macroeconomic
TWU	Transport Workers Union
UNSW	University of New South Wales
VECCI	Victorian Employers' Chamber of Commerce and Industry
WAIRC	Western Australian Industrial Relations Commission
WSC	Workplace Standards Commission
WHS	Workplace Health and Safety
WR	Workplace Relations
WTO	World Trade Organization

Explanations

Billion The convention used for a billion is a thousand million (10^9).

17 Unfair Dismissal

Key points

- Unfair dismissal laws provide important and needed protections for employees, but are capable of misuse. They should strike a balance between creating incentives for treating people fairly at a time of significant shock, and potentially imposing costs on good employers that bear the risks of vexatious claims and compliance burdens.
- While the reported incidence of unfair dismissal is low in Australia as a proportion of all work separations, unions, advocacy groups, businesses and business representative bodies can all demonstrate fault with individual process and outcomes. For this chapter, the crucial question is whether that translates to a need for fundamental change in the unfair dismissal law.
 - The answer is no.
- Moreover, the inquiry assesses that unfair dismissal laws are not playing a major role in hiring and firing decisions, a further crucial test.
- The current unfair dismissal regime reflects twenty years of intense debate. While recent legislative amendments to strengthen the Fair Work Commission's (FWC's) hand in regard to costs and the dismissal of unmeritorious cases are steps in the right direction, some further incremental reform is needed to:
 - prevent spurious cases from resulting in financial settlement, by introducing more effective upfront filters that focus on the merits of claims, and revised fee arrangements for upfront lodgment and for cases proceeding to arbitration
 - not favour form over substance, by changing the legislative test for unfair dismissal and the penalty regime to ensure that procedural errors alone are not sufficient to award compensation or restore employment in what would otherwise be regarded as a fair dismissal
 - reform the governance of the FWC and some aspects of its conciliation and arbitration processes (chapter 3).
- The Small Business Fair Dismissal Code should also be removed, with a reliance instead on improvements in education and related generic arrangements through procedural and governance reforms.
- Removing statutory unfair dismissal laws is not justified on the evidence. Moreover, it could see an increase in cases pursued via alternative, costlier avenues (such as common law remedies through the courts), and a renewed direct involvement by self-interested third parties.

Australia's workplace relations (WR) system provides remedies for workers who are dismissed in a 'harsh, unjust or unreasonable' manner. The Fair Work Commission (FWC) may order the unfairly dismissed employee be reinstated, or paid compensation where reinstatement is inappropriate.

Unfair dismissal arrangements reflect that employees and employers do not always act appropriately. Firms and managers may act harshly or without sufficient cause. They may dismiss employees based on whimsy or without due process. Dismissal is typically a shattering experience for employees, and can have long-term effects on their employment prospects and their lives.¹ On the other hand, sometimes employees may underperform, be disruptive or behave inappropriately, with adverse consequences for a business and its managers. Labour markets can only function efficiently if employers are able to require improvement from poorly performing employees and, absent of that, are able to dismiss or otherwise penalise them. Accordingly, there is a need for balance between the prerogative of businesses to manage and the rights of employees to fair treatment.

The system for unfair dismissal protections and remedies in Australia has as its centrepiece the unfair dismissal provisions in the *Fair Work Act 2009* (Cth) (FW Act), and the related role of the FWC in overseeing conciliation and arbitration processes. This chapter looks in detail at the operation of this framework and evaluates the case for further reform.

The chapter is organised as follows:

- section 17.1 discusses the current institutional setting, providing an overview of the main avenues by which employees can lodge unfair dismissal claims and the key institutions considering such claims
- evidence on the prevalence of unfair dismissal cases and how well the current unfair dismissal system is working is presented in sections 17.2 to 17.5
- reform options are assessed in section 17.6.

17.1 The institutional setting

In the current workplace relations framework employees have several avenues of remedy if they think their employment has been terminated unfairly or unlawfully. The lion's share of applications (roughly around 85 per cent at present) are made under s. 394 of the FW Act (application for unfair dismissal remedy). This avenue is available to all national system employees, subject to minimum employment periods. Award and agreement free national system employees earning more than the high income threshold are not protected from unfair dismissal.²

The other avenues for remedy are s. 365 (application for the FWC to deal with a contravention of the general protections involving dismissal) and s. 773 (application for the

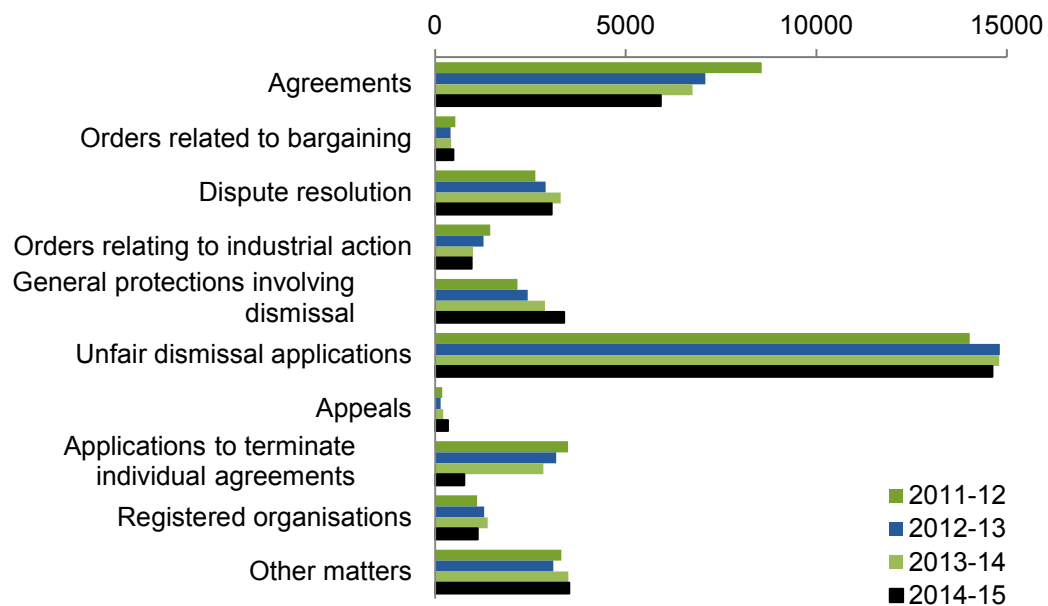
¹ For a discussion of the mental health aspects of job insecurity and dismissal see, for example, D'Souza et al. (2003), Domenighetti, D'Avanzo and Bisig (2000), Freyens (sub. 149, p. 4), Employment Law Centre of WA (sub. 89, pp. 28-30).

² Further detail on the definition and scope of the national employment system is provided in Chapters 1 and 2.

FWC to deal with other terminations of employment). Finally, in certain circumstances, an employee can seek damages from unfair dismissal through the common law.

Since the commencement of the FW Act in 2009, unfair dismissal applications have been the biggest source of work for the FWC (figure 17.1).

Figure 17.1 **Case load by matter type: Fair Work Commission**



Source: FWC (2015c).

Protection from unfair dismissal under the *Fair Work Act 2009*

Unfair dismissal is covered in Part 3-2 of the FW Act. The stated object of this part of the Act is to establish a framework for dealing with dismissal that:

- balances the needs of business (including small business) and employees
- establishes procedures that are quick, flexible and informal; and that address the needs of employers and employees
- provides remedies if a dismissal is found to be unfair, with an emphasis on reinstatement rather than financial compensation
- in regard to procedures and remedies, ensures that a ‘fair go all round’³ is accorded to both the employer and employee concerned. (FW Act, s. 381)

³ An expression used by Sheldon J in *Re Loty and Holloway v Australian Workers’ Union* [1971] AR (NSW) 95.

Protection from unfair dismissal in Australia has a relatively long history, and the current formulation of protections in the FW Act is the result of modifications and refinements over several decades (figure 17.2).

What constitutes an unfair dismissal?

In the FW Act (s. 385), a person has been unfairly dismissed if the FWC is satisfied that:

- the person has been dismissed; and
- the dismissal was harsh, unjust or unreasonable; and
- the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- the dismissal was not a case of genuine redundancy.

The Act contains detailed criteria on the identification of harsh, unjust or unreasonable dismissals. These include criteria relating to the person's capacity or conduct at the time of dismissal, notification and enterprise size.

A person is not unfairly dismissed where he or she has been genuinely made redundant (FW Act, s. 389). A genuine redundancy is said to have occurred if the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and the employer has complied with any obligation in a modern award or enterprise agreement to consult about the redundancy.

There are minimum employment or probation periods set down in the FW Act that must elapse before employees can access the Act's main unfair dismissal protections. Specifically, under the FW Act (s. 382), employees are protected from unfair dismissal only if they have served a minimum employment period (six months, or one year for those employed by small businesses (defined as businesses having fewer than 15 employees)). Service as a casual employee does not count towards the period of employment unless it was on a regular and systematic basis and the employee had a reasonable expectation of continuing engagement on a regular and systematic basis.

Finally, to be eligible for protection, the employee must be covered by a modern award or enterprise agreement (which together covers most employees), or earn less than the high-income threshold (set at \$136 700 on 1 July 2015, but adjusted annually).

An employee has 21 days from the date on which they were dismissed to make an unfair dismissal application.

Figure 17.2 **Comparison of unfair dismissal protections in the FW Act and previous frameworks**

	<i>Workplace Relations Act 1996</i>	<i>WR Amendment Act 2005</i>	<i>Fair Work Act 2009</i>
Commencement date	November 1996	March 2006	July 2009
Coverage of workforce	About 50%	About 50%, taking in account exemptions	About 90%
Test for unfair dismissal	'harsh, unjust or unreasonable'. Some dismissals also unlawful.	Same as WR 1996	Same as WR 1996
Employer size threshold for claims	No threshold	>100 employees	No threshold
Qualifying period of service for Employment Claims	3 months	6 months	6 months (but 12 months for small businesses)
Time limit to lodge claims	21 days for the date that the dismissal takes effect	21 days from the date that the dismissal takes effect	At commencement of Act was 14 days. Increased in late 2012 to 21 days from the date that the dismissal takes effect
Exclusions	Casuals with <12 months' service	Casuals	Casuals who are not employed on a regular/ systematic basis (s. 384(2))
	Contractors	Contractors	Contractors
	Trainees	Trainees	Trainees
	Fixed term employees	Fixed term employees	Fixed term employees at end of term
	High wage employees	High wage employees	Employees earning <\$136k indexed ^a , if not covered by award or agreement
Redundancy definition	'Job performed by no one' There was a reluctance of courts to intervene in employer judgments about economic reasons.	'Genuine operational reasons' There is no need for employer to show that this was the only reason, or that the operational reasons made the dismissal necessary.	'Genuine redundancy'
Remedies	Reinstatement, compensation, capped at 6 months	Reinstatement, compensation, capped at 6 months	Reinstatement, compensation, capped at 6 months
Other dismissal remedies	Unlawful termination	Unlawful termination	Dismissal claims possible under adverse action provisions s. 365

^a As of 1 July 2015. Adjusted annually. ^b Discussed in greater detail in chapter 18.

Source: Adapted from Freyens and Oslington (2013, p. 304).

Separate arrangements apply to small businesses

For small businesses, a dismissal will be deemed fair if the FWC is satisfied the employer followed the Small Business Fair Dismissal Code (box 17.1).

Box 17.1 **The Small Business Fair Dismissal Code**

Summary (or immediate) Dismissal

It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair, it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. The employer must have reasonable grounds for making the report.

Other Dismissal

In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.

The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural Matters

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

A small business employer will be required to provide evidence of compliance with the code if the employee makes a claim for unfair dismissal to the Fair Work Commission, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.

Source: Australian Government (2011).

In the FW Act (s. 23), a small business is defined as employing fewer than fifteen workers on a head count basis (not full-time equivalents). Casual workers employed on a regular and systematic basis are counted as employees (Australian Government 2011, p. 1).

This count includes the employee claiming unfair dismissal, any other employees dismissed at the same time, as well as any employees working for an 'associated entity' of the employer as defined by the Act (Stewart 2013, p. 46). Given this head count definition, two businesses with identical labour inputs in terms of hours worked may be classified into

different employment size categories, and subject to different statutory requirements (an issue that is examined further below).

Remedies and procedures

Reinstatement is a primary object of the unfair dismissal framework in the FW Act (s. 390). The *reinstatement* provisions require that, where an order for reinstatement is made, the person either be reappointed to the same position as they occupied immediately prior to the dismissal, or to another position on terms or conditions that are no less favourable than those on which the person was employed immediately prior to dismissal. These provisions apply to employers and their associated entities. The FWC can only award compensation where it is satisfied that reinstatement is inappropriate.

Compensation for unfairly dismissed employees is capped at the lesser of either half the high income threshold (which would currently be equal to \$68 350), or 26 weeks' remuneration, with determination of the amount paid up to that cap based on the likely future income of the employee, deductions of any money earned since termination and several other factors. While the FWC may reduce compensation if the employee's misconduct contributed to the employer's decision to dismiss, the compensation amount is in many cases essentially formulaistic (box 17.2).

Box 17.2 The 'Sprigg Test'

In awarding compensation for unfair dismissal, the Fair Work Commission tends to rely in many cases on the so-called Sprigg Test. The recent case of *Haigh v Bradken Resources Pty Ltd* [2014] FWCFB 236 discusses the structure and application of the test:

The frequently quoted case on compensation calculations is *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21 in which a Full Bench of the Australian Industrial Relations Commission (AIRC) confirmed the following steps in determining compensation under the unfair dismissal provisions of the Workplace Relations Act:

1. Estimate the amount the employee would have received or would have been likely to receive if the employment had not been terminated.
2. Deduct monies earned since termination.
3. Deductions for contingencies.
4. Calculate any impact of taxation.
5. Apply the legislative cap.

The legislation has been amended since that time by permitting a reduction in an amount otherwise payable if an employee's misconduct contributed to the employers decision to dismiss.

Compensation amounts are not related to the seriousness of any unfair action by the employer or the emotional effects of the dismissal. Indeed, the FW Act specifically excludes consideration of 'shock, distress or humiliation' as relevant for compensation. High compensation amounts are more likely if the employee would have been expected to otherwise have stayed in their job for an appreciable period, and if they did not receive

significant wages after termination. There is, in effect, an incentive not to get a job for some dismissed workers, though the importance of that incentive is not clear.

In practice, the average compensation paid is relatively low. For example, in 2014-15, of the 141 arbitrated cases where compensation was granted, around 57 per cent involved payment of less than \$10 000, while 39 per cent of cases involved payment of less than \$6000 (FWC 2015c, p. 77). These totals include wages owed to employees.

Other FW Act avenues for remedy

As discussed previously, an application for a remedy for unfair dismissal is not the only avenue available to an employee whose employment has been terminated.

First, it is possible to make an application for the FWC to deal with a breach of the *general protections* involving dismissal (s. 365). This avenue differs from the unfair dismissal provisions in Part 3-2 in several respects. For example, compensation is uncapped; there is no high-income threshold; relief is available to certain employees outside the national WR system; and, rather than using the ‘harsh, just or unreasonable’ formulation, the dismissal must constitute ‘adverse action’ or otherwise contravene Part 3-1 of the Act. As will be discussed further below, and in chapter 18 (General protections), this alternative avenue for relief has seen a significant growth in cases in recent years (table 17.1).

Table 17.1 Dismissal lodgments by type

	<i>FW Act, s.394: Application for an unfair dismissal remedy</i>	<i>FW Act, s.365: Application to deal with contraventions involving dismissal (General protections)</i>	<i>FW Act, s.773: Application to deal with an unlawful termination dispute</i>	<i>WR Act, s.643: Application for relief re termination of employment</i>	<i>Total</i>
2009-10	11 116	1188	262	488	13 054
2010-11	12 840	1871	174	12	14 897
2011-12	14 027	2162	141	3	16 338 ^a
2012-13	14 818	2429	128	2	17 377
2013-14	14 796	2879	130	2	17 807
2014-15	14 624	3382	114	-	18120

^a The total for 2011-12 is stated to be 16 338 in the relevant annual report, yet the sum of all lodgments only equals 16 333.

Sources: Fair Work Australia (2012a), Fair Work Commission (2013, 2014b, 2015c).

Second, a claim of *unlawful termination* is possible under Part 6-4, Div 2 of the Act (s. 773).

It is not possible to pursue both a s. 394 application for unfair dismissal *and* an application via either s. 773 or a general protections application, as this is ruled out by sections 725-733 of the FW Act. Further, dismissed employees cannot pursue an unlawful termination claim if they are able to make a general protections complaint (s. 723).

State unfair dismissal laws

With the exception of Victoria, each state also has laws on unfair dismissal:

- the *Industrial Relations Act 1996* of New South Wales
- the *Industrial Relations Act 1999* of Queensland
- the *Industrial Relations Act 1979* of Western Australia
- the *Fair Work Act 1994* of South Australia
- the *Industrial Relations Act 1984* of Tasmania.

Claims brought under these laws are heard in the relevant state-based commissions.

The coverage provided by the state laws is quite limited and, given the national coverage of the FW Act, confined to non-national system employees, such as state government employees and in Western Australia employees of unincorporated enterprises. This limited coverage is reflected in the increasingly low prevalence of claims lodged under these provisions (as noted below).

Common law remedies

A final avenue of recourse for employees is to pursue a claim of *wrongful dismissal* at common law. Wrongful dismissal generally requires dismissal to be in breach of the employment contract, which is a much higher bar than the unfair dismissal protections under the FW Act.

While wrongful dismissal can be more difficult to establish, expensive to pursue, and contain greater risks of having to pay a defendant's costs if unsuccessful, it can nevertheless suit some individual's circumstances. For example, higher paid workers whose salary exceeds the high income exclusion threshold (\$136 700 as at 1 July 2015), and workers on longer fixed-term contracts, may find it necessary to pursue claims via the common law (Stewart 2013, p. 338).

Compensation rather than reinstatement is the primary remedy available to employees for wrongful dismissal (in contrast to the pre-eminence given to reinstatement under the FW Act). Further, there is no cap on the quantum and nature of compensation that can be sought at common law.

The number of common law claims is currently small relative to those undertaken via the FW Act. To the extent that they establish significant precedent, recent cases (most notably *Commonwealth Bank of Australia v Barker*⁴) have ruled out certain avenues for undertaking common law actions, and clarified the circumstances under which an action may proceed successfully. In particular, after the Barker case, it appears that it is more difficult to successfully pursue cases alleging breach of an implied duty of mutual trust and confidence than may have been supposed previously. This is expected to reduce the number of claims being pursued in the future via this route.

Compensated no fault dismissal — the ‘nuclear option’

Some have argued for the complete dismantling of unfair dismissal protections, while still providing some compensation (see, for example, Johns (2011), Collier (2011) and box 17.3). This would involve the introduction of a novel ‘no fault’ arrangement where, on dismissal, employees would receive some settlement from employers, but there would no further avenue of appeal. There would be some advantages from this approach, including the reduction in the current \$80 million budget of the FWC (where individual matters constitute a large share of the total business), and significant savings in the private costs of parties to disputes. It would displace the current compensation payments required by the FWC. And, depending on the level of the payment, it would still provide some broad incentives for businesses not to unscrupulously dismiss workers.

Box 17.3 Divorce and unfair dismissal: a comparison

Grace Collier outlines the basic features of a no-fault dismissal system as follows:

Employment is a relationship, a very important one; but like all relationships the only guarantee it contains is that one day it will end. Dismissal, resignation, redundancy or business closure will see all Australians one day put out of their jobs. So it is with marriage too, but when the relationship of marriage ends, people don’t insist that the government steps in to make a judgment on whether the separation was ‘fair’ or not.

A no fault dismissal system with a reasonable paid notice period, including an assistance package and supportive job transition service, may be a better way. It would certainly be cheaper. It would remove the legal argument over whether it is ‘fair’, ‘unfair’, a ‘redundancy’, ‘dismissal’ or ‘constructive dismissal’ and the costs of mounting those arguments. It would put a lot of Fair Work Australia commissioners and lawyers out of work and that would not be a bad thing.

Source: Collier (2011).

On the other hand, moving to a no-fault arrangement (compensated or not) raises several major issues:

⁴ [2014] HCA 32. The High Court of Australia held that under the common law of Australia, employment contracts do not contain an implied term of mutual trust and confidence. See also *State of New South Wales v Shaw* [2015] NSWCA 97 (17 April 2015).

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- if compensation was included, it would provide some restitution in minor cases, but inadequate payments for genuinely egregious dismissals
 - it would also leave open the possibility that all employees subject to dismissal with cause (a substantially larger group than those currently lodging claims) could seek and obtain compensation
 - it might create perverse incentives for some employees to engage in misconduct to receive the no-fault payout, since the employee knows that the employer has no recourse to have a vexatious claim dismissed
 - no-fault arrangements do not create effective incentives for employers because the costs of an unfair dismissal would not be proportionate to the lost employment opportunities of any given dismissed employee. The failure to do this adversely affects employees, but also means that the imbalance of power between employers and employees shifts
 - regardless of whether compensation was permitted or not, such a measure would leave parties to seek remedies through the common law. In theory, such common law rights could be removed through statute, but the grounds for doing so would be weak. Accordingly, no-fault dismissal might simply open a less efficient door for uncapped restitution.

Notwithstanding its ingenuity, the Productivity Commission considers that such a major reform of dismissal protections is not warranted. The current arrangements provide significant exemptions and probation periods for businesses of all sizes. On balance, while these arrangements do require improvements, their wholesale dismantling is not justified by the weight of evidence available to the inquiry.

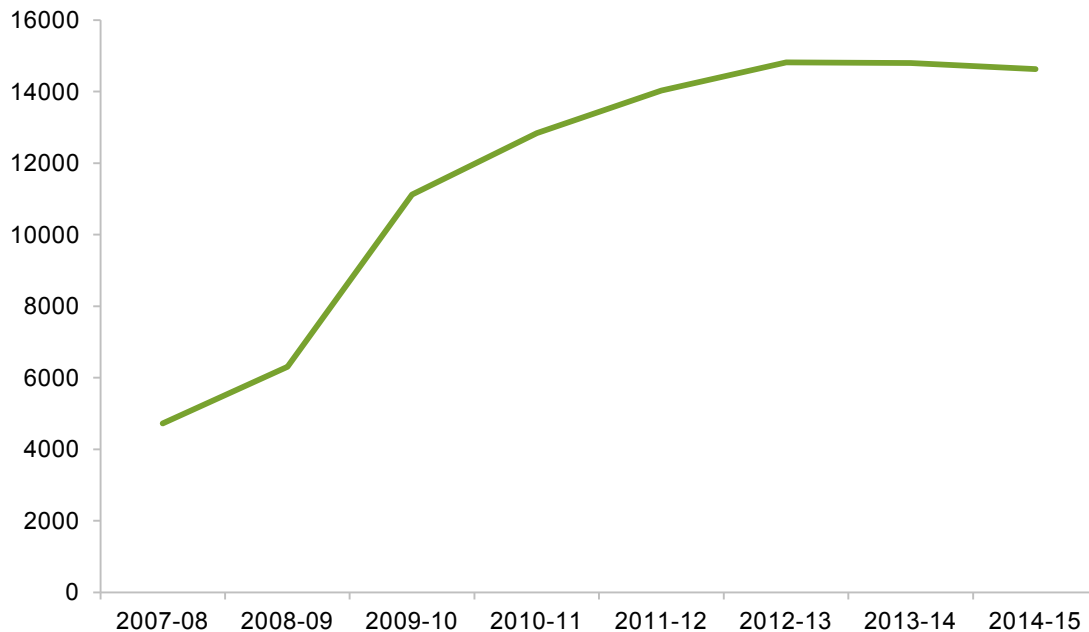
17.2 The incidence and costs of unfair dismissal cases in Australia

As a first step in evaluating current arrangements, it is important to consider evidence on the frequency of unfair dismissal claims and their impacts on employers and employees. This is discussed in this section and more detailed accompanying data is available in appendix B.

The incidence of claims

There has been a significant increase in the number of unfair dismissal lodgments since the introduction of the FW Act in 2009 (figure 17.3). This is to be expected given removal of the 100 employee exemption, expansion of the national WR system and growth in the labour force.

Figure 17.3 Unfair dismissal applications lodged



Sources: Australian Industrial Relations Commission (2008), Australian Industrial Relations Commission (2009), FWC (2014b).

Following lodgment with the FWC, if claims are not dismissed for jurisdictional or procedural reasons,⁵ they proceed to conciliation and, where necessary, arbitration. *Conciliation* of unfair dismissal applications is a voluntary, informal process in which participants ‘identify the issues in dispute and endeavour to reach an in-principle agreement to resolve the dispute in a way that meets the needs of the parties’ (O’Neill 2012a, p. 30). Most conciliations are conducted by telephone conference organised by the FWC. In 2014-15, the proportion of conciliated cases was large, at around 80 per cent of the 14 624 total applications made in that year, and this continues a trend that has been apparent since the introduction of the FW Act.

If an application is not dismissed or settled through conciliation, it proceeds to substantive *arbitration* (O’Neill 2012a). Following a long decline, the rate of substantive arbitration has risen in recent years. Around 630 unfair dismissal cases proceeded to substantive arbitration at FWC in 2014-15. The rise in claims that proceed all the way to arbitration has been accompanied by a noticeable fall in the success rate for claimants (appendix B, table B.2).

⁵ Cases can be dismissed on procedural or jurisdictional grounds. Examples include cases where the claimant is an irregular or casual employee, where the minimum employment period has not been served, where there was no award, agreement, or the claimant was a high-income employee, as well as late claims, cases of genuine redundancy, frivolous or vexatious claims, and claims where the applicant has not actually been dismissed.

One significant limitation of the available data is that it fails to capture any unfair dismissal disputes that do not make it to the lodgment stage. Some employees with valid unfair dismissal claims may not lodge a claim for a number of reasons, including lack of knowledge about their rights. Further, as discussed below, some employers may pay employees to leave the business (sometimes referred to as ‘go away money’) to avoid a dispute making its way to the FWC, even though the employers believe the dismissal was for a valid reason (Hannan 2012). Past commentary in Australia has called for greater scrutiny of the pre-claim stage, and some commentators have called for the introduction of pre-claim conciliation as a way to resolve many disputes while the employment relationship is still extant, for example Howe (2012).

Monetary settlements

In the current system, a considerable number of conciliated cases result in some form of monetary settlement. Using FWC data, for example, across 2013-14, around 60 per cent of total successful conciliations initiated resulted in monetary settlement. On average, the settlement amounts are relatively modest, with over 50 per cent being set at \$4000 or less (figure 17.4). Nevertheless, some businesses may not have the liquidity or access to borrowing to easily meet such payments.

Around 30 to 40 per cent of total cases that proceed to substantive arbitration also result in payment (appendix B, table B.4). In general, compensation awarded under arbitration exceeds that awarded under conciliation, although the \$2000–\$3999 band is still the most common under both methods of finalisation.

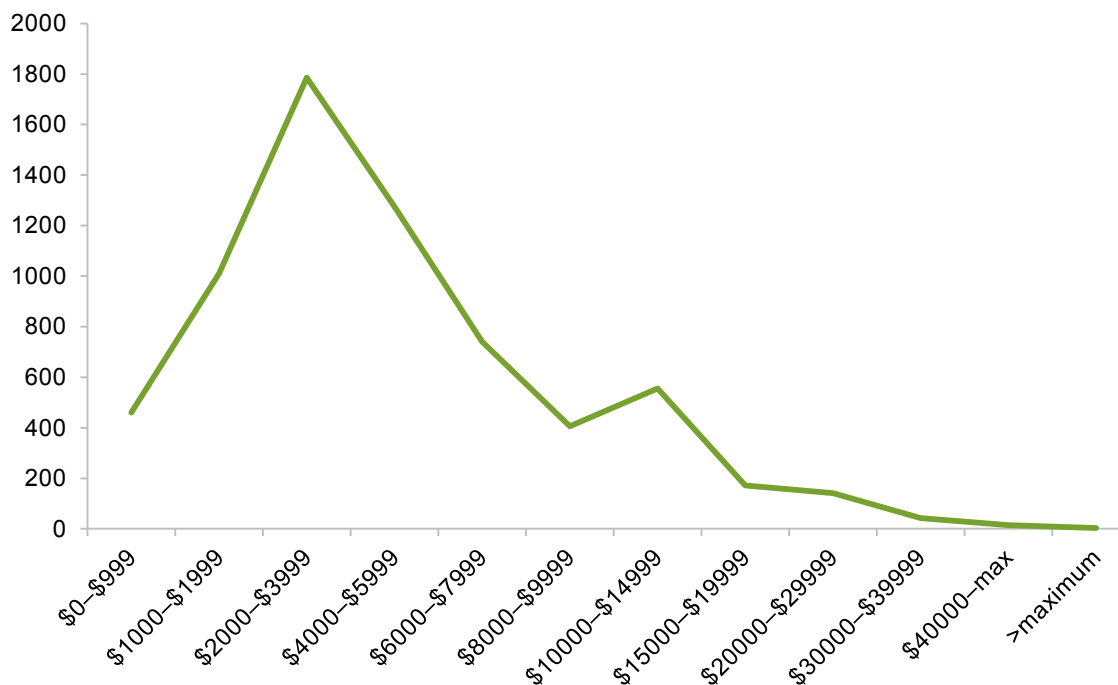
Cost perspectives

Putting perceptions aside, the available data provide some evidence about the degree to which unfair dismissals are likely to have significant adverse economic effects via their cost impacts. The statistics show that unfair dismissal claims remain relatively small in proportional terms across the Australian labour force. For example, in 2012-13, there was a total of around 17 000 unfair dismissal and other dismissal-related lodgments made via the various available avenues available. This equates to roughly 0.18 per cent of employees, and 4.5 per cent of cases where an employee involuntarily lost their job due to retrenchment, redundancy, their employer going out of business, no work being available or for dismissal with cause.⁶

⁶ Based on ABS 2014, *Australian Labour Market Statistics*, Cat. No. 6105.0 for November 2013 and ABS, 2014, *Labour Mobility, Australia, February 2013*, Cat. No. 6209.0, table 11. It should be noted that the ABS labour mobility data will underestimate total separations over a year because it records multiple instances of separations for a given person as a single separation.

Figure 17.4 Conciliation settlements involving money

Distribution of payment totals, 2013-14



Sources: O'Neill (2012a), Fair Work Australia (2012a), FWC (2013, 2014b).

Unfortunately, there are few estimates of the number of dismissals with cause. Very dated information for the 1990s suggested that between 2.1 and 4.4 per cent of employees were dismissed for cause in any given year (Harding 2002, p. 18). Were such a figure still to apply, it suggests that there would have been between 200 000 and 420 000 dismissals with cause in 2012-13. The latter is implausible because it is higher than separations associated with a far broader range of reasons, but if the 200 000 estimate is taken as a more reasonable estimate, it suggests that unfair dismissal lodgments (many of which are unsuccessful) comprise around 10 per cent of total dismissals with cause. Unfair dismissal lodgments resulting in compensation payments from the employer would comprise around 5 per cent of dismissals with cause.

Freyens (sub. 149, p. 5) also discussed dismissals for cause, stating:

... we have no information at all about the number and characteristics of individuals dismissed for cause in any given year ... McCallum, Moore and Edwards (2012) suggests an annual claim rate of about 1.5%, but that is worked out against all separations, not just dismissals for cause, which should be our reference group. Buechtemann (1993) provides a 10% rate for the UK, which suggests 9 out of 10 workers dismissed for cause do not contest the dismissal.

These data are clearly highly uncertain. Nevertheless, they suggest that employers will infrequently encounter unfair dismissal cases taken to the FWC, with only around half of

these occasioning compensation (though the business still bears administrative and other non-pecuniary costs with the remaining cases).

The cost data provided by the FWC regarding conciliated settlements and arbitrated outcomes does not incorporate indirect costs to employers or employees (box 17.4). Including the time cost to employers for the conciliation or arbitration process, the cost of obtaining legal advice, and any settlement payment to the dismissed employee suggests that average total costs of an unfair dismissal case going to the FWC are currently around \$13 500. Even so, this is likely to underestimate the true costs of an unfair dismissal system because it fails to take into account the costs to the business of employees who are not dismissed despite poor performance and of processes used by the business to attempt to avoid unfair dismissal cases arising in the first place (Harding 2005).⁷ It also does not assess costs to employees who are unfairly dismissed, but do not take action. Nor does it include other costs borne by dismissed employees from unfair dismissal processes, such as travel costs and costs associated with disruption to job search activities. There are no reliable estimates of such costs.

The potential longer term costs for employees

For *employees*, the longer-term effects of involvement in unfair dismissal (through lodgment, settlement, conciliation and/or arbitration) can be significant. These effects are also germane in any consideration of the costs of unfair dismissal arrangements, and should be of particular importance in deciding if a cap on compensation is appropriate, and what the level of the cap might be.

17.3 Impacts on employment and productivity

Existing theoretical and empirical work, from Australia and internationally, shows varying economic effects of unfair dismissal regulations on employment, productivity and labour market transitions. This section considers some potential costs and benefits of unfair dismissal regulation, and explores the available evidence on employment and productivity effects.

⁷ However, it should also be noted that the compensation amounts shown in the tables above include payments for entitlements that the employee would have received anyway (including unpaid wages), and so should not properly be characterised as compensation associated with unfair dismissal. This has been ignored in the estimates.

Box 17.4 **What about administrative and time costs?**

In considering cost estimates regarding unfair dismissal, data provided by the FWC, while useful, does not provide detail on some important elements of cost. For employers in particular, involvement in unfair dismissal cases is likely to incur time and administrative costs that are additional to more direct costs associated with compensation. Employees also incur time, emotional disturbance and administrative costs in bringing their claim, in addition to the FWC's lodgment fee.

It is possible to make high-level comparisons between the FWC data on unfair dismissal costs and the findings of earlier research by Freyens and Oslington (2007) (F&O), which incorporate a broader set of costs. (This research was conducted when the 100 employee exemption applied.) They estimate costs of dismissal using a large-scale survey of small and medium-sized Australian enterprises and present figures displaying the distributions of firing costs for uncontested dismissal, conciliation costs, arbitration costs and redundancy costs.

The data available from F&O and the FWC differ in their source and level of detail. The costs F&O report for conciliated and settled dismissals include the time cost of the conciliation process, the cost of obtaining legal advice, and any settlement payment to the dismissed employee. On the other hand, the FWC data employed to represent conciliation costs include only compensation payments, so that the values are lower on average.

	<i>Average compensation (2012 dollars)</i>	
	<i>Conciliation</i>	<i>Arbitration</i>
F&O (2007)	12 240	14 594
FWC, 2010-11	5560	11 642
FWC, 2011-12	5670	11 200
FWC, 1 July 2012 – 31 January 2013	5830	11 440

For arbitration costs, F&O report the total costs associated with a dismissal challenged by an employee and arbitrated. These costs incorporate all possible outcomes of arbitration, including cases where no remedy is attained. However, time and administrative costs are not included. The FWC reports only compensation payments awarded for granted applications under arbitration. Therefore, the FWC average arbitration costs are less complete than F&O's costs, and lower on average since additional costs to the employer of the arbitration process are not considered.

Sources: Freyens and Oslington (2007), Fair Work Commission (2013) and O'Neill (2012a).

Potential benefits and costs

Unfair dismissal legislation is a feature of many countries' WR systems (section 17.4). There are several motivations for such provisions:

- The most obvious of these is the protection of vulnerable workers from the vicissitudes of unfair practices on the part of negligent or malicious employers. Unfair dismissal can result in large adverse impacts on an employee, including loss of income, stress, reduced social status, lower future employment prospects and the loss of social

networks in their workplaces. It can also adversely affect other employees who are not dismissed, but nevertheless fear that his or her employer may do so.

- If unfettered, the capacity to dismiss an employee without any safeguards changes the relative bargaining power of the parties and also leaves open the potential for abuse of power in other ways. For example, an employer may request that an employee work longer hours without payment, or that he or she acquiesce to inappropriate employer conduct. If such conduct is hard to objectively monitor (and this may be the case), even the *threat* of dismissal can reduce the capacity of an employee to resist any such behaviour. So employees can bear significant costs, even if no dismissal actually occurs.
- In the absence of well-defined legislative and institutional approaches to apparently unfair dismissals, other less efficient processes may predominate. For instance, an unfair dismissal may prompt industrial strife (although this is more likely to directly affect medium to large employers). The outcome may subsequently reflect the industrial muscle of the competing parties, rather than the merits of the case. In the meantime, the industrial action itself can have significant immediate costs on employees and employers, as well as undermining future trust. Similarly, common law claims involve uncapped compensation amounts and have high transactions costs (and, accordingly, for many are an inaccessible remedy). As Freyens and Oslington (2013, p. 303) point out:

We must remember that ... (unfair dismissal) costs include payouts of statutory entitlements which would be recoverable in the absence of an unfair dismissal claims system, and that the counterfactual is not the absence of an unfair dismissal claims system (Collier 2011) but common law claims for breach of contract, damages etc (as emphasised by Howe (2012)).

- Statutory protections mean that an employee's capacity to contest arbitrary dismissal does not depend on the capacity to enlist union support (Howe 2013, p. 1; Peters et al. 2010, p. 6).

While not a motivation, unfair dismissal legislation can also improve aggregate productivity performance by penalising poorly managed businesses (Ji and Wei 2013).

Although unfair dismissal regulations are an important part of an employment protection framework, they are also not socially costless. As Oslington argues:

Both the effect of the regulations on incumbent wages and the subtle discrimination against risky workers induced by dismissal regulation mean that the 'social justice' arguments are not all on the side of those advocating stronger employment protection. Regulation can hurt some of the most vulnerable in the Australian labour market. (Oslington 2012, p. 1)

Where regulation is poorly designed or implemented, it can have several adverse effects:

- If employers feel restricted in exercising the prerogative to dismiss underperforming employees, it undermines the efficiency, flexibility, profitability and even the viability of some enterprises. Recent literature on firm performance associates positively the capacity of an organisation to reward high performers and to re-train or remove

underperformers with productivity and return on capital (Bloom, Sadun and Van Reenen 2012). There is international evidence that some forms of employment protection increase absenteeism, lower productivity and discourage investment.⁸ However, the extent to which these findings are relevant to Australia is not clear.

- Moreover, other employees may be adversely affected if managers face obstacles in dismissing underperforming colleagues. Workloads may be unreasonably distributed, the workplace may be less pleasant, and the time costs of addressing underperformance diverts talented people away from essential tasks.
- Managers and owners of businesses also face emotional costs from vexatious claims, and the stress of managing these. Several participants discussed this point in detail, for example, Remy Favre (sub. 20, p. 2); Major Events Consulting Australia Pty Ltd (sub. 38, pp. 1–2); Western Australian Government (sub. 229, p. 33).
- Such regulations can also act as a disincentive to hire workers who are perceived to be higher risk, such as the long-term unemployed and those with lower levels of educational attainment.⁹
- Dismissal regulations can also facilitate the earning of unjustified wage premiums for incumbent workers, and may also act as a blocker to firm-level innovations.

Empirical evidence on employment and productivity effects

The *employment effects* of workforce protection laws (of which unfair dismissal laws form an important part) have been extensively studied internationally. As a whole, these empirical studies present a mixed picture.

In this context, Autor, Kerr and Kugler (2007) explain that the impact of unfair dismissal costs on employment is theoretically ambiguous. This is because dismissal costs are akin to a tax on firing, which reduces dismissals, but also decreases the chance of new workers being hired. However, if expected unfair dismissal costs are small, then unfair dismissal laws are unlikely to play a major role in the hiring and firing decisions of firms.

Research from Australia has shown mixed results.

- Harding (2002) used the results of a survey undertaken of 1802 businesses with fewer than 200 employees, and estimated that unfair dismissal laws reduced employment of workers on the average wage by about 0.46 per cent, corresponding to approximately 41 400 jobs Australia-wide at that time.

⁸ There is an extensive literature on effects, such as on absenteeism (Ichino and Riphahn 2005); productivity (Autor, Kerr and Kugler (2007), Bassanini, Nuzziata and Venn (2008), Bjuggren (2014), Cingano et al. (2014), Gianfreda and Vallanti (2013), Laporsek and Stubelj (2012), Trentinaglia De Daverio (2014); employment (Micco and Pages (2006); and investment (Calcagnini, Ferrando and Giombini (2014).

⁹ For further discussion on this point see Oslington (2012).

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- Freyens and Oslington (2007) used quantitative survey results and other publicly available information to calibrate a labour demand model, and found much lower impacts, estimating that repealing all Australian unfair dismissal laws would create approximately 12 000 jobs (an upper bound for the direct employment impact).
 - In a more recent study of the impact of the WorkChoices legislation, Venn (2011) found no significant employment effect associated with the 100-employee exemption. The study found that the reform had no discernible impact on hiring, firing or working hours in the treatment group, compared with larger firms.
 - A later paper by Freyens and Oslington (2013), using more recent data on unfair dismissal claims under the FW Act, confirmed the conclusion of their earlier paper that unfair dismissal regulations impose small actual costs on business and have minimal impacts on aggregate employment.

Some of the international empirical evidence has identified small but significant negative employment effects of more stringent regulations (OECD 2013a).

Research on *productivity effects* has, if anything, less clear results. As stated by the OECD and ILO in 2011:

Theoretically the effects of employment [protection] regulations on productivity are uncertain. Overall there is evidence that overly strict employment protection regulations have a negative effect on labour turnover and ... on productivity growth. (2011: 19, ft.7). (quoted in Freyens 2014)

In theory, limitations on dismissal *may* affect productivity through a number of channels. At the firm level, it may have some positive effects on firm-level productivity because it provides an incentive to screen potential worker productivity more thoroughly, and to substitute from labour to capital. On the negative side, such regulations could be productivity-reducing if they require employers to follow costly processes to dismiss a less productive employee and thereby retain less productive workers for longer periods than would otherwise be the case.

Disentangling the productivity effects of such regulation at the *aggregate* level is very difficult. Even were unfair dismissal regulations to increase labour productivity of employees by excluding less productive people, it could reduce aggregate output per capita.

17.4 How does Australia compare internationally?

International comparisons of dismissal arrangements tend to place Australia towards the less interventionist end of the spectrum:

Australia has an intermediary level of unfair dismissal protection, stricter than the complex but highly decentralised and unpredictable system in place in the United States, but far less constraining than the unfair dismissal provisions that operate in Continental Europe, and the

even more constraining systems in place in BRICS [Brazil, Russia, India, China and South Africa] countries. (Freyens, sub. 149, p. 8)

However, the exact results of such comparisons depend on the methodology and indicators of stringency used.

Since 1985, the OECD has published annually a series of indicators capturing various facets of the protection of permanent workers against individual dismissal (see, for example, OECD (2013a, p. 83). Australia currently has a relatively low rank regarding the level of procedural inconvenience attached to its dismissal laws. This includes such things as notification procedures and delays before notice can effectively start. A low rank is also shown on the overall difficulty of dismissal, which includes indicators of the definition of unfair dismissal, compensation requirements, maximum times for claims, length of employee trial periods and the possibility of reinstatement (figure 17.5).

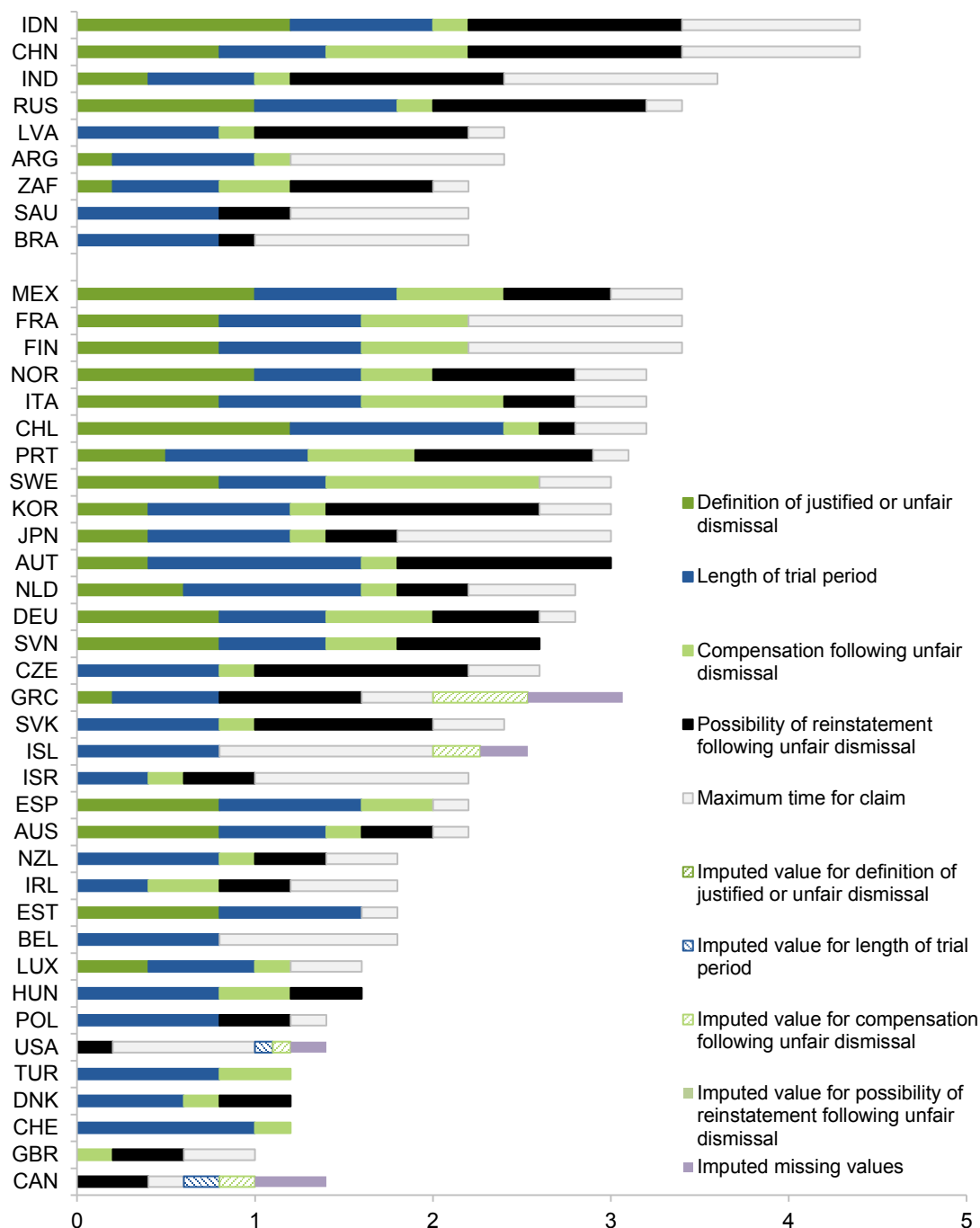
The OECD's results align closely with those of the International Labour Organization (ILO 2015b).

Drawing on the perceptions of business leaders, international comparisons of the relative restrictiveness of Australia's dismissal arrangements are also published as part of the Global Competitiveness Report (World Economic Forum 2014). The surveyed businesses ranked Australia relatively poorly in the capacity of employers to hire and fire employees compared with other developed economies. However, the OECD measure and business perceptions do not coincide for Australia. Countries rated by the OECD as having highly restrictive systems compared with Australia — Mexico, Sweden and Norway — were rated by business leaders as having much easier arrangements (figure 17.6). Similarly, while the OECD categorises the New Zealand and Australian systems as similarly unrestrictive, business leaders perceive them to be very different.

There is some research into the unreliability of business surveys in this area.¹⁰ That said, such material may indicate the level of business disquiet about a system, but not a measure of its cost or its effectiveness. Of course, if those perceptions are firmly held they will impact on hiring behaviour.

¹⁰ The unreliable nature of business surveys regarding unfair dismissal laws is discussed in some detail in Oslington (2005) and Freyens and Oslington (2007).

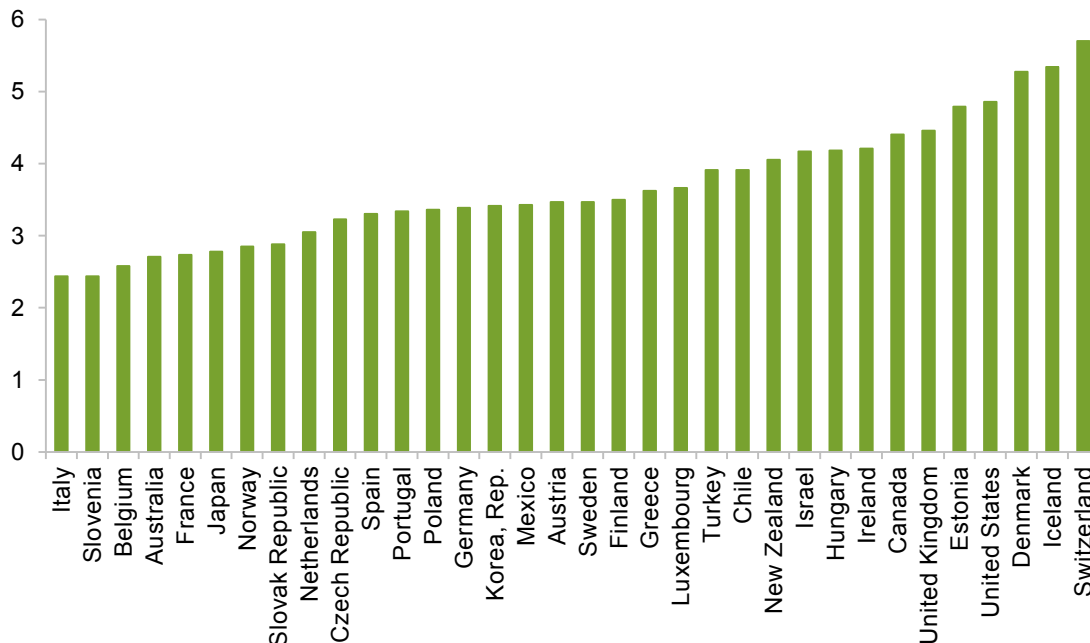
Figure 17.5 International comparison of the difficulty of individual dismissal (OECD)



^a Data refer to 2013 for OECD countries and Latvia, 2012 for other countries. The figure presents the contribution of different subcomponents to the indicator for difficulty of dismissal. The length of the bar represents the value of the indicator for difficulty of dismissal. For the sole purpose of calculating the indicator of difficulty of dismissal, missing values of specific subcomponents are set equal to the average of other non-missing subcomponents (excluding the maximum time for claim) for the same country.

Source: OECD (2013a).

Figure 17.6 **World Economic Forum rankings on ease of hiring and firing^a**



^a Higher bars indicate greater ease of dismissal.

Source: World Economic Forum (2014).

17.5 The performance of the current system

Stakeholder views were very divided on the operation of the unfair dismissal system as currently configured (box 17.5). For those stakeholders who did have concerns about the system, these tended to focus on three main areas:

- the continued presence of ‘go away’ money
- the current arrangements as they apply to small businesses
- the role and performance of the FWC.

The extent to which employers pay employees to leave their business

Employers sometimes say that they provide money to dismissed employees to avert an unfair dismissal claim (‘go away’ money), even though the employer believes dismissal was appropriate. This is because the time and administrative costs associated with defending a case, and the uncertain outcome of the processes, may make this a cost effective option. ‘Go away’ money is an easily misunderstood term, and any measure of its frequency should not include cases where an employer may pay an employee some amount

in addition to redundancy and unpaid entitlements to encourage an easier separation of the parties. There may also be cases where both parties are partially at fault, the employment relationship must end, and money is the lubricant for that outcome.

Box 17.5 Some participant's views

Employment Law Centre of WA (inc):

The current unfair dismissal framework has too great a focus on protecting businesses from unfair dismissal claims, at the expense of employees. The current framework protects too narrow a range of employees from unfair dismissal. (sub. 89, p. 17)

Kingsford Legal Centre:

Many of our clients who have been unfairly dismissed suffer financial, psychological and family stress as a result of losing their job. Often the remedies available through unfair dismissal do not adequately reflect the effect of unfair dismissal on employees. (sub. 87, p. 7)

Queensland Industry:

Unfair dismissal is the number one workplace relations issue for Queensland businesses ... Even among those businesses that have not had any claims, 47 per cent indicated major to critical concern with the current legislation. (sub. 150, p. 29)

Ethnic Communities' Council of Victoria:

... more recognition is needed that investing in workplace protections, including unfair dismissal and discrimination, is a necessary and strategic cost – and not just a 'burden' on business. (sub. 75, p. 5)

Australian Small Business Commissioner:

Unfair dismissal laws are a serious burden for small businesses due to the time and training required to deal with the issues ... The ASBC recommends that the PC consider ways to further strengthen the Small Business Fair Dismissal Code ... We also suggest that the PC consider the reintroduction of a broader exemption from the unfair dismissal laws for small business. (sub. DR366, p. 8)

Australian Hotels Association and Accommodation Association of Australia:

Becoming more prevalent are lawyers and IR consultants who work on a 'no win - no fee' basis, and they are the only real winners (Commercial decisions are made more often than not to pay the 'go away money' because the cost of defending the matter is usually higher, regardless of the facts of the matter). (sub. 164, p. 18)

Sydney Symphony Orchestra:

The current unfair dismissal provisions provide a clear and equitable process for parties to address a dispute as a consequence of the termination or possible termination of an employee's employment. It is our experience that the compulsory conciliation requirement is essential to the timely resolution of many disputes of this nature. (sub. 100, p. 9)

Ben Freyens:

... achieving a perfect balance in the strictness of the legal provisions is nearly impossible. All we can do is amend the laws incrementally and regularly, and try to observe as best we can whether these changes engender net positive flow-on outcomes. (sub. 149, p. 7)

The practice of paying 'go away' money to settle unfair dismissal claims was raised extensively in submissions to the current inquiry, and has been a source of contention in past reviews and commentary, for example, McCallum, Moore and Edwards (2012, p. 218), Sloan (2012), Collier (2012). It has been reported in the past that the average

amount paid was \$5000 to \$6000 (Hannan 2012), though it is hard to gauge the accuracy of data of this kind unless the circumstances of the cases are clear.

Many participants, mostly employers or their representative bodies, claim that paying ‘go away’ money is still a widespread occurrence,¹¹ that current arrangements under the FW Act contain an in-built bias towards such payments, and that, in many cases, this results in unfair outcomes for employers. It may also be unfair for employees if a legitimate case is not pursued because of a quick settlement. While anecdotal evidence suggests that ‘go away’ money is still paid, the exact share of settled cases falling into this category is not clear.

Cases where unfairly dismissed employees leave without any compensation

The problems of ‘go away’ money should also be set against instances where an employee is unfairly dismissed, but does not take the matter up with the FWC (what could be termed ‘go away quietly’ cases). There are many reasons why employees may not act. The costs of embarrassment, concern about references, and the emotional and time costs of pursuing a case may exceed the uncertain value of any outcome with the FWC. Such instances may or may not involve a pecuniary cost, but they do represent a cost, as does taking a new job at a lower wage, or being unemployed while looking for a new job. As with ‘go away’ money being paid, the evidence for the prevalence of these outcomes is not readily available.

It is inevitable that any system for regulating dismissal arrangements will elicit, on the one hand, undetected instances where an employee is appropriately sacked, but given money to leave, and on the other, cases where the employee is inappropriately sacked but no claim is made (despite being unfairly dismissed). The objectives should be to make the system sufficiently simple and relatively inexpensive to use and with reasonable prospects of a timely result that these instances are few. Were arrangements to lower any compensation from unfair dismissal then it might address the first problem, but exacerbate the second. A good system must try to balance these two unintended incentives (and minimise the overall costs).

Regardless, a major problem in assessing the number of instances of ‘go away’ money or ‘go away quietly’ cases is that there is no independent party to assess whether either has occurred. An employer may strongly believe a dismissal to be just, and this can mean that, in such cases arbitrated by the FWC, employers will remain of this view regardless of a contrary finding. Similarly, many employees believe that their dismissals are unfair, but when assessed, this has been found to be incorrect. Self-assessed cases of what constitutes fair or unfair dismissal are always going to be tainted by bias.

¹¹ The Chamber of Commerce and Industry Queensland (sub. DR311, p. 21), for example, surveyed its members and found that 25 per cent of respondents had paid an employee dismissed ‘with cause’ to avoid an unfair dismissal case or the threat of such a case.

Particular concerns around arrangements for small business

Some participants were also concerned about the impacts of unfair dismissal arrangements on small business.¹² The OECD, reflecting on the recent introduction of new unfair dismissal arrangements in Australia as part of the FW Act, said:

Care needs to be taken that the restoration of unfair dismissal protection at small and medium-size enterprises does not impair labour market flexibility The new system of dealing with unfair dismissal claims should ... be closely monitored to make sure that the administrative costs faced by the firms, especially smaller ones, are not so high as to jeopardize productivity growth and redeployment of labour ... (OECD 2010, p. 135)

Arguments in support of a tiered regulation for small business that point to an absence of HR expertise in small business — connected in part to resourcing — have also been prominent. This point was also made by several participants to the inquiry (for example, VECCI, sub. 79, p. 78; Clubs Australia Industrial, sub. 60, p. 41), who used it to argue either for the maintenance of existing arrangements for small business or, indeed, for a lifting of the employee threshold.

Mixed views were evident, in particular, about the effectiveness of the small business fair dismissal code. Some have positive views about the code. For example, the Council of Small Business of Australia (COSBOA) said that small businesses appreciated the guidance provided by the Code and the certainty and simplicity of its checklist approach (pers. comm., 15 January 2015). The Office of the Small Business Commissioner also stated:

The information in the Code is easy to understand and the checklist provides practical steps to follow. In our opinion, the Code is a valuable resource which assists small business employers and should remain part of the workplace relationship system. (sub. 119, pp. 8–9)

On the other hand, there have been concerns about its impacts and effectiveness from many other quarters. For example, Restaurant and Catering Australia contended:

... the Fair Dismissal Code has not worked as intended, albeit we are part of the group that designed the supporting materials and the like. We agree that the overriding of clear exemptions under the Code, via procedural-type aspects of employment relationships, makes no sense and does lead to the payment of go-away money. At the outset of the Code, this was one of the objectives, to stamp out some of that go-away money, and it certainly hasn't happened when that framework has been implemented. (trans., p. 448)

Possible reforms to arrangements for small business, and in regard to the utilisation of a Code, are discussed further in section 17.6.

¹² The impacts of unfair dismissal laws on small business are also discussed in detail in chapter 31.

Box 17.6 **Employment status of small businesses in Australia**

The Australian Bureau of Statistics (ABS) catalogue *Counts of Australian Businesses, Including Entries and Exits* (2013) provides information about the number of Australian businesses by size category. This provides an overview of changes in business size across the period June 2008 to June 2012.

Businesses operating in June 2012

	<i>Number of businesses</i>	<i>Share of total</i>	<i>Share of employing</i>
	No.	%	%
Non-employing	1 306 093	61	
1 to 4	514 859	24	62
5 to 19	231 591	11	28
20 to 199	82 326	4	10
200+	6 411	~0	1
Total employing	835 187	39	100
Total	2 141 280	100	

Source: ABS (*Counts of Australian Businesses, Including Entries and Exits*, Cat. no. 8165.0).

The ABS data above shows that, as at June 2012, businesses employing fewer than 20 employees made up approximately 90 per cent of all employing businesses.

In this release, the ABS also reports firm survival rates, which is the proportion of firms operating in June 2008 that were still operating in June 2012. Aside from non-employing businesses, businesses employing 1 to 4 employees had the lowest survival rate across the period (68.1 per cent), and businesses employing 15 to 19 employees had the second lowest (75.1 per cent).

Businesses employing less than 20 employees account for less than 25 per cent of the total number of employees.¹³ (This figure excludes owner-managers of incorporated enterprises — who are in some ABS series also referred to as employees.)

The role and performance of the FWC

A further major concern of numerous stakeholders in regard to unfair dismissal was the apparent randomness of FWC decisions. Several participants argued that the outcomes of cases heard by the FWC are unpredictable, and that some decisions turn more on finer points of interpretation about select provisions of the FW Act than on judgments about reasonable outcomes in the context of a place of employment (see, for example, Remy Favre (sub. 20, p. 2); Major Events Consulting Australia Pty Ltd (sub. 38, pp. 1–2) (box 17.7)).

¹³ ABS 2015, *Employee Earnings and Hours, Australia, May 2014*, Cat. no. 6306.0, released 22 January.

Box 17.7 **Some notable recent dismissal cases**

The following selection of recent cases demonstrates some of the complexities in the FW Act, and the tension between fair process and the substantive case for dismissal that can exist.

***Sheng He v Peacock Brothers & Wilson Lac v Peacock Brothers* [2013] FWC 7541.**

This case involved dismissals after two employees punched one another in the head in an argument. The two employees were dismissed after a brief investigation by management. The FWC accepted that the employees' conduct was a valid reason for dismissal, but that management's failure to follow procedural fairness (such as seeking corroboration from witnesses and offering translation services) was sufficient to deem their dismissal 'unjust, unreasonable and therefore unfair'. The employer was required to provide compensation to the dismissed workers.

***Mr David Taleski v Virgin Australia International Airlines Pty Ltd T/A Virgin Australia* (U2011/12885) [2013] FWC 93**

Mr Taleski was employed as a flight attendant with the airline. Mr Taleski wished to maintain a hairstyle past collar length, and claimed he suffered from a body image disorder that prevented him from cutting his hair. This style contravened Virgin Australia's 'Look Book', a company policy prescribing acceptable dress and presentation standards for male and female flight crew. On 24 October 2011, Mr Taleski's employment was terminated.

At arbitration, the FWC Commissioner found that five of the eight medical certificates provided by Mr Taleski to support his claims prior to dismissal did contain the information Virgin Australia sought. The Commissioner also found that Mr Taleski was, to the best of his ability and within the constraints of a medical condition linked to the length of his hair, intending to comply with the 'Look Book'. Taken together, the Commissioner was satisfied that Mr Taleski's dismissal was harsh, unjust or unreasonable, and the Commissioner ordered that Mr Taleski be reinstated to his former duties as a flight attendant. No orders were made as to how Mr Taleski's appearance was to be handled in the future. Virgin Airlines lost a subsequent appeal in mid 2014.

***Gary Homes v Coles Group Limited T/A Coles Warehouse Edinburgh Parks* [2014] FWC 1013**

A Coles warehouse employee Gary Homes won his job back after the FWC found that taking company-supplied Milo home was not a valid reason for dismissal. During the time of his dismissal, Homes was notified that he had removed Coles' property without consent, preparing his own mix of Milo. This was seen as serious misconduct, which led to the termination of his employment.

Homes claimed that Coles could have stopped him taking Milo home for his special mix, as he had not made this a secret. He said that if he had been told to stop, he would have complied. Moreover, the company had provided the Milo for employee use, with no restrictions on how it could be used or consumed. On the other hand, Coles asserted that Homes had inappropriately used its resources, said it was his Milo at first and then subsequently altered his story. This action breached the employee Code of Conduct and he was dismissed due to theft and employee compliance attached to the Code.

(continued next page)

Box 17.7 (continued)

Ultimately, the FWC found that there was no valid reason for dismissal, as Homes only drank his Milo mix at work, bringing the Milo home only to prepare the mix. Evidence had also shown that the Milo he drank at work was not provided by Coles, and it could not be constituted as theft. The Commission also noted that the matter could have easily been avoided with clear instructions.

Sources: Norton Rose Fullbright (2013), Employment Law Matters Australia (2014).

In regard to *arbitration* at the FWC, the Productivity Commission was also made aware of some research pointing to outcomes partly reflecting the background of the Fair Work commissioners hearing the case. As discussed in Booth and Freyens (2014) and Freyens and Gong (2015), whether an appointee to the FWC and its predecessors has a business background appears to be a significant predictor of case outcomes (table 17.2).

Further development and refinement of the latter set of results were also reported by Freyens (sub. DR287, p. 2; pers. comm. 30 October 2015) and in Freyens and Gong (2015). Most notably, subsequent use of Jackknifing techniques has confirmed that these results are not caused by the skewed decision making of one or two errant Commissioners.

The exhibition of preferences in table 17.2 is concerning. While not necessarily incontrovertible evidence of inconsistencies, this perception has developed and the data appears to support it. There is also a broader concern that in arbitrated cases matters are determined using an overly legalistic approach, with little apparent focus on the economic costs of such cases or on the quality of outcomes for all parties (Air Conditioning and Mechanical Contractor' Association, sub. 85, p. 1; AMMA, sub. 96, p. 298; Western Australian Government, sub. 229, p. 33).

Further evidence on the performance of the FWC was presented in chapter 3. Possible reforms affecting conciliation and arbitration are also discussed in section 17.6 below.

A further concern by some employees and employers is the complexity of the unfair dismissal system. In discussing the complexity of processes around dismissal, several participants cited the example of serious misconduct. In their view, the current process for summarily dismissing employees is overly complex and time consuming.

But a range of other participants argued that such complexity is an inevitable feature of a jurisdiction that deals with often contentious claims and counterclaims on a matter — employment termination — that has large impacts on all parties involved. These participants argued that present arrangements were generally working well, and were the result of gradual refinement over several decades (Freyens, sub. 149, pp. 7–8).

Table 17.2 Case determinations and tribunal judges' work backgrounds

Author's calculations from courts transcripts, 2001-2010

<i>Employer association background</i>			<i>No employer association background</i>		
		%			%
Award employee	123	29	306		43
Award employer	297	71	409		57
Total	420	100	715		100
Union background			No union background		
Award employee	189	46	240		33
Award employer	222	54	484		67
Total	411	100	724		100
Labor appointee			Conservative appointee		
Award employee	303	42	126		31
Award employer	420	58	286		69
Total	723	100	412		100

Source: Booth and Freyens (2014, p. 372).

Stakeholder views that were strongly supportive of current arrangements

Many participants to the current inquiry were also strongly supportive both of unfair dismissal protections generally, and more particularly, of the current arrangements set out in the FW Act.

A consistent theme was that an appropriate balance had been achieved between the needs of employers and employees. For example:

Legal Aid NSW believes that the current Unfair Dismissal processes meet the purpose of providing remedies to workers where they are unfairly dismissed, while balancing the rights of employers and business realities. (sub. 197, p. 10)

In a similar fashion, Professionals Australia argued that the current tests to establish unfair dismissal:

... are appropriate for the purposes of determining whether conduct is unfair on the basis that they strike a balance between the interests of businesses and the rights employees have to fair treatment. (sub. 212, p. 36)

The important role of unfair dismissal protection in situations of power imbalance between employees and employers was also discussed in several submissions (see, for example, Footscray Legal Centre, sub. 143, p. 11).

The role of perceptions

Perceptions have tended to play a major role in people's views about the working of the current system. Individual cases where, as reported, an employee should have been fairly dismissed, but has instead received compensation, may create an impression of a system in crisis. Equally, some reports claim instances where employers have behaved egregiously — underpinning support of the status quo or even the strengthening of the arrangements. In both cases, the evidence appears insufficient to assert either crisis or a need for strengthening.

Perceptions can still influence people's behaviour. Business perceptions about the prevalence of unfair dismissals and 'go away' money, and reported instances of the apparent misuse or unexpected outcomes of the provisions, may affect their hiring practices, even if the reality does not match the perceptions. Similarly, employees' perceptions about their workplaces and relationships with their employers may be conditioned by particular instances of unfair dismissal highlighted in the media (box 17.7).

Despite the relatively small number of total unfair dismissal applications lodged each year, and evidence that direct settlement payments are, on average, quite low, there remains some level of disquiet amongst employers and employer groups regarding the dismissal jurisdiction. One reason for this continuing concern could be that the *potential* quantum of an unfair dismissal payout (up to six months wages) weighs more heavily on employers' minds than the low actual likelihood of a payout.

Large enterprises with hundreds of employees and specialised human resources personnel will probably have a relatively accurate impression of the true probabilities of unfair dismissals and their likely costs.

However, small businesses have neither the specialised resources, nor do they have the employee numbers needed to accurately estimate the true probabilities. They may also be more liquidity constrained, so that an unexpected financial cost has greater impacts on their viability. People tend to overestimate the probabilities of emotionally salient events outside their control (shark attacks and plane crashes for example), so any bias is more likely to inflate perceived probabilities — especially for small businesses.

In addition, people tend to often overreact to high cost, but low probability events:

Behavioural economics (e.g. Kahneman, 2003) suggests an alternative explanation of their concern about dismissal regulation. A consistent experimental finding is that agents heavily weight large low probability losses when making decisions. To the extent that payouts capped at six months wages can be regarded as large losses then we would expect these to weigh more heavily on employers minds when making employment decisions than the expected cost calculations might suggest. Another explanation might be concerns about fairness (Fehr, Goette and Zehnder, 2009) of compensation payouts weighing heavily on the participants – employers don't like paying out when they are in the right. (Freyens and Oslington 2013, p. 303)

So actual responses to unfair dismissal arrangements may be much more significant than may be warranted by the actual impact of these arrangements.

The impacts of unfair dismissal — a summing up

Australia's policy debate about unfair dismissal regulation appears to be beset by mythologies about the prevalence and economic impacts of cases, as observed previously, for example, by Oslington (2005). Nevertheless, the Productivity Commission's own analysis, and other sources of reliable international and Australian evidence, suggests that Australia's unfair dismissal arrangements are unlikely to have significant negative impacts on medium to large businesses, especially considering that their purpose is not to minimise costs to employers, but to balance the interests of both employees and employers.

More contemporary data on the incidence of dismissals for cause and the indirect costs of unfair dismissal legislation would help narrow the estimates of the effects of unfair dismissal legislation. Additional data from the FWC and the ABS would also assist greatly in improving the accuracy of estimates. The ABS is introducing a more comprehensive and frequent measure of retrenchments.¹⁴

Given the twenty year history of unfair dismissal regulation in Australia at the Commonwealth level, there appears to be widespread general awareness of these laws. There is also a greater degree of stability in current arrangements following the more dramatic pendulum swings that characterised the WorkChoices period.

Notwithstanding some uncertainty about the effects of unfair dismissal regulations, however, there is reasonable evidence of some remaining flaws in the system. Parts of the process are overly legalistic, there may be too much of an emphasis on procedural fairness in instances where the conduct of the employee would normally warrant dismissal, and there are concerns about the consistency of arbitrated decisions. There remains scope for some limited, careful adjustment of the current arrangements.

17.6 Reform Options

Several proposals for change from stakeholders, and other possibilities suggested by the literature and overseas experience, warrant further discussion. These include possible reforms in the following main areas:

- some further measures to better identify cases without genuine merit (thereby reducing the practice of 'go away' money) and to reduce the average value of such settlements

¹⁴ If nothing else, the new data may allow the cyclical component of retrenchments to be isolated, giving a better estimate of the residual, which includes dismissals for cause.

including where feasible, separating arrangements to penalise ‘poor’ process from compensation of employees

- revisiting the need for the tiered regulatory arrangements for small business described in section 17.1.

In each of these areas, the Productivity Commission has considered the case for reform with an emphasis on delivering better employment outcomes for both employees and employers, while retaining reasonable opportunity for redress for all parties.

Possible reforms to the governance structure and conciliation and arbitration processes of the FWC, which are also fundamental to improving outcomes in the unfair dismissal jurisdiction, but will have broader effects, were discussed in chapter 3.

Measures to better identify dubious cases and limit amounts of ‘go away’ money

The continued problem of ‘go away’ money was acknowledged by the 2012 review of the FW Act, which suggested that the current system may contain incentives towards such settlements, with adverse consequences for the overall fairness of the system:

It is not surprising that this might become a feature (though to what extent is another question) of a legal process in which one party can seek a remedy against another party using processes that are comparatively informal, inexpensive and where the grant of the remedy is likely to depend upon a subjective evaluation of criteria which are fairly broadly expressed. We accept that it is undesirable that payments of this character are made. (McCallum, Moore and Edwards 2012, p. 222)

The issue continues to be prominent, and, as discussed above, was raised repeatedly in submissions and discussions for the inquiry.

As has been identified elsewhere, there are several key design elements of the present system that create incentives for such settlements. One important contributing factor is the general absence of a requirement that losers in arbitrated cases pay the winner’s costs (other than for vexatious/groundless claims). Another key factor is the capping arrangements.

Recent changes following the 2012 review of the FW Act were intended to reduce this practice further by addressing several of the main incentives. These included increased powers for the FWC to:

- dismiss applications where it was satisfied that the applicant had behaved unreasonably (FW Act, s. 399A)
- make an order for costs against a party if their unreasonable act or omission caused the other party in the matter to incur costs (FW Act, s. 400A)

-
- impose cost orders on lawyers and paid agents where the tribunal is satisfied that they encouraged speculative claims (FW Act, s 401(1A)).

The Productivity Commission considers that these changes were a step in the right direction, however some further reforms may assist in reducing this practice to a greater degree.

Changes to lodgment fees?

While the recent further measures outlined previously appear to have improved outcomes, several further changes were suggested by participants to reduce gaming within the settlement process, or to reduce the overall magnitude of settlement payments when they do occur.

One option suggested by several parties was to raise the application fee for lodging a dismissal claim from its current level of around \$70 to a larger amount (see, for example, Australian Meat Industry Council, sub 236, p. 23; Australian Higher Education Industrial Association, sub 102, p. 9; Chamber of Commerce and Industry of Western Australia, sub 134, p. 55; Australian Sugar Milling Council, sub 226, p. 6). In this context, the South Australian Wine Industry Association and the Winemakers' Federation of Australia (sub 215, p. 50) pointed to application fees in the United Kingdom equivalent to \$480 per unfair dismissal application and a further \$1800 for cases going to arbitration.¹⁵

As part of its Draft Report, the Productivity Commission sought further views on the use of increased lodgment fees as a means to reduce speculative unfair dismissal claims.

Some stakeholders remained strongly supportive of this proposal. For example, the South Australian Wine Industry Association and Winemakers' Federation of Australia (sub. DR352, pp. 29–30) presented further information in support of the need to increase fees, including that:

- fees for filing an employment dispute claim in the New Zealand Employment Court were \$NZ 204.44 (\$AU 185.15 approximately) with an additional hearing fee for each half day of hearing after the first day of \$NZ 250.44 (\$AU 226.81 approximately)
- fees in State and Territory jurisdictions regarding minor civil claims varied from \$95 in New South Wales to \$138 in South Australia and Victoria.

They proposed an indicative series of revised lodgment fees based on income levels up to the high income threshold: \$100 for employees with an annual income of \$34 175 (or 25 per cent of the high income threshold); \$200 for employees with incomes from \$34 176 to \$68 350 (up to 50 per cent of the high income threshold); \$250 for employees with incomes from \$68 351 to \$82 000 (up to 60 per cent of the high income threshold); and

¹⁵ For a discussion of the recent UK experience with fees, see Urquhart and Bonino (2015).

\$320 for employees with an annual income in excess of \$82 000. The Associations also suggested an additional hearing fee of \$178 should apply, and that such fees would act to further discourage speculative claims and provide enhanced cost recovery. They also noted that fee waivers determined by FWC should continue to apply in cases of severe financial hardship.

Other stakeholders opposed modification of the current fee structure, and pointed to problems that would in their view result regarding access to justice and a possible increase in the pursuit of claims via far costlier alternative avenues. For example, Job Watch Inc. stated:

While filing fees may help deter vexatious claims, they are a blunt instrument that may equally deter meritorious claims. (sub DR285, p. 5)

Along similar lines, Ben Freyens said:

... raising fees may lead to deterring as many genuine cases as it deters frivolous ones. The main benefit of the system is to keep people off Federal courts, if the fees are income-rated, some high-income workers may switch to Federal courts action instead. (sub. DR287, p. 3)

Legal Aid NSW argued that those lodging unfair dismissal claims were often in a situation of considerable financial uncertainty:

Legal Aid NSW does not support any increase in lodgement fees and, in particular, any increase that is not means tested ... Workers making unfair dismissal claims are often in a precarious financial position following the termination of their employment. This situation is often exacerbated where employers have not paid statutory and award entitlements on termination. (sub. DR364, p. 3)

Aged and Community Services Australia and Leading Age Services Australia (sub. DR328, p. 7) also argued that, while they supported further change to reduce frivolous and vexatious claims, the risks that increased lodgment fees would deter legitimate claims were likely to outweigh any positive effects on reducing unmeritorious claims from being lodged.

As part of its recent inquiry into access to justice (PC 2014a), the Productivity Commission discussed at length the use of court and tribunal fees. A consistent theme in that discussion was that the targeted and consistent use of fees, *where appropriate*, could improve the efficiency of dealing with cases and provide adequate cost recovery for courts and tribunals.

The cost and time disadvantages of arbitration (as opposed to conciliation or pre-claim conciliation) are well-documented in many judicial contexts, and apply equally to unfair dismissal cases. For example, a rough estimate of the direct costs of conducting conciliation was provided by the FWC as follows:

In regards to unfair dismissals - in 2013-14, 10,972 unfair dismissal conferences were conducted by staff conciliators. Taking conciliator wages only into account (including salary super, leave etc.) the cost per conference was \$356.20. (pers. comm., 1 May 2015)

The costs of arbitration are not known, but the salaries of members are much greater than those of conciliators, and the processes and documentation more elaborate and time consuming. It can be safely assumed that the costs are many multiples of \$350 per conciliation case. Moreover, arbitration also involves costs for the respondent and, given that costs are not awarded to respondents when an unfair dismissal case is rejected, some account might reasonably be taken of the average level of those costs too. Full cost recovery is not appropriate for the reasons given in the Productivity Commission's inquiry into access to justice (PC 2014a, p. 541), but recovery should be sufficient to reduce claims that have little intrinsic merit.

Taking into account access to justice concerns, and the desire to avoid costlier alternatives such as Federal Court actions, it is clear that the current upfront fee for unfair dismissal lodgment, while moderately lower when compared with similar matters in other courts and tribunals; do permit access to recourse that is low cost and that many applicants pursue claims at a time of considerable financial uncertainty. The effects of fees on the ability of claimants to access effective representation is a further important consideration.

While significant changes to upfront application fee arrangements with regard to their size are not, on balance, recommended, in the Productivity Commission's view, there is merit in the introduction of non-refundable arrangements for such fees. This change would provide some further incentive to applicants to consider in detail the merits of their case prior to lodgment. It would also relieve the FWC of what is currently a considerable administrative burden associated with the refunding of lodgment fees.

A further change that the Productivity Commission recommends is the introduction of a fee, of equivalent magnitude to that which currently applies for initial lodgment, for those cases proceeding to arbitration. As with the revised upfront fee, this further fee would also be non-refundable, and its introduction would serve to provide a further price signal to parties that decide to seek recourse via a formal hearing.

Revised arrangements of this type may go some way towards further ensuring that claims are lodged and proceed with some greater consideration of the broader costs to both the system being utilised for their consideration and to employers, who may also incur considerable costs in defending claims.

RECOMMENDATION 17.1

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.

Consideration by the FWC of applications ‘on the papers’ or via more merit focused conciliation processes?

The absence of an effective filter at the front end of the unfair dismissal claims process and, at conciliation, a tendency to steer parties towards financial settlement, were issues raised in a number of submissions (see, for example, Qube Ports and Bulk, sub. 123, p. 12; Catholic Commission for Employment Relations, sub. 99, p. 33).

In regard to an upfront filter, one suggested reform (a variant of which is currently being considered) is to accord the FWC with greater discretion to consider the merits of an application ‘on the papers’, following lodgment by an employee (Form F2) and receipt of an employer response (Form F3) and prior to commencement of the conciliation process. The risk of such an approach would be to weight outcomes against applicants who (in applying via a Form F2 application), present an incomplete or illegible application. This may be more likely in cases with applicants who have poor literacy or are from a non-English speaking background. It has also been suggested in a previous review that such a reform, where it had been tried in the past, had not proved to be effective. (McCallum, Moore and Edwards 2012, p. 222)

Another possibility would be to conduct a more detailed, merit focused conciliation process, post the F2 and F3 lodgment, as suggested by Catholic Commission for Employment Relations:

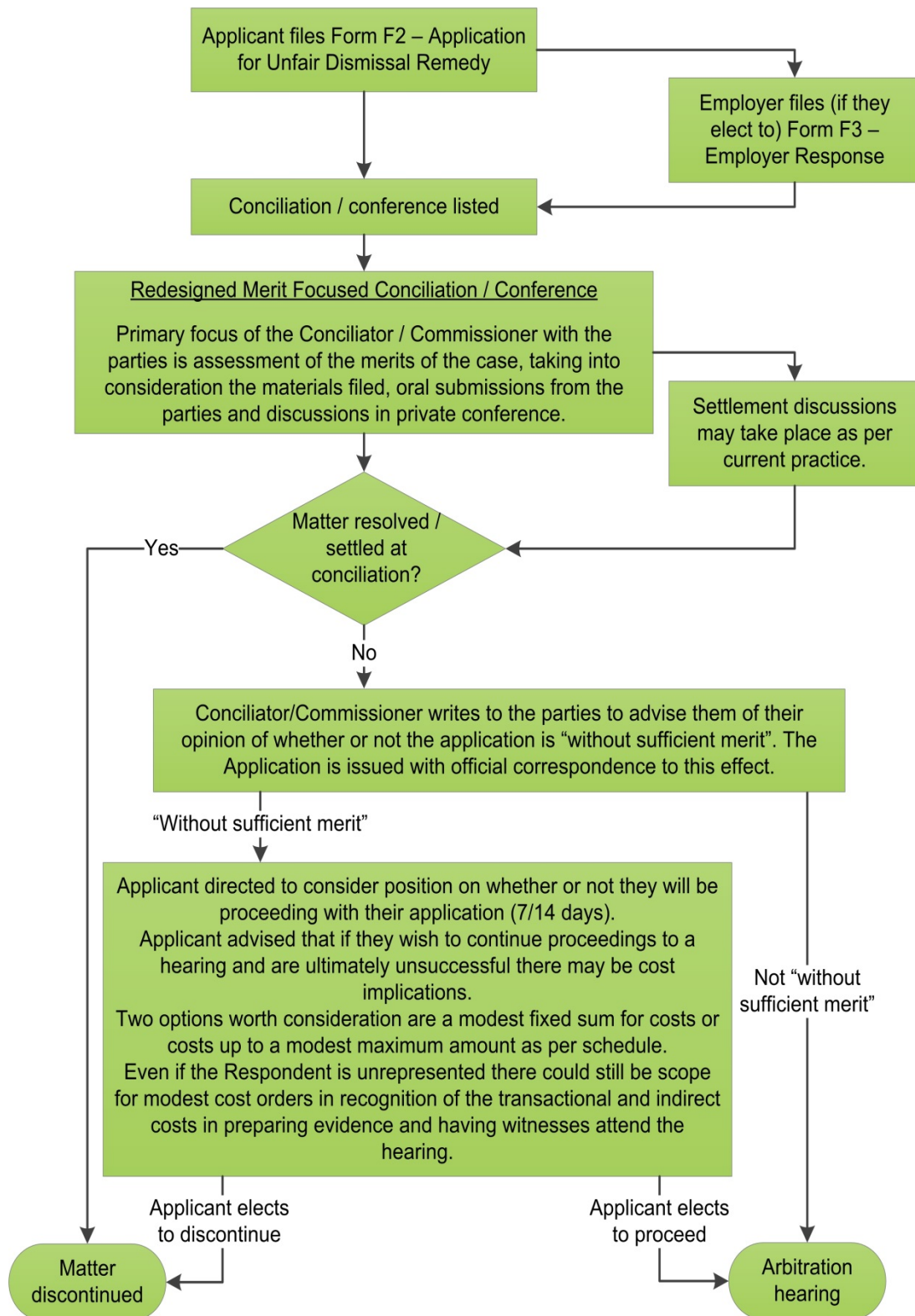
... this concept incorporates the conciliation into the initial assessment, rather than allowing applications to be struck out on the papers ... This will enable the parties to still turn their mind to settlement, however this will be done in the context of a more robust discussion of merits and in the knowledge that the parties will receive the conciliator’s opinion on merits soon after the conciliation. (sub. 99, pp. 35–36)

Further detail on this proposed process is shown in figure 17.7.

Adoption of more merit based conciliation processes would have several notable potential downsides. It would increase the time taken to conduct conciliations at FWC, and would involve FWC staff in decision making processes more usually reserved for Members at the arbitration stage. Some tension would also appear to exist between the conduct of conciliations via the phone, in a relatively informal setting, and more determinative proceedings.

Despite these downsides, there are some aspects of the merit-based conciliation proposal that should nevertheless be considered. The use of better designed application forms, requiring applicants and respondents to provide more useful detail about the circumstances surrounding dismissal, would be an improvement. Improved guidance material to parties on the conciliation process, along the lines of that provided by the Australian Human Rights Commission (2012), would be a further important addition to what is already useful guidance provided by the FWC Benchbook and other material. Broader improvements in unfair dismissal case triage are also being considered by the FWC, in line with their recent experiences in triage of agreements, and this is a worthwhile initiative on their part.

Figure 17.7 **A redesigned merit focused conciliation process**



Source: Adapted from Catholic Commission for Employment Relations (sub. 99, p. 38).

Consideration of dismissal applications ‘on the papers’ is already being canvassed via legislative amendments, and some of the inherent risks in such proposals could be managed via a process of assistance for applicants. Subject to this occurring, procedural changes of this type, married with changes to conciliation discussed in chapter 3, may serve to reduce the number of unmeritorious unfair dismissal cases considered by the FWC, and to reduce claims of ‘rough justice’ resulting from conciliation processes.

RECOMMENDATION 17.2

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’).

The balance between procedural and substantive matters

A further complementary reform is to separate the approach taken by the FWC in relation to procedural matters followed by the employer and those pertaining to the appropriate conduct of the employee. In its submission to the 2012 Review of the FW Act, ACCI (2012, p. 142ff) identified a set of cases where the employee appears to have clearly underperformed or behaved inappropriately, however the dismissed employees were awarded compensation (the case of Mr N. below fits into this group).¹⁶

The existing arrangements mean that an employee who, on prima facie grounds, should have been dismissed, may still receive compensation because of faults in the termination processes. This opens the door to possible hunting by dismissed employees (or their agents) for technical reasons for compensation, and may provide leverage for ‘go away’ money. An alternative is that where the FWC is satisfied that:

- the employee has either committed serious misconduct or genuinely underperformed, their dismissal is upheld without any compensation
- the employer has failed to follow due process, the FWC has the discretion to choose between advice to the employer to educate them, and where the employer is a recidivist or the procedural lapse a serious one, the capacity to pursue penalty within the present cap through the courts.

As pointed out by Justice Iain Ross (sub. DR357, p. 8), accompanying legislative change may be required if the intention is to more clearly prioritise substantive matters. This would be achieved via modification of the FW Act to emphasise that, in considering if a dismissal was harsh, unjust or unreasonable, the existence of a valid reason for dismissal is a more fundamental consideration than may be suggested in the present formulation.

¹⁶ *Mr N v The Bakery* [2010] FWA 3096.

RECOMMENDATION 17.3

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

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.

Should reinstatement be the favoured remedy?

While reinstatement is a core objective of the FW Act's unfair dismissal provisions, it occurs rarely in practice. For example, of the 349 unfair dismissal matters reported as being finalised at arbitration at the FWC in 2014-15, only 12 resulted in reinstatement, while a further 15 resulted in a combination of reinstatement and lost remuneration. This contrasts with 141 matters resulting in compensation only (FWC 2015c, p. 74).

The low level of reinstatement is hardly surprising given that the trust that is central to a harmonious and productive employment relationship is irremediably destroyed at the end of most unfair dismissal cases. It may also be more difficult in practice to reinstate an employee into a small business than a larger firm.

While Part 3-2 of the FW Act places an emphasis on reinstatement as a remedy for unfair dismissal, the Commission understands that, at the FWC arbitrations, consideration of the reinstatement objective is, in a very large proportion of cases, a mere formality, and is honoured more in the breach than the observance.

Several inquiry participants raised the issue of the reinstatement objective, and called for greater emphasis on compensation as the primary remedy in the FW Act. Compensation is also the favoured remedy under the common law.

There are good grounds for revising the current formulation. It is apparent that employers and employees are consulted about reinstatement during conciliation or arbitration processes but that, in a very large number of cases, alternatives such as compensation are chosen. Retaining reinstatement as an objective (but not the primary objective) would be consistent with established legislative practice in some comparable countries, and the product of refinements in legislative formulation in this area that have taken place over a considerable period of time. However, as it now stands there is little concordance between the objective and practice on the ground.

RECOMMENDATION 17.5

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).

Changing arrangements for small business?

The case for regulatory tiering

As discussed in section 17.1, the current framework has special rules for businesses with fewer than 15 employees. Special unfair dismissal arrangements for small business are often premised on the likely higher compliance costs of such arrangements for these businesses, their reduced access to human resource (HR) expertise and arguments about employment creation by such businesses.

The employment-creating potential of small business has been researched in Australia and overseas in the past, with varying results, for example, Barrett (2003) and Bauernschuster (2013). There has also been a lengthy past debate in Australia about the effects of unfair dismissal exemptions specifically on job quality in small business and on employment practices in such businesses.

While this is very much contested ground, the weight of reliable analysis shows that:

- small business is a significant employer numerically in the economy overall
- a large share of small business hiring activity is related to new businesses, and a relatively smaller share is accounted for by new hires by existing small firms
- employment protection laws, such as unfair dismissal laws, are often nominated in opinion surveys of small business as an important factor in hiring decisions, although

the reliability of such surveys has been questioned, instance by Oslington (2005, p. EWRE2).

Exemptions and lighter regulation for small business can be problematic for several reasons.

In principle, it is desirable wherever possible not to have special arrangements for some businesses, if the need (for recognition of their limited resources) can be achieved without altering the broad approach of the law. This helps both employees — creating fewer exceptions to the rules — and lowers complexity costs for business.

Further, exemptions can distort the efficient size distribution of businesses, create growth traps for firms approaching the threshold defining a small firm and change the mix of full time and part-time workers to be under the threshold. In effect, tiering ignores the fact that if a larger business can more efficiently meet certain regulatory requirements, this is similar to other aspects of the business environment that confer advantages on firms based on their size. In many other areas of regulatory compliance, such as tax or pollution standards, small firms do not receive exemptions or face reduced regulatory requirements.

On the other hand, in some cases, regulatory tiering can be efficient (Bickerdyke and Lattimore 1997; Nijssen et al. 2008), especially in circumstances where the effect of the tiering is to reduce compliance burdens without substantively reducing compliance. In effect, the marginal benefits of more elaborate compliance arrangements fall with firm size. The fact that small enterprises are more intensive employers of employees at the margins of the labour market — who may be particularly vulnerable to stricter employment protection — may reinforce this argument.

Accordingly, there are grounds for retaining some special unfair dismissal arrangements for small business. An important point is that the existing framework involves a more delayed exposure of small businesses to unfair dismissal laws (for example, the minimum employment period is 12 months rather than six months), as opposed to a blanket exemption (as was proposed by some stakeholders). This provides employees of small businesses with access to unfair dismissal protections, whilst balancing this with the resourcing difficulties faced by small business and their need to screen and verify the performance of new employees across time.

The definition of small business, and coverage implications

As has been observed in several previous Productivity Commission inquiries, there is a large degree of arbitrariness in defining small business, including through the use of definitions based on sales turnover or the number of employees. The Reserve Bank of Australia has also identified the very different revenue and employment thresholds for describing small businesses (Connolly, Norman and West 2012). In this context, several participants pointed to a discrepancy between the definition used for the purposes of unfair

dismissal, and the '20 employees' definition used by the ABS to define small businesses within its reporting activities.

Largely, the choice of cut off comes down to broader objectives about how much, or how little, coverage is required. Certainly, current arrangements mean that all businesses still face unfair dismissal regulation in some form.

The average firm with around 15 employees has annual revenue close to \$3 million,¹⁷ and will have a range of regulatory requirements involving tax, accounting standards, WH&S and payroll. Such firms are also likely to have some access to HR knowledge, even if not of a specialist nature. In combination with the guides available from the FWC, it is reasonable that businesses of such size would be able to meet relevant employment standards. This would suggest that, for the purposes of applying unfair dismissal regulations, shifting from the existing definition of small business to one involving a larger number of employees would probably not be warranted.

Use of the fair dismissal code

The Small Business Fair Dismissal Code (box 17.1) is an important component of the current special arrangements applying to small businesses. The Code is accompanied by a checklist which was intended to simplify its application. Any assessment of the success or otherwise of the Small Business Fair Dismissal Code and its checklist hinges on a judgment about the extent to which it provides adequate protections to employers and employees alike. On this, much rests on how it has been used, for good or ill, in practice.

Early in its operation there were doubts raised about the code as an approach. For example, Chapman (2009, p. 763) contended that it:

... may represent a significant lessening of the standard that has been required of employers in the past. Whether it does will depend on how the concept of 'reasonable grounds' is interpreted. For an employer to believe 'on reasonable grounds' that a summary dismissal is justified may require that a level of procedural fairness be accorded to an employee, such as being provided with an opportunity to respond to allegations of misconduct or lack of performance.

The concerns persist, albeit reflecting sometimes quite different perspectives about what constitutes failure (box 17.8).

The checklist has also had a chequered history. In its original form the list did not alert employers to some of the important matters they had to consider. For example, in *Mr. N v The Bakery* [2010] 3096, an employee was dismissed for submitting false time sheets. The

¹⁷ The average sales and service income per employee in small businesses (those employing less than 20 employees) was around \$190 000 in 2012-13. This suggests that average sales and service income per employee of a business employing 15 people would be around \$2.9 million annually (ABS 2014, *Australian Industry 2012-13*, Cat. No. 8155.0, released 28 May).

employer filled in the checklist (on the advice of Fair Work Australia), but failed to ensure that the employee had the right to a support person during the investigative stage. Fair Work Australia's judgment in the case was that the termination of Mr N. was neither unjust nor unreasonable, but that it was 'harsh' because it occurred without notice or access to a support person. The Bakery was ordered to pay a small compensation to Mr. N. The Commissioner on the matter concluded that:

There is nothing in the Checklist itself that would have alerted Ms O to the requirement in the Code for an employee to have another person present to assist in circumstances where dismissal is possible. This deficiency, together with the extent to which the Checklist does not assist where there are disputed facts or an element of doubt about the reasonableness of the employer position means that I consider the checklist to be of dubious value as a determinant of whether the Code has been complied with.

The current checklist preamble includes advice that an employee 'can have another person present to assist', and has tick boxes relating to whether an employee has sought support and whether they have been permitted to receive it. However, filling in the relevant tick boxes is not required if an employee has been terminated on the basis of what the employer perceives as serious misconduct. Yet if, on assessment by the FWC in any unfair dismissal case, it is determined that the alleged serious misconduct is not genuinely serious, the failure to offer support may be decisive in the outcome of the case. More generally, the checklist does not indicate whether a yes or no to *any* given question is likely to protect the employer from an unfair dismissal action. It may be that greater guidance in filling in the checklist may be helpful, but many of the critics saw more fundamental problems, such as that guidelines and codes cannot be comprehensive enough to substitute for better education and widespread understanding of the law.

On balance, it appears that the Small Business Fair Dismissal Code is neither fish nor fowl. Appearances aside, it poses considerable risks to small businesses if a decision is contested, undermining its original goal. In a separate review, the Code was characterised in a similar fashion by the Reviewer as follows:

I do not favour the Small Business Fair Dismissal Code ... It seems a poor document to me. On the one hand it encourages employers to escalate certain types of misconduct into police matters as a matter of course. And on the other hand, it completely fails to deal with misconduct falling short of serious misconduct which might nevertheless justify termination on notice (as opposed to summary dismissal). The Small Business Fair Dismissal Code seems to suggest that such misconduct needs to be the subject of performance management as a matter of course, which is odd, to say the least, and bordering on the bizarre. (Amendola 2009, p. 211)

Problems with the Code in relation to its effect on unfair dismissal protections for the employees of small businesses have also been raised previously (Howe 2012).

Box 17.8 **Is the Code working? Some criticisms from participants**

Participants had a variety of sometimes contradictory views about the code. Some saw it as removing effective worker protections; others considered that it gave the appearance of providing a simpler avenue for fair dismissals, but that in reality, the simplicity was illusory:

... unfortunately the Code does not provide businesses with the certainty they need and does not prevent the bringing of unfair dismissal claims. The matters subject of the Code are still subjective and capable of challenge. (Housing Industry Association sub. 169, p. 48)

The Small Business Fair Dismissal Code (SB Code) is of limited value to small business because reliance upon it is open to challenge, with a small business employer required to provide evidence of compliance with the ... code if the employee makes a claim for unfair dismissal to the FWC. (Australian Chamber of Commerce and Industry sub. 161, p. 109)

... the small business fair dismissal code offers a broad exemption for small businesses from unfair dismissal laws, often to the detriment of employees who would otherwise be successful in an unfair dismissal action. (Kingsford Legal Centre sub. 87, p. 7)

Having examined unfair dismissal cases since 2001 I am not convinced that the Code makes any real difference for small business compared to the procedural requirements in place prior to the Code. If small businesses are to be provided any substantial relief from the costs of unfair dismissal other policies should be formulated. ... The Code is no panacea. It reflects the substantive and procedural questions that an arbitrator would investigate through arbitration. It is difficult to see how ticking the boxes of the Code actually change much to the workings of unfair dismissal laws. (Ben Freyens sub. 149, p. 11)

Following the Code does not appear to be a sufficient safeguard for small businesses against a claim of unfair dismissal, nor is the advice provided by the Code clear and concise. It is not easy to see how amendments to the guidelines could remedy this, especially given the difficulties in precisely delineating ‘serious misconduct’. A business’s *perception* of serious misconduct is neither here nor there. If an employee contests a decision by an employer, the conduct still has to meet the legal tests set by the FW Act and the precedents of past cases determined by the FWC. The common advice appears to be for small businesses to obtain legal advice if terminating someone’s employment. If that is seen as the sensible course of action, then the Code is failing its purpose. The more general reforms proposed below regarding the FWC’s treatment of procedural matters in unfair dismissal cases, together with ongoing guidance material provided by the FWC on such matters and on unfair dismissal processes more generally, are likely to be sufficient in meeting small business needs in this area.

RECOMMENDATION 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).

18 The general protections

Key points

- The general protections under Part 3-1 of the *Fair Work Act 2009* (Cth) bring together a range of previously dispersed protections. While many of these protections were part of past legislative frameworks, the current framework differs in the breadth of many of these protections and uncertainties about their interpretation and implementation.
- Stakeholders have very different views about the effectiveness of the protections as a group and on the design of individual protections:
 - Many employers argued that the adverse action provisions are flawed, particularly regarding the allowance of multiple reasons and the unclear definition of what constitutes a workplace right.
 - Claims of jurisdiction shopping and speculative cases were also common.
 - The reverse onus of proof, which requires those alleged to have taken adverse action for a proscribed reason to prove they did not, was seen by some participants as problematic.
 - Some employers and employer groups argued that the general protections are misused to obstruct legitimate business restructuring and to drive excessive discovery processes.
 - Unions, legal and employee groups were more positive about the general protections and, in some instances, called for their expansion.
- The Commission recognises that many of the general protections have strong prima facie justification. However, the practical effect of the complicated structure and absence of active guidance on defences and coverage is causing unnecessary contention. Improvements are required:
 - The ambiguous right to make a ‘complaint or inquiry’ needs to be better defined.
 - Active management by the Fair Work Commission (FWC) and the Courts of discovery processes, consistent with similar limits to sweeping discovery action in the Federal Court, is essential when a reverse onus of proof is in operation.
 - Greater powers to award costs against applicants in certain circumstances are also required.
- The FWC should be required to report more details about general protections claims and the outcomes of such cases, and be adequately resourced to do so.
- The Government should further review the operation of the general protections within 18 months of the recommended reforms taking effect if there is continuing growth in FWC case numbers.

The industrial relations framework in Australia provides a broad range of protections to employees, employers and industrial associations. The general protections provisions of the *Fair Work Act 2009* (Cth) (FW Act) prohibit a wide range of conduct defined as

‘adverse action’. Adverse action includes doing, threatening, or organising an action *because of* a particular proscribed reason. For example, it is unlawful for employers to discriminate against workers or to dismiss them because of temporary absence due to illness or injury.

Australia is not unique in providing an array of employment-based protections. What *is* unique about Australia’s protections is the combined effects of: their breadth; their operation under the rubric of ‘adverse action’; and some ambiguities in their coverage. These ambiguities were a particular focus in submissions for a large number of employer groups, who expressed concerns about the general protections framework.

This chapter describes the current array of protections (section 18.1), looks at evidence on their impacts (section 18.2), which is a much neglected area in the consideration of these arrangements, and assesses possible areas for further reform (section 18.3).

The focus of the chapter is on the general protections part of the FW Act (Part 3-1). Other protections such as unfair dismissal (Part 3-2) and anti-bullying (Part 6-4B) are considered elsewhere in the report (in chapters 17 and 19 respectively).

18.1 Key features of the general protections

The individual elements that make up the general protections have a long history in Australia, with some dating back to the early 1900s (box 18.1). As stated by Burnett (2014, p. 5):

Section 340 and s. 346 represent almost one hundred years of statutory evolution concerning the taking of prejudicial action against employees because of union membership or associated activities.

While originally intended to safeguard unions and their members, the protections have gradually broadened to cover a range of behaviours adversely affecting individuals in the workplace (Winckworth 2011). In addition to protecting freedom of association, the stated objectives of the general protections include protecting workplace rights, providing protection from workplace discrimination, and providing effective relief for persons who have been discriminated against, victimised or otherwise adversely affected by contraventions of the protections (FW Act, s. 336).

Interestingly, given the historic objective of the protections, they have also been used for some time to guarantee the right *not* to join a union (Stewart 2013, p. 284), and have been used in cases to allege adverse action by union officials.

Box 18.1 **The development of the protections over time**

Chapman, Love and Gaze discuss the (cumulative) history of prohibited conduct and prescribed grounds in Australia:

In 1904, the prohibition covered only one prohibited action (dismissal), and two prescribed grounds: being an officer or member of an organisation, or being entitled to the benefit of an agreement or award.

Five years later, amendments added a new prohibited action (injuring an employee in their employment), and expanded the prescribed grounds to include being an officer or member of an association that has applied to be registered as an organisation.

In 1911, altering an employee's position to his or her prejudice was prohibited, and in 1914 a new prescribed ground was added: where the employee has appeared as a witness, or given evidence, in a proceeding under the Act.

The trend of introducing new prohibited actions and prescribed grounds continued throughout the 20th century. The enactment in 1996 of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) heralded significant expansion to the federal victimisation scheme. With this Act, the prohibitions on victimisation were expanded beyond the traditional realm of the federal system, to encompass, for example, conduct by an incorporated employer regulated through a state system, or conduct by a union that was not registered in the federal system. Principals and independent contractors were brought within the scheme. These expansions relied on a broader constitutional base for the federal statute than its predecessors and in 2000, Creighton and Stewart expressed the view that as a consequence the framework of the *Workplace Relations Act 1996* (Cth) 'is far more complex than its predecessors', and that the provisions 'have become ridiculously convoluted.'

Immediately before the *Fair Work Act 2009* (Cth) came into effect, the legislation defined five prohibited actions taken by an employer against an employee or prospective employee, and specified 16 prescribed grounds. The prescribed grounds included:

- being, or not being, a union officer, delegate or member;
- making an application for a secret ballot;
- making an inquiry or complaint to certain persons or bodies; and
- being absent from work without leave for the purpose of carrying out duties or exercising rights as a union officer, if an application for leave had been unreasonably refused.

Throughout the 20th century, there was considerable litigation regarding both the scope of prohibited conduct and the breadth of prescribed grounds, reflecting uncertainty in these aspects of the jurisdiction.

Source: Chapman, Love and Gaze (2014, p. 5).

Content of the main protections

The principle protections in Part 3-1 are divided into protections relating to workplace rights and engaging in industrial activities.

A person has a *workplace right* if he or she:

- is entitled to the benefit of a workplace law, workplace instrument or order made by an industrial body
- has a role or responsibility under such a law, instrument or order

-
- is able to initiate or participate in a process or proceedings under a workplace law or instrument
 - is able to make a complaint or inquiry to a person or body with the capacity to seek compliance with that law or workplace instrument
 - is able to make a complaint or inquiry in relation to their employment. (FW Act, s. 341(1))

The *industrial activity* provisions protect:

- being or not being a member or officer of an industrial association
- participation or non-participation in other lawful industrial activity
- non-participation in unlawful industrial activity.

Legislation and case law provide detailed definitions of the various terms above. For example, an industrial body encompasses a wide range of bodies including the Fair Work Commission (FWC), the Federal Court, the Federal Circuit Court, and eligible state and territory courts and commissions (FWC 2014d).

Certain persons, including employers, employees and industrial associations, are prohibited from taking adverse action against certain other persons because the other person has, or exercises a workplace right, or engages in industrial activity.

The type of conduct that constitutes adverse action will depend on the relationship between the parties, covering conduct by employers and employees (including prospective employers and employees), people (principals) who engage independent contractors, the contractors themselves and industrial associations.

The wide scope of protections provided by Part 3-1 of the FW Act is indicated by the array of actions that are defined as ‘adverse’:

- an employer dismissing an employee, injuring them in their employment, altering their position to their detriment; or discriminating between them and other employees
- an employer refusing to employ a prospective employee or discriminating against them in the terms and conditions the employer offers
- a principal terminating a contract with an independent contractor, injuring them or altering their position to their detriment, refusing to use their services or to supply goods and services to them, or discriminating against them in the terms and conditions the principal offers to engage them on
- the actions of an employee or independent contractor taking (or not taking) industrial action against their employer or principal
- an industrial association, or an officer or member of an industrial association, organising or taking industrial action against a person, or taking action that is detrimental to an employee or independent contractor

-
- an industrial association imposing a penalty of any kind on a member. (FW Act, s. 342)

As well as adverse action, this Part also prohibits a person from:

- coercing another person to engage in industrial activity
- knowingly or recklessly making a false or misleading representation about another person's obligation to:
 - become or not become, or remain or cease to be, an officer or member of an industrial association; or disclose whether she or he, or a third person, is or is not, an officer or member of an industrial association; or
 - disclose whether she or he, or a third person, is or is not, an officer or member of an industrial association, or is becoming, or not becoming, or remaining or ceasing to be, an officer or member of an industrial association.
- taking adverse action against another person on discriminatory grounds.

Some illustrative examples of what constitutes a workplace right, 'adverse action' and other contravening behaviours are provided in box 18.2.

Protections related to *industrial activities* form a second main tranche (Part 3-1, Division 4). Under these protections, a person must not take adverse action against another person for membership (or not) of an industrial association, or for engaging (or not), or proposing to engage in, industrial activity.

A third area within Part 3-1 (Division 5) provides for an array of *other protections*, including those covering discrimination, temporary absence due to illness or injury, bargaining services, fees and types of coercion. The discrimination provisions have been, and are likely to remain, an important area of debate. While employers must not take adverse action against employees or prospective employees due to race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin, employers will not contravene this protection where their action is lawful under discrimination laws (figure 18.1), or it was taken because of the inherent requirements of the particular job, or was in accordance with certain religious beliefs (FW Act, s. 351).

Finally, a fourth area of the general protections deals with *sham contracting* (Part 3-1, Division 6). An employer must not misrepresent to employees (actual or prospective) that the contract of employment is a contract for services for work performed by an independent contractor. It also proscribes dismissing an employee in order to engage them as an independent contractor to perform the same, or substantially the same, work under a contract for services. False statements by employers to employees aimed at persuading or influencing the employee to enter into a contract for like work are also prohibited. (Sham contracting is discussed further in chapter 25).

Box 18.2 Illustrative examples of key concepts

What is a workplace right?

Freddy works part-time at a petrol station. He believes he is not being paid the correct award rate for a console operator. He writes a letter of complaint to the Australian Competition and Consumer Commission (ACCC) as he mistakenly believes that it is able to investigate wage underpayments. Freddy tells his manager about the letter. Following this, his hours for the next fortnight are halved. While the complaint would not be covered by paragraph 341(1)(c)(i) of the FW Act, as the ACCC does not have capacity under a workplace law to seek compliance with the applicable award, Freddy would still have exercised a workplace right because he has made a complaint regarding his employment (FW Act, s. 341(1)(c)(ii)).

Adverse action

Kylie is employed by Daffy Duke Pty Ltd. Daffy Duke proposes, during negotiations for an enterprise agreement, to make a number of rostering changes at the workplace. A number of staff are unhappy about the proposal and the relevant union organises protected industrial action that includes a strike against Daffy Duke. Kylie is happy with the proposed rostering changes and declines to participate in the protected action ballot or participate in a strike. The union would be prohibited from taking adverse action against Kylie (for example, refusing to provide her with union services) because she refused to participate in the protected action ballot and any subsequently approved strike.

Coercion

John was told by his employer, Big Bird Constructions Pty Ltd, that if he did not sign an individual flexibility arrangement he would become a casual employee, would not receive standard hours each week, could not continue working the hours he was currently working, and could not be employed by the company. Under the FW Act, this would amount to threatening to take action with intent to coerce John to exercise, or not to exercise, his workplace right and/or exercise his workplace right in a particular way.

Undue influence

Sam is employed by Happy Café Pty Ltd (Happy Café) as a casual waiter. The manager of Happy Café would like Sam to work from 5am – 1pm each day so that the restaurant can open for the lunch and breakfast trade. The manager would like Sam to work these hours at his regular hourly rate of pay (that is, no penalty rates) under an individual flexibility arrangement. The manager tells Sam that if he doesn't agree to the arrangement, he cannot guarantee Sam a minimum number of hours of work each week. The manager's threat of reduced hours convinces Sam that he should agree to the proposed arrangement. This would amount to undue influence or pressure and would be prohibited by subclause 344(a).

False or misleading representation

Madison is a long-term casual employee of Benny J Enterprises Pty Ltd. Madison is pregnant with her first child and asks her manager about her parental leave entitlements. Madison's manager tells her that only full-time employees are entitled to parental leave, knowing that this is not true. In doing so, the manager will contravene the prohibition in paragraph 345(1)(a) regarding false or misleading representations about a person's workplace rights.

Source: Australian Government (2008b, pp. 218, 223, 228).

Figure 18.1 **Coverage of anti-discrimination protections at the Commonwealth and state and territory levels**

Blue squares denote attributes covered by the relevant legislation

	Race	Colour	Sex	Sexual preference	Age	Physical or mental disability	Marital status	Family or carer's responsibilities	Pregnancy	Religion	Political opinion	National extraction	Social origin
Age Discrimination Act 2004 (Cth)					■								
Disability Discrimination Act 1992 (Cth)						■							
Racial Discrimination Act 1975 (Cth)	■	■										■	■
Sex Discrimination Act 1984 (Cth)			■	■			■	■	■				
Anti-Discrimination Act 1977 (NSW)	■		■	■	■	■	■	■					
Equal Opportunity Act 2010 (Vic)	■		■	■	■	■	■	■	■	■	■		
Anti-Discrimination Act 1991 (Qld)	■		■	■	■	■	■	■	■	■	■		
Equal Opportunity Act 1984 (WA)	■		■	■	■	■	■	■	■	■	■		
Equal Opportunity Act 1984 (SA)	■		■	■	■	■	■		■				
Anti-Discrimination Act 1998 (Tas)	■		■	■	■	■	■	■	■	■	■		
Discrimination Act 1991 (ACT)	■		■	■	■	■	■	■	■	■	■		
Anti-Discrimination Act (NT)	■		■	■	■	■	■	■	■	■	■		
ALL EMPLOYEES	■	■	■	■	■	■	■	■	■			■	■

Source: FWC (2014d).

Coverage and lack of a cap

Not only do the general protections cover many different types of conduct, they also apply to a much wider group of people than most other parts of the FW Act (such as the unfair dismissal provisions).

The protections apply to certain types of ‘action’ — action taken by particular persons, action that has a particular effect, or action taken in a territory or Commonwealth place.

Hence the protections are not limited to national system employees and employers, but also extend to principal contractors, industrial associations and, in some circumstances, non-national system employers and employees (Forsyth et al. 2010, p. 168). They also extend to potential employees. Further, there is no high-income threshold.

Payouts arising from successful claims under Part 3-1 can be potentially much larger than via other parts of the FW Act, as the compensation provisions in Part 3-1 do not include a cap. Further, unlike the unfair dismissal sections of the FW Act, compensation for pain and suffering is not precluded. There may also be a tendency towards higher average payments under this part of the Act, as high-income earners who are effectively ‘capped out’ from pursuing cases via other routes may choose the general protections where they are eligible to pursue cases. (Evidence on the magnitude of actual payouts is assessed in section 18.2.)

Who does what? The role of the Fair Work Commission and the courts

General protections disputes can involve both the FWC and/or the courts. The nature and extent of involvement of each institution depends partly on whether the dispute is dismissal-related or not, and these roles have developed over time (box 18.3).

Box 18.3 The Fair Work Commission and general protections claims

The FW Act requires the FWC to handle s. 365 applications differently to s. 372 applications.

- Where a matter does not relate to a dismissal (s. 372), the FWC can only hold a conference to deal with the dispute if both parties agree to attend. If one of the parties to a non-dismissal dispute does not agree to participate in a conference, or if the dispute remains unresolved after the conference, the employee can choose to make an application to the Federal Court or the Federal Circuit Court to deal with the matter. During a conference, a Commission Member will work with those involved to reach an agreed resolution to the dispute. The Commission Member may make a recommendation or express an opinion during the conference, but cannot make a binding final decision or an order.
- If a dispute involves a dismissal (s. 365) the FWC must convene a conference. Both parties must attend the conference. If the dispute is not resolved during the conference, and the Commission is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then the Commission will issue the parties a certificate stating these facts. It must also advise the parties if it considers that a consent arbitration or an application to a court would not have a reasonable prospect of success. If there is some prospect of successful arbitration and parties agree within 14 days of the issuance of the certificate, then at the first instance, the Commission can arbitrate their dispute. If one or both of the parties do not consent to arbitration by the Commission, the dismissed employee can choose to take the matter to a court.

Source: FWC (2015g).

Most recently, the FWC’s role has expanded to allow arbitration, with the parties’ consent, of general protections claims involving dismissals. Prior to 1 January 2014, the FWC could only conciliate regarding such disputes, but did not have arbitration powers (FWC 2014b,

p. 37). This change in responsibility, together with the growth over time in the number of general protections claims (discussed below), has resulted in a significant increase in workload for the FWC (figure 3.1):

Individual matters continue to make up a significant proportion of the Commission's workload. Consistent with previous years the greatest numbers of applications are for unfair dismissal. Whilst this year there was a slight decline in the number of unfair dismissal applications received there was also an increase of 18.5 per cent in the number of applications for general protections involving dismissal. (FWC 2014b, p. 27)

The implications of this expanded role for the resourcing of the FWC and the quality of outcomes form part of the discussion in the next section.

Multiple reasons and a reverse onus of proof

The general protections have several design elements that, at first glance, appear unusual. These are covered in Part 3-1, Division 7 within a section entitled Ancillary Rules.

First, *multiple reasons* for action are considered to be material. That is, 'a person takes action for a particular reason if the reasons for the action include that reason'. This means that, in proving that an employer took adverse action, for example, an employee needs to demonstrate that, amongst the reasons which the employer had for taking such action (and they can be numerous), only one was a proscribed reason.

Second, there is a *reverse onus of proof*, such that reasons for action will be presumed unless proved otherwise. That is, the person who took the action will be presumed to have taken that action for contravening reasons unless they can prove otherwise.

As will be discussed below, these design elements have been the subject of considerable commentary and debate during this inquiry.

18.2 Adequacy of current arrangements

In assessing the performance of the general protections, the Productivity Commission has considered:

- (limited) available data on the nature, incidence, and cost of claims since the introduction of the general protections in their current form in 2009
- the views of participants regarding scope and process problems in general protections cases
- analysis of the potential economic impacts of the dismissal and non-dismissal segments of the protections.

The recent large growth in applications

The number of general protections claims has been growing very strongly (table 18.1). By far, the largest number of lodgments under Part 3-1 relate to disputes about dismissals. There is very little information available about the balance of matters that comprise non-dismissal disputes. What is clear is that non-dismissal disputes under the general protections provisions have also increased significantly in recent years.

Table 18.1 General protections lodgments across time
Number of applications lodged

Matter type	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15
Dismissal disputes (s.365)	1 188	1 871	2 162	2 429	2 879	3 382
Non-dismissal disputes (s.372)	254	504	598	555	779	879
Total lodgments	1 442	2 375	2 760	2 984	3 658	4 261

Sources: Fair Work Australia (2010, p. 76, 2011, p. 80), and FWC (2014b, pp. 36–37, 2015c, pp. 61–62).

A significant proportion of dismissal-related matters do not proceed to arbitration (table 18.2). Around 69 per cent of matters lodged in 2014-15 were finalised without certificate, indicating that settlement is likely to be a common occurrence.

Table 18.2 General protections matters involving dismissal (s. 365); manner of finalisation

	2011-12	2012-13	2013-14	2014-15
Certificate issued	931	832	967	1 073
Finalised without certificate issued ^a	1 393	1 517	1 811	2 402
Total finalised	2 268 ^b	2 349	2 778	3 475

^a Finalising without issuing a certificate includes disputes that are settled, applications that were withdrawn, invalid or late, and matters that are adjourned indefinitely. ^b Total reported also includes s. 773 matters relating to the unlawful termination of employment. These totalled 141 matters in 2011-12.

Sources: FWC (2013, 2014b, 2015c).

The size and growth of compensation payments can also affect the behaviour of parties. To the extent that general protections claims result in very large payments, and expose senior management to liability, it is more likely that they will play an influential role in determining workplace decisions and processes. These payments can occur informally, through settlement at early stages, or formally, as a result of arbitration.

The value of compensation settlements is unknown. Aggregate information on payments of compensation arising out of arbitrated Part 3-1 cases is not readily available.

Problem areas identified by participants

Despite recent reforms, stakeholders (mainly employers and employer groups) continued to express concern about how Part 3-1 operates in practice. Such concerns are not new, and significant problems have (according to a wide variety of commentators) beset the general protections jurisdiction for some time.

One focus of past concerns was on the (previously) different time limits for lodgments of dismissal claims that existed between Parts 3-1 and 3-2 of the FW Act. For example, in their submission to the 2012 review of the FW Act, Forsyth and Stewart stated:

The larger problem for us, is the veritable flood of dismissal-related claims now being lodged with FWA under s. 365 ... It is widely believed or acknowledged amongst practitioners that a significant proportion of these claims involve speculative or tenuous allegations. (Forsyth and Stewart 2012, p. 34)

They went on to recommend harmonisation of lodgment timeframes across these parts of the FW Act, and this occurred in 2013.

But concerns of a more general, systemic nature have also been raised about the general protections. For example, in its submission to the 2012 review, the Victorian Employers' Chamber of Commerce and Industry (VECCI) stated:

... general protections claims threaten to be the nadir of the Fair Work reforms – without much in the way of jurisdictional hurdles, mandating the operation of a reverse onus of proof, requiring only 'one reason' being proscribed (not being the sole or even dominant reason) as the basis for the adverse action taken by an employer, and uncapped compensatory possibilities in addition to pecuniary penalties that may be imposed. (VECCI 2012, p. 74)

This more generalised view of problems was a theme also running through VECCI's submissions to the present inquiry (sub. 79, p. 90; sub. DR339, p. 22).

The Australian Human Resources Institute (AHRI) presented the results of a survey of its members in its submission to this inquiry. The results showed particular concern regarding the adverse action provisions of the general protections (figure 18.2). Interestingly, there was far greater concern evident amongst surveyed members about general protections than other specific areas of employment protections, such as anti-bullying and unfair dismissal. Of course, such surveys may not be representative of all businesses.

Claims of excessive breadth

One major area of concern raised by a considerable number of inquiry participants was that the general protections are bedevilled by their excessive breadth. The broad scope of the protections was a conscious intent of the Fair Work amendments in 2008. While the FW Act aimed to ensure:

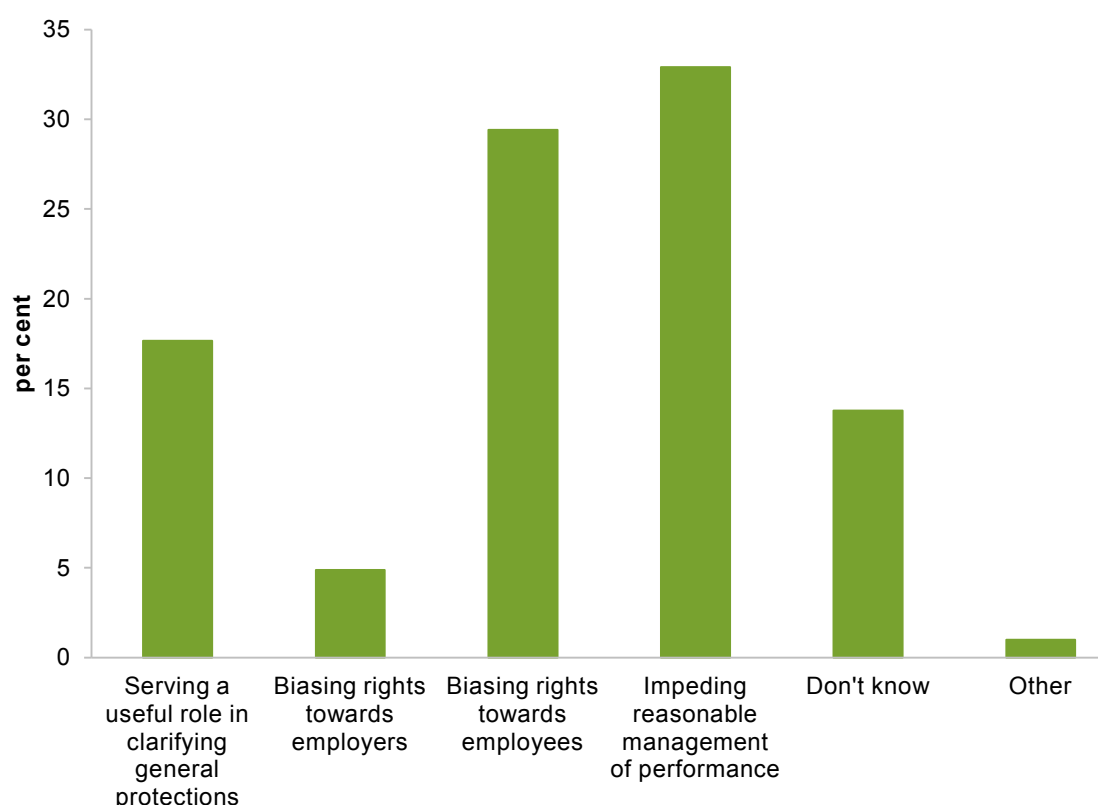
... fairness and representation at the workplace by recognising the right to freedom of association and preventing discrimination and other unfair treatment ... The consolidated

protections in Part 3-1 are intended to rationalise, but not diminish, existing protections. (Australian Government 2008b, p. 212)

the Australian Government acknowledged, even prior to the introduction of the provisions, that generalising the protections could also expand their scope.

Figure 18.2 AHRI's member survey on the impact of adverse action provisions in the workplace^a

799 respondents



^a It is important to treat surveys with caution, as often they are not undertaken by an impartial body, may not be representative, and answers may be conditioned by the context of the questions. Some other surveys examined by the Productivity Commission have also been subject to these concerns. They provide some information, but are not definitive.

Source: AHRI (sub. 46, p. 12.).

Many participants argued that the expansion in scope has turned out to be excessive, and that the current formulation provides a much too broad set of avenues for appeal. For example, Victorian Automobile Chamber of Commerce, Motor Trader's Association of New South Wales, and Motor Trade Association of South Australia (sub. 201, p. 9) stated:

Our members are very concerned about the general protections provisions. We are seeing more claims in this area as awareness is raised. These provisions are so broad and subjective they

create great uncertainty for employers. These provisions encourage vague, vexatious and ill-advised claims.

In a similar vein, the Australian Federation of Employers and Industries (sub. 219, p. 53) stated:

The breadth of employer actions identified under s. 342 (1) as adverse or prejudicial to an employee's actual or future employment is excessive, the nature of a 'workplace complaint' is all encompassing.

A number of stakeholders suggested a return to previous formulations. For instance, the National Retailer's Association (sub. DR327, p. 9) stated:

The NRA opposes the continuation of General Protections Applications, especially given that they impose a reverse onus of proof and impose substantial penalties for both employer companies and individuals who are knowingly involved in contraventions of the relevant provisions. We suggest a reversion to the position prior to the introduction of these provisions namely the freedom of association and unlawful termination provisions.

In support of a similar view, the VECCI suggested that, of 142 cases over recent years which they analysed, only one successful case would not have had coverage under previous legislative arrangements. (sub. DR339, pp. 18–19)

Concerns about the definition of a workplace right

A particular concern of several stakeholders (including the Catholic Commission for Employment Relations as described in box 18.4) was that the definition of what constitutes a 'workplace right' was overly vague. Many employers argued that the current definition of a workplace right could be used to prevent them from undertaking legitimate performance management or restructuring activities for fear of facing an adverse action claim¹⁸. For example, the Minerals Council of Australia (sub. 129, p. 33) stated:

Such claims are being used to interfere unreasonably with ordinary management decision making and performance management processes.

Overlapping legislation an issue for some

The overlap with other laws, particularly in the area of anti-discrimination (figure 18.1), was also discussed by several participants. To the extent that this overlap ensures protection in otherwise exposed areas of human interaction, there can be potential grounds

¹⁸ The 2012 FW Act Review did not see problems in this regards, and stated: "The Panel has not seen any evidence of a judicial interpretation of the general protections which infringes unjustly on an employer's right to initiate performance management processes against an underperforming employee. With time, the Panel believes a body of jurisprudence regarding the general protections will develop, which should provide employers and employees with greater certainty about the range of behaviour prohibited by the general protections" (McCallum, Moore and Edwards 2012, p. 234).

for initially accepting such duplication. However, this duplication can also encourage jurisdiction shopping and gaming. Ultimately, a simplifying exercise would require formal conferencing of the Commonwealth, states and territories and numerous independent regulators. The gain may not be worth the pain, desirable as such simplification might be.

Box 18.4 Specific areas of ambiguity and uncertainty: one participant's view

The Catholic Commission for Employment Relations (sub. 99, pp. 40–41) provided the following list of features that, in its view, lead to ambiguity and uncertainty around the complaint or inquiry right in the FW Act:

1. Whether an employee making a complaint needs to hold a genuine belief in its merits in order for the complaint or inquiry to fall within the definition in s. 341(1)(c)(ii) of the FW Act.
2. 'Complaint or inquiry' is not defined in the FW Act or in the Fair Work Regulations 2009, nor is it comprehensively analysed in the Explanatory Memorandum to the Fair Work Bill 2009 (sic). As a consequence:
 - (a) There is no test or qualification regarding the substance or content of a complaint for it to constitute a 'complaint' within the meaning of the FW Act ...
 - (b) The FW Act does not define how the complaint or inquiry right must be exercised. Consequently, there is a lack of clarity as to whether the complaint needs to be properly communicated to the employer, or for the employee to demonstrate that they reasonably intended for the employer to take significant steps in response to it. In other words, there is uncertainty as to whether a complainant needs to reasonably put the employer on notice that they have actually exercised the right to make a complaint ...
3. There is uncertainty as to the meaning of a complaint or inquiry that is 'in relation to his or her employment'. There is a divergence in the case law on this point, and consequently it is unclear whether the protection is limited to complaints directly related to the complainant's own employment, and if not, the extent to which a complaint may be indirectly 'in relation to' the complainant's employment.
4. Whether the meaning of the words 'is able to' in s. 341(1) of the FW Act, means there are certain circumstances in which an employee is not able to make a complaint or inquiry that attracts the protection.
5. Whether 'complaint or inquiry' is one cumulative workplace right with a single meaning, or whether they constitute two distinct workplace rights with their own scope and meaning.

Concerns about the onus of proof

The reverse onus of proof was also seen as problematic, but by a far more limited number of participants. For example, Minter Ellison (sub. 94, p. 3) said:

In our experience, the reverse onus is being misused. The fact that there is a reverse onus is being used to make assertions of contravention where there is no logical (or actual) connection between alleged adverse action and alleged motivation. While ... these allegations will ultimately fail, they can significantly add to the costs of defending a claim.

Qantas (sub. DR295, p. 2) stated:

... it is inherently difficult for an employer to satisfy the reverse onus where there is a temporal (but not causal) relationship between the protected attribute (e.g. the relevant employees have an entitlement under an industrial instrument) and the adverse action, even where all of the reasons for the action are lawful.

Several submissions (such as Qantas, sub. 116, p. 16) argued that a reverse onus is not observed in other parts of the FW Act or in many other legal contexts.

Benefits

The general protections are aimed at protecting workplace rights, freedom of association and non-discrimination in the workplace. Intrinsically, such protections have a valid role as:

- discrimination against any party based on factors unrelated to their work performance is both inefficient and contrary to well established social norms
- the realistic capacity for collective action by employees must address any attempts by employers or other parties to subvert this through covert measures (such as disadvantaging union members or employee representatives).

In that light, unions, legal and employee groups were generally positive about the general protections, arguing that, despite some faults, they nevertheless provided critical coverage to employees against a range of adverse behaviours. For example, the Employment Law Centre of WA (sub. 89, p. 42) stated:

The general protections in the FW Act do provide necessary protections to employees, and provide a large degree of certainty to all parties.

The Queensland Council of Unions (sub. 73, p. 38) stated:

The introduction of the general protections into the Fair Work Act 2009 was a positive step in providing decent workplace rights for Australian employees. These provisions are not onerous and would only penalise employers engaging in vindictive conduct towards their workforce.

Several parties described the protections as the result of an evolutionary process, and of gradual refinement over time.¹⁹ The consolidation of the protections within a single part of the FW Act was also seen by some as a positive step, resulting in clarification of coverage and scope.

¹⁹ For discussion of the historical development of the general protections, see Love (2014) and Chapman, Love and Gaze (2014).

The effects of the *BRIT v Barclay* and *CFMEU v BHP Coal* decisions

Several recent decisions have improved and clarified some important aspects of the general protections.

Foremost amongst these has been the High Court judgment in September 2012 of the appeal regarding *Board of Bendigo Regional Institute of Technical and Further Education (BRIT) v Barclay* [2012] HCA 32 (box 18.5). Prior to the High Court judgment in this case, employers were concerned that disciplinary actions taken against an employee who was underperforming, but also happened to be a union official or had some other attribute that was irrelevant to an assessment of their underperformance, could be caught up under the general protections. This would have had the effect of legitimising unacceptable conduct by some employees, or in some cases, providing unwarranted industrial leverage to those few union officials willing to push the legislation to its limits. The High Court judgment is generally seen to have clarified that the central consideration about the reason for adverse action is the subjective intention of the person taking the alleged adverse action and that, in this regard, a decision maker's evidence of the reason for their decision is enough, provided that there is no contradictory evidence.

The decision of the High Court in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41A is also seen as a second significant case that has further clarified aspects of the general protections. This case involved a BHP employee, who was also an official of the union, who was involved in a protest on his day off and was dismissed by the company for waving a placard that it deemed was offensive to other employees. The majority decision in this case has generally been seen as reiterating the logic applied earlier in the Court's judgment in the Barclay case.

The dismissal segment is critical in assessing impacts

In considering the economic impact of the general protections, the prevalence of dismissal-related claims is likely to be a key driver of costs and benefits.

As shown above, data provided to the inquiry by the FWC show that by far the largest share of general protections applications (around 80 per cent) involve a dismissal (s. 365). Many of these applications are similar disputes to those covered by s. 394 but are made via the general protections route because applicants are capped out or excluded for other reasons:

Compared to an unfair dismissal claim there are fewer exclusions, there is often no cap on the compensation that may be awarded, and in some instances the legislation puts the burden of proof on the employer to show the true reason for dismissal. As against those advantages, such proceedings can sometimes take a long time to be resolved. (Stewart 2013, p. 338)

Box 18.5 **The BRIT v Barclay case**

Mr Barclay was a senior teacher employed by the Bendigo Regional Institute of Technical and Further Education (BRIT). He was also the Sub-Branch President at BRIT of the Australian Education Union (AEU).

Mr Barclay forwarded an email to AEU members employed at BRIT, regarding an upcoming re-accreditation audit, in which he said he was aware of reports of serious misconduct by unnamed persons in BRIT. Before sending the email he did not advise any of his line managers of the details of the alleged misconduct. The email was passed on to senior managers and subsequently, the Chief Executive Officer (CEO) of BRIT. She wrote to Barclay requiring him to show cause, why he should not be disciplined for failing to report the misconduct alleged in his email to senior managers. Barclay was suspended on full pay, had his internet access suspended, and was not required to attend BRIT during the suspension period.

The respondents (Mr Barclay and the AEU) commenced proceedings, contending that BRIT had contravened provisions of the Fair Work Act 2009 (Cth) (FW Act), designed to protect the right of union officials and members, so that the action taken by the CEO constituted adverse action within the meaning of s. 342 of the Act. BRIT conceded that Barclay's suspensions and preclusion from BRIT did constitute adverse action. However, BRIT submitted that the decision to require Barclay to show cause was not adverse action within the meaning of the FW Act. The respondents submitted that the test of the reason why the relevant action was taken was objective and not subjective.

In February 2011, the Full Court of the Federal Court held that sending of email was part of Barclay's functions as AEU officer and therefore adverse action had been taken within the meaning of the Act.

On appeal, the then Minister for Tertiary Education, Skills, Jobs and Workplace Relations, the Hon. Bill Shorten MP, intervened in support of the appellant, as allowed under s. 569 of the FW Act.

In September 2012, the High Court decided that BRIT had not breached the adverse action provisions by suspending and issuing a show cause letter to a union delegate over an inflammatory email — reversing the decision of the Full Court of the Federal Court.

The High Court's decision included the following points:

- There will be no legitimacy in the search for an 'unconscious' reason, which the Federal Court had undertaken in the appeal decision.
- Direct evidence of the decision-maker's state of mind, intent or purpose will be crucial to establishing the employer's reasons for imposing adverse action on an employee, and evidence comparing what the decision maker would have done if an employee who was not a union official had engaged in the misconduct will be relevant.
- An employee's union position and activity will not in and of itself be a factor which must have something to do with adverse action, or which can never be dissociated from adverse action.
- An employer's reasons that will be relevant are only those that are 'operative and immediate' so that, for example, the mere fact that a decision maker is aware of past industrial activity by an individual will not make that activity a substantial and operative reason.

Sources: Minter Ellison (2012); High Court of Australia (2011); Hunt and Hunt Lawyers (2012).

Historically, a further reason for many dismissal applications under s. 365 reflected the capacity to lodge claims well after the time limit had elapsed under the specialised unfair dismissal provisions of the FW Act. A significant change in this context concerns the recent harmonisation of timeframes for lodging a dismissal dispute under s. 365 and s. 394 as mentioned above. The results of this change were discussed in detail in the previous chapter, and, following alignment of the time limits, this driver has disappeared.

Any impacts from the dismissal segment of the general protections on hiring behaviour and employment will be similar in form to those made under the s. 394 unfair dismissal protections, though they are likely to be of a lower magnitude given the smaller number of claims. Nevertheless, there is some evidence from participants that the cost per case under the general protections exceeds that of the specialist regime.

There were 879 applications in 2014-15 for breaches of the general protections not involving a dismissal. Unfortunately, as mentioned above, the FWC is not required to record more detailed data on which protections these applications relate. They use a binary classification, splitting claims into dismissal and non-dismissal.

The potentially beneficial impacts of the protections (as discussed above) also need to be weighed against any of their adverse effects.

Assessment

There is a reasonable presumption that many of the protections have positive impacts. For example, it would be hard to justify adverse action against an employee because they were or were not a union member. Removing any such protection would widen the scope for employers or unions to abuse any power they might have, with damaging consequences for the efficiency of labour markets. The main issue for these kinds of protections, then, is not their inherent validity, but whether there are problems associated with uncertainty about their application, the compliance costs they might entail, any unintended behavioural responses by employers and employees, and the processes by which disputes are resolved.

On the other hand, many stakeholders pointed to problems associated with the combination of broad protections, multiple reasons and the reverse onus of proof, and overlap with other parts of the FW Act or other laws. These go to matters largely of design, rather than the existence of the protections per se. The way that the protections are implemented in practice is an important further consideration. A particular issue in this regard concerns the potential misuse of the adverse action provisions to frustrate commercial restructures, with both direct effects (such as delay) and indirect, ‘chilling’ effects on future restructure plans.

The pronounced rise in lodgments in recent years, both for dismissal and non-dismissal matters, could be evidence simply of a jurisdiction that is finding its feet. But a considerable number of stakeholders to the present inquiry disagreed with this, and pointed to many cases where the general protections were being used as a ‘stalking horse’ to

launch dubious, but costly and time-consuming, cases. In support of this point, VECCI provided a template letter which, it claimed, demonstrates that lawyers were repeatedly encouraging individuals to lodge spurious claims (sub. DR339. p. 48).

It is the Productivity Commission's view, based on the consideration of further evidence and testimony, that significant further reform of the general protections is needed to restore greater balance between the needs of employers and employees, and to strengthen the ex-ante filters around such cases.

In this regard, the 'elephant in the room' is not any given administrative feature, such as the application timeframe, that could be further improved. Such features have been refined since 2009, but to limited effect. This has not staunched the flow, if not the now veritable flood, of lodgments in this area.

Reforms are needed both to the architecture of protections, as well as to arrangements concerning their practical implementation. These are discussed in the next section.

18.3 Further reforms to the general protections

Reinstating the sole or dominant reason test

As discussed, the current general protections allow for multiple reasons for taking action to be considered as material, with contravention if one or more of the reasons are proscribed. This test applies generally, as set out in the Ancillary rules of Part 3-1 (Division 7). Many participants argued that a return to a sole or dominant reason test, as applied in a previous formulation, is more appropriate. Several submissions focused on the operation of the current test in practice, and argued that it inevitably places employers at a disadvantage in disproving allegations of proscribed conduct.

A common argument was that the general protections have provided a very extensive list of grounds for contravention and this, in combination with the current test, amounts to a 'one strike and you're out' approach to cases. While allowance for multiple reasons is important in complex cases, a sole or dominant reason test would, in this view, remove unnecessary ambiguity, reduce the scope for primarily vexatious claims, and refocus consideration of genuinely adverse actions.

There are several counterarguments regarding the reintroduction of the sole or dominant test. First, the High Court's decision in the Barclay case has clarified to a considerable degree the operation of the test within the general protections. As is now clear, a prohibited reason must still be a 'substantial or operative' factor influencing an employer's decision to dismiss an employee, or an 'operative or immediate' reason for acting. If there were other strong grounds for dismissal — such as poor performance — the dismissal would unlikely be adverse action. This judgment has provided guidance, particularly for

employers, on the operation of the test. Second, when it was in operation, the ‘sole or dominant reason’ test was widely seen as providing too high a hurdle in proving claims of contravention, so reverting to it may shift the balance too much in favour of employers.

On balance, and given recent case law, the grounds for significant change do not seem persuasive. Recent decisions have clarified substantially that the test to employ is whether a person took adverse action against another person, with a focus on ‘substantial or operative’ factors influencing the decision, or an ‘operative or immediate’ reason for acting, as the primary consideration. Given this, the evidence presented thus far to the inquiry does not suggest that a return to a test based on a sole or dominant reason is required.

Reforms to the onus of proof

As discussed, unlike many of the other major provisions in the FW Act, and other legislation (such as anti-discrimination law), Part 3-1 of the FW Act requires that, in cases where adverse action is alleged for proscribed reasons, employers or other respondents must disprove that action was taken for those reasons (s. 361), reversing the usual onus of proof.

The inclusion of this reverse onus has its historical foundation in the desire to make it easier for applicants to prove that an action was carried out for a proscribed reason (Chapman, Love and Gaze 2014, p. 2). The decision maker, rather than the claimant, is in the best position to provide evidence about the reasons for his or her action. In essence, it is a tool used to tease out causal reasons for an action or actions, and to therefore consider a range of possible motives underlying such action.

Some participants claimed that the reverse onus had significant negative consequences. A particular concern was that adverse action cases may be taken where a business undertakes structural reforms that have adverse impacts on the job security or wages and conditions of its employees (for example, moving to labour hire arrangements or adopting labour-displacing technology). The general protections do not outlaw adverse action per se, but do constrain structural adjustment where the *purpose* is to undermine the employment conditions of employees.

Since employees cannot be in a position to discover intent, there is some justification for such an onus. However, the reverse onus of proof can, several participants claimed, also trigger a discovery process that allows a union or court to sift through potentially hundreds of thousands of documents in search of intent. Doing so may not only be costly in its own right, but may disclose many aspects of a business that it 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.

Recent significant improvements to limit discovery processes in the Federal Court are noteworthy here, as are that Court's pre-existing practices in this area. These reforms and practices were noted in the Productivity Commission's 2014 report on Access to Justice Arrangements (PC 2014a, pp. 398–407), and include:

- presumptions against standard discovery
- the development and maintenance of judicial education and training programs specifically dealing with judicial management of the discovery process in Federal Court proceedings
- requirements to seek the leave of the Court to obtain discovery.

Many of the Federal Court's practices in this area are detailed in its Rules and in Practice Note CM5 from August 2011 (box 18.6). Introducing limits on discovery processes for general protections cases that align with such practices is recommended and would provide safeguards against overly onerous or excessive discovery.

Box 18.6 Case management of discovery in the Federal Court

Federal Court rules require all applications for discovery orders to specifically address the need for the orders sought and require the Court in all cases to make a determination as to whether discovery is necessary. In this way, discovery obligations in Federal Court proceedings are the result of conscious judicial decision making.

In determining whether to make any order for discovery, the Court will have regard to the issues in the case and the order in which they are likely to be resolved, the resources and circumstances of the parties, the likely benefit of discovery and the likely cost of discovery and whether that cost is proportionate to the nature and complexity of the proceeding.

In making orders for discovery, the Court must actively fashion any order to suit the issues in a particular case and consider the following:

- Is discovery necessary to facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible?
- If discovery is necessary, for what purpose?
- Can those purposes be achieved by a means less expensive than discovery or by discovery only in relation to particular issues?
- Where there are many documents, should discovery be given in a non standard form, for example initially on a limited basis, with liberty to apply later for particular discovery or discovery on a broader basis?
- Whether discovery should be given by the use of categories or by electronic format or in accordance with a discovery plan?
- Should discovery be given in the list of documents by categories and by a general description rather than by identification of individual documents?

Sources: Federal Court Rules 2011 (Cth), r. 20.11; Federal Court of Australia (2011); PC (2014a, p. 404).

More broadly, subject to the other proposed reforms in this chapter being introduced, and accompanying changes with regard to the interpretation of the test for establishing the reasons for action, retention of the reverse onus provisions is justified. They remain an important feature in instances of evidentiary imbalance between parties.

RECOMMENDATION 18.1

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.

Tightening up arrangements regarding a 'workplace right'

As it currently stands, both the definition of a workplace right, and aspects of the associated provisions, result in a very broad range of potential applications. Problems with the drafting and definitions in this section of the general protections have been apparent for some time. For example, in 2010 Creighton and Stewart stated that this part of the FW Act:

... opens up the possibility that an employee who makes any complaint or inquiry to *any* body or person about any matter relating to their employment, even if the 'matter' does not pertain to a workplace law or workplace instrument, would still be entitled to the protection of Division 3 ... If that were indeed found to be the case, it would give employees and their industrial representatives a new basis for challenging the actions of employers in the workplace – an option that is made all the more potent by the reverse onus provisions in s 361. (Creighton and Stewart 2010)

Several stakeholders argued that the generality of these provisions present problems. For example, Master Builders Australia (sub. 157, p. 52) stated:

The protection of 'workplace rights' should be limited to protecting employees from adverse action for filing a formal inquiry or complaint with a competent administrative authority that is directly in relation to his or her employment. Further, it should go without saying that in order for such inquiry or complaint to be protected, it must be one that has been made in good faith and not for an ulterior purpose.

The Australian Chamber of Commerce and Industry raised similar concerns in its submission (sub. 161, pp. 143–144), arguing that the implementation of such broad provisions inevitably created difficulties for employers and afforded a very wide range of grounds for dispute to employees.

Varying views on the breadth or narrowness of this section of the FW Act have been evident in recent judgments (see, for example, Young and Forsyth (2014)). But in the Productivity Commission's view there is a pronounced need to much more precisely define the meaning of a workplace right, and to place at the forefront of such definition a tangible relationship with employment. As currently drafted, s. 341 of the FW Act leaves open a broad potential array of instances that might be coverable as 'in relation to ... employment'

but that, in fact, should not reasonably be construed as such. Modification of s. 341 and related explanatory material is therefore needed to ensure that far greater clarity is provided to all parties, in the law, of the appropriate circumstances where the protections may be deemed to apply.

RECOMMENDATION 18.2

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'.

Compensation caps and other devices to prevent speculative dismissal claims

Several stakeholders suggested that the absence of compensation caps for matters covered by Part 3-1 of the FW Act creates incentives for some parties to choose this avenue for action, rather than the standard unfair dismissal provisions of the FW Act. For example, the Australian Retailers Association (sub. 217, p. 18) said:

... it has been the experience of ARA members that these types of claims are being made by terminated employees where they cannot access unfair dismissal protection, or because the absence of a compensation cap and the risk of civil penalties is a bigger stick that the employee and their representative can use against the employer.

The lack of a cap may, in this view, encourage some employees to press claims with little or no basis for essentially speculative reasons.

The absence of a cap is, in part, due to the protections covering matters that are diverse, can have very adverse impacts on claimants, and which include dismissal, but are far broader in scope.

While the introduction of caps (in particular for dismissal disputes) that are similar to those that apply to cases under Part 3-2 may be expected to deter some speculative cases, a number of stakeholders argued that they may also have some significant unintended consequences. Such caps may preclude the awarding of significant levels of compensation that may be justified, for example, in cases of discrimination or other proscribed areas. In this context, Legal Aid NSW (sub. DR364, p. 5) stated:

General Protections claims deal with breaches of important protective provisions in the FW Act ... An appropriate comparison of some of the General Protections provisions can be made with Federal anti-discrimination laws, where there is no cap on compensation.

Along similar lines, caps would also limit the awarding of significant claims involving injury, such as those that applied recently in the case of Maritime Union of Australia (MUA) vs. Fremantle Ports (FWO 2015I). The Fair Work Ombudsman therefore argued against such caps, stating:

If a compensation cap was to also apply to proceedings commenced in the Federal Circuit Court and Federal Court to enforce Part 3-1 of the FW Act, we are concerned that this could compromise our ability to recover appropriate compensation for employees (or other persons) affected by such contraventions through such proceedings, and the broader deterrent effect our proceedings seek to achieve. (sub. DR368, p. 4)

On balance, it does appear that subject to the other reforms in the general protections being implemented, and given potential unintended consequences, inclusion of such caps may not be warranted at this time.

Given the need to further limit speculative dismissal claims under Part 3-1, the question therefore arises of what other alternatives to caps may be viable? An option suggested by Stewart et al. (sub. DR271, p. 9) is the introduction of possible penalties for those unsuccessfully pursuing dismissal claims contrary to the recommendation of the FWC. This option would avoid some of the unintended outcomes discussed above with regard to caps, while still acting to reduce the incentives of parties to pursue claims for speculative reasons.

RECOMMENDATION 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.

Improvements to reporting arrangements

Notwithstanding their rising prevalence, there is surprisingly little information about the main drivers of lodgment of claims under the general protections section of the FW Act, the aggregate outcomes of such cases, and the implications for resourcing and priorities of the FWC. This dearth of information is in contrast to the relative abundance of information concerning unfair dismissal claims made under Part 3-2 of the FW Act. There is therefore a strong case for the Australian Government to require the FWC to provide more information about Part 3-2 claims.

RECOMMENDATION 18.4

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.

The end goal in reforming the general protections

Given the complexities around this set of protections, and the diversity of views about the many and varied legal aspects that underpin them, it is useful to return to first principles and consider what the general protections are trying to achieve.

The historical foundations of the protections lie in a legitimate desire to provide safeguards of freedom of association, in all its various guises. Across time, the gradual addition of protected matters, together with the introduction of concepts such as workplace rights and adverse action, have broadened the scope of the protections considerably.

The importance of balance and a common sense approach should be emphasised, as should the economic impacts of such protections in addition to their legal interpretations. In this regard, the High Court judgment in the Barclay case and, in particular, its emphasis on subjective intentions is, across time, likely to provide much needed clarity about Part 3-1 cases.

As emphasised above, the general protections provide valid safeguards against adverse actions, and their long historical lineage underscores their necessity. But this is certainly a case where the ‘devil is in the detail’ and, where some further improvement is possible to what is in principle a desirable set of protections.

The reforms outlined above are likely to rebalance this part of the FW Act. However, the Commission is concerned by the continuing growth in general protection cases (especially those relating to dismissals). The Government should again review the operation of the general protections within 18 months of the recommended reforms taking effect, if the growth rate in FWC case numbers continues at the current pace.

RECOMMENDATION 18.5

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.

19 Anti-bullying

Key points

- Surveys of employees suggest that bullying behaviour in its various forms is relatively common in workplaces in Australia and many other countries.
 - Very serious cases in Australia have received considerable publicity, prompting further recent action by the Commonwealth and state governments.
 - Given the considerable differences in methodologies and survey sizes, comparisons of prevalence across countries and even across jurisdictions can be extremely difficult.
 - Estimates of the costs of workplace bullying also vary widely. Commonly quoted cost estimates remain somewhat experimental.
- Anti-bullying provisions are a very recent addition to the *Fair Work Act 2009* (Cth) (FW Act). It is too early to conclude on the effectiveness of – or indeed the need for – national laws and their impact on businesses and the economy.
 - Situating such protections within the FW Act was questioned by a number of participants.
 - There is overlap between the anti-bullying jurisdiction in the FW Act and a number of other avenues for recourse at both the Commonwealth and state levels, particularly workplace safety regulation.
 - Others have argued that these protections are a necessary safeguard in modern workplaces that are increasingly based on the rights of individual employees, and where there is a growing diversity of views, cultures and ways of working.
- Evidence on the operation of the jurisdiction thus far by the Fair Work Commission (FWC) shows a gradual development in approach.
 - While the caseload has been relatively small to date, the jurisdiction is resource intensive for the FWC as evidence provided by applicants can be extensive if not always substantive.
 - Overall, the FWC's approach appears to be considered and effective.
- A further independent review of performance of this jurisdiction in the medium term is scheduled, and will be useful in monitoring its effectiveness.

Anti-bullying provisions are a new feature of the workplace relations system, being introduced into the *Fair Work Act 2009* (Cth) (FW Act) in January 2014. This chapter examines the operation of the anti-bullying jurisdiction within the FW Act.

- Section 19.1 discusses the current institutional setting, looks at the anti-bullying provisions, considers the role of the Fair Work Commission (FWC), and analyses alternative avenues by which individuals can pursue bullying claims.
- Evidence on the current prevalence and costs of bullying are discussed in section 19.2.

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- Section 19.3 considers evidence and arguments on how well the anti-bullying jurisdiction is performing.
 - Options for further review are assessed in section 19.4.

19.1 Anti-bullying protections

The main provisions

Part 6-4B of the FW Act concerns workers bullied at work. Bullying is defined as behaviour towards another person that is unreasonable, repeated, and creates a risk to health and safety (s. 789FD). Reasonable management action, carried out in a reasonable manner, is not classified as bullying behaviour.

The Act accords a key role to the FWC in overseeing the jurisdiction. As is the case for unfair dismissal (chapter 17), 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 to workers. Workers may be able to seek compensation through other means, for example, through workers' compensation, workplace health and safety and common law claims. A failure to comply with FWC orders exposes the employer and/or the relevant bullying party to civil penalties.

Coverage

The anti-bullying provisions in the FW Act provide coverage for persons conducting a business or undertaking (using the same meaning of a worker as in the *Work Health and Safety Act 2011* (Cth)), where that person is either a constitutional corporation, Commonwealth authority, incorporated in a Territory, or operating in a Territory or a Commonwealth place (Stewart 2015, p. 324).

The provisions in the FW Act do not relate to employees of unincorporated enterprises or to state government agencies (though such parties could use one of various avenues outside the FW Act for redress). Nor do they relate to people who have been bullied in the past, but have since left the employer. They may apply to bullying occurring at times prior to the commencement of the new regime, so long as the person is still employed by the same employer, and where there is a concern that, without action, bullying might re-occur (Murphy 2014).²⁰

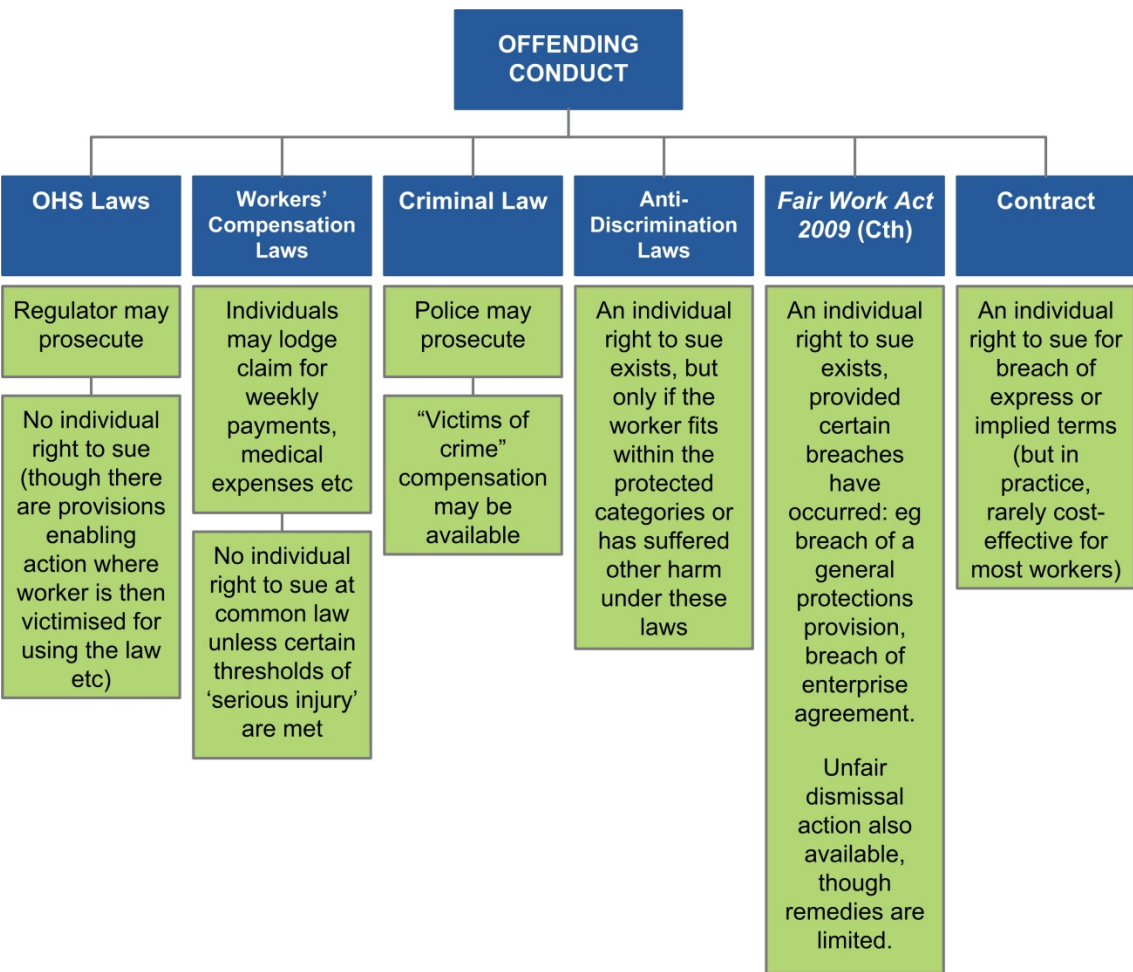
²⁰ An important recent decision on this is *Ms K McInnes* [2014] FWCFB 1440 (unreported, Ross J, Hatcher VP, Hampton C, 6 March 2014).

There are no differences in the applicability of the measures by the size of the business, or the salary or tenure of the worker (unlike unfair dismissal). The bullying party may be a supervisor, subordinate or colleague. Anti-bullying laws could apply to intimidation by, or of, union officials employed in a business.

Alternative avenues available

Prior to the introduction of specific provisions on anti-bullying in the FW Act, there were other provisions within the same Act, as well as a range of other alternative avenues, that were (and remain) available to pursue a claim. Figure 19.1 provides an example in relation to Victoria.

Figure 19.1 **Triaging a typical bullying claim in Victoria prior to FWA's anti-bullying jurisdiction**



Source: Ryan Carlisle Thomas Solicitors, Submission 106, p. 8, as quoted in House of Representatives Standing Committee on Education and Employment (2012, p. 31).

Victoria is also unique in that particular protections are available following amendments by the Victorian Government to the *Crimes Act 1958* (Vic) (box 19.1). These were made to clarify that serious instances of bullying are a criminal offence (House of Representatives Standing Committee on Education and Employment 2012). Few have challenged this law.

Box 19.1 The introduction of ‘Brodie’s Law’ in Victoria

In 2006, Brodie Panlock, a 19 year old waitress, committed suicide after enduring persistent and vicious bullying at work. Her case gained public attention when, in 2011, the Victorian Government amended the *Crimes Act 1958* (Vic) to remove doubt that serious instances of bullying, such as that experienced by Brodie, are criminal offences. The amendments, colloquially known as Brodie’s Law, were introduced in response to community outrage at the apparent inadequacy of sanctions against the parties who bullied Brodie. Although the men who bullied Brodie were fined for breaching their health and safety duties, they were not charged with serious criminal offences under criminal legislation.

Source: House of Representatives Standing Committee on Education and Employment (2012, pp. 39, 50).

Across all jurisdictions, there is a wide range of other remedies:

At common law, the occurrence of workplace bullying may give rise to a variety of actions in tort and contract, often concurrently. A number of statutory avenues may also be available under occupational health and safety legislation, anti-discrimination legislation, workers’ compensation and the *Fair Work Act*. (Kelly 2011, p. 11)

The effectiveness of the latter suite of remedies has been questioned in the past by numerous parties (as discussed in House of Representatives Standing Committee on education and Employment (2012, pp. 29–64)). Indeed, an important motivating factor for introducing a separate jurisdiction was the desire to provide an alternative appeal mechanism that was more easily navigated and provided more extensive coverage. In particular, differing burdens of proof under the different legal avenues, and uncertainties regarding remedies, were seen as problems. As noted by the House of Representatives Standing Committee on Education and Employment (2012, pp. 64–65), while there are a variety of frameworks to protect against workplace bullying:

... none of these frameworks provide an ‘all in one’ response to workplace bullying; that is, none provide both universal protection and recourse. Thus, workers are left to navigate the overlapping frameworks, which can be frustrating and confusing for targets of workplace bullying. The variation across jurisdictions in each of these areas creates more confusion and frustration.

The question of whether a separate jurisdiction within the FW Act was required for anti-bullying was the subject of considerable debate in 2012 and 2013 prior to its introduction.

Numerous parties argued for the development of a dedicated anti-bullying jurisdiction. For example, the Australian Council of Trade Unions (ACTU) submitted in 2012 that:

... existing health and safety regulatory frameworks are an ineffective deterrent against workplace bullying ... To redress this imbalance the ACTU calls for a national regulation and national supporting codes of practice to address psychosocial hazards including bullying. (ACTU 2012d, p. 27)

However, industry representatives typically argued against the new provision:

Additional legislation we feel is unlikely to aid in changing workplace behaviours and will simply result in increased complexity and confusion. Given that workplace safety and health provisions have been the primary means of dealing with bullying to date, and the connection is fairly well understood, our viewpoint is that that should continue, that there is no need for a separate arm of legislation dealing with the same issue. (Moss 2012, p. 8)

... confusion would arise particularly from adding a specific federal jurisdiction to receive complaints as this step potentially allows forum shopping and adds another layer of complexity for business and enforcement agencies. (Calver 2013)

They, and other participants, also noted the absence of a dedicated bullying jurisdiction in comparable countries, such as the United Kingdom (box 19.2).

As discussed further below, debate regarding the need for a separate jurisdiction in the FW Act continues to be evident in submissions to the current inquiry.

Box 19.2 The United Kingdom approach

There is no specific legal provision protecting employees from bullying in the UK. Instead, a range of statutes are relied upon to deal with bullying. The *Employment Rights Act 1996* enables an employee to claim unfair constructive dismissal if the employer has failed to maintain trust and confidence and has breached their employment contract. Bullying may be a feature of claims brought under constructive dismissal and other jurisdictions.

The employer's duty of care under the *Health and Safety at Work Act 1974* may also apply to cases of alleged bullying. If the employer has breached the duty to protect the employee's health and safety at work (for example by failing to protect against bullying), the employee could be in a position to bring a civil action for damages against the employer ... In addition, employers are subject to vicarious liability in the case of employees who commit bullying and harassment and can be pursued for failing to cease or protect against bullying and harassment, unless reasonable steps have been taken to prevent it (Acas 2006).

Acas advisers stated that in their (considerable) experience, they had not heard or known of anyone that had taken a bullying and harassment case using health and safety legislation as a lever. Bullying and harassment cases were almost entirely taken through the Employment Tribunal (under the *Employment Rights Act or Equality Act 2010*).

Source: Oxenbridge and Evesson (2013, p. 8).

19.2 Evidence on prevalence and cost

This section considers the available evidence from Australia and overseas regarding the prevalence of bullying in the workplace and estimates of related costs.

Prevalence

An important precursor to assessment of anti-bullying regulations is the *prevalence* of bullying among workplaces and employees (McLinton et al. 2014).

A very wide range of estimates are apparent internationally regarding the prevalence of bullying at work (table 19.1). These are generally derived using similar survey methodologies and show prevalence rates among surveyed employees varying from lows of around 5 per cent to highs of 1520 per cent over a given period (usually six months).

There have also been some attempts at cross-country meta-analysis. For example, Nielsen, Matthiesen and Einarsen (2010) combined 86 studies across 130 000 individuals to obtain a prevalence estimate that 14.6 per cent of workers had been bullied in the workplace. However, this result is open to question given many of the relevant studies covered industries generally considered to be higher risk, such as health and education (Safe Work Australia 2012b).

In Australia, the most prominent recent estimates of prevalence include the:

- Australian Workplace Barometer (AWB) study, which estimated in 2012 that 6.8 per cent of the adult employed workers surveyed (N=5743) experienced bullying in the previous six months (Safe Work Australia 2012b).
- Personality and Total Health (PATH) Through Life Project, which in 2011-12, collected data from 1286 workers aged 3236 years via an online survey, together with follow up face-to-face interviews with 546 respondents. Over 5 per cent of respondents reported currently experiencing bullying in their workplace; a further 16 per cent reported previously being bullied in their current workplace; and 24 per cent of respondents reported being bullied in a previous workplace (Butterworth, Leach and Kiely 2013, p. v).

In its 2010 report on occupational health and safety regulation (PC 2010b), the Productivity Commission also considered prevalence estimates from Australia and other countries. This work did not produce new estimates of prevalence, but drew largely on previous work, in particular, estimates in Sheehan, McCarthy, Barker and Henderson (2002) (discussed below). The Productivity Commission's report noted that, while prevalence estimates varied, the levels of accepted claims for workplace bullying or harassment were relatively low (equal to 14.7 claims per 100 000 employees in 2007-08 or 0.014 per cent of employees) (PC 2010b, p. 285).

Table 19.1 Comparable estimates of the prevalence of workplace bullying of employees

Country	Prevalence estimate by methodology (share of employees affected) ^c			Period	Year	Source
	Self-labelling	Bullying behaviours	Overall			
Australia	6.8%	Some data collected on harassment behaviours	-	6 months	2009-11	Australian Workplace Barometer (AWB) study
	6.8%	Data collected	Research ongoing	6 months	2011	PATH through life study
Belgium	-	NAQ severe bullying: 3.6% ^a	-	Probably 6 months	Not reported	Notelaers et al. (2011)
Denmark	8.3%	-	-	12 months	2004/05	Ortega et al. (2009)
France	Male: 22% Female: 27%	LIPT M: 11% F: 13% ^b	Male: 9% Female: 11% Overall: 10%	12 months	2004	Neidhammer et al. (2007)
Great Britain	10.6 %	NAQ severe bullying: 5%	-	6 months	Not reported	Hoel et al. (2001) Einarsen et al. (2009)
Ireland	7%	-	-	6 months	2000/01	O'Connell and Williams (2002)
	7.9%	-	-	6 months	2006/07	O'Connell et al. (2007)
Norway	4.6%	NAQ 6.2%-14.3%	6.8%	6 months	2005	Neilsen et al. (2009)
Spain	unclear	NAQ severe bullying: 5.8%	-	6 months	2006/07	Gonzalez Triueque and Grana Gomez (2010)
USA	9.4%	NAQ 28%	-	6 months	Not reported	Lutgen-Sandvik et al. (2007)

^a NAQ: Negative Acts Questionnaire. ^b LIPT: Leymann Inventory of Psychological Terror. ^c Measurement methods: Studies usually survey exposure to workplace bullying by one of two methods: either by assessing perceived victimisation/self-labelling of bullying or by assessing perceived exposure to specific bullying behaviours. It has been noted that these methodologies generate different estimates of bullying, with some groups of workers being less likely to self-identify as having been bullied despite reporting exposure to specific bullying behaviours. The reverse is also true, where some groups self-label/identify as being bullied but do not report exposure to bullying behaviours. Ideally, studies would use both measurement approaches.

Source: Safe Work Australia (2012a, pp. 4–5).

The Australian Public Service Commission (APSC) also reports annually on survey responses by Commonwealth public servants on a range of issues, including perceived bullying and harassment over the past year (box 19.3). These surveys have shown significant levels of bullying. However, as noted by the APSC in an earlier report, such results should be treated with some caution, given that only a very small number of actual cases proceed to formal claim and investigation (with claims by 0.13 per cent of all APS employees formally investigated in 2010-11) (APSC 2012, p. 2).

Box 19.3 **Bullying behaviour reported in the 2013-14 State of the Service report**

Seventeen per cent of employees responding indicated they had been subjected to harassment or bullying in their workplace in the 12 months before the survey. Twenty-one per cent reported they witnessed another employee being subjected to what they perceived as bullying or harassment in the same period. These results are similar to 2012-13 (16 per cent and 21 per cent, respectively).

When asked to report on the most serious type of behaviour that the bullying or harassment involved, just over one-quarter of respondents selected verbal abuse. The other main categories of unacceptable behaviour related to inappropriate and unfair performance management practices (15 per cent), inappropriate and unfair application of other work policies or rules (14 per cent) and harassment based on a personal characteristic (12 per cent).

Of employees who considered they had been harassed or bullied, 37 per cent reported it, down from 43 per cent in 2012-13. The reporting rate was higher for employees who reported witnessing what they perceived as the harassment or bullying of others (40 per cent, up from 35 per cent in 2012-13).

Type of harassment or bullying employees felt they had been subjected to, 2014

<i>Type of behaviour</i>	<i>Share of those that reported harassment or bullying</i>
	%
Verbal abuse	26
Inappropriate and unfair application of performance management practices	15
Inappropriate and unfair application of other work policies or rules	14
Harassment based on a personal characteristic (for example, gender, disability, ethnicity, age, religion, political opinion, sex)	12
Inappropriate and unfair application of fitness for duty assessments	2
Physical behaviour	1
'Initiations' or pranks	1
Other	29

Source: Australian Public Service Commission (2014a, p. 239).

The difference between the prevalence and investigation rates are likely to reflect the reluctance of parties to make official complaints, an awareness that bullying may be hard

to substantiate, the quiet resolution of matters without any formal investigation, and that there is a spectrum of bullying severity, with people more likely to take action when the bullying has particularly severe outcomes.

Cost

In Australia, the most frequently quoted estimates of the cost of bullying are those produced in Sheehan, McCarthy, Barker and Henderson (2002). Over time, these estimates, have also been attributed (incorrectly) to the Productivity Commission.

This analysis estimated low and high cost ranges using the following methodology:

- Two prevalence rates were used. The ‘more conservative’ prevalence rate was 3.5 per cent over 12 months, drawing on a Swedish workplace survey that measured the exposure rate of the Swedish working population to one or more ‘unethical or hostile actions’ at least once a week for six months or longer (Leymann 1996). It was assumed that this is a reasonable indicator of the annual rate. The higher prevalence rate was 15 per cent over 12 months, based on the midpoint of Hoel, Cooper and Faragher’s (2001), 10.5 per cent rate from 5300 UK employees, and Keashley and Jagtic’s (2000) survey rate of 21.5 per cent for the Minneapolis population (Sheehan et al. 2002, p. 7).
- These prevalence rates were applied to the then working population in Australia of 10 million people, to obtain a low cost range of between \$6 billion and \$13 billion per year, and a high cost range of between \$17 billion and \$36 billion per year (table 19.2).

Interim assessment

While all Australian estimates of the prevalence and cost of workplace bullying point to a considerable problem, such estimates are experimental and so rather imprecise. Clearly, much depends on estimated prevalence, and there are quite divergent rates obtained in the research, both in Australia and overseas. While the much-quoted work of Sheehan, McCarthy, Barker and Henderson (2002) characterised an annual prevalence rate of 3.5 per cent as ‘conservative’, other authors (for example, Hoel et al. (2003), Beswick, Gore and Palferman (2006)) consider rates of 1-4 per cent more likely in the European context. In Australia, more recent estimates have ranged from 520 per cent, but the upper bound figure for Australia may, in part, reflect methodological differences.

Table 19.2 Estimated annual cost per costed impact

	<i>With a 3.5 per cent prevalence rate</i>	<i>With a 15 per cent prevalence rate</i>
	\$ million	\$ million
Absenteeism among victims	235.7	1 010.1
Staff turnover among victims	169.0	724.1
Absenteeism and staff turnover among co-workers	20.2-80.9	86.7-346.9
Legal costs for court and tribunal matters	44.9	192.4
Compensation costs for courts and tribunals	11.8	50.6
Compensation costs – conciliated/mediated	24.5-61.3	52.5-131.3
Redundancy and early retirement payouts	420.0	1 800.0
Total overt direct costs	926-1 024	3 916-4 255
Formal grievance procedures	350.0	1 500.0
Management/supervisor time addressing impacts	336.0-672.0	1 440.0-2 880.0
Workplace-based support services (eg. EAP, HR)	29.40-73.5	29.40-73.5
Workers Compensation costs	680.0	680.0
Total hidden direct costs	1 395-1 776	3 649-5 134
Productivity loss - reduced performance by victims	390.4-1 561.4	1 673.0-6 691.8
Productivity loss - replacement employees	175.0-525.0	750.0-2 250.0
Productivity loss - internal transfer	17.5-43.8	75.0-187.5
Productivity loss - co-worker	29.14-116.6	124.9-499.6
Productivity loss - absenteeism	364.4	1 561.6
Total lost productivity costs	976-2 611	4 184-11 190
Intra-sector lost opportunity costs^a	2 609-7 828	5 219-15 656
Out of sector flow-on costs	min. 35	min.150
Overall costs per annum	5 942-13 273	17 118-36 384

^a Increased to 1 to 3 per cent for 15 per cent prevalence rate estimate.

Source: Sheehan et. al. (2002, p. 8).

Estimates of prevalence rates depend on the definition of bullying, the breadth of industry coverage, the date and methodology of the survey, and the measure of prevalence. For example:

- All of the prevalence rates in the literature are ‘period’ prevalence rates that measure the presence or not of bullying over a given period (usually six months or one year). Clearly, the longer the period, the higher the prevalence rate.
- As discussed by Safe Work Australia (2012a, p. 5), studies tend to use differing definitions of bullying, which can affect the comparability of results:

... the Australian AWB study and the Norwegian study used the same definition of bullying. This was the most narrow definition of bullying, explicitly excluding bullying that may occur

between opponents of equal ‘strength’. The remaining studies (except PATH) defined bullying in a similar way to the AWB and Norwegian study, with the exception that they did not exclude bullying that may occur between opponents of equal ‘strength’. If the remaining studies had used the same definition as the AWB, this may have resulted in lower prevalence estimates for workplace bullying in these studies. The PATH through life study had the broadest definition of workplace bullying, with no mention of repetitive behaviours.

There is also a wide variation in estimates of the cost of bullying. Again, much depends on the chosen methodology. The very large cost estimates produced by Sheehan, McCarthy, Barker and Henderson (2002) in the Australian case, for example, are only the estimated costs to employers, but the results are still nonetheless large.

There are considerable difficulties in estimating costs, so much so that one recent review of the literature noted:

... in monetary terms, the calculations and assessments of costs involved with bullying can only be as good as the research on which they are based, and the many uncertainties exposed in previous studies means that such cost estimations at best represent what has been referred to as well-informed guesses. (Hoel et al. 2010, p. 142)

Nevertheless, this study still strongly argued that it made ‘good business sense for organisations to prevent and stop workplace bullying’.

A recent Australian assessment also acknowledged the wide dispersion of prevalence and cost estimates in Australia and overseas (House of Representatives Standing Committee on Education and Employment 2012, pp. 9–10):

The discrepancy of estimates indicates an urgent need to improve Australia’s evidence base. Yet, collating solid evidence faces many statistical challenges, including:

- lack of common definition;
- self-reporting – may affect both under reporting and over reporting as workers and employer’s struggle with defining behaviour as bullying;
- lack of consistency in the research or data across Australian jurisdictions; or
- duplication – reports to state-based regulators may relate to the same instance as reported to federally-based industrial relations regulator or anti-discrimination commissions.

If there are problems with measuring prevalence estimates at particular times, the challenges are even greater for the assessment of any trends. Currently, there is no adequate indicator of trends. More reliable and valid measures of cross-sectional prevalence measures will be required before any meaningful attempt to gauge trends can occur.

19.3 How well is the current jurisdiction performing?

The anti-bullying jurisdiction in the FW Act is relatively new, having been in operation for just under three years. Further, the relatively small number of claims makes a definitive assessment of the performance of the jurisdiction unrealistic at this early stage.

Initially, it was anticipated by the FWC, the Law Council of Australia and others that many thousands of claims would be lodged annually (Lucas 2013a). While this has not transpired, there has been a marked increase in lodgment and case activity since the commencement of the new jurisdiction. In 2013-14 the FWC received 197 applications for an order to stop bullying (FWC 2014c), with 21 finalised by a decision. Of these, only one application resulted in an order to stop bullying. In 2014-15, 676 applications were made, 60 were finalised by decisions, and only one resulted in an order (tables 19.3 and 19.4).

Table 19.3 Anti-bullying claim applications to the Fair Work Commission

	2013-14	2014-15
Application withdrawn early in case management process ^a	59	185
Application withdrawn prior to proceedings ^b	34	122
Application resolved during the course of proceedings ^c	63	191
Applications withdrawn after a conference or hearing and before decision	20	118
Application finalised by decision	21	60
Total	197	676

^a Applications withdrawn with case management team or with Panel Head prior to substantive proceedings. ^b Includes matters that are withdrawn prior to a proceeding being listed; before a listed conference, hearing, mention or mediation before a Commission Member is conducted; and before a listed mediation by a staff member is conducted. This also includes matters where an applicant considers the response provided by the other parties to satisfactorily deal with the application. ^c Includes matters that are resolved as a result of a listed conference, hearing, mention or mediation before a Commission Member or listed mediation by a staff member.

Source: FWC (2015c; 2014b) .

Table 19.4 Anti-bullying finalisations by nature of decision

Number of applications

Applications dismissed	2013-14	2014-15
Jurisdictional objection upheld	3	2
Bullying not found or no risk of bullying continuing	4	10
s. 587 – includes matters not pursued by applicant or not made in accordance with the Act	13	47
Total applications dismissed	20	59
Applications granted		
Worker at risk of continued bullying – order issued	1	1
Worker at risk of continued bullying – order yet to be issued	0	0
Worker at risk of continued bullying – further decision and order issued	0	0
Total applications granted	1	1
Total decisions	21	60

Sources: FWC (2014b, 2015c).

There is some evidence of broader interest in the jurisdiction. For example, the Victorian Government cited FWC figures for 2014 involving over 185 000 unique website hits about bullying and around 7000 telephone inquiries (sub. 176, p. 64).

Claims may increase further as people become aware of the legislation. On the other hand, the absence of compensation and the fact that any redress only applies to people who have continued their employment in the relevant business may limit the use of the provisions (Caponecchia 2014).

Participant's views on the role of the FWC

Support for the central role of the FWC was expressed in several submissions. For example, the Shop, Distributive and Allied Employees' Association argued:

Personal rights must be afforded to individuals along with appropriate and effective dispute resolution processes via the resources and expertise available in the Fair Work Commission. This jurisdiction operates in the domain of the workplace and is therefore cognizant of the machinations which exist in workplaces. FWC also provide fast and effective dispute resolution. (sub. 175, pp. 67–68)

Clubs Australia Industrial also supported the role of the FWC, saying:

From the perspective of an employee who genuinely is seeking that the bullying stop rather than compensation, the FWC is a low cost and user friendly tribunal to appear in. For employers, the same benefits apply, and it provides an alternative option for employees who would otherwise go to the more costly, adversarial jurisdictions to seek a remedy. (sub. 60, p. 36)

However, some concerns were raised in submissions by other parties about the effectiveness of the process. For example, the Australian Federation of Employers and Industries submitted that:

The FWC case management processes afford applicants every opportunity to pursue their allegations ... This can tie employers up for months, including where it appears the applicant cannot be contacted, until the FWC finally dismisses the matter. (sub. 219, p. 71)

In a similar fashion, the Catholic Commission for Employment Relations said its experience was that the bullying jurisdiction involved processes that were ‘lengthy, resource intensive, and adversarial’ (sub. 99, p. 26). The Employment Law Centre of WA (Inc) (sub. 89, p. 38) argued that its clients generally found the FWC process to bring actions was overly complex and difficult to access.

Several participants argued that, if anything, the introduction of a new jurisdiction has added to the uncertainties, and made the system less navigable for individual claimants and more onerous for employers. For example, the Chamber of Commerce and Industry of Western Australia said:

The punitive action which can arise from a bullying incident conflicts with the well understood common law concept of double jeopardy. It also results in two regulators (namely, the Fair Work Ombudsman and the WHS inspectors) and is an example of unnecessary duplication and red tape. (sub. 134, pp. 57–58)

Another view was that these provisions are not well placed within the FW Act. In this regard, a number of stakeholders argued that bullying is better dealt with in occupational health and safety frameworks and that additional protections within the FW Act simply add another layer of regulation to an already crowded space. For example, the Australian Chamber of Commerce and Industry (ACCI) stated:

The change ACCI proposes is the repeal of the anti-bullying provisions. Workplace bullying must instead continue to be addressed as a work health and safety (WHS) issue and not through the national WR Framework. (sub. 161, p. 128)

ACCI reiterated this view in responding to the Productivity Commission’s Draft Report (sub. DR330, p. 48).

Several submissions that were critical of the provisions argued that they overextended the work of the FWC, and were a time-consuming distraction to its ‘core business’ (for example, Business SA, sub. 174, p. 17).

Several participants pointed to the relatively low number of applications granted, and the high relative number of applications either withdrawn or dismissed, as proof of problems with the jurisdiction (for example, ACCI, sub. 161, p. 131; Chamber of Commerce and Industry of Western Australia, sub. 134, p. 57). However, the evidence that many claims are withdrawn was seen as desirable and an indicator of the efficacy of the FWC processes by others (see, for example, Dr Carlo Caponecchia, sub. 72, p. 2).

Despite such adverse commentary, it appears that the FWC has made considerable efforts to implement effective and evidence-based systems and processes for dealing with cases. There is a staged process for dealing with claims and related triage. The FWC's processes also draw on international practices that are considered effective, such as those used by the Advisory Conciliation and Arbitration Service (ACAS) in the UK (Oxenbridge and Evesson 2013).

Commentary about several of the formal decisions made since commencement in early 2014 also suggests that they have gone some way towards clarifying the operation of the new provisions (box 19.4).²¹

Box 19.4 The recent DP World case

The case of *Bowker, Coombe and Zwarts v DP World, MUA and Others*, [2014] FWCFB 9227 is an example where an arbitrated anti-bullying decision has significantly clarified aspects of the provisions. It involved alleged bullying behaviour, including via social media, by members of the Maritime Union of Australia who were also employees of DP World:

In a ruling on the reach of the anti-bullying regime, a five-member FWC bench has held that “at work” means performing work or engaging in employer-authorised activities, rejecting a much broader definition sought by a group of DP World employees.

President Iain Ross, Vice President Adam Hatcher, Deputy President Val Gostencnik and Commissioners Peter Hampton and Leigh Johns, in a decision on the meaning of “at work” in s789FD of the Fair Work Act, said the words encompassed “both the performance of work (at any time or location) and when the worker is engaged in some other activity which is authorised or permitted by their employer, or in the case of a contractor their principal (such as being on a meal break or accessing social media while performing work).”

The bench said alleged bullies need not be “at work” at the time of their conduct.

... In hearings in November — during which the ACCI and AiG also made submissions — the workers argued that conduct occurred on the job if it had a “substantial connection to work”, but the full bench said there was “no persuasive argument linking the definition proffered with the actual language of s.789FD(1)(a)”.

The tribunal said the words should be “construed conformably with the evident policy or purpose of the substantive enactment and the mischief that it was designed to overcome”.

“As we have seen the mischief to which Part 6-4B is directed is workplace bullying.

“Seen in that context the words ‘at work’ in the expression ‘while the worker is at work’ (in s.789FD(1)(a)) are words of limitation which are intended to confine the operation of the substantive provisions.”

Source: Workplace Express (2015).

²¹ Also see, for example, *Mac v Bank of Queensland Limited*; *Locke*; *Thompson*; *Hester*; *Van Den Heuvel*; *Newman* [2015] FWC 774 (13 February 2015); *James Willis v Marie Gibson*; *Capital Radiology Pty Ltd T/A Capital Radiology*; *Peita Carroll* [2015] FWC 1131 (17 February 2015); and *Application for an order to stop bullying* [2015] FWC 562 (11 February 2015) (Barringtons 2015).

Impacts on businesses and employees

The particular impacts of anti-bullying laws on business were discussed in some submissions.

A number of submissions focussed on the overall positive impacts of the new regime. For example, Australian Industry Group said:

Essentially, our views are that, to date, the anti-bullying laws have not had an adverse impact on most businesses. (sub. DR346, p. 25)

Given the evidence presented in table 19.2, such laws would be likely to have positive economic effects on the operation of businesses if they were effective at reducing workplace bullying or encouraging better management of it when it occurred. Moreover, the provisions might be expected to prompt better policies and practices regarding workplace interaction and behaviour and, more generally, encourage more sophisticated human resources management. Positive productivity benefits may also result through improvements in staff morale and reductions in labour turnover.

Conversely, several submissions focused on costs for firms, both in terms of compliance costs and costs caused by employees using the anti-bullying laws to frustrate genuine attempts at performance management. For example, the Catholic Commission for Employment Relations noted:

... concerns expressed by some employers that bullying claims remain ‘a strategic lever’ for employees to pursue various agendas including workplace change or to extract ‘advantageous exit packages’. Alternatively, claims may be made to frustrate performance management processes or to support claims for workers compensation. (sub. 99, p. 23)

Immediately prior to the introduction of the new jurisdiction in early 2014, there was a palpable sense of uncertainty regarding its operation and the obligations it would exert on employers. There is some evidence that the ongoing operation of the laws has largely allayed such concerns.

Impacts on employees were also discussed in some submissions. Many participants drew on personal experience to argue that the new laws are necessary and effective. The positive benefits of such laws on mental health outcomes for workers were discussed in several submissions (see, for example, Clubs Australia Industrial sub. 60, p. 35). These participants argued that while many workers may not use the laws in any formal sense, they still view them as providing legitimate protections against bullying from employers or co-workers, and derive a considerable degree of reassurance through their existence.

On balance, while there is clear scope for net benefit from improved management of workplace bullying, the realisation of this through regulation will depend on the FWC’s skill in implementation and the willingness of firms to adopt better internal processes. Yet the incentives may not be aligned. As an example, currently laws do not require that internal review processes within firms should be the first means of response by employees

experiencing bullying. The FWC could encourage this, while not denying applicants their right under the law. If it does not, a powerful incentive for better management could be lost.

19.4 A further review?

Bullying behaviours are a serious and possibly growing problem in Australian workplaces. Such behaviours can have profound and prolonged adverse impacts on individuals, their co-workers and families and friends. In addition to their obligations to make places of work safe and to cultivate a workplace culture of respect, most employers also have an interest in developing innovative and productive workplaces. Bullying is anathema to such goals.

In the course of its inquiry, the Productivity Commission was presented (as were previous inquiries on this topic) with compelling evidence about the adverse impact of such behaviours on workers, workplaces, and society in general. This evidence points to the need for an effective and broad-based mechanism for prevention, detection, cessation and redress. The recent introduction of a separate jurisdiction under the FW Act was intended to provide such a mechanism.

A post-implementation review of the law was due to commence within 1 to 2 years of its introduction (Australian Government 2013). While the results of this review are yet to be made public, the Productivity Commission understands that it is underway, and that the Department of Employment will publish review outcomes in the first half of 2016. The results of the review will form an important input into any further consideration, if required, of broader matters regarding the inclusion of a dedicated anti-bullying avenue within the workplace relations framework.

20 Enterprise bargaining

Key points

- Bargaining at the enterprise level over the terms and conditions of employment has been a mainstay of Australia's workplace relations (WR) system for over two decades. About 40 per cent of employees work under some form of enterprise agreement (EA), generally in larger businesses, with coverage often varying markedly by occupation and industry.
- The *Fair Work Act 2009* (Cth) (FW Act) has detailed rules around enterprise bargaining, including how bargaining begins, carries on and ends, and the approval process.
 - EAs can be rejected by the Fair Work Commission (FWC) for minor procedural defects during bargaining. The FWC should have greater discretion to overlook such inconsequential defects.
- EAs can currently include agreement terms that pertain to the relationship between an employer and a union. This can lead to confused aims and conflicts of interest (principal-agent problems). EA content should be limited to employee–employer issues only.
- EAs can also contain 'non-permitted' terms that are not legally binding, but that can nonetheless cause uncertainty and disputes. Such terms should be excluded from EAs.
- The application of the better off overall test (BOOT) discourages enterprise bargaining and creates uncertainty during the agreement approval process. The BOOT should be replaced by a no-disadvantage test (NDT).
- Allowing parties to negotiate EAs with longer durations, up to five years, would reduce the costs associated with bargaining. Greenfields agreements should be allowed to match the period of the construction phase of the project, to avoid undue bargaining power by unions when a project is not completed at the expiry of a greenfields agreement.
- Despite calls for the introduction of productivity clauses within all EAs, this might generate outcomes inimical to productivity. Employers and employees already have strong incentives to commit to productivity improvements and, where possible, to specify ways in which this might be achieved through EAs without resorting to new regulation.
- Individual flexibility arrangements (IFAs) within EAs are underutilised. To create more opportunities for using IFAs that meet the genuine needs of employees and employers, the matters covered by the model flexibility term should be included in all EAs as the minimum matters over which flexibility is permitted.
- Attempting to enact a blanket prohibition on pattern bargaining would have unintended and undesirable consequences. However, the ACCC should have regard to the use of pattern bargaining in considering mergers or secondary boycotts.

The workplace relations (WR) framework provides a safety net of employment conditions through minimum wages (chapter 4), awards (chapters 7 and 8), and the National Employment Standards (NES) (chapter 16).

However, employees and employers can bargain together to improve the terms and conditions provided by the safety net. They can do this through individual arrangements (chapter 22), or by bargaining collectively for an enterprise agreement (EA).

The focus in this chapter is on the latter area: enterprise bargaining. This lies at the heart of the *Fair Work Act 2009* (Cth) (FW Act), which sets out detailed rules and requirements for the conduct of such bargaining processes. The chapter first covers the history of collective bargaining in Australia, and how we arrived at the current system of enterprise bargaining (section 20.1). It then outlines the current rules around making an EA (section 20.2). Section 20.3 briefly describes who is using EAs and why. Section 20.4 covers the adequacy of the current arrangements and suggested improvements. Finally, section 20.5 queries whether enterprise bargaining is suited to changing ways of working.

Issues specific to enterprise bargaining in the public sector are discussed in chapter 24. Industrial action associated with enterprise bargaining is discussed in chapter 27.

20.1 Collective bargaining in Australia

While collective action is generally frowned on in competition policy (chapter 31), collectively determined wages and conditions have been a mainstay of WR policy since Federation (and is an ubiquitous feature of WR systems in most countries). The current system of enterprise bargaining is the result of a prolonged process of innovation and modification of this collective approach.

For almost a century, Australia's bargaining and agreement making was characterised by centralised conciliation and arbitration. However, collective bargaining still occurred informally under the auspices of the centralised system — typically, an industrial tribunal stepped in between employers and employees to arbitrate matters on which the parties could not agree (Creighton and Stewart 2010). As noted in chapter 7 (awards), in the early 20th century, dispute settlements often resulted in multi- and single-enterprise awards. These resembled current EAs in some respects, with employers and unions often negotiating terms, except that the content of the award was ultimately determined by a tribunal. However, as the Commonwealth Court of Conciliation and Arbitration grew in significance, awards shifted to more of an industry and occupational basis.

The move to enterprise level collective bargaining

Gradual moves away from the centralised system began in the late 1980s. 'Consent awards' and 'certified agreements' under the *Industrial Relations Act 1988* (Cth) recognised agreements hammered out at the enterprise level. However, enterprise level bargaining came into its own in 1993, when it was introduced as the centrepiece of the *Industrial Relations Reform Act 1993* (Cth) (table 20.1).

Table 20.1 How collective bargaining has evolved in Australia

<i>Pre 1993</i>	Centralised wage fixing and arbitration Enterprise level variations negotiated between unions and employers, and ratified by the Australian Industrial Relations Commission (AIRC) through firm specific clauses or standalone enterprise awards. Informal bargaining also occurred. If agreement was reached on a 'matter pertaining', AIRC could make a consent award; if no agreement was reached, AIRC could arbitrate.
<i>1993</i>	Enterprise bargaining introduced Underpinned by a safety net of awards, introduction of good faith bargaining rules and a no-disadvantage test. Union (Certified Agreements) and non-union (Enterprise Flexibility Agreements) agreements could be made. Parties could bargain about 'matters pertaining'. If agreement was reached, collective agreement was made; if no agreement was reached, AIRC could arbitrate.
<i>1996</i>	Enterprise bargaining continues, individual statutory agreements introduced Australian Workplace Agreements (AWAs) prevailed over awards and any collective agreement, and could be offered as a condition of employment, subject to a no-disadvantage test. Union and non-union certified agreements could be made, subject to a no-disadvantage test in comparison to the award. Parties could bargain about 'matters pertaining'; AIRC had conciliation powers, but no power to arbitrate. Good faith bargaining requirements were removed.
<i>2006</i>	Further changes to individual statutory agreements AWAs could undercut awards, until a no-disadvantage test was restored in May 2007. 'Enterprise flexibility' terms in collective agreements were prohibited; no new enterprise awards were to be created. Employers could put collective agreements directly to an employee vote. Parties could bargain about 'matters pertaining' but not 'prohibited content' or 'pattern' claims. AIRC had voluntary conciliation powers, but could not arbitrate.
<i>Since 2009</i>	Enterprise bargaining given primacy again Ability to make AWAs was removed, collective bargaining was given precedence. Parties can bargain about lawful terms, but term unenforceable if not a 'matter pertaining'. Good faith bargaining reintroduced. Fair Work Commission cannot arbitrate. Enterprise agreements can be modified through individual flexibility arrangements (IFAs), subject to a better off overall test in comparison to the agreement. IFAs cannot be made a condition of employment, and can be unilaterally withdrawn by an employee.

Sources: Adapted from Australian Council of Trade Unions (2012c, p. 8) and McCallum et al. (2012).

The introduction of enterprise bargaining in the early 1990s was a historic break from the past. Enterprise bargaining carried the expectation that employees and employers should work together at the enterprise level to agree on conditions of employment, subject to a safety net of awards. The more decentralised system heralded by enterprise bargaining created greater potential for wages and conditions to match the individual circumstances of employers and employees, while still giving employees the benefits of collective action.

Despite the promises offered by a decentralised system, a centralised system had its own benefits during one of Australia's important historical moments. The Prices and Incomes

Accord of the 1980s capitalised on Australia's then centralised WR system, working to break the inflation wage growth nexus and help with structural change of the economy.²²

Both businesses and unions supported the move towards enterprise bargaining. Frustrations associated with the Accord process eroded union solidarity behind centralised wage fixing, with some unions judging that they could deliver better outcomes for their members if they were free to bargain outside the strictures of the Accord (Briggs 2001).

Further changes — shifting to individual bargaining, then back to enterprise bargaining

Under the *Workplace Relations Act 1996* (Cth), individual bargaining through Australian Workplace Agreements (AWAs) was given priority over collective bargaining. While union and non-union collective agreements were provided for, there were no legislative mechanisms to compel employers to engage in collective bargaining (Forsyth et al. 2010, p. 116). Further changes made through the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) reinforced the central role of individual agreements.

The FW Act has returned to an emphasis on enterprise-level collective bargaining as the basis for determining wages and conditions and, more broadly, for shaping the relationship between business owners and their employees. While individual registered agreements were a feature of previous regimes, EAs are the only form of registered agreements under the FW Act. The object of the FW Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians, including by:

... achieving productivity and fairness through an emphasis on enterprise level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action. (s. 3(f))

Part 2–4 of the Act, which regulates the making of EAs, includes as an object to:

... provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits ... (s. 171(a)).

The administrative discretion exercised by the predecessor bodies to today's Fair Work Commission (FWC) through compulsory conciliation and arbitration of bargaining disputes has disappeared. In its place are legislated minimum standards and tests that aim to ensure a net benefit for employees involved in enterprise bargaining.

²² As noted in Chapman (1990, p. 57): 'In macroeconomic terms, it is hard to believe that the Accord has not delivered what its proponents apparently hoped for: wage restraint and job growth, leading to a substantial — and, because of measurement problems, an understated — decrease in the unemployment rate. This has been associated with increases in labour supply and a reduction in long-term unemployment.'

The FW Act's rules around enterprise bargaining are discussed in greater detail in the following section.

20.2 Current rules around enterprise bargaining

Negotiations between employers and employees on conditions of employment are subject to a detailed system of rules and requirements. The content or terms that can be agreed to, and the negotiation process itself, is regulated mainly by the FW Act.

Types of enterprise agreements

Three types of EAs can be made under the FW Act (s. 172). There are:

- single enterprise agreements, which employers can make with some or all of their employees. Two or more employers can be treated as 'single interest employers' (for example, employers engaged in a joint venture or common enterprise, or related bodies corporate) for the purposes of enterprise bargaining
- multi-enterprise agreements, which can be made between two or more employers (not single interest employers), and some or all of their employees
- greenfields agreements (chapter 21), which can only be made where there is a 'genuine new enterprise'. Employers cannot unilaterally determine the conditions for future employees in new work sites. They must be negotiated with one or more relevant employee organisations (usually, unions).

The overwhelming majority of EAs are single enterprise agreements (appendix E). For example, in 2013-14, of the 6754 total agreements lodged for approval, 88 per cent were single enterprise agreements, 11 per cent were greenfields agreements, and less than 1 per cent were for multi-enterprise agreements.

Standard and non-standard processes

When an employer initiates bargaining, or agrees to bargain when initiated by its employees, the standard bargaining process involves:

- a pre-bargaining process (where parties can appoint bargaining representatives)
- bargaining (parties and/or their representatives need to bargain in good faith)
- an approval process (employees and the FWC need to approve the agreement) (figure 20.1).

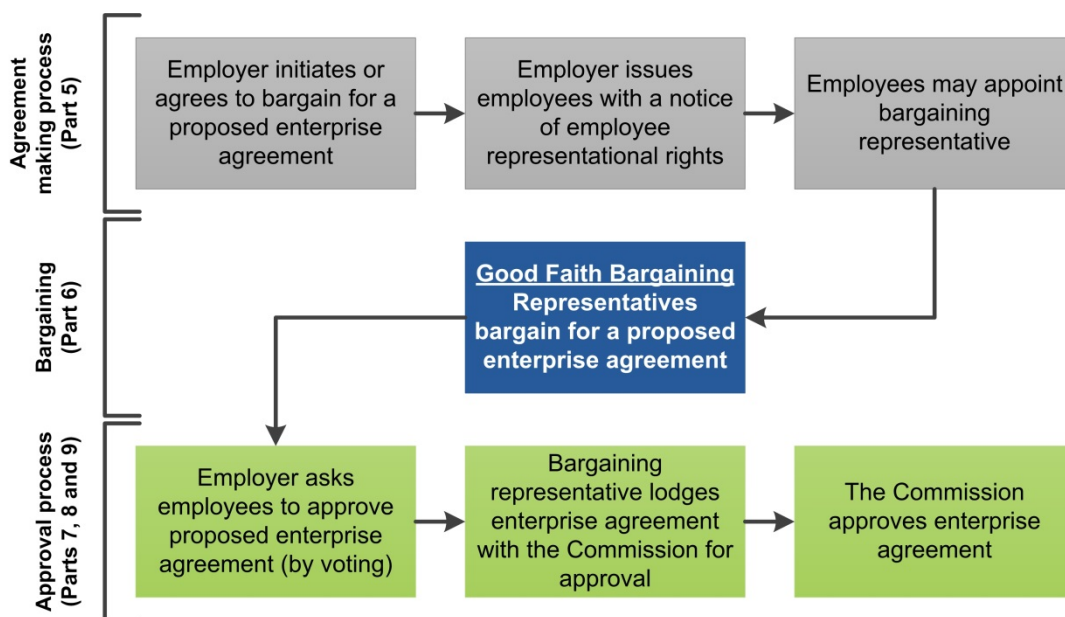
Additional bargaining processes can include:

- majority support determinations (MSDs). If a majority of employees want to bargain and their employer refuses, an employee bargaining representative may apply to the

FWC for a MSD to require that the employer bargains. If the employer continues to refuse to bargain, the employee bargaining representative may seek a bargaining order to require the employer to meet the good faith bargaining requirements

- an application for a single interest employer authorisation, to allow employers that are bodies corporate or joint venture partners to bargain as one employer (for example, franchisees, schools in a common education system, and public entities providing health services)
- Low-paid authorisations (which allow low-paid employees to collectively bargain with their employers)
- scope orders (where there is a dispute about which employees are to be covered by the proposed agreement)
- bargaining orders to uphold the good faith bargaining requirements
- bargaining disputes.

Figure 20.1 **Standard bargaining process under the Fair Work Act^a**



^a This diagram sets out the enterprise bargaining process as it applies in general terms. It does not relate to the process for making a greenfields agreement (chapter 21).

Source: Fair Work Commission (2015e, p. 12).

How does bargaining commence?

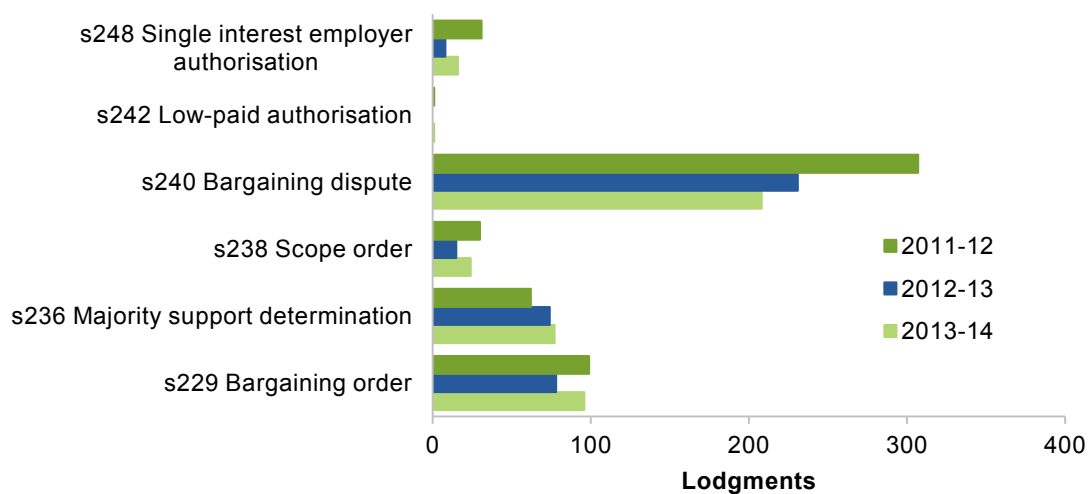
Bargaining for an EA begins when:

- the employer agrees to bargain or initiates bargaining (which happens in most cases), or

- the employer is compelled to bargain because the FWC makes a MSD (s. 236), a scope order (s. 238) or a low-paid authorisation (s. 242).

About 70 applications for a MSD were lodged with the FWC each year for the past three years (figure 20.2). MSDs are proving to be a highly effective mechanism for unions to overcome employer resistance to collective bargaining (Forsyth et al. 2010, p. 133).

Figure 20.2 Bargaining applications with the FWC



Source: Fair Work Commission (2014b, p. 59).

Scope orders allow the FWC to arbitrate the scope of a proposed agreement, and are only available in relation to single enterprise agreements. 24 scope order applications were made in 2013-14, up from 15 in the previous year (figure 20.2). An employee or employer bargaining representative may apply for a scope order if he or she is concerned that bargaining is not proceeding efficiently or fairly because the agreement will not cover appropriate employees, or that it will cover inappropriate employees.

A bargaining representative or relevant union can also apply to the FWC for a low-paid authorisation. Low-paid authorisations provide entry into a special multi-employer bargaining stream for low paid employees and their employer. These rules recognise that certain types of employees (for example, those employed in community services, cleaning, child care, security and aged care) have, for various reasons, not been able to participate in enterprise bargaining, and are therefore ‘stuck’ on minimum safety net wages (Forsyth et al. 2010, p. 137). These provisions have been widely identified as one of the most novel features of Australia’s bargaining framework from an international perspective (Forsyth et al. 2012, p. viii).

Since the low-paid authorisation provisions commenced on 1 July 2009, there have been five applications. One authorisation was made in response to two of the applications, two were dismissed, and one was withdrawn:

-
- The first two applications were made by United Voice and the Australian Workers Union and covered employers and employees in the aged care industry. An authorisation was granted by a Full Bench of the then Fair Work Australia in 2011.²³
 - In 2013, the Australian Nursing Federation's bid for an authorisation for nurses employed in private sector medical practices was refused. The authorisation was refused on a number of grounds, including: that most practice nurses do not fall within the definition of 'low paid' employees; that the union had not sought to advance the interests of its members through other avenues available under the FW Act such as enterprise based negotiations; and that multi-employer bargaining was likely to be cumbersome and less appropriate than enterprise bargaining.²⁴
 - In 2014, the FWC refused United Voice's application for an authorisation to cover five private sector security companies in the ACT. This application was rejected on the grounds that efforts had not been made to bargain with the relevant employers, and it had not been demonstrated by the union that the employees did not have access to collective bargaining or faced substantial difficulty bargaining at an enterprise level.²⁵

Employees must be informed of their right to appoint a representative

Once an employer initiates bargaining or agrees to bargain (or a scope order, MSD or low-paid authorisation comes into operation), they must notify each employee of his or her bargaining rights via a notice of employee representational rights (NERR) as soon as practicable, and no later than 14 days (s. 173). The content of the NERR is prescribed by regulation (s. 174), and includes information on the employee's right to appoint a bargaining representative. The FWC's website includes a step by step guide for employers on when and how to complete the notice (FWC 2015h).

Employees can represent themselves, or appoint a representative. Union members are represented by their union by default, but may choose to appoint another person (s. 176). To become a bargaining representative, a union needs only one employee to be a member. Unions are among several potential bargaining representatives — since 1993, collective bargaining without union representation has been recognised.

Employers can also appoint another person to bargain for them, such as an employer association. However, the employer always remains a bargaining representative (s. 176). An employee bargaining representative can request a copy of the instrument of appointment (s. 178).

²³ *United Voice v The Australian Workers' Union of Employees, Queensland* (2011) FWA 2633.

²⁴ *Australian Nursing Federation v IPN Medical Centres Pty Limited and Others* (2013) FWC 511.

²⁵ *United Voice* (2014) FWC 6441.

Parties must bargain in good faith

Under the FW Act, employers, employees and their representatives are required to bargain in 'good faith'. If negotiations break down or become deadlocked, the FWC has only limited powers to assist parties through the bargaining process. It can issue bargaining orders (s. 229) and, when requested by the parties, mediate, conciliate or arbitrate disputes about the making of the agreement (s. 240).

The FW Act prescribes six good faith bargaining requirements, including attending and participating in meetings, disclosing relevant information and giving genuine consideration to proposals made by other bargaining representatives (box 20.1). The requirements do not apply to bargaining representatives for greenfields agreements, or multi-enterprise agreements (unless there is a low-paid authorisation in place) (s. 229(2)). Further, they only apply during the process of bargaining for a new EA, not the process of varying or terminating an EA.

Box 20.1 **The good faith bargaining requirements**

A bargaining representative must meet the following good faith bargaining requirements:

- attending and participating in meetings at reasonable times
- disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner
- responding to proposals made by other bargaining representatives for the agreement in a timely manner
- giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to proposals
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining
- recognising and bargaining with the other bargaining representatives for the agreement.

The good faith bargaining requirements do not require a bargaining representative to make concessions during bargaining for the agreement, or to reach agreement on the terms that are to be included in the agreement.

Source: Section 228 of the *Fair Work Act 2009* (Cth).

The good faith bargaining requirements are *procedural* only. Parties are not required to make concessions or forcibly sign up to an agreement.

The good faith requirements begin to apply when the employer initiates bargaining or agrees to bargain for a new agreement, or where the FWC makes an order requiring parties to bargain via a MSD, scope order or low-paid authorisation.

MSDs are the most widely used of the three gateways to bring reluctant parties to the bargaining table. They allow a majority of employees to compel an employer to commence

bargaining, and have demonstrably encouraged collective bargaining (McCallum, Moore and Edwards 2012). The FWC may determine whether a majority of employees wants to bargain using any method it considers appropriate. Where an employer continues to refuse to collectively bargain following a MSD, the employee bargaining representatives would need to apply for a bargaining order based on breaches of the good faith bargaining requirements (Forsyth et al. 2010).

A breach of the requirements is not a contravention of the FW Act. A representative can seek a 'bargaining order' (s. 229) from the FWC if they have concerns that good faith bargaining requirements are not being met. The FWC made around 100 bargaining orders in 2013-14 (figure 20.2). Such orders commonly involve some form of direction as to the conduct of the negotiating process, usually designed to facilitate the parties' resumption of bargaining activities such as attending meetings, setting a timetable for negotiations, or disclosing specific information (Rinaldi, Lambropoulos and Millar 2014). The FWC is not empowered to make an order that has the effect of requiring particular content to be included or not included in a proposed EA (s. 255(1)(a)). In a number of decisions, the FWC has established that 'hard bargaining', or holding resolutely to a position in negotiations, is permissible, which is a natural consequence of s. 228(2) (Forsyth et al. 2010).

Examples of the kinds of bargaining orders the FWC may make include (s. 231(2)):

- an order requiring the bargaining representatives to attend meetings on specified dates to discuss the proposed EA
- an order excluding a bargaining representative from bargaining, or requiring some or all representatives to meet and appoint one representative
- an order that an employer not terminate the employment of an employee or, if employment was already terminated, an order reinstating the employee
- an order delaying the conduct of a ballot on a proposed agreement (Forsyth et al. 2010, pp. 127–8).

Failure to comply with orders can lead to penalties²⁶ and, potentially (as a last resort), FWC arbitration where repeated breaches occur.

There are limits on when an application for a bargaining order can be made. If parties are already covered by an existing agreement, an application for a bargaining order may not be made until 90 days or fewer before the existing agreement reaches the nominal expiry date, or until the employer requests employees to approve a proposed agreement (whichever

²⁶ Failure to comply with a bargaining order is a breach of a civil penalty provision (s. 233 FW Act). An individual bargaining representative who fails to comply with a bargaining order may be ordered to pay a penalty of up to \$6 000 following civil remedy proceedings in the Federal Court or the Federal Circuit Court (s. 539). A body corporate that fails to comply may be ordered to pay a penalty of up to \$33,000 (s. 546). Injunctions may also be obtained to enforce bargaining orders (Forsyth et al. 2010, p. 128).

comes first): s. 229(3)(a). If parties are not covered by an existing agreement, an application for a bargaining order can be made at any time (s. 229(3)(b)).

The FWC may deal with bargaining disputes on request

Section 240 of the FW Act allows a bargaining representative to seek assistance from the FWC in relation to a dispute about the making of an EA. For single enterprise agreements or multi-enterprise agreements in the low-paid authorisation stream, a bargaining representative can apply to the FWC, independently of the other representatives. For other multi-enterprise agreements, the application must be made jointly by all bargaining representatives.

Regardless of whether the application is made jointly or by a single bargaining representative, the FWC may only arbitrate (that is, determine) the dispute if all bargaining representatives agree. For example, the bargaining representatives may agree to empower the FWC to arbitrate a particular term of a proposed EA that has been an insurmountable obstacle to resolving the process where all other matters have been agreed. But absent such agreement, the FWC may only deal with the dispute via mediation or conciliation, and may issue a recommendation or express an opinion as to the appropriate resolution of the matter, but not resolve it (Rinaldi, Lambropoulos and Millar 2014).

Employees approve an agreement by voting for it

An EA cannot be approved by the FWC unless employees have approved the agreement. An employer may request that employees to be covered by an EA approve the EA by voting for it. The request to vote must be made at least 21 days after the NERR was given (s. 181). During the seven days prior to the start of the voting process, employees must be given a copy of the proposed EA, and the employer must take reasonable steps to notify employees of how and when voting will occur, and explain the EA (s. 180).

Final step — obtaining FWC approval

Once an EA has been made, a bargaining representative must apply to the FWC for approval of the agreement (s. 185). Before approving, the FWC must be satisfied of different things for different agreements (figure 20.3), including that the agreement has been made with the genuine agreement of those involved, passes the better off overall test (BOOT), and meets various requirements regarding content and procedure.

Figure 20.3 Requirements for FWC approval

<i>Requirement for approval</i>	<i>FW Act section</i>
For ALL enterprise agreements, the FWC must be satisfied that:	
The agreement has been genuinely agreed to by the employees covered by the agreement (this does not apply to a greenfields agreement)	186(2)(a)
The group of employees covered by the agreement was fairly chosen	186(3)
The agreement passes the better off overall test	186(2)(d)
The agreement specifies a nominal expiry date	186(5)
The agreement includes a dispute settlement term	186(6)
The agreement does not include any unlawful terms	186(4)
The agreement does not include any designated outworker terms	186(4A)
The enterprise agreement meets the requirements with respect to particular kinds of employees (shiftworkers, pieceworkers, school based apprentices and school based trainees and outworkers)	187(4)
Where a scope order is in operation, that approval of the agreement is not inconsistent with good faith bargaining	187(2)
Additional requirements for multi-enterprise agreements:	
The agreement has been genuinely agreed to by each employer covered by the agreement, and that no person coerced, or threatened to coerce, any of the employers to make the agreement	186(2)(b)
If the agreement was not approved by the employees of all of the employers proposed to be covered — then the agreement has been varied so that it only covers those employers whose employees approved the agreement	187(3)
Additional requirements for greenfields agreements:	
The relevant unions that will be covered by the agreement are (taken as a group) entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement, in relation to work to be performed under the agreement	187(5)(a)
It is in the public interest to approve the agreement	187(5)(b)

Source: Fair Work Commission (2015e, pp. 112–3).

Rules around the content of agreements

The FW Act requires that EAs only contain ‘permitted matters’ that relate to the employee employer relationship or the union employer relationship (s. 172(1)). While the FW Act is quite specific on some permitted matters, such as terms that deal with the way in which an agreement will operate, and employee authorised deductions from wages, it is largely silent on the large set of matters that might be considered as part of the employee–employer or union–employer relationship, leaving the detail to case law.

While the FWC scrutinises EAs for unlawful terms, it does not check whether agreements only contain permitted matters. An approved EA is still valid even if it includes terms that are not permitted matters, but the offending terms will have no legal effect (s. 253).

The following terms *cannot* be included in EAs:

- unlawful terms (s. 194), which relate to issues such as discrimination, the ability to ‘opt out’ of an agreement, requirements to pay bargaining service fees, terms that breach the

FW Act's general protections provisions, attempts to modify rights to unfair dismissal protection or protected industrial action, and terms that provide an entitlement to right of entry that are inconsistent with the FW Act's right of entry provisions

- designated outworker terms (that is, terms that relate to outworkers in the textile, clothing or footwear industries), as the relevant terms in a modern award continue to apply.

A consultation term and a flexibility term must be included in EAs. If no such term is included, the model consultation term and model flexibility term are taken to be terms of the agreement (s. 201).

- A consultation term requires the employer to consult with their employees about a major workplace change that is likely to have a significant effect on employees, and allows for representation of employees for consultation purposes.
- A flexibility term must enable an employer and employee to make an individual flexibility arrangement (IFA) that varies the effect of the EA, in order to meet the genuine needs of the employee. While the term must be included, parties are able to bargain over its content and, thereby, there is scope to vary the EA via use of an IFA.

Enterprise agreements need to make employees better off overall

An EA needs to make employees better off overall than if the relevant modern award applied to the employee. The better off overall test or BOOT (s. 193) is the mechanism for assessing this (box 20.2). It replaces various formulations of the no-disadvantage test that applied under previous federal enterprise bargaining laws.

For approval of an EA, the BOOT only requires comparison against the modern award, not against any previous or existing agreement, meaning that employees might conceivably receive lower rates of pay than under a previous agreement (although in normal circumstances this is unlikely). In principle, it is a global test; not every individual term needs to be an improvement on the award, provided that the cumulative advantages outweigh the disadvantages. It is not a collective test, as each employee (or prospective employee²⁷) under the agreement must be better off — though the FWC can assume (in the absence of contrary evidence) that an employee is better off if the class of employees they belong to is better off. So while there is scope in an EA to trade off particular benefits of a modern award against other benefits that are valued more highly by employees, this requires that all classes of employees covered by the agreement are better off overall.

The FWC makes the final determination and must be satisfied that the agreement meets the BOOT before it will approve an agreement. There are exceptional circumstances when, on public interest grounds, the FWC may approve an agreement that does not pass the test; for example, for a business experiencing a short term crisis (s. 189).

²⁷ For greenfields agreements, the BOOT applies to prospective award-covered employees.

Box 20.2 **The better off overall test (the BOOT)**

An enterprise agreement passes the BOOT if the Fair Work Commission is satisfied that each employee (and prospective employee) for the agreement would be better off overall under the agreement than if the relevant modern award applied to the employee. The comparison is made between the agreement and the award at the time of the application for approval.

Flexibility terms in modern awards and enterprise agreements (EAs) must contain a requirement that the employer ensure that an individual flexibility arrangement (IFA) must result in the relevant employee being better off overall than if no IFA were agreed to.

Overall, the relevant benchmarks for the BOOT can be summarised as follows:

- an EA must make the employees better off than if the relevant award applied
- an IFA made under an EA must make the employee better off than the EA
- an IFA varying an award must make the employee better off than if no IFA were agreed to
- an IFA varying an above-award individual arrangement must make the employee better off than their current above-award arrangement.

Source: Fair Work Act 2009 (Cth) s. 193, 203(4) and 144(4)(c).

Unions may choose to be covered

A union can apply to be covered by a proposed EA, provided it was a bargaining representative and it applies before the FWC approves the agreement (s. 183). The legal consequences of a union being covered are limited to ensuring that agreement content under s. 172(1)(b) is permitted; providing rights to terminate the agreement; and prohibiting organising and engaging in industrial action until 30 days before the nominal expiry date of the agreement (McCallum, Moore and Edwards 2012, p. 154).

Between 70 and 80 per cent of all EAs lodged with the FWC each quarter for approval, cover a union (Department of Employment 2015c, p. 32).

Moreover, unions can (and do) intervene, to be added as a party to an agreement, even if they have not participated in the negotiation process. This may have a benefit for the employer (limitation on future industrial action), but can also have costs (it may encourage demarcation disputes with an incumbent union, and may even see the agreement reopened).

Once an enterprise agreement is in place

Individual flexibility arrangements (IFAs) can be made

IFAs are the vehicle through which individual employees and employers can vary an EA to suit their circumstances. For example, IFAs can be made in relation to working hours and

family friendly work practices (Australian Government 2008b, para. 860). As discussed above, all EAs must contain a flexibility term that gives employees and employers the capacity to make IFAs that vary the effect of the EA. However, the content of the term is a matter for negotiation between parties.

An IFA has effect in the same way as if it were a term of an agreement (and is therefore enforceable in the same way), and the agreement operates as if it were varied by the IFA, but only in relation to the employee and employer that have made the IFA (s. 202) (Creighton and Stewart 2010, p. 313).

IFAs need to make employees better off overall than if there was no IFA. That is, the EA provides the relevant benchmark for assessing whether the employee is better off overall. IFAs must satisfy a number of other requirements (s. 203), including that it is genuinely agreed to, and that the employer or employer can terminate the IFA with 28 days' notice. IFAs can only be formed after the relevant employee has commenced employment; they cannot be formed as a condition of employment. Further, existing employees cannot be required to sign an IFA to continue employment. The use of IFAs is further examined in chapter 22, which focuses on individual arrangements.

How to enforce the agreement and resolve disputes over terms and conditions

The various WR institutions (chapter 3) have different roles to play in enforcing EAs and resolving disputes over terms and conditions in EAs.

The first place to look is the dispute resolution procedure in the applicable EA. The FWC can deal with disputes about EAs if the EA's dispute resolution clause allows. EAs must include a procedure allowing an independent person to settle the dispute, which may or may not be the FWC. The FWC can only deal with disputes if an application has been made by the parties to the dispute. If a provision in an EA refers a dispute to the FWC:

- depending on the terms of the clause, the FWC may settle a dispute via mediation, conciliation, or by making a recommendation or expressing an opinion, except in the circumstances where the parties have agreed to limit the powers of the FWC
- the FWC may, where agreed by the parties, deal with the matter by arbitration and make a binding decision about the dispute (FWO 2010). While an order made by the FWC is legally binding, only courts have powers to enforce FWC orders.

Parties can, with permission, appeal a FWC decision to the Full Bench of the FWC.

The Fair Work Ombudsman can assist parties by providing advice, offering dispute resolution processes, and sometimes litigating on a person's behalf in the courts.²⁸ The Fair Work Ombudsman's functions include promoting and monitoring compliance with the FW Act (s. 682). It can investigate disputes related to breaches of a Fair Work instrument, such as an EA. Fair Work inspectors have compliance powers, including the power to enter premises and require a person to produce documents. The Fair Work Ombudsman can accept enforceable undertakings and can issue compliance notices.

Ability to vary or terminate an enterprise agreement

EAs can be varied through a similar process to that involved in making agreements. A variation is made if it is approved by a majority of affected employees who have cast a valid vote. While many agreements include a 'no extra claims' provision that attempts to constrain changes to the EA during its life, the recent *Toyota* decision (box 20.3) has confirmed that such provisions cannot prevent proposed variations to EAs that would otherwise be allowed by the FW Act (Ellery, Creighton and Levy 2014).

20.3 Patterns in the use of enterprise agreements

Evidence on the prevalence of EAs and their effects varies because of different survey respondents (employers versus employees), different sampling frames, diverging definitions, missing data (for example, coverage of national system employees rather than all employees) and sampling errors. The results are covered in detail in appendix E. Nevertheless, some clear patterns are apparent:

- About 40 per cent of employees are on an EA.
- Few enterprises use EAs, reflecting the large number of very small employing businesses,²⁹ which do not tend to form EAs. The share of employees on EAs is about 80 per cent for the largest enterprises (employing 1000 or more people) and under 5 per cent for enterprises employing less than 20 employees.
- EAs are least common for technicians and trade workers and managers, but otherwise fairly similar for other occupational groups.

²⁸ The overwhelming bulk of the Fair Work Ombudsman's litigation relates to underpayment (around 80 per cent of litigation cases in 2013-14). Most are in relation to awards, not EAs. Other litigation matters have included adverse action, sham contracting, failure to comply, discrimination, and unlawful conduct in relation to individual agreements. In other words, the Fair Work Ombudsman's litigation is entirely aimed at remedies for (and deterrence of) clear breaches of the FW Act and primarily does not relate to EAs.

²⁹ Of the roughly 825 000 employing businesses in June 2014, there were around 570 000 businesses employing 1-4 businesses, and a further 200 000 businesses employing 5-19 employees. Accordingly, those remaining businesses most likely to have EAs represent a small share of employing businesses, with businesses employing 20-199 employees representing 6.3 per cent and those employing 200+ representing only 0.4 per cent (ABS 2015c).

Box 20.3 **The Toyota decision**

In late 2013, in the context of uncertainty about the car industry's future, Toyota contacted its employees requesting a number of variations to its existing enterprise agreement, which was due to expire in 2015. The company argued that to deliver scheduled pay increases, some 'outdated and uncompetitive terms and conditions' would have to be removed from the enterprise agreement. The 29 proposed changes included:

- removal of a four hour paid leave allowance for blood donations
- a requirement that employees be available to work at least of 20 hours overtime each month
- removal of shift premiums for employees taking long service leave
- reductions in Sunday penalty rates from double and a half to double.

The proposed variations were challenged in the Federal Court by a group of employees, who argued that the requested changes were in breach of the enterprise agreement's 'no extra claims' clause, which stipulated that the parties:

... will not prior to the end of this agreement: make any further claims in relation to wages or any other terms and conditions of employment; and take any steps to terminate or replace this agreement without the consent of the other parties.

In defence of the variations, Toyota argued that the employees' interpretation of the clause was inconsistent with Part 2–4, Division 7 of the Fair Work Act, which expressly allows employers to request their employees to approve a proposed variation to an enterprise agreement.

Justice Bromberg found that the proposed changes contravened Clause 4 of the agreement, and ordered that Toyota refrain from organising a vote to approve the proposed variations to the enterprise agreement. Justice Bromberg concluded that because the 'no extra claims' clause itself could first be removed from the agreement, it was not inconsistent with the Act.

This decision was overturned on appeal by Toyota to the Full Court of the Federal Court. The Full Court concluded that the proposed changes to the agreement were 'extra claims', and that the 'no extra claims' clause was inconsistent with the Fair Work Act regardless of whether it could be removed or varied itself. However, the Full Court also agreed with Justice Bromberg that the 'no extra claims' clause pertained to the relationship between employer and employees, thus making it a permitted matter.

Sources: Ellery, Creighton and Levy (2014); Johnston and Wellington (2014); Wood, Mason and Eglezos (2014); *Toyota Motor Corporation Australia Ltd v Marmara* (2014) FCAFC 84.

- EAs are highly prevalent for employees of public sector service agencies providing education, health and administrative services, and for utilities (with roughly 60 per cent or more of employees on EAs in these industries). EAs have low prevalence for employees (below 15 per cent) in professional services, real estate, administrative and support services and wholesale trade.
- About 70 per cent of national system EAs cover unions, but this does not necessarily mean the union is prominent as a negotiating party.
- The number of EAs has generally increased over time and at a faster rate than numbers of employing businesses, suggesting that the prevalence of EA has risen.
- Wage increases in EAs have considerably outpaced awards (but so too have individual arrangements), suggesting that the role of awards is to be a safety net. Areas where

unions have higher bargaining power — such as greenfields agreements (a form of EA) — tend to have produced higher wage outcomes.

- The content of EAs demonstrates significant flexibility in wages and other conditions, with above and below award arrangements relatively frequent. The latter is feasible because of flexibility arrangements that allow tradeoffs between different aspects of an agreement (or award), if the new outcome passes the BOOT.

Why do parties use (or not use) enterprise agreements?

Businesses indicate that they use EAs:

- to respond to demands from employees or employee representative bodies (22 per cent)
- to reward employees with higher wages than the applicable award rate (21 per cent)
- to address award terms and conditions that were not suitable or flexible enough for the enterprise (20 per cent)
- to reduce complexity from otherwise having to use multiple awards (17 per cent) (FWC 2015d, pp. 23–24).³⁰

Businesses without EAs identified several reasons for not using them, but mainly because they saw advantages in other employment arrangements. For example, of those enterprises that only used awards to set pay for their employees, almost half indicated that they did not have an EA because award rates and conditions were adequate. Similarly, many of those enterprises only using individual arrangements (not at the award rate) did not use EAs because of a preference to negotiate with employees individually rather than collectively. However, some businesses, notably small and medium enterprises, noted that they perceived the enterprise bargaining framework to be too costly or complex to engage with (discussed further in section 20.5).

20.4 Adequacy of current arrangements and possible reforms

While enterprise bargaining allows some employers and employees to craft flexible arrangements that suit the circumstances of the particular enterprises, several features have made enterprise bargaining more rigid and costly than necessary.

³⁰ Totals do not add to 100 per cent as multiple responses were permitted. Base = 774 enterprises. Enterprises that did not know whether there was an enterprise agreement in place are excluded from the analysis.

Make procedure a servant, not the king

The commencement of bargaining occurs when the employer issues the NERR, which ultimately leads to lodgment of an EA with the FWC and (assuming that it passes the various legal requirements) its approval.

The FWC is meeting its own performance benchmarks for processing times. Its benchmark is that, from the date of lodgment: 50 per cent of all s. 185 applications are to be finalised within three weeks; 90 per cent within eight weeks; and 100 per cent within 12 weeks. These benchmarks were met in 2013-14, with 59 per cent finalised within three weeks; 93 per cent within eight weeks, and 98 per cent within 12 weeks (FWC 2014b, p. 32).

While the FWC approves agreements relatively efficiently, the whole bargaining process from start to finish can be protracted. Data from the Department of Employment provided to the Productivity Commission suggest that, where the old agreement has a direct relationship with the new one, it takes an average of 151 days (including approval processing time) to replace an EA under the FW Act.

As noted by various participants, sometimes undue emphasis is placed on procedural requirements when agreements are submitted for approval (Victorian Employers' Chamber of Commerce and Industry (VECCI), sub. 79; Catholic Commission for Employment Relations, sub. 99; Minerals Council of Australia, sub. 129; Peabody Energy, sub. 241; Ports Australia, sub. 249). The infamous 'staple case'³¹ illustrates the dominance of form over substance, where a bargaining representative nomination form that was stapled to the NERR tainted the entire bargaining process, requiring the employer to begin the agreement making process again (Caspersz 2014).

While there are often good reasons for having procedural requirements (for example, to prevent a party engaging in potentially misleading conduct during the approval process), substance rather than form should prevail, which is a recurring theme in this report. Where the FWC rejects an EA on procedural grounds, it can trigger a fresh round of complex negotiations. This is not only a costly and tedious process, but can also compromise the relationship between employers and employees. This was noted by a member of the Launceston Chamber of Commerce, whose EA was rejected by the FWC due to a technical defect in their NERR:

We are now forced to go back to the ballot again. Whilst I understand and respect the legalities imposed by legislation, the pedantic nature in which the provisions are applied has a significant impact on the productivity of the organisation for no apparent reason or protection of the employees from any wrongdoing. The situation has now caused a potentially detrimental relationship between the organisation and the workforce. Because it has been on a knife-edge before, so to speak, they do not understand the reasons for the rejection. Rather, they are becoming suspicious that they must have done something wrong because the Fair Work Commission rejected the agreement. (Launceston Chamber of Commerce, trans., p. 114)

³¹ *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* (2014) FWCFB 2042.

There are other strong grounds for avoiding rejection of fundamentally-sound EAs on the basis of technical purity:

- Once expired, EAs do not provide for further wage increases, with possible adverse financial consequences for employees if delays continue. They would also delay any new benefits for employees that might have been a feature of the EA.
- Pedantic, legalistic decisions can influence perceptions of the cost and complexity of bargaining, and thus discourage businesses and employees from pursuing EAs.
- Procedural issues when negotiating a greenfields agreement can delay the commencement of new projects.
- Even where an agreement is not a greenfields agreement, businesses want some certainty when making large investments, innovating and introducing efficiency improving measures. Delays in EAs leave them susceptible to several risks. Decisions about capital, in part, depend on the cost of competing inputs, of which labour is one. Equally, uncertainty about future labour costs, and therefore overall costs, can affect a business's capacity to self-finance investments or may raise the cost of capital when seeking external finance.
- Moreover, to the extent that any business strategy (investment, entry into new markets, new product lines or restructuring) is contingent on striking an agreement, the consumer benefits of that strategy are also delayed, imposing costs on not just the participants in the negotiation but also third parties.

To its credit, the FWC is also embarking on early intervention and outreach programs by identifying trends in errors and providing education and guidelines to employers (Justice Iain Ross, sub. DR357; Inca Consulting 2015a). This should help reduce the prevalence of inadvertent procedural errors.

However, even with education and guidelines, some parties, especially those with little or no dedicated HR staff, will still make inadvertent errors. Further, governments will inevitably 'tinker' with regulations or processes from time to time, which can lead to parties making procedural errors (for example, by using an outdated form or following outdated guidelines). Where these inadvertent errors arise, the agreement process should not be unnecessarily derailed.

The FWC should be allowed to overlook minor procedural defects without undertakings

In its current form, Division 4 of Part 2–4 only allows the FWC to approve an EA if it meets all the requirements in ss. 186 and 187 (such as being genuinely agreed to by employees, passing the BOOT, no unlawful terms, etc.), and in other limited circumstances (where approval of the EA would not be contrary to the public interest and where the employer agrees to undertakings). However, s. 190 of the FW Act currently gives the FWC the power to approve an agreement that does not meet these requirements if the employer agrees to undertakings that will meet the FWC's concerns. Any such undertakings must not

be likely to cause financial detriment to any employee or result in substantial changes to the agreement.

The power to approve an agreement with undertakings may help resolve defects in an agreement (such as a failure to pass the BOOT) in an efficient manner, without requiring the costly process of returning to negotiations, revising the agreement's terms, and voting on the agreement again. While some employer groups expressed concern about how undertakings during the approval process are applied by the FWC (VECCI, sub. 79; Australian Mines and Metals Association (AMMA), sub. 96), the existing limitation that undertakings must not result in substantial changes to the agreement should limit any potential misuse of undertakings by FWC members. Further, some degree of uncertainty with respect to how the FWC exercises its discretion may also help encourage compliance — if an employer is concerned about potential undertakings imposed by the FWC, they will have an incentive to ensure that they have met all the necessary requirements for approval of their agreement.

However, there can be some cases where a procedural defect in an agreement cannot be addressed by an undertaking and the FWC is left with no choice but to reject the application for approval. This is so even in circumstances where the unmet requirement has not materially affected bargaining or the proposed EA.

For example, s. 181(2) requires that an employer not request its employees vote on approving an EA until at least 21 days after the last NERR is issued. Satisfying s. 181(2) is a precondition for establishing that an EA was genuinely agreed to by employees, which is a requirement for an agreement to be approved. The FWC has previously rejected applications for agreement approval on the grounds that the agreement was voted on by employees before this 21 day period was reached.³² While s. 190 would theoretically permit an undertaking to address this concern, it seems unlikely (in the absence of time travel) that an undertaking to meet this requirement would be feasible.

In cases where an undertaking is not feasible or would cause undue inconvenience, the FWC should have the discretion to determine whether a procedural defect did not materially affect the bargaining or approval process and therefore does not require an undertaking to remedy it. The key test for exercising discretion could be that the FWC is satisfied that employees were not likely to have been placed at a disadvantage during bargaining or the pre-approval process because of the unmet procedural requirement. The FWC should also have regard to the likely costs to the parties — including the employees — associated with further delaying approval of the agreement. To help maintain consistency and transparency for all parties, the FWC could develop and publish guidelines about how members should exercise their discretion with respect to procedural defects.

The goal of this proposed change is to resolve procedural inflexibilities and prevent minor procedural errors or defects in the bargaining process derailing an otherwise fundamentally

³² *Lincoln Sentry Group Pty Ltd Prestons Warehouse Enterprise Agreement 2010* (2010) FWA 6765.

sound agreement at the approval stage. Numerous inquiry participants³³, primarily employers and employer groups, were supportive of such a change. The capacity for the FWC to overlook minor procedural defects is also not without precedent — s. 461 of the FW Act currently allows a protected action ballot order (chapter 27) to be valid even if where there is a ‘technical breach’ of the provisions.

Allowing the FWC the discretion to overlook a procedural defect without an undertaking should not be seen as an avenue to allow some employers to skirt procedural requirements in order to gain an edge during bargaining. Employers generally do not have an incentive to expose themselves to the FWC over procedural issues. It is also unlikely that a deliberate procedural error by an employer would both lead to a meaningful advantage in bargaining and yet also escape the scrutiny of the FWC.

Deficiencies in notices of employee representational rights (NERR)

Some participants have raised concerns specifically with the overly prescriptive treatment of deficiencies in a NERR (Catholic Commission for Employment Relations, sub. 99). This is not isolated to the ‘staple case’. For example, another agreement was deemed invalid because the NERR had contained an omission reading ‘[Name of employer]’, notwithstanding that the letterhead on the notice contained the employer’s name.³⁴

In another case, an agreement was rejected because the employer had inadvertently issued a NERR template from the FWC website which had not been updated, and as such was technically not compliant. According to the employer’s HR manager:

... the substance of the content between the two forms is the same. For example, on the old former NERR, one inserted a specific union, i.e., HACSU in our case, whereas the new NERR refers to ‘union’. It just seems to be bureaucracy at its best.

At this time, as it came to light, I was speaking with the industrial organiser from the union and he said that the Fair Work Commission had struck down another eight enterprise agreement applications that week for the same reasons and were equally annoyed. (Launceston Chamber of Commerce, trans. pp. 114–15)

A FWC decision invalidating a NERR can particularly delay an agreement because the parties must issue a new NERR and wait at least 21 days after issuing it before the agreement can be approved by holding another employee vote.

³³ Including Catholic Commission for Employment Relations, sub. DR289; Master Builders Australia (MBA), sub. DR290; Australian Higher Education Industrial Association, sub. DR297; National Farmers' Federation, sub. DR302; Australian Hotels Association, sub. DR303; Master Electricians Australia, sub. DR304; Allens, sub. DR310; Toll, sub. DR312; AMMA, sub. DR322; Chamber of Commerce and Industry of Western Australia, sub. DR323; National Retail Association, sub. DR327; Leading Age Services Australia and Aged & Community Services Australia, sub. DR328; ACCI, sub. DR330; Ai Group, sub. DR346; SAWIA and WFA, sub. DR352.

³⁴ *Catholic Commission for Employment Relations through Executive Director Anthony Farley* (2013) FWC 8686.

One proposed solution is that the FWC should have the legal discretion to decide whether deficiencies in the notice should prevent the agreement from being approved, rather than simply invalidating the notice and forcing bargaining to start over. Indeed, in the ‘letterhead’ case outlined above, the FWC member noted:

If it seemed the Act allowed discretion in relation to the matter, I would exercise it; that is, the departure in the content of the notices of representational rights from the prescribed form might be considered to be something akin to a misnomer of no real consequence, rather than anything that, in a practical sense, alters the advice to employees of their rights in such respects.¹³

In assessing whether the departure was ‘something akin to a misnomer of no real consequence’, the FWC should take into account the views of the employer, bargaining representatives, the employees to be covered by the agreement, and any evidence on whether the deficiency in the NERR had disadvantaged an employee who would be covered by the agreement (for example, by being confusing, misleading or intimidatory to the extent that it affected an employee’s nomination of a representative).

Some employee groups opposed this proposal, arguing that any loosening of the prescriptive requirements would allow employers to mislead employees as to their representational rights, and thus undermine the capacity for unions to act as bargaining representatives for employees (Community and Public Sector Union (CPSU) (SPSF Group), sub. DR270; Australian Council of Trade Unions (ACTU), trans., pp. 88–9).

However, the Productivity Commission is unconvinced by these arguments. The proposed approach would not give employers carte blanche with respect to the NERR’s content. Were an employer to issue a NERR which appeared to be materially misleading, it is likely that the FWC would reject it. Preventing the small possibility that a misleading NERR may slip through the FWC’s discretion does not justify the tangible costs and delays to bargaining participants that arise from the prescriptiveness of the existing rules.

RECOMMENDATION 20.1

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.

Majority support determinations (MSDs)

Currently, the FWC has the discretion to decide the method for determining whether a majority of employees want to bargain (s. 237). This can include a range of methods, such

as a secret ballot, a survey of employees, written statements or a petition. A number of participants have expressed dissatisfaction with this approach, arguing that a secret ballot be specified as the sole basis for establishing majority support for bargaining to commence.³⁵

It may be that this would be a reasonable approach in some cases, but it is not likely to be required in all. As noted previously, rigidly prescribed approaches have the potential to lead to unnecessary disputes over process. Indeed, in its submission the Australian Institute of Employment Rights argued:

... the flexibility given to [FWA] under the legislation to determine the question of majority support where this [is] in dispute is ... an appropriate way of avoiding the potential for complex litigation in this area. (sub. 140, p. 31)

There is also little evidence that the FWC is currently applying its discretion capriciously in this area. While one employer provided anecdotal evidence of a secret ballot showing a different result to a union petition (Glencore, sub. 185), no evidence was available to this inquiry which suggested a systematic issue.

Further, recent amendments³⁶ to prohibit industrial action prior to bargaining commencing mean that a MSD is now the sole avenue via which employees can compel an employer that is refusing to bargain. An employer now also has nothing to lose by refusing to bargain, as they face no risk of industrial action as a result. This means that the number of MSDs being sought by employees is likely to increase. More complex or prescriptive MSD processes would further add to any increase in the compliance and administrative costs of MSDs for both employee groups and the FWC.

Does good faith bargaining work?

The intention of enterprise bargaining was for parties to negotiate in good faith, avoiding the requirement for arbitration (which is, in effect, a regulatory incursion) by a third party umpire — currently the FWC. The FW Act lists the types of behaviour that are ‘good faith’ for the purposes of bargaining, but by its nature, good faith in this context can be hard to codify. Bargaining is a game in which parties do not have entirely coincidental interests. Consequently, tactical behaviour is to be expected. The key problem is to establish a set of rules that provide some bounds on such behaviour, while not overly encumbering the bargaining process.

³⁵ This approach was recommended by the Business Council of Australia (sub. 173), Bluescope Steel (sub. 58), VACC, MTA-NSW and MTA-SA (sub. 201), AMMA (sub. 96), Linney Strategies (sub. 113), Glencore (sub. 185) and Rio Tinto (sub. 122).

³⁶ *Fair Work Amendment Act 2015* (Cth)

The 2012 post-implementation review of the FW Act recommended relatively few changes, arguing that the measures were largely effective (McCallum, Moore and Edwards 2012), citing the evidence in submissions to that review.

In prescribing the bargaining model and the good faith bargaining obligations, the legislation avoids many of the pitfalls of similar legislation in international jurisdictions. One such pitfall is to be over prescriptive, making it even more technically complex and thereby deterring employees from undertaking their own negotiations. For this reason the [Business Council of Australia] does not support further prescription, but rather, clarification and streamlining. (BCA 2012, p. 35)

The reach of the new good faith bargaining provisions are still being worked out through [Fair Work Australia] and court decisions. The legitimacy of a range of practices — such as ‘surface bargaining’, using replacement labour during strikes, unilateral employer offers, and employer direct dealing with staff (without the knowledge of their bargaining representatives) — are yet to be decided conclusively. (ACTU 2012c, p. 40)

Some participants in this inquiry continue to echo the view that not much is wrong:

... the good faith bargaining provisions in the Fair Work Act do not need to be supplemented by further prescriptive rules. The [Qantas] Group has some experience with bargaining in overseas jurisdictions. In particular, our experience of the more prescriptive good faith bargaining provisions under the otherwise simple and flexible New Zealand legislation has been that these provisions tend to lead to a focus on process at the expense of expedition and outcomes. The good faith bargaining obligations also, prior to the recent amendments to the New Zealand legislation, seriously inhibited an employer’s ability to communicate directly with its employees. (Qantas Group, sub. 116, p. 5)

However, some unions said that the FWC’s narrow construction of good faith bargaining meant they were of limited effect, while some employers claimed that the FWC adopted an overly bureaucratic approach. Some argued that the notion of ‘good faith bargaining’ was difficult to define, a general proposition that is hard to disagree with, but does not lead to a solution. For example, while parties cannot ‘surface bargain’ (going through the motions and pretending to bargain in good faith by superficially meeting the requirements), they can ‘hard bargain’ by maintaining a certain position without ceding ground (box 20.4). But, as Smith (2009) remarked ‘enterprise bargaining was not meant to be easy’. The case law does seem to have successfully distinguished between hard and surface bargaining.

Some inquiry participants called for a greater role for the FWC to intervene in protracted bargaining stalemates. For example, the ACTU (sub. 167) has suggested that the FWC should be empowered to take a more active role to facilitate agreement making in intractable disputes, by initiating a form of supervised negotiation process. Similarly, Bluescope Steel (sub. 58) advocated that compulsory arbitration should be triggered where negotiations have been exhausted and the future commercial viability of the employer is threatened by an intractable dispute.

Box 20.4 ‘Surface bargaining’, or just ‘hard bargaining’?

In *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers Australia* (2012) 217 IR 131, a Full Bench of the Fair Work Commission found that the employer had breached the obligations in s. 228 in significant ways. Even though the company had superficially complied with the formal requirements by participating in meetings and responding to proposals put by the union, it did not show a genuine effort to bargain, feeling no obligation to present proposals of its own. This conduct spanned a period of 12 months. The company said that it had never had a collective agreement in the workplace and it needed to be convinced otherwise. Significantly, the union had to apply for a majority support determination under s. 237 to enable bargaining to commence as the employer had no intention of starting a collective bargaining process.

Whilst there is no requirement to make substantive concessions during negotiations, there still must be evidence of an attempt to reach agreement by giving genuine consideration to the proposals and giving genuine reasons for rejecting a proposal. The Fair Work Commission found that the employer did not make these efforts.

This decision can be contrasted with *Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* (2010) 195 IR 58, where the Fair Work Commission found that the employer had not breached s. 228 as it was simply engaged in ‘hard bargaining’.

Source: Rinaldi, Lambropoulos and Millar (2014, p. 311).

It might be tempting to institute legislated thresholds that would trigger arbitration (for example, a time limit on the bargaining period). Compulsory arbitration may indeed bring some protracted disputes to an end. However, in other cases, this can create an incentive for parties to hold out until a third party will intervene and arbitrate, instead of genuinely bargaining and trying to reach agreement. Policymakers should thus be wary when considering the introduction of legislated triggers for arbitration.

It is also hard to see how further codification would address the fundamental issue that an industrial umpire does not have access to the day to day information that would allow it to discern whether bargaining was in good faith or not. Purpose cannot reliably be inferred from effect. In any case, all parties recognise that some strategic game playing is legitimate, and that no code could realistically eliminate it.

There are also some natural breaks on such strategic game playing, primarily that both sides generally have incentives to agree, in order to lock in gains, and to avoid triggering disruptions. Employees want pay rises and employers want to lock in certainty, avoid the threat of industrial action, and achieve enterprise change. For most businesses, the relationships between employees and employers are long-term ones, so bargaining is a repeated game. This also naturally limits strategies that overly disadvantage one side or the other in any single bargaining round. Most EAs are negotiated without fuss or bile — on average, EAs are approved less than 6 months after expiry (Department of Employment, sub. 158) — and it is good management practice to develop non-adversarial relationships within an enterprise. Finally, as noted above, the FWC already has powers to step in as a last resort when there are repeated breaches of bargaining orders.

Overall, the Productivity Commission does not accept that greater access to arbitration will lead to improved behaviour across the bargaining landscape. Occasional problems, while painful, do not necessarily require legislative solutions. For the moment, the case for returning to greater FWC control of the process seems weak.

Some participants have also called for the FWC to have greater powers to terminate bargaining and impose an arbitrated outcome where an intractable dispute has apparently developed. This issue is addressed more specifically in chapter 27, which deals with industrial disputes.

There is one remaining potential peculiarity in the current bargaining process that does not involve the issue of forced arbitration as the remedy for delay. While failure to comply with orders can lead to penalties and potentially, as a last resort, FWC arbitration, negotiations in some relatively rare cases have extended for considerable periods. For example, bargaining (ultimately unsuccessful) for a new agreement has extended for more than five years in the case of Cochlear Limited (a manufacturer of an implantable hearing device) and its workforce (McCallum, Moore and Edwards 2012, p. 137). The delay was not found to be a problem to the extent that it represented hard bargaining between the parties, and employees do not appear to have been disadvantaged, based on their decisions during the process (box 20.5).

Box 20.5 A long, long time

The circumstances of the protracted Cochlear bargaining process were that the employees of the business had made a majority support determination to commence bargaining for an EA. In addition to Cochlear and the union concerned (the AMWU), there were several other enterprise bargaining representatives. Once the majority support determination has been made, several processes are triggered under the Fair Work Act, and bargaining commences. Bargaining does not need to be fast, and the parties can bargain strenuously and are not obliged to reach agreement. In principle, Cochlear's employees could have taken industrial action to accelerate the proceedings, but there was little appetite by employees to do this. Cochlear provided pay increases during the bargaining process, so there were few incentives to take such action.

The Fair Work Commission (FWC) found that the difficult relationship between the negotiating parties and their respective stances on bargaining contributed to the 'extraordinary length and complications of the bargaining'. In general, the FWC considered that the fact that Cochlear had 'fought hard' and had taken advantage of 'every procedural point' in bargaining was a reflection of the adversarial nature of the relationship, and not itself a breach of good faith bargaining. There was only one substantive matter that led the FWC to conclude that Cochlear had breached the good faith bargaining requirements of the Fair Work Act, and that related to a tardy response to a proposal for an agreement put by the union.

Notwithstanding the single instance of a failure to meet good faith bargaining requirements, the main lesson from the Cochlear case is that, as in commercial bargaining, the parties are not obliged to reach agreement. An EA achieved via bargaining is not the sole solution to the employee-employer relationship, and alternative employment agreements were ultimately used.

Sources: AMWU v Cochlear Limited (2012) FWA 5374.

However, the Cochlear case raises the question of whether it should be possible for employees to retract a MSD if the majority of them wish to do so. This would allow parties to consider other bargaining options without the risks to the enterprise of industrial action and the costly theatre of a bargaining process that is going nowhere, and where neither an EA nor arbitration is by this point the desired end.

Instances of such protracted delays are rare, and intervention by the FWC to force a vote to assess whether employees stand by their majority support determination could be open to strategic game playing by an employer that would undermine enterprise bargaining. Nor would industrial action really be a genuine concern if the majority of employees (by now) were uninterested in bargaining. That leaves the costly theatre of bargaining — again, a regrettable but relatively rare event. Given the relative rarity, the Productivity Commission is sceptical about the case for more FWC control. Bargaining should be about the two parties. Other options for agreement making — such as the Productivity Commission’s recommendation for enterprise contracts (chapter 23) — are available to the parties (as indeed has occurred with Cochlear) if bargaining proves to be ineffective.

Is pattern bargaining a problem?

Pattern bargaining is the practice of a bargaining representative seeking common terms in agreements across two or more different enterprises. The FW Act does not contain a blanket prohibition on pattern bargaining. However, a party that is engaged in pattern bargaining is generally not permitted to undertake protected industrial action, unless the party can establish they are ‘genuinely trying to reach agreement’.

During its Public Infrastructure inquiry (PC 2014c), the Productivity Commission found pattern bargaining to be rife in Australia’s construction industry, as did the Australian Chamber of Commerce and Industry (ACCI) in its submission to this inquiry:

The Construction Forestry Energy and Mining Union (CFMEU) has promoted common terms that exist within the agreements it negotiates, stating that for the period 2009–2011 over 90% of its enterprise agreements are identical, with a small number containing either higher or lower benefits, depending on the sector/trade. This is not only indicative of strong evidence of a pattern bargaining approach in the construction industry but also demonstrates the bargaining strength of the union in negotiations relative to the employers with whom it is bargaining. (sub. 161, p. 95)

Pattern bargaining is problematic where it is imposed by a party with excessive leverage. If pursued on a mutually convenient basis by employer and union, it can also be seen as a form of anti-competitive conduct. Moreover, as also noted by some participants, pattern bargaining can conflict with the WR system’s goal to develop agreements that reflect the circumstances of the enterprise and its employees (Housing Industry Association, sub. 169).

Some inquiry participants called for a complete prohibition on pattern bargaining (National Farmers' Federation, sub. DR302; Master Electricians Australia, sub. DR304; ACCI, sub. DR330; Australian Industry Group (Ai Group), sub. DR346).

However, a complete ban on pattern agreements would not be a desirable response. In some circumstances pattern agreements may not be disadvantageous or coercive, and may be desirable for both parties:

- Pattern bargaining may reduce the costs of negotiating EAs and may, as some employer groups have argued, reduce project risk if they take the form of identical agreements forged by a head contractor and subcontractors on a major project (Ai Group 2014a, p. 15). It is notable that in New Zealand, a country that has generally embraced a relatively light handed industrial relations regime, multi-enterprise collective agreements are relatively commonplace.
- Template agreements may also provide guidance and lower the costs of developing EAs for smaller enterprises, and may sometimes be preferred over awards or individual arrangements, as noted by the Shop, Distributive and Allied Employees' Association (sub. 175) the Australian National Retailers Association (sub. 216), and the Australian Newsagents Federation (sub. DR301). Indeed, the Productivity Commission has explored the adoption of enterprise contracts as a new form of award variation, especially for smaller enterprises that find EAs too costly to negotiate (chapter 23). Enterprises could form their own bespoke award variations, but templates may also be available that might make enterprise contracts easier to develop. Use of these templates would likely lead to some common features across agreements.
- For practical purposes, something like a template of success is likely to emerge from multiple EA rounds across similar firms, over time.

Thus it is not, per se, the presence of common features across bargaining agreements that is problematic, but the extent to which those common outcomes reflect the excessive power of one party over another, and an unwillingness to allow negotiation of some different set of conditions. As noted by Teys Australia:

The difficulty it seems lies not in preventing pattern bargaining altogether, because indeed some employers, employer bodies and Unions actually embrace it, but in any coercion of employers to submit to it. (sub. DR307, p. 7)

Ideally, the current prohibition on protected industrial action where a party is engaged in pattern bargaining should address concerns about the use of excessive leverage to impose pattern agreements on employers. Some participants argued that the existing legislation adequately addresses pattern bargaining (Leading Age Services Australia and Aged & Community Services Australia, sub. DR328).

However, in practice the current restriction on industrial action may be of limited effect due to the narrowness of the definition of pattern bargaining. Under the FW Act, a course of conduct does not amount to pattern bargaining so long as the bargaining representative is 'genuinely trying to reach an agreement' by, for example, demonstrating a preparedness

to bargain by taking into account the individual circumstances of that employer. Indeed, Forsyth et al. (2010, p. 146) have noted that negotiating parties would need to be seeking identical (rather than merely similar) terms across two or more employers to fall foul of the existing prohibition. In the case law, ‘even if the cumulative arithmetic of the increases ended up the same’, the preparedness by a union to negotiate different wage outcomes for different employers is sufficient to protect the union from a claim of pattern bargaining.³⁷ As a result, some have argued that unions can still advance pattern agreements with the threat of industrial action by carefully constructing their claims to eschew the allegation of pattern bargaining.

Given the shortcomings of the existing definition, some participants argued pattern bargaining should be redefined in the FW Act. For example, AMMA (sub. DR322, p. 56) suggested that the definition of pattern bargaining ‘... not require the seeking of “common terms” but rather seeking terms that are “substantially similar”’.

Ai Group suggested more substantially redefining a pattern agreement as an agreement that:

... is published, distributed, promoted, pursued or agreed to by an industrial association (as defined in the FW Act), or related entity or agent of the industrial association, which is intended to apply to all or a substantial proportion of the employers operating in an industry sector. An ‘industry sector pattern agreement’ does not include published drafting tips and guidelines which do not contain wage rates, wage increases or other substantive conditions of employment. (Ai Group, sub. DR346, p. 42)

Some employer groups suggested that the FWC should be required to be satisfied that a party is not engaged in pattern bargaining before granting a protected action ballot order (Master Builders Australia (MBA), sub. DR290; Ai Group, sub. DR346; South Australian Wine Industry Association and the Winemakers’ Federation of Australia (SAWIA and the WFA), sub. DR352). However, in the Productivity Commission’s view, this proposal would likely add additional complications and delay when employees seek a protected action ballot order — a process that is already complex and open to legal disputes, as noted in chapter 27. It would require the FWC to carry out an assessment of whether pattern bargaining is occurring whenever a protected action ballot order is sought, even in sectors where pattern bargaining is uncommon or unlikely. The existing provisions are preferable as they allow an employer to seek an injunction against industrial action where pattern bargaining arises, without imposing a disproportionate blanket burden on the protected action ballot process (s. 422).

Others have argued that the ‘genuinely trying to reach agreement’ exemption against pattern bargaining be removed (MBA, sub. DR290; Housing Industry Association, sub. DR319; AMMA, sub. DR322). However, without an exemption for those who are ‘genuinely trying to reach agreement’, the existing definition of pattern bargaining under

³⁷ *Farstad Shipping (Indian Pacific) Pty Ltd v Maritime Union of Australia* (2014) FWC 8130.

the FW Act (and the alternative definitions proposed by employers outlined above) would be too broad. This may unduly restrict the use of protected industrial action in sectors where agreements are very similar or identical across employers — even where employee representatives are not deliberately pursuing pattern agreements, but rather bargaining at an established market rate. As noted by Creighton and Stewart:

It is simply not plausible to suggest that unions will not, or should not, seek common terms and conditions in particular industries or parts of industries, or that they will not do so by reference to some notion of the ‘going rate’ for the industry or its part. (2010, p. 777)

This highlights the difficulty of discriminating between pattern agreements where the negotiations are genuine and those that are imposed through excessive leverage.

Ideally, the key test for pattern bargaining would be one that includes an examination of the competitive circumstances of the industry and the relative leverage of each bargaining party. For example, the Australian Shipowners Association (sub. 206) suggested that the FWC be required to look to the character of a union’s conduct beyond the claims advanced on paper. If an industry exhibits evidence of low barriers to entry, and perhaps other features of a competitive market, the existence *in negotiations* of very similar proposals *from either side* is unlikely to represent the adverse aspect of pattern bargaining that should concern public policy.

The Productivity Commission queried in the draft report whether a nuanced approach to pattern bargaining could prevent it being imposed through excessive leverage or in a way that is likely to be anticompetitive, while allowing it in cases of more genuine consent. Reactions from inquiry participants to this query were mixed. Some were sceptical — for example, the Housing Industry Association described the proposition as ‘ill-conceived’ (sub. DR319, p. 13). Others were more optimistic. Teys Australia (sub. DR307) suggested that the ACCC could have standing to seek cease and desist orders via the FWC where the ACCC is satisfied that parties are engaged in anti-competitive pattern bargaining. Similarly, MBA (sub. DR290) noted that the anticompetitive nature of pattern agreements has previously generated inquiry by the ACCC.

Ultimately, the Productivity Commission is not convinced that changes are required to address pattern bargaining directly. However, persistent evidence of successful pattern bargaining may be suggestive of excessive market power. Thus the ACCC should have further regard to pattern bargaining issues when considering the competitive circumstances of an industry in relation to other issues, such as mergers or secondary boycotts. But concerns about the adverse use of pattern bargaining in some sectors may be addressed by other recommendations in this report. These include changes to greenfields agreement negotiations (chapter 21), prohibition of contractor ‘jump up’ clauses (chapter 25) and recommendations relating to the industrial action provisions in the FW Act (chapter 27). These recommendations would, at least in part, reduce the excessive leverage that can be used by some parties to press claims for pattern agreements during bargaining.

Are the rules on agreement content justified?

While enterprise bargaining is generally predicated on parties having the flexibility to negotiate and mutually agree upon terms in an EA for their own benefit, there is nonetheless a public interest at stake in the agreement process. EAs are recognised and enforced by the government, and the parties negotiating EAs are afforded unique rights, such as collective bargaining and industrial action, that would generally be considered contrary to public policy principles regarding competition (chapter 31). As such, there are good public policy reasons for placing some restrictions on the types of content that can be included in EAs, including:

- preventing EA terms that are discriminatory or harmful to individuals
- preventing terms that may exacerbate any existing bargaining imbalances (for example, terms that affect access to industrial action, unfair dismissal, right of entry or bargaining rights)
- limiting anticompetitive practices being enshrined in EAs
- limiting self-interested behaviour by bargaining representatives at the expense of those they represent (for example, by including a ‘bargaining services fee’ in an EA).

The FW Act places limits on what terms and conditions can be contained, or enforced, within an EA. This includes: defining ‘permitted matters’, which are legally enforceable and can be supported by industrial action during bargaining; ‘unlawful terms’ which explicitly cannot be included in EAs; and mandatory terms that must be included in EAs.

Permitted matters

The range of matters that should be permitted in an EA is an area of strong contention.

As noted previously, the FW Act currently defines permitted matters as including matters pertaining to the relationship between the employer and employees, matters pertaining to the relationship between the employer and employee organisations, deductions from wages for any purpose authorised by an employee, and how the agreement will operate.

This contrasts with the previous *Workplace Relations Act 1996* (Cth), which limited agreements to matters pertaining to the relationship between an employer and employees. This was clarified by the High Court’s *Electrolux* decision (box 20.6), which ruled that EAs could not include matters pertaining to the employer/union relationship.

Box 20.6 **The *Electrolux* decision**

In 2001, Electrolux and a number of unions had commenced bargaining for a new enterprise agreement (EA). After a breakdown in negotiations, the unions provided notice of their intent to undertake industrial action.

Electrolux mounted a legal challenge against the industrial action. The unions' draft EA proposal had contained a term requiring all (including non-union) employees to pay a \$500 per annum 'bargaining agent's fee' to the union. Electrolux argued that as part of the unions' claim, this term did not pertain to the relationship between the employer and employees, and therefore the action was unprotected.

The High Court found that under the *Workplace Relations Act 1996* (Cth), an EA could not be certified if it contained matters that did not pertain to the relationship between an employer and employees.

The High Court also found that industrial action taken in support of claims including matters not pertaining to the relationship between an employer and its employees, could not be protected industrial action.

Subsequent to *Electrolux*, numerous decisions not to approve EAs were appealed to the Full Bench of the then Australian Industrial Relations Commission to clarify whether or not particular EA terms were permitted. These appeals clarified whether or not a range of EA terms were deemed to fall within the employment relationship defined in *Electrolux*. For example, the *Schefenacker* case established that permissible EA terms included:

- salary packaging
- employees of labour hire agencies
- shop steward training leave
- union right of entry
- union officials and shop stewards
- recognition of worksite representatives

Matters not considered to involve the employment relationship included:

- payroll deductions
- union right of entry for matters not related to members' actual employment, for example campaigning for union elections or raising awareness of current political issues.

Sources: *Electrolux Home Products Pty Ltd v Australian Workers' Union & Ors* (2004) HCA 40; *Schefenacker* 'three agreements' decision (2005) AIRC PR956575.

Employee groups have tended to argue for a more expansive range of matters. For example, the ACTU (2012c, p. 57) has previously argued that the FW Act should — as encouraged by the International Labour Organization (ILO) — allow EAs to be made on all matters affecting employees' working lives, including job security, and social and economic matters that have a direct impact on workers in general.

The Maritime Union of Australia (sub. 121) also argued that the existing rules regarding permitted matters place an unnecessary and severe restriction on the capacity of employees to secure outcomes beyond the employment relationship. They argued that bargaining

should provide employees with the opportunity to improve the working and community lives of themselves and wider society, for example by allowing EAs to:

- institute boycotts and bans against particular foreign regimes
- influence the materials and external labour standards utilised by an employer when they purchase from other suppliers (for example, to reflect employees' views regarding environmental concerns or the use of child labour)
- require non-union employees to pay bargaining fees to unions.

On the other hand, employers have generally sought to reduce the range of matters over which bargaining can occur. There was a consensus among major employer groups that agreement content needed to be restricted to matters related to the relationship between the employer and employees, though there were some differing views on how this restriction should be enacted (Ai Group, ACCI, BCA and AMMA, sub. DR370).

In particular, numerous employer participants³⁸ called for a return to a permitted matters formula consistent with the *Electrolux* decision, which would remove the union/employer relationship from the range of permitted matters. Some also called for a more extensive and prescriptive list of unlawful content that could not be included in an EA (AMMA, sub. 96; Ai Group, sub. 172; SAWIA and the WFA, sub. 215).

The BCA proposed arguably the most radical approach to restricting agreement content. The BCA argued that a reliance on the common law to interpret the matters pertaining rule 'fails to give all parties the certainty they need' (sub. DR337, p. 50). Instead, the BCA proposed using legislation to define a prescriptive 'whitelist' of allowable EA terms. The BCA also criticised the use of a list of prohibited content, arguing:

The challenge with creating a list of prohibited matters is that, in the first instance, it requires the policy designer or parliamentary drafter to envisage all possible scenarios that should be excluded. This is improbable on two fronts. The first is that no single person has sufficient experience across the industries that operate in Australia, and the different sizes of businesses, to predict all circumstances where clauses could be proposed that are not relevant to the employment relationship. The second barrier is that we do not know what the workplaces of the future will be, so we cannot predict what clauses could emerge that should be excluded from agreements. (BCA, sub. DR337, p. 50)

However, the BCA's criticisms of a prescriptive list of unlawful content apply equally to a 'whitelist' of allowable content. It is impossible to envisage all possible clauses that may be relevant to the employment relationship in the future, and thus should be allowed for

³⁸ Including Bluescope Steel, sub. 58; AMMA, sub. 96; Manufacturing Australia, sub. 126; Minerals Council of Australia, sub. 129; Asciano, sub. 138; National Electrical and Communications Association, sub. 159; Teys Australia and NH Foods, sub. 179; Chamber of Minerals and Energy of Western Australia, sub. 199; Australian Shipowners Association, sub. 206; Australian Retailers Association, sub. 217; National farmers Federation, sub. 223; MBA, sub. DR290; Toll, sub. DR312; VECCI, sub. DR339; Ai Group, sub. DR346; SAWIA and WFA, sub. DR352.

inclusion in agreements. There is a tradeoff between the certainty of legislative prescription, and the flexibility of allowing precedent to build and develop with reference to context via the common law. For this very reason, the Productivity Commission considers a ‘matters pertaining’ approach to permitted agreement content to be preferable to a prescriptive approach.

Relevance of the union–employer relationship in EAs

Adopting a ‘matters pertaining’ approach to agreement content begs the question as to what types of relationships the terms in an EA should be permitted to pertain to. It is self-evident that the employee–employer relationship should be a permitted matter in EAs. However, the relevance of the union–employer relationship is less clear-cut.

The union–employer relationship was introduced as a permitted matter under the FW Act. The primary justification for this, according to the FW Act’s Explanatory Memorandum, was to:

... cut regulation so that matters that historically have been included in agreements which encompass the relationship between an employer and a union but were prohibited under Work Choices can be included where agreed to, for example, union consultation clauses or leave to attend union training. (Australian Government 2008b, p. xxxv)

However, it is doubtful that an extension of permitted matters to the union/employer relationship was required to make the examples named above permissible under the FW Act. For example, as noted in box 20.6, union training leave had already been deemed in the case law to fall within the scope of the employee–employer relationship. But WorkChoices contained an explicit ban on union training leave as part of its prescriptive list of prohibited content. Repealing this explicit prohibition would appear to have sufficiently achieved this objective, without extending the definition of permitted matters beyond the employment relationship.

In principle, the primary role of unions is to act as representatives for its members. Unions do not participate directly in the exchange of labour for wages, nor do they have a direct stake in the viability or profitability of a business as employees and employers do. And even though unions may play a role in negotiating an EA, the agreement is ultimately struck between the employer who proposes it and the employees who vote on it. As such, it does not follow that a union’s relationship with an employer should be enshrined in an industrial instrument (other than where it also involves the nexus of employees and employers).

A further concern is the potential for conflicts of interest to arise where a union can negotiate for EA terms that relate to its own relationship with the employer, rather than the employees who it is representing. This can give rise to principal–agent problems, where a union, despite notionally acting on behalf of employees, may prioritise obtaining favourable terms that relate to the union–employer relationship over the employee–employer relationship (such as pay and conditions). Some employer participants suggested

that union-related agreement terms tend to dominate bargaining discussions and prove the sticking point in negotiations, with employee interests falling by the wayside (Chamber of Commerce and Industry of Western Australia, sub. 134; Australian Retailers Association, sub. 217).

These problems are likely to be exacerbated by the default bargaining status of unions (a status that the Productivity Commission does not recommend removing — see below), as default status gives the union the capacity to represent employees that may be uninformed or disinterested in the bargaining process (and therefore unlikely to hold the union to account for any self-interested behaviour that may occur).

However, it is worth noting that removal of the union–employer relationship from the range of permitted matters would not eliminate principal–agent problems entirely in bargaining. As mentioned above, many EA terms in which a union may have a direct interest can still fall within the scope of the employee–employer relationship. Further, legislative attempts to constrain EA content will not affect the capacity for unions and employers to concurrently enter into formal or informal side deals (an issue that is discussed further below).

On balance, the Productivity Commission recommends that the union–employer relationship should be removed from the range of permitted matters. Such a change would not preclude all EA terms that involve unions (such as union training leave), but rather preclude those that do not involve the employee–employer relationship (for example, a clause requiring the employer to allot time for union delegates to meet with new employees for recruitment purposes³⁹).

Inclusion of terms that relate to non-permitted matters

A related concern is the inclusion of non-permitted matters in EAs. The description of some agreement terms as ‘non-permitted’ is somewhat of a misnomer. The FWC can still approve an EA that contains non-permitted matters (as opposed to unlawful terms), but if a term relates to a non-permitted (but lawful) matter, it has no legal effect (s. 253).

The merits of allowing terms recognised as unrelated to the employment relationship and with no legal enforceability to be present in an EA are debatable. Numerous employer participants called for any EA terms that do not relate to permitted matters to be excluded from an agreement before it can be approved.

Prior to the FW Act, the *Electrolux* ruling confirmed that an EA could not be certified if it contained matters not related to the employment relationship. The rationale for changing this rule in the FW Act, according to its Explanatory Memorandum, was that requiring the FWC to scrutinise every EA to ensure that all its terms were about permitted matters would

³⁹ *KL Ballantyne and National Union of Workers (Laverton Site) Agreement 2004*, (2004) PR952656.

‘unduly delay the agreement approval process’ (Australian Government 2008b, p. 107). Stewart and Riley (2007) have previously noted that restrictions on agreement content under WorkChoices caused uncertainty and delays, due to variable interpretations of content rules such as the ‘matters pertaining’ requirement.

In the draft report, the Productivity Commission queried whether restricting EA content to permitted matters would lead to increased uncertainty and litigation during EA approvals. In response, some employer groups suggested that this would not be an arduous or complex task, arguing that the *Electrolux* decision and subsequent case law provided more sufficient clarity and that the FWC had substantial experience in determining what EA terms fall within the scope of the employee–employer relationship (MBA, sub. DR290; VECCI, sub. DR339; Ai Group, sub. DR346; Chamber of Commerce and Industry of Western Australia, sub. DR323). They also argued that the primary confusion around permitted matters arose as a result of the FW Act’s inclusion of the union/employer relationship, rather than from the prior case law.

In its submission to the Australian Senate’s inquiry into the Fair Work Bill 2008, the then Australian Government Department of Education, Employment and Workplace Relations noted that much of the ambiguity around the employment relationship was resolved by *Electrolux* and subsequent cases:

The concept of ‘matters pertaining’ has a long history in Australian workplace relations law. It is a well-recognised concept, however, one where there has been some ambiguity at the margins as to what might fall within it. Much of this ambiguity was resolved after the High Court’s decision in *Electrolux Home Products Pty Limited v The Australian Workers’ Union and others* (2004) 221 CLR 309 and subsequent decisions of the AIRC, which considered a large range of these matters and whether they pertained to the employment relationship. (DEEWR 2009, p. 25)

While allowing non-permitted matters to be included in EAs may help avoid delays at the approval stage, it can still lead to considerable uncertainty and potentially litigation for parties. For example, because industrial action can only be taken in support of claims about permitted matters, the inclusion of non-permitted matters in an EA can cause uncertainty about the rights of parties to take industrial action during bargaining (Ai Group, sub. 172).

Further, while non-permitted matters are legally unenforceable in theory, in practice they may still hold sway and be applied until such time as one or other party challenges it or refuses to abide by it. Indeed, the fact that parties still bother to bargain over the inclusion of such terms in an agreement indicates that non-permitted terms can still hold value, even if only symbolic, to a party. The legal inefficacy of a term is only exposed if the parties become aware of a query over the provision and if they choose to challenge it in court.

Should the relationship deteriorate during the term of an EA as a consequence of non-observance of an invalid provision, the consequence come bargaining time is likely to be negative. Thus a non-permitted term in an agreement can still increase the potential for disputes — industrial or legal — to arise between the parties. For these reasons, non-permitted matters should be precluded from being enshrined in EAs.

Side deals

A concern that arises from additional restrictions in agreement content is the possible emergence of ‘side deals’ between employers and unions containing terms that have been legislatively excluded from an EA. Stewart and Riley (2007) have noted that restrictions on agreement content following *Electrolux* and its related rulings led to the proliferation of side deals. This was exacerbated by the extensive prohibited content rules under WorkChoices, which they argue made the seeking of a unregistered side deal ‘almost compulsory for many unions’.

There are a number of factors that need to be weighed up when considering whether it is preferable for some parties to enshrine terms in a side deal or for those terms to be permitted in EAs.

On the one hand, parties technically cannot use protected industrial action to agitate for terms in a side deal. However, this becomes more complicated when a side deal is being sought concurrently with bargaining for an EA. A union may notionally be taking industrial action in support of their permitted bargaining claims, but the true sticking point in negotiations may be the content of the side deal. A previous ruling⁴⁰ by the Full Bench of the AIRC established that a party is not genuinely trying to reach agreement if they are concurrently pursuing a side deal containing prohibited content. However, Stewart and Riley (2007) have noted that this can be easily circumvented by a union formally declaring that it is no longer pursuing the side deal in conjunction with bargaining, obtaining access to protected industrial action, and then resuming its pursuit of the side deal at a later date.

A related issue is that it may be more difficult for parties to legally enforce a side deal. AMMA suggested that this was ‘entirely a matter for the parties’ (sub. 96, p. 144), while the ACTU (sub. 167) suggested that parties must rely on good will to honour a side deal, and that it would be costly and uncertain to legally enforce a common law deed.

However, as noted previously for non-permitted matters, an agreement that is legally unenforceable can still hold sway over parties in a less formal sense, especially where one party has substantially greater bargaining power. A similar observation was made by Stewart and Riley:

In practical terms, unions that are able to secure a written undertaking on matters of prohibited content will usually be satisfied that the commitment will be observed, whatever the strict legalities. In the world of industrial relations, managers do not lightly go back on explicit promises. (2007, p. 912)

A final concern is that side deals may undermine the integrity and transparency of the bargaining process. When terms are enshrined in an EA, employees are able to view the terms and decide whether they are satisfied with an EAs content before voting whether to approve. However, terms that are enshrined in a side deal outside of an EA (but that

⁴⁰ *United Firefighters’ Union of Australia v Country Fire Authority* (2006) 158 IR 120.

nonetheless may have influenced the bargaining exchange) may not be as transparently scrutinised. This may exacerbate principal–agent problems between unions and employees.

For example, to secure agreement with an employer on a term that prescribes particular benefits to a union, a union presumably would have to expend some of its ‘bargaining coin’ that otherwise could have been used to pursue a different term — there is inevitably an opportunity cost. Were these terms to be proposed within an EA, employees would have the capacity to view these terms, and question whether they could be traded off for another benefit, for example a wage rise. Such a tradeoff may not be as apparent if the employees are unaware of a side deal between the union and employer.

Ultimately, the Productivity Commission’s assessment is that the possible emergence of side deals is not a sufficient reason to preclude changes to agreement content. In many ways, a side deal that is legally unenforceable and unable to be pressed for using industrial action is analogous to the current status of non-permitted matters in EAs under the FW Act. While the displacement of such non-permitted matters from EAs to side deals may lead to a loss of transparency, this is ultimately the responsibility and fault of the parties. If the employer and employee representatives are so minded, there is little the regulatory structure can do to help prevent it. However, the WR framework should not facilitate it, and rather should encourage parties to focus more directly on the matters pertaining to the employment relationship.

RECOMMENDATION 20.2

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

- remove matters pertaining to the relationship between an 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.

Unlawful terms

Restricting EAs to only include matters pertaining to the relationship between employers and employees places the role of interpretation in the hands of the FWC and the courts. This definition may thus evolve over time and circumstance to reflect changes in the nature of the employment relationship and patterns of work. However, this raises the question as to whether there should be particular agreement terms that should be explicitly prohibited from agreements for public policy reasons, regardless not whether they fall within the ‘matters pertaining’ definition.

As discussed above, terms that are already unlawful include terms relating to issues such as discrimination, the ability to ‘opt out’ of an agreement, requirements to pay bargaining service fees, terms that breach the FW Act’s general protections provisions, attempts to

modify rights to unfair dismissal protection or protected industrial action, and terms that provide an entitlement to right of entry that are inconsistent with the FW Act's right of entry provisions.

Additional matters that employer participants argued should be stipulated as unlawful included:

- clauses that limit the capacity of employers to use contractors, labour hire workers, foreign workers, or non-union workers (AMMA, sub. 96; Manufacturing Australia, sub. 126; National Electrical and Communications Association, sub. 159; ACCI, sub. 161; Ai Group, sub. 172; Brickworks, sub. 207; Australian Petroleum Production and Exploration Association, sub. 209)
- trade union training leave, time off and pay for attendance at union meetings (AMMA, sub. 96; Qube Ports, sub. 123; Brickworks, sub. 207; SAWIA and the WFA, sub. 215)
- clauses encouraging membership of a union (AMMA, sub. 96; Ai Group, sub. 172; SAWIA and the WFA, sub. 215)
- terms requiring the provision of information to unions about employees, contractors or labour hire workers (AMMA, sub. 96; Ai Group, sub. 172)
- terms providing union delegates with access to particular amenities onsite — for example, a phone, computer or photocopier (AMMA, sub. 96; Brickworks, sub. 207)
- terms that place restrictions on what types of suppliers an employer can purchase from — for example, a term which required an employer to only purchase Australian-made products (Ai Group, sub. 172)
- terms that require products or services to be acquired from particular suppliers, and that provide a party to the agreement or a bargaining representative a collateral benefit (Asciano, sub. 138; Ai Group, sub. 172)

Some of these terms may be either reduced in their scope, or precluded from EAs altogether, by the Productivity Commission's other recommendations as well as other restrictions within the FW Act. For example, clauses that limit the capacity of employers to use alternative forms of labour (such as contractors) are addressed further below and in chapter 25. A clause encouraging union membership, or a clause requiring an employer to purchase Australian made materials would be precluded by changes to permitted agreement content under Recommendation 20.2. The permissibility of some other terms — for example, providing shop stewards with access to particular amenities — may depend on context, and the FWC's interpretation of whether the exact wording of a term sufficiently pertains to the relationship between the employer and employees.

However, whether particular terms outlined above — for example, trade union training leave — should also be explicitly deemed as unlawful terms is debateable. Without a strong public policy justification for doing so, prescriptive intervention by governments in banning particular EA terms is a recipe for regulatory instability with the swinging of the workplace relations pendulum. This was illustrated during the period of 2006 to 2009, with

a lengthy prescriptive list being introduced under WorkChoices, and most of these items being removed with the introduction of the FW Act.

It may be argued that more explicit prohibition of terms such as those listed above is justified by imbalances in bargaining power, which may allow unions to force employers into agreeing to terms that they find objectionable. However, there are two counterpoints to this.

First, classifying a particular type of EA term as unlawful precludes it from inclusion in all EAs, not just those where an imbalance of bargaining power may exist. This means that policymakers risk excluding EA terms that may be mutually beneficial to parties. For example, in a workplace where a union plays a central role in dispute resolution between employers and employees, it may be in the interests of both parties for union delegates to have access to dispute resolution training. While parties could still reach agreement informally to provide such access, they may prefer the certainty, transparency and enforceability of an EA term to avoid misunderstandings or disputes if an informal arrangement goes sour.

Second, in circumstances where an employer is faced with substantially less bargaining power than the union, a black letter prohibition of a term from an EA will not afford them much protection. As discussed above, parties can circumvent restrictions on agreement content through the use of side deals. While such deals may be legally unenforceable, it is likely that a particularly strong union would still be able to ensure that an employer complies with a side deal containing unlawful terms. As noted previously, if parties are inclined (or forced) to enter into side deals, there is little the WR framework can do to prevent it.

When a particular EA term has been deemed to fall within the employee–employer relationship as determined by the case law, policymakers should be hesitant to prescriptively prohibit a term purely because it is costly to employers. Strong public policy arguments for prohibition should be required, and the Productivity Commission is not convinced that a strong case for prohibition has been made for many of the terms put forward by participants.

However, two particular types of EA terms stand out as requiring greater attention: terms that regulate labour hire and contractors, and terms that stipulate that employers must purchase or contribute to funds or products from which bargaining representatives derive a collateral benefit.

Terms that regulate labour hire and contractors

Terms that purport to regulate the engagement of labour hire and contractors are an especially contentious matter.

Most employer groups viewed such terms as unduly restricting their ability to manage and allocate resources, and argued that such terms should not be permitted (ACCI, sub. 161; Australian Petroleum Production and Exploration Association, sub. 209; Manufacturing Australia, sub. 126; Qantas, sub. 116; VECI, sub. 79; SAWIA and the WFA, sub. 215). The BCA (2012, p. 47) has said that such terms inevitably limit the capacity of employers to respond to changing market conditions or to make best use of the skills of their employees. Qantas (sub. 116) suggested that unions were using such terms to fetter business strategy and to obstruct change, negatively affecting productivity.

Some employee groups have argued that employee's bargaining power and the integrity of collective agreements can be undermined by an employer's ability to undercut the conditions by using labour hire or contractors. These concerns are valid to the extent that the work performed by employees and contractors is substitutable.

Labour hire and subcontracting is rare in most industries. Moreover, restrictions on labour hire and subcontractors can be likened to restrictions on the choices of suppliers to a business more generally. For example, few would accept that it would be reasonable for an EA to include provisions that prohibit the use of imported inputs produced in another state or territory, despite this weakening the capacity of employees to bargain. There are grounds for changes to the FW Act to limit the capacity of agreements to regulate the use of contractors and labour hire (which are in any case, in spirit, contrary to the *Competition and Consumer Act 2010* (Cth)). This is discussed further in chapter 25 on alternative forms of employment.

Terms that stipulate contributions to funds or products from which bargaining representatives derive benefit

Some EAs contain provisions that require parties to purchase products (such as income protection insurance or training services) or contribute to particular funds (such as redundancy funds) in which bargaining representatives, particularly unions, have a direct pecuniary interest. There are several concerns that arise from these terms.

First, such terms can present an actual or perceived conflict of interest for bargaining representatives. This was also noted by the Royal Commission into Trade Union Governance and Corruption (2015), which is currently investigating this issue, and by some participants in this inquiry (AMMA, sub. 96, Asciano, sub. 138). These conflicts of interest can undermine the incentive for a bargaining representative to act in the best interests of employees during negotiations (and are surely at risk of appearing to do so). For example, a union may expend some of its 'bargaining coin' on securing a deal on a particular product or fund, from which it is (or appears to be) the primary beneficiary, rather than securing higher employee pay or conditions.

Second, such terms are contrary to the spirit of competition policy — they are analogous to third line forcing. While the WR framework is generally exempted from competition policy for public policy reasons (chapter 31), the influence of this exemption (and the

corresponding market power that is granted to those who are engaged in collective bargaining) should not extend into restrictions on competition in product markets such as insurance and training services. Both employees and employers may benefit from exposing these types of products to competition from other providers (for example, by receiving a lower cost or higher quality insurance product or training service than that provided by the vendor stipulated in an EA).

Prima facie, there are grounds for being wary about deals which provide direct pecuniary benefits to employee representatives. Some may be legitimate but others are likely to represent gains to representatives at the expense of employees. However, the Productivity Commission has not been presented with sufficient evidence during this inquiry to consider this issue in depth and consult with participants accordingly about the potential merits and risks of prohibition. The Royal Commission into Trade Union Governance and Corruption (2015) has floated a number of possible solutions in its discussion paper on options for law reform, including prescribing these types of EA terms as unlawful under s. 194 of the FW Act. This option may warrant future consideration, but the Productivity Commission has not reached a conclusive view in the course of this inquiry.

Mandatory terms

Consultation clauses

Some employer groups argued that mandatory consultation clauses in EAs interfere with managerial prerogative and flexibility. One criticism of mandatory consultation terms was that they can be used as a starting point for further demands for consultation. As noted by the Australasian Railway Association:

... the requirement to include a term about consultation on roster changes provides leverage for employee bargaining representatives to negotiate terms that further entrench the right of employees and unions to agree on any changes to rosters before they are implemented. (sub. 155, p. 28)

To address this, AMMA (sub. 96) suggested that if mandatory terms are to be included in agreements, then the use of the model term should be required, with no scope to depart from it — noting that model clauses should be crafted to be fair to all parties.

Some studies suggest that workplaces that include employees in change processes perform better (Farmakis-Gamboni et al. 2014, p. 20). In many European countries, there are statutory provisions for consultation and it is common for board level employee representation on company boards (though their determinative power varies). There are doubts about its value in some countries, but it appears more favourably regarded in

Germany, though even here the empirical evidence is mixed.⁴¹ However, Germany has a distinctive industrial relations system, and it is doubtful that its model would translate well to Australia (any more than those from the United States would do so).

Arguably, if there were clear benefits from cooperation, good business managers would have incentives to promote it. Equally, poor managers may not. Mandatory requirements may also reduce the goodwill from voluntary arrangements. As with a number of other regulated aspects of the WR framework, what is in principle desirable is at risk due to process and an emphasis of form over substance — for example, where the apparent threat of a ‘failure to consult’ becomes an industrial lever rather than a desirable part of a non-adversarial environment:

The requirement for consultation also provides an opportunity for any proposed changes to agreements to be stalled by the invoking of dispute resolution procedures if employees or their representatives take the view that consultation processes have not been strictly followed. (Australasian Railway Association, sub. 155, p. 28)

However, consultation does not require acquiescence. Moreover, removing the right to be consulted will not alter the industrial climate that makes consultation into a form of leverage. The response of unions or employees is in substantial part likely to be reflective of the overall working relationship, and will persist (possibly deteriorate) even if not consulted. If relationships are poor, for whatever reason, eliminating the obligation to consult will do nothing to facilitate change in workplaces. If dispute resolution is mechanism for stalling, fixed limits to that step would seem advisable.

Flexibility terms

A flexibility term authorising the use of IFAs must also be included in all EAs. IFAs vary the effect of the EA, in a manner that suits the needs of the employee and their employer and leaves the employee better off overall compared with the terms of the EA (chapter 22). However, there is evidence that the range of matters over which an IFA can be made sometimes gets whittled down during the bargaining process, with many flexibility terms in EAs allowing less flexibility than the model flexibility term set out in the Fair Work Regulations 2009. The 2012 post-implementation review (McCallum, Moore and Edwards 2012) recommended that EAs only be allowed to supplement, rather than erode, the flexibilities provided by the model flexibility term, to encourage greater use of IFAs.

If the opportunity for workplace flexibility is of genuine interest to individuals and firms, as it appears to be in many instances on occasion, it seems perverse to create the opportunity but then allow a collective negotiation process to prevent its use. Adopting the reform proposed by the 2012 Review would reduce the extent to which bargaining can restrict the scope for IFAs.

⁴¹ For example, Fitzroy and Kraft (2005), Addison et al. (2013), Kriechel et al. (2014) and Feils et al (2014).

RECOMMENDATION 20.3

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.

More flexibility around duration of enterprise agreements

Currently, EAs must include a nominal expiry date that is not more than four years after the day on which the FWC approves the agreement. In the absence of a limit on agreement life, parties may be able to exploit short term disparities in bargaining power to lock in favourable terms for a very long period (perhaps decades). Excessive agreement durations could particularly undermine the bargaining power of employees since industrial action is not permitted during the life of an agreement.

There is a strong rationale for extending this maximum period to five years. As bargaining for an EA can be prolonged, the investment in achieving a bargain may currently be spread over too few years, as noted by United Voice (sub. DR354). For all parties to the agreement, a longer EA duration increases the returns both of the time and effort in negotiating an agreement, and provide more certainty about measures that enhance conditions, productivity and performance. Given that parties might both accede to longer EAs because they wish to lock in provisions that they believe advantage them, they should be able to agree to a longer nominal EA length of up to five years. This proposal was supported by numerous inquiry participants.⁴²

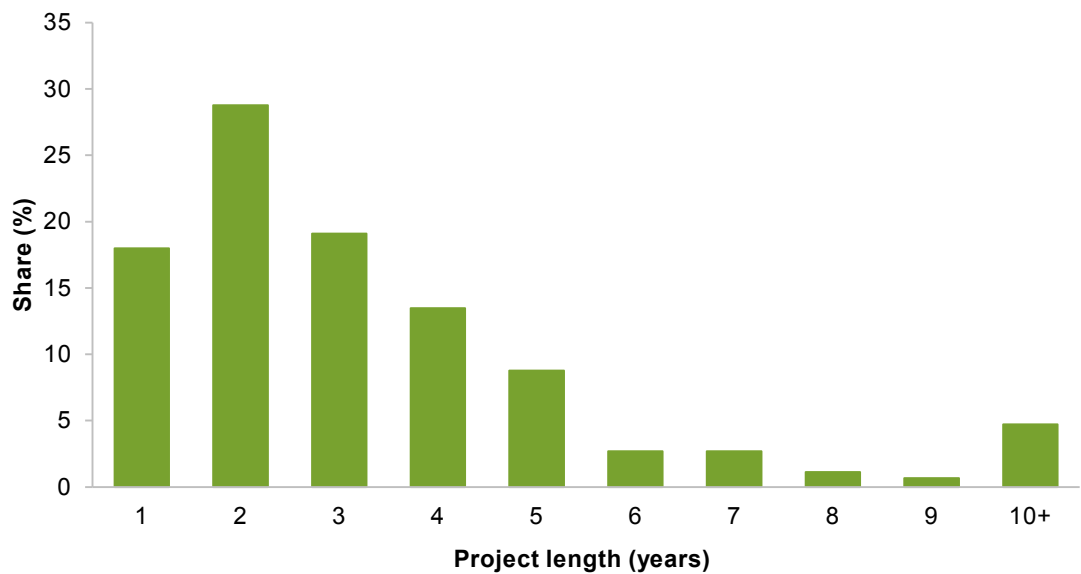
Second, greenfields agreements (chapter 21) are not intended to be enduring, but logically should survive for the duration of construction of a particular project. Any agreement with a life less than the expected duration of the project exposes the business to substantial risks. Delays in negotiating a greenfields agreement can lead to underutilised capital and may cause the contractor to incur a penalty for delay in the delivery of the project. This creates an imbalance in bargaining power. Even if employees do not actually use this leverage, the ex-ante risk of it raises investor risk and may add to project cost. Empirical evidence suggests that there is a preference for longer lifespans for greenfields agreements — roughly two thirds of current greenfields agreements are for a period greater than 3 years (appendix E). Productivity Commission analysis of construction project lengths

⁴² Including Qantas, sub. 116; MBA, sub. DR290; Ai Group, sub. DR346; Australian Newsagents' Federation, sub. DR301; National Farmers Federation, sub. DR302; Australian Hotels Association, sub. DR303; Master Electricians Australia, sub. DR304; AMMA, sub. DR322; Leading Age Services Australia and Aged & Community Services Australia, sub. DR328; ACCI, sub. DR330; BCA, sub. DR337; Chamber of Minerals and Energy of Western Australia, sub. DR349; SAWIA and WFA, sub. DR352; Minerals Council of Australia, sub. DR363; and United Voice, sub. DR354.

also suggests that extending the maximum nominal expiry date for all EAs to five years would capture the full length of an additional 9 per cent of construction projects (figure 20.4). Further, where an employer can demonstrate that a project will take longer than five years to complete the construction phase, there are clear grounds for the FWC to approve greenfields agreements with an expiry date that matches the construction project phase. This proposal was supported by numerous employer participants.⁴³

Figure 20.4 Distribution of construction project lives^a

Share of projects in sample



^a Based on start and projected end dates from a sample of 445 publicly and privately owned construction projects.

Source: Deloitte Access Economics Investment Monitor database, September 2013.

Some participants noted concerns that longer durations may lead to parties being forced to work under outdated or unsuitable EA terms as circumstances change (Master Electricians Australia, sub. DR304; Queensland Government, sub. DR338; National Disability Services, sub. DR325). However, parties in industries that are likely to face changing conditions in the near future are not compelled to agree to longer durations. Further, the Toyota decision clarifying that ‘no extra claims’ clauses cannot prevent mutually agreed variations to an enterprise agreement (box 20.3) has addressed some of the risk that extended EA lives might reduce the capacity of a business to adapt to adverse economic shocks. While some employers may find it difficult to convince employees of the need to

⁴³ Including Australian Petroleum Production and Exploration Association, sub. 209; Origin Energy, sub. 141; MBA, sub. DR290; Allens, sub. DR310; AMMA, sub. DR322; BCA, sub. DR337; Chamber of Minerals and Energy of Western Australia, sub. DR349; Minerals Council of Australia, sub. DR363

approve a variation (National Disability Services, sub. DR325), this does not necessitate a regulatory response.

For some EAs that have conditions close to the award level, there is a risk that longer agreement lives could lead to a gulf between award and EA conditions, as the BOOT is only applied at the time the agreement is approved. Conditions in the award could subsequently improve to be better than those in the agreement. However, it is worth noting that EAs that are close to award conditions are not the norm (appendix E). Moreover, there is no obligation on employees to agree to an EA, any more than there is an obligation for employers to have one. In part, negotiated arrangements are inevitably a reflection of the conditions of the market as seen at the time, and this is one of the risks in any negotiation. Where there is uncertainty, parties would be advised to use a shorter term.

Finally, were the maximum agreement period to be extended, the benefits are likely to accrue to a limited group of firms and employees who have a strong interest in stability. Agreements of less than five years duration would still remain common — almost 60 per cent of current agreements are less than three years duration despite being able to last up to four years (appendix E). Similarly, the data suggests that many greenfields agreements would continue to be less than five years duration. Even if not commonly used, there are grounds for permitting longer EAs where they are desired by the parties.

RECOMMENDATION 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.

Does enterprise bargaining promote productivity?

Some employer participants expressed concern that agreements do not give enough emphasis to productivity. While EAs can contain clauses that specify commitments to improve productivity in exchange for improvements in wages and conditions, these are not mandatory.

Data provided to the Productivity Commission suggest around one third of agreements include some specific productivity measures, while around half make general commitments (these are not mutually exclusive; a given agreement may include both). It is more common for agreements negotiated with unions to contain ‘commitment to productivity’ clauses (McCallum, Moore and Edwards 2012, p. 143). Case studies of

particular EAs suggest that the parties sometimes agree to quite concrete arrangements (Farmakis-Gamboni et al. 2014).

A study by Farmakis-Gamboni et al. (2014, p. 43) found that, by industry, EAs in the construction (64 per cent of agreements) and manufacturing (57 per cent) industries are most likely to contain a ‘commitment to improve productivity’ clause. Rental, hiring and real estate services (49 per cent) and construction (46 per cent) agreements are most likely to contain ‘specific productivity measures’ clauses.

The same study also found that there does not appear to be a directly observable association between ABS measures of productivity growth and productivity clauses in EAs among industries that have a high proportion of collective agreements (Farmakis-Gamboni et al. 2014, p. 43). This is consistent with the Productivity Commission’s findings in its inquiry into Public Infrastructure (PC 2014c).

Some participants suggested that the FWC should be required to consider the parties’ ability to achieve productivity benefits when approving any EA. The Australian Government is proposing to introduce rules that require discussion of productivity improvements as part of the bargaining process. The Fair Work Amendment (Bargaining Processes) Bill 2014 proposed that the FWC be required to be satisfied, in order to approve the agreement, that the parties to a proposed EA discussed productivity improvements at the workplace during negotiations.

Prima facie, a commitment to bargaining processes and/or agreements that promote productivity may appear sensible. The goal is that employees wishing to bargain for increases should show why they should get them, and that some sort of commitment to productivity improvement would be one basis for improved wage rises.

However, any *regulated* requirement suffers from several limitations:

- Its underlying premise is wrong. There may be a misapprehension that real wage increases are only justified if there are real productivity improvements at the firm level. There are many sectors where productivity growth is low — such as aged care — and yet any employer would have to provide wage increases at least commensurate with those in the other industries that might otherwise employ such workers. To do otherwise would mean an industry could neither retain nor attract workers.
- Any ‘requirement to discuss’ during bargaining is easily met, even if not genuine, and so lacks substance. In general, governments should not include in legislation any unenforceable entreaties. The objectives of legislation are a more traditional place to locate such a sentiment.
- It may also inadvertently create perverse incentives that work against productivity improvement. Where clauses are required, employees may have incentives to obstruct (or at least not actively facilitate) any new management initiated productivity improvements during the (later) life of an EA, so that they can then agree to relax any obstructions as part of a productivity clause in the next agreement. Qantas claimed that

productivity bargaining might in fact reward the least efficient work groups because they have the most to trade away (sub. 116) — of course, that would not in itself be a reason not to trade, but it does exemplify an incentive for a work group to remain inefficient until the next agreement.

- There are several practical obstacles to leaving judgments about productivity improvements to the FWC. This might involve significant subjective judgment by a party that is not aware of the commercial circumstances of the firm,⁴⁴ potentially delaying approval of the EA and potentially forcing the parties to return to the bargaining table.

In saying this, it is important to be clear that arguing against *regulated* requirements does not repudiate the potential for parties to *voluntarily* negotiate mutually beneficial changes in work practices.

But negotiating for productivity gains is inherently a responsibility for employers — if they are not motivated by market forces to seek productivity gains, it is unlikely that regulation will alter their stance. Instead, the use of competition policy reforms or other removal of other impediments to effective management (for example, in the public sector) would seem far more effective.

The debate about mandated productivity discussions or clauses in EAs also misses productivity improving options that lie outside legislated enterprise bargaining processes. A complementary model for achieving long run productivity improvements is to encourage greater employee engagement and greater trust between employers and employees. There is a large literature suggesting that employee engagement is associated with higher firm performance (Rayton, Dodge and D’Analeze 2012), although the research is often not of great quality (Briner 2014). Engagement cannot be legislated, and indeed regulatory requirements that attempt to do so within an adversarial bargaining framework undermine the voluntary nature of trust.

There is also a body of research that has highlighted the role of better management in enhancing labour productivity. Some studies have shown that while Australia’s WR system placed relatively few constraints on the ability of managers to hire, fire, pay, and promote employees, the performance of Australian firms at managing employee incentives was comparatively poor (Bloom and Van Reenen 2010; Bloom et al. 2012). This suggests improved management practices may be a more fruitful source of productivity gains than legislative changes.

The 2012 post-implementation review of the FW Act recommended that the FWC play a more active role in promoting productive workplaces (McCallum, Moore and Edwards 2012). Consequently, the FWC will conduct and publish qualitative research to

⁴⁴ One participant also questioned whether the FWC currently has the expertise required to make such commercial judgments (Brendan McCarthy, sub. 43).

identify clauses in EAs that enhance productivity or innovation (FWC 2014b, p. 58). Further, the Fair Work Ombudsman has a best practice guide on improving workplace productivity in bargaining, which explains how best to negotiate when making EAs to take advantage of productivity benefits (FWO 2013). Whether promotion, pilots and research in this area produce results will need to be determined after evaluation. Yet these approaches have the advantage that they do not limit the capacity of employers and employees to have discussions about productivity as they see fit, without the leverage, process and appeal burdens implied by the presence of an umpire.

FINDING 20.1

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.

Concerns with the BOOT

While an EA must be voted on by employees, the voting process does not ensure that an EA is compliant with the relevant safety nets, such as awards. This requires an EA to be assessed against an award by the FWC — in the absence of such a test, the safety net could easily be undercut by enterprise agreements. Currently, to approve an EA, the FWC must be satisfied it passes the BOOT. A number of participants in this inquiry expressed concern with the test and way it is applied by the FWC.

Some participants questioned whether awards should continue to serve as the benchmark against which proposed EAs are assessed (ACCI, sub. 161; BCA, sub. 173; MBA, sub. 157). For example, ACCI suggested that clear and simple minimum statutory standards should form the benchmark for bargaining. The Productivity Commission's view is that, while the award system is in need of repair, there is no case for replacing awards as the safety net (chapters 11 and 12) and therefore, awards remain the appropriate benchmark for EA approval purposes.

Replacing the BOOT with a no-disadvantage test

The Productivity Commission recommends that the BOOT be replaced by a no-disadvantage test (NDT) for the purposes of approving EAs (as well as IFAs — this is discussed further in chapter 22).

The objectives of testing an EA against an award should be threefold:

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- to prevent employers from exploiting imbalances in bargaining power to circumvent the safety net during bargaining
 - to ensure that a ‘yes’ vote by a majority of employees cannot approve an agreement that leaves other employees worse off than the award (discussed further below)
 - the test should not discourage enterprise bargaining by being onerous, complex or imposing unnecessary costs on parties.

Given these objectives, there are a number of reasons why a NDT is preferable to the BOOT.

In principle, the BOOT discourages employers whose current employment arrangements are at, or close to, the award level from willingly engaging in enterprise bargaining. The requirement to make employees better off than the award means that an employer that currently uses an award-based arrangement may see limited upside for their business, due to a test that appears skewed towards employees. Innovation may be discouraged and inefficiency retained for fear of failing an unclear test.

This is compounded by the capacity for employees to force an employer to commence bargaining via MSDs. As noted by the Catholic Commission for Employment Relations (sub. DR289), an employer can be forced to bargain for an agreement, which due to the BOOT, will inevitably cost the employer more than the award. This is likely to exacerbate adversarial attitudes to bargaining, and may also encourage employers to frustrate the MSD process and resist employee attempts to collectively bargain.

Further, while the difference between these two tests should be marginal in theory, a NDT is likely to be more workable in practice. This is because in order to approve an agreement, 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 agreements to be rejected at the approval stage when compared with a NDT, which would require the FWC to identify how an agreement makes a class of employees worse off overall in order to reject an agreement. Some participants noted that there is a lack of hard evidence that a BOOT is harder to meet than a NDT, but did concede that there could be a symbolic difference that may incline FWC members to treat the BOOT as setting a slightly higher bar (Stewart, McCrystal and Howe, sub. DR271).

Numerous participants,⁴⁵ particularly employee groups, expressed opposition to this change. Interestingly, while most unions argued that switching to a NDT would have a negative impact on workers, the CPSU (SPSF Group) instead argued that the change would be ‘semantic and too marginal to warrant change’ (sub. DR270, p. 15).

⁴⁵ Including the CPSU (SPSF Group), sub. DR270; Victorian Government, sub. DR274; Government of South Australia, sub. DR281; Communist Party of Australia, sub. DR282; Australian Services Union, sub. DR283; Electrical Trades Union, sub. DR300; CPSU, sub. DR332; Queensland Nurses Union, sub. DR309; Queensland Government, sub. DR338; National Working Women's Centres, sub. DR345; United Voice, sub. DR354; ACTU, sub. DR355

Some argued that the BOOT exists to ensure that enterprise bargaining produces improvements in conditions for employees, and that this guarantee enabled enterprise agreements to reduce income inequality. (National Working Women's Centres, sub. DR345; ACTU, sub. DR355). However, the Productivity Commission does not accept that the benefits to employees from enterprise bargaining should arise from a regulated requirement to make employees better off. Rather, improvements in pay and conditions should arise from both an increase in employees' bargaining power from bargaining collectively, and the gains in productivity that can come from varying conditions to better suit the circumstances of both the employer and employees.

How the no-disadvantage test should be applied

In the draft report, the Productivity Commission sought further information from inquiry participants on how a NDT should be formulated, which would comprise several key elements set out detail below.

While various forms of a NDT have been used in the past, the methodologies used to apply these tests have varied somewhat over time (box 20.6). Many participants, primarily employers, expressed general support for a NDT.⁴⁶ In particular, numerous employers⁴⁷ cited the test that operated prior to 2006 as a desirable model for future changes. The Association of Mining and Exploration Companies suggested that the test used by the Western Australian Industrial Relations Commission would provide a useful model (sub. DR340).

The Productivity Commission's proposed NDT would replace the better off overall criteria of the BOOT with a requirement to not be at a net disadvantage overall. As is already the case with the BOOT, the test should be applied by the FWC at the agreement approval stage (this is discussed further below). The test should also:

- base comparisons with the award on how an EA would affect each class of employees, rather than each individual, to be covered by the agreement — this is discussed further below.⁴⁸ At present, under the BOOT, this matter is somewhat confusing. The wording of the BOOT in the FW Act requires each award covered employee to be better off overall. However, the guidance in the Explanatory Memorandum to the Fair Work Bill

⁴⁶ This approach was supported by numerous participants, including the Australian Hotels Association, sub. DR303; Leading Age Services Australia and Aged & Community Services Australia, sub. DR328; Motor Trades Organisation, sub. DR324; VECCI, sub. DR339; Australian Newsagents' Federation, sub. DR301; Housing Industry Association, sub. DR319.

⁴⁷ Qantas Group, sub. DR295; Australian Higher Education Industrial Association, sub. DR297; National Farmers Federation, sub. DR302; Housing Industry Association, sub. DR319; Chamber of Commerce and Industry Western Australia, sub. DR323; ACCI, sub. DR330; BCA, sub. DR337.

⁴⁸ Supported by MBA, sub. DR290; Australian Higher Education Industrial Association, sub. DR297; National Farmers Federation, sub. DR302; Chamber of Commerce and Industry Western Australia, sub. DR323; Ai Group, sub. DR346

2008 (Australian Government 2008b, p. 128) and the FWC's benchbook (FWC 2015e) states that the FWC is not required to enquire into each employee's individual circumstances and may, in the absence of evidence to the contrary, apply the BOOT to classes of employees instead. This means that even if a class of employees is generally better off under an EA, if the FWC is presented with sufficient evidence that an individual employee will be worse off, the EA would fail the BOOT.

- take a 'global' approach, assessing the net impact of an agreement on the whole rather than a 'line by line' comparison with the award.⁴⁹ This is already a characteristic of the existing BOOT, and the NDT that applied between 1996 and 2006 (box 20.7). While some participants pointed to examples of FWC members taking a 'line by line' approach in the past (ALDI Stores, sub. 146; Teys Australia and NH Foods, sub. 179; Qantas, sub. 116), the FWC has now explicitly clarified through its benchbook (FWC 2015e) and recent Full Bench decisions⁵⁰ that a line by line approach is not appropriate.
- take into account both monetary and non-monetary benefits. This was advocated by several participants (Toll, sub. DR312; Chamber of Commerce and Industry of Western Australia, sub. DR323; National Disability Services, sub. DR325), and is already permissible under the BOOT.

The test should be applied across each class of employees

Rather than requiring each individual employee to be better off, the Productivity Commission recommends that the NDT require that each class of employees not be disadvantaged when compared with the relevant award. As is already the case for the BOOT, there should be no strict definition of a 'class' of employees for the purpose of applying the test — for example, the FWC may choose to assess an EA against the award using classes based on characteristics such as classification, grade or job level, and work patterns (for example, weekday or weekend workers, or day or night shift workers) (FWC 2015e). In a small or specialised firm, it is conceivable that a single individual could be deemed by the FWC to comprise their own class of employee, provided their duties or patterns of work were sufficiently distinct (for example, a sole casual employee staffing a shop on weekends).

⁴⁹ Supported by Catholic Commission for Employment Relations, sub. DR289; Qantas Group, sub. DR295; MBA, sub. DR290; Australian Higher Education Industrial Association, sub. DR297; National Farmers Federation, sub. DR302; Master Electricians Australia, sub. DR304; AMMA, sub. DR322; ACCI, sub. DR330; Recruitment and Consulting Services Association, sub. DR343

⁵⁰ *AKN Pty Ltd t/a Aitkin Crane Services* (2015) FWCFB 1833.

Box 20.7 **The various forms of the no-disadvantage test**

The no-disadvantage test was first introduced in the early 1990s to prevent the certification of enterprise agreements that disadvantaged any employee compared with the award or any other relevant law, or were contrary to the public interest. In practice, this involved a line-by-line consideration of the agreement against the award. The no-disadvantage test was modified over subsequent years and ultimately abandoned in 2006. In 2007 another test — the fairness test — was introduced, built around the concept of ‘fair compensation’ for any loss of protected award conditions.

The no-disadvantage test was reinstated by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth). Collective agreements and individual transitional employment agreements (in effect, Australian Workplace Agreements) were required to pass this no-disadvantage test before being approved by the Workplace Authority. An agreement passed the test if the agreement ‘does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees whose employment is subject to the agreement under any reference instrument (for example, any designated award) relating to one or more of the employees’ (s. 346D).

The no-disadvantage test that applied between 1996 and 2006 was similar to the version above, in that it facilitated a global assessment rather than line-by-line comparison. While the test required each employee to not be disadvantaged, in practice, the assessments tended to be made on a more generalised basis. Furthermore, agreements made between 1996 and 2006 were tested against a narrower class of instruments — either the relevant or designated award.

A no-disadvantage test is also used in assessing Employer Employee Agreements in Western Australia. The Registrar of the Western Australian Industrial Relations Commission determines the relevant award (or other instrument as prescribed in the regulations) that would apply to the employee, and is required to be satisfied that the agreement is no less favourable than the applicable award or order ‘when considered as a whole’.

Under a no-disadvantage test, parties would need to have sufficient practical information to be able to apply the test and be confident that an agreement would pass. Although the ‘transitional’ no-disadvantage test under the Fair Work transitional arrangements was virtually identical to that in place prior to WorkChoices, it had few procedural safeguards and the vagueness of the criteria created uncertainty for employers as to whether an agreement would pass the test.

Sources: Pittard and Naughton (2010), Sutherland (2009), WAIRC (2002); Stewart, McCrystal and Howe, sub. DR271.

While many participants⁵¹ were in favour of this approach, it was not universally supported. For example, some employers suggested that the test should be applied across the employees as a whole, rather than on a class of employee basis. ACCI (sub. 161, p. 103) had a similar suggestion, proposing that the FWC should give greater weight to the views of employee representatives prior to deciding not to approve an agreement, and that a failure to pass the BOOT should not override the view of the majority of employees.

⁵¹ Including MBA, sub. DR290; Australian Higher Education Industrial Association, sub. DR297; National Farmers Federation, sub. DR302; Chamber of Commerce and Industry Western Australia, sub. DR323; Ai Group, sub. DR346.

However, using this type of majoritarian approach to apply the NDT would be deeply flawed. It is not difficult to conceive of circumstances where the majority of employees may be made better off than the relevant award at the expense of other employees, due to inconsistent distribution of above-award and below-award conditions throughout the workforce. For example, permanent weekday staff might be willing to obtain an increase in their own base wages in exchange for a reduction in weekend penalty rates at the expense of casual weekend staff. This issue is further compounded by a recent Federal Court decision⁵² confirming the capacity for a small number of employees to approve an EA that has the capacity to apply to a wider range of prospective employees in the future. Finally, for EAs that do not involve a ‘to and fro’ bargaining process, but rather feature management making a proposal, and the employees voting without much or any prior negotiation (and possibly understanding), a majority vote might not provide adequate assurance that the safety net has been satisfied.

The test should be applied at the approval stage

As is currently the case with the BOOT, the NDT should be applied when an application is made for approval of the agreement.

A few participants expressed concern that it is possible for an EA approved by one group of employees and the FWC to be subsequently applied in the future to a different set of circumstances (Queensland Council of Unions, sub. DR305; Sheila Hunter, Ipswich, trans., p. 713). In particular, this may be a concern when EAs are used in less conventional arrangements, such as a labour hire firm (this is discussed further in section 20.5).

Both the BOOT and the Productivity Commission’s proposed NDT include prospective employees as well as current employees, meaning that FWC members should (in theory) have the capacity to take future circumstances into account when deciding whether to approve an agreement. There is also the possibility that a FWC member could require undertakings to ensure that future employees will not be made worse off in different circumstances (noting that undertakings cannot substantially alter an EA). However, it is unclear whether FWC members currently adequately account for the possibility of an agreement being applied in substantially different circumstances in the future — this may be worthy of further empirical research (appendix J).

The process of agreement scrutiny can be as important as the legislation

A key element of applying any test to EAs is the consistency and transparency of the process by which agreements are scrutinised. Despite employers’ characterisations of the pre-2006 NDT as more consistent and easier to apply, some participants have suggested that this test was equally lacking in consistency (Stewart, McCrystal and Howe,

⁵² *Construction, Forestry, Mining and Energy Union v John Holland* (2015) FCAFC 16.

sub. DR271). As with the BOOT, the ‘global’ nature of the test, the requirement that no individual be worse off, and the difficulty of weighting monetary and non-monetary entitlements inevitably led to some subjectiveness and uncertainty. Perceptions of the pre-2006 test’s simplicity may thus be more reflective of a lack of rigorous scrutiny and transparency when it was applied:

In our view, what has changed most since the FW Act took effect is not the switch from the NDT to the BOOT as such, but far more consistent scrutiny of agreements. The agreement approval process is now more structured and consistent than it used to be, with greater input from staff supporting the work of FWC members and publication of all approval (or rejection) decisions. We would accept that some members take a stricter line than others – but there is nothing new in that, compared to what used to happen under the WR Act. Where the relevant principles are misapplied to reject an EA, such decisions can be (and are in practice) reversed on appeal. We would also suspect (although research would be needed to confirm this) that fewer agreements that fail the BOOT, and should likewise have failed the NDT, are being approved by mistake or oversight, compared to the position under the WR Act. (Stewart, McCrystal and Howe, sub. DR271, p. 12)

The consistency of the FWC’s decision making is also likely to further improve over time. The FWC is currently rolling out programs to improve the agreement approval process, including ‘triaging’ of agreements, with preliminary reviews of agreements conducted by specially trained legal staff to identify any technical issues prior to FWC member consideration, and the publishing of an agreement making guide and checklist for use by employers (Justice Iain Ross, sub. DR357). A pilot study to evaluate these programs found that they led to improvements in both the timeliness of agreement approvals and the consistency of approval decisions (Inca Consulting 2015a).

As such, were the FWC to maintain its modern processes for agreement approval (which the Productivity Commission recommends), it is unlikely that adopting a new NDT would precisely replicate the pre-2006 experiences. This should help assuage the concerns expressed by some participants (Shop, Distributive and Allied Employees’ Association, sub. DR306) that the switch to a NDT would lead to employers undermining the safety net.

RECOMMENDATION 20.5

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).

Who can bargain?

Worldwide, there are multiple ways in which labour law determines legitimate bargaining representatives. In most countries, the party on the employer side is the owner of the enterprise concerned — as is generally the case in Australia. But in some, as in Austria, Sweden and the Netherlands, the employer bargaining representative is an employer organisation. In the Australian context, there is no rationale for shifting away from the role played by the individual employer (or their specifically-nominated representative) because businesses are different and labour arrangements should reflect that.

On the employee side, the dominant international model is bargaining by a union representative(s). For example, this is the case in New Zealand, the United Kingdom and the United States. Australia departs from this model in that the FW Act allows for multiple representatives during bargaining, including non-union affiliated parties. Employees can nominate themselves, or any other individual or organisation, as a representative.

The wider ambit of allowable negotiating parties in Australia is, arguably, one area of labour regulation where historical arrangements have lost their grip, and is a better reflection than in many other countries of the importance given to competition more broadly in the economy, as well as the decline of union membership. Although they may not always be efficiently realised (a point emphasised below), some of the key underlying principles underlying Australia's arrangements are that:

- unions may not always be the best representatives of certain employees, particularly for employees that work in distinctly separate roles or conditions in a large enterprise
- there is a value in competition in the provision of 'bargaining services' to employees, with non-union representative being one source of that competition (and not subject to deals between competing unions to monopolise given workplaces)
- different bargaining representatives can bring information to a negotiating table that others are unaware of, or give too little prominence to (for example, female employees in male-dominated industries). The concept of 'voice' for employees outside the historical union-centric model has been seen as increasingly important in modern industrial relations practices.

However, there can be a tradeoff between the efficiency of bargaining, and the degree of representation afforded to each party to the agreement. Multiple bargaining representatives can add to complexity, raise the costs of bargaining, and can be a nuisance to the main parties, a point raised by some inquiry participants, who suggested that:

- individual bargaining representatives make claims that are often particular to the circumstances and experiences of an individual employee, or a very small number of employees. Their interests may not reflect the views of the broader workforce and they may raise only a subset of the issues upon which bargaining is required (BCA 2012, p. 44; Australasian Railway Association, sub. 155; Qantas, sub. 116; United Voice, sub. DR354; CPSU (SPSF Group), sub. DR270)

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- the appointment of multiple bargaining representatives increases the time and cost associated with bargaining, especially for very large employers and firms with employees that are geographically dispersed or work within 24/7 operations (Australasian Railway Association, sub. 155; Qantas, sub. 116).

There are some available remedies for these concerns. The FWC has powers to make a bargaining order if bargaining is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement (s. 230). The bargaining order may involve excluding a bargaining representative, or ordering some or all of the bargaining representatives to meet and appoint one of them to represent the others (s. 231(2)). However, this remedy does not appear to have been pursued in the FWC by any bargaining participants in the past. This may indicate that the costs of seeking FWC intervention exceed the annoyance of dealing with multiple representatives. But small nuisances summed across a large number of bargaining rounds may still represent a significant cost.

In its draft report, the Productivity Commission proposed addressing the above issues by requiring that a person could only be a bargaining representative if some proportion of the employees to be covered by the agreement (say, 5 per cent) nominated them as a representative, or if they represent a registered trade union with members covered by the proposed agreement.

This proposal was supported by numerous employee and employer participants,⁵³ although others argued that the threshold should be a higher percentage of the workforce (National Farmers' Federation, sub. DR302; Police Federation of Australia, sub. DR320) or that the threshold should apply equally to union representatives (MBA, sub. DR290; Chamber of Commerce and Industry of Western Australia, sub. DR323).

While a 5 per cent threshold would reduce the capacity for an excessive number of bargaining representatives to hinder the efficiency of bargaining, it could have unintended impacts. At the broadest level, the concern is that it would have the effect of limiting the effective participation by non-union representatives, and would be inconsistent with some of the key principles described above. There are several ways in which these problems would become manifest under the simple 5 per cent rule.

First, it is possible that a group of employees comprising less than 5 per cent of the workforce may have legitimately distinct interests to be pursued as part of EA negotiations. Indeed, in a very large firm, 5 per cent of the workforce could comprise many thousands of employees, and encompass distinct groups within the workforce. Excluding these employees from being represented may yield an EA that does not adequately take into

⁵³ Including Qantas Group, sub. DR295; CPSU (SPSF Group), sub. DR270; Australian Hotels Association, sub. DR303; Master Electricians Australia, sub. DR304; AMMA, sub. DR322; BCA, sub. DR337; Queensland Government, sub. DR338; Ai group, sub. DR346; SAWIA and WFA, sub. DR352; United Voice, sub. DR354.

account differing preferences across the workforce to be covered by it (Leading Age Services Australia and Aged & Community Services Australia, sub. DR328).

A related concern is that small groups of employees may instead attempt to agitate for a separate agreement under which they would comprise more than 5 per cent of the workforce. It is worth noting that a sufficiently small group of employees would also be precluded from seeking a scope order (the usual way of contesting and resolving EA coverage issues under the FW Act) as scope orders may only be sought by a bargaining representative.⁵⁴

Finally, a numerical threshold may be a barrier to the use of non-union employee representative bodies or services (which may play an important role in filling the ‘representation gap’ as union membership continues to decline). An example is the Nurses Professional Association of Queensland (2014), which claims to operate as ‘a new type of employee representative organisation that focuses on professional development, representation and protection of its Members’, and is not a registered union. However, the 5 per cent proposal would still allow small associations or services to represent employees if they were a registered organisation (though the process and compliance burden of becoming a registered organisation may be a considerable barrier).

One way of reducing the scope of some of the above concerns would be to also include an absolute numerical threshold for representation — for example, by recognising bargaining representatives nominated by at least 20, 50 or some other reasonably modest number of employees. (The choice of an exact number is somewhat arbitrary, but there may be evidence that could support one number over another — an area the Productivity Commission has not explored.)

This approach could improve the efficiency of the bargaining process by precluding individualistic or idiosyncratic levels of representation, while not overly restricting access to representation for distinct groups of employees.

⁵⁴ As was pointed out to the Productivity Commission in consultations, small groups or individual employees would also be precluded from taking industrial action, as a protected action ballot order can only be sought by a bargaining representative. However, rights are presumptive, and it is important to recognise that there is some tradeoff between the desirability of meeting them, and the costs that their realisation may present.

RECOMMENDATION 20.6

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.

It would be critical that adoption of this recommendation be accompanied by clear processes for determining the level of support for a bargaining representative that passes the threshold test above. In many cases, this could be straightforward, but the application of the recommendation (or the Commission's draft proposal) would need to account for:

- the possibility that an employee can revoke or change their nomination for a representative at any given point in bargaining (s. 178A)
- the fact that employment numbers change in an enterprise and that a representative meeting the threshold at one point may not do so at a later time. The threshold could be applied at the time of the appointment of the bargaining representative
- the prolonged nature of agreement-making may lead to the departure of the relevant employee representatives. The process should therefore permit new ones to be appointed, subject to the threshold above.

These ancillary features are important because it would be counterproductive to the goal of more efficient bargaining processes if disputes over the legitimacy of a bargaining representative's support led to further disruption or delay.

Finally, if Recommendation 20.6 is not adopted, the effectiveness of the current capacity for the FWC to make bargaining orders should be examined closely. It is not clear why firms facing significant nuisance with the current model have felt unable to use the existing orders.

Unions as default bargaining representatives

Quite apart from the concerns about the number of representative parties, some participants expressed concern about unions having disproportionate power in negotiations. For example, ACCI said that:

Collective bargaining under the current system has the potential to erode collaborative approaches by encouraging the involvement of a third party in the negotiations pursuing a largely pre-determined industrial agenda that does not appropriately consider the needs of the particular business or the individuals working within that business. (sub. 161, p. 94)

Many employer groups have suggested that unions should not be the default bargaining representative of union members (Qube Ports, sub. 123; Manufacturing Australia, sub. 126; Housing Industry Association, sub. 169; AMMA, sub. DR322; MBA, sub. DR290; ACCI, sub. DR330; Association of Mining and Exploration Companies, sub. DR340; BHP Billiton, sub. DR362). Several suggested changing to an opt-in system, or a requirement that a union be appointed as a representative by a majority of employees, arguing that it would reduce the prevalence of unions acting in their own self-interest about issues that employees may be apathetic about.

However, while self-interested action by unions may occur, this is not problematic if this largely aligns with the interests of its members. People generally join unions voluntarily, and pay their dues presumably with some expectation that the union has their broad interests at heart. The Productivity Commission's recommendation to remove the union/employer relationship from the range of permitted EA terms should also better align the interests of union bargaining representatives with those of employees.

Further, while unions may act as default bargaining representatives, ultimately an EA is approved by a majority vote of employees. Provided they have made attempts to bargain in good faith, an employer can pursue the option of putting a proposed EA to employees for a vote without the union's consent. This not only acts as another brake on bargaining that is not broadly consistent with employees' preferences, but also provides employers with an avenue for bypassing an intransigent representative if necessary.

Conflicts of interest in bargaining representatives

An issue raised by Minter Ellison (sub. 252) is that the FW Act does not contain any specific mechanism for resolving potential conflicts of interest that may arise when bargaining representatives are appointed. Curiously, while the Fair Work Regulations 2009 contain a regulation requiring the bargaining representative of an employee to be free from 'control ... and improper influence from the employee's employer or another bargaining representative', no such requirement exists to ensure that employers are protected against such conflicts of interest.

To illustrate this issue, Minter Ellison pointed to a recent situation faced by one of their clients during bargaining. The official nominated by the union to lead the EA negotiations was a long-term, full-time employee of one of the employer's direct competitors. This led to a perceived conflict of interest, and in the employer's view, inhibited the negotiations during a prolonged period of industrial action. The conflict of interest also discouraged the employer from disclosing commercially sensitive information that may have made negotiations more expedient. While the employer raised with the union its concerns about the perceived conflict of interest, it was to no avail and there was no avenue under the FW Act to address the employer's concerns (Minter Ellison, sub. 252, pp. 2–3).

Ultimately, the Productivity Commission has not been presented with evidence that such conflicts are sufficiently widespread to warrant a legislative response. However, were more

frequent occurrences to be established, there is a *prima facie* case for the Australian Government to consider amending the legislation accordingly, for example, by requiring that employee representatives be free from undue influence or control by a competitor of the employer.

Once an agreement is in place, is it easy to enforce and resolve disputes?

The capacity to vary an EA is most important when business viability is reduced and employees face likely retrenchments. However, it would be undesirable for agreements to be constantly subject to re negotiation. This would be costly and would undermine other reforms, such as matching the duration of EAs to infrastructure construction periods. The Productivity Commission's view is that the prohibition of protected industrial action during the life of an EA and the requirement for mutual consent to a variation satisfactorily constrains the capacity to change an agreement before it expires. (As noted earlier, the *Toyota* case seems to have clarified matters regarding attempts to fetter the ability to vary an EA under the FW Act.) Participants did not otherwise raise any concerns about the operation of this provision in the FW Act.

Some suggested that the FWC and Fair Work Ombudsman need greater powers to interpret and enforce entitlements under EAs. The ACTU (pers. comm., 15 January 2015) said that there is a need for greater access to quick dispute resolution regarding interpretation of entitlements under agreements. The FWC is unable to make orders regarding the interpretation of EAs, unless there is a term in the agreement allowing it to arbitrate. The Fair Work Ombudsman focuses on underpayment, not other terms and conditions. The Federal Court and Federal Circuit Court can grant injunctions for breach of an EA.

The Fair Work Ombudsman can issue infringement notices (fines), issue compliance notices (not taken lightly), accept enforceable undertakings (for serious breaches, where undertakings are publicly available and legally binding) and pursue litigation (for the most serious cases).

Given the range of remedies and assistance available, the Productivity Commission does not propose any additional protections.

20.5 Is enterprise bargaining suited to changing ways of working?

Several participants questioned the role of enterprise bargaining in the face of modern business practices, such as labour hire and independent contracting, and employees moving between jobs. The ACTU has said that:

The system is designed around, and arguably works best for, a very particular model of the workplace that is far from the norm. We have created a bargaining system that is predicated on

the existence of employers who enjoy at least a measure of economic autonomy, and who engage a relatively stable and secure workforce. (ACTU 2012c, p. 41)

Labour hire

Labour hire arrangements (chapter 25) may make enterprise bargaining challenging. Labour hire involves a three-way relationship between the host employer, the labour hire agency and the worker, where labour hire agencies may have limited control over the work environment.

A particular concern among some participants is the potential for labour hire agencies to circumvent the conventional safeguards that exist in enterprise bargaining, given the itinerant and flexible nature of labour hire agencies and their employees. Several inquiry participants pointed to recent events at the Capalaba Sports Club (box 20.8) as an example of a potential vulnerability in enterprise agreements and the BOOT with the emergence of labour hire. The Queensland Council of Unions suggested this demonstrated problems with the current application of the BOOT, arguing that the EA in question had been approved under different circumstances by the FWC after agreement with eight of its employees in Sydney (trans., pp. 616–17).

Box 20.8 Capalaba Sports Club and HospitalityX

The Capalaba Sports Club recently outsourced its hospitality staff to a labour hire firm called HospitalityX. The club's existing staff, who at the time were working under award-based arrangements, were informed that if they remained employed at the club they would be covered by HospitalityX's enterprise agreement, which had been previously negotiated by HospitalityX with eight of its employees in Sydney. The enterprise agreement had been approved by the Fair Work Commission and assessed as having passed the better off overall test.

While the EA contained penalty rates for both permanent and casual staff (clause 7.2), it also contained an 'available hours' clause (clauses 9.2 and 9.3[e]). This clause meant that where employees indicated their available hours of work ('after taking into consideration their family, personal responsibilities or other genuine needs'), the employer would not be entitled to pay penalty rates for time worked within those hours. This meant that existing staff at the club who could only work nights or weekends (for example, students) would no longer receive penalty rates for those shifts as they had previously under their relevant award.

Sources: HospitalityX Certified Agreement 2014 (2014) FWCA 7968; Samarah Wilson and Sheila Hunter, Ipswich hearing, trans., pp 109-119.

However, as noted previously, the FWC takes into account prospective employees when considering whether a proposed agreement passes the BOOT (or the Productivity Commission's proposed NDT). Provided that FWC members are sufficiently considering the possibility of future changes and requesting appropriate undertakings where required, the BOOT (NDT) is not necessarily flawed in the context of labour hire.

Further, while some may consider it problematic that eight employees can vote in favour of an agreement that will be applied to other employees in a different context in the future, it is worth noting that this is not an issue that is unique to labour hire. Recent legal disputes, such as *CFMEU v John Holland*⁵⁵ have demonstrated in other contexts that EAs can be approved by a small number of current employees on behalf of a larger number of prospective employees in the future.

It is not evident in this example that any possible differences between the circumstances of the labour hire company's employees in Sydney, and employees at the Capalaba Sports Club, are the most relevant concern in considering whether the EA in question should have passed the BOOT. Rather, it would seem that the more relevant issue in this particular case was the inclusion of a preferred hours clause in the labour hire firm's EA. In the past the FWC has generally rejected agreements that include preferred hours clauses on the basis that they fail the BOOT (Cameron 2012). As such, it is possible that the initial decision by the FWC to approve the EA in question could be subjected to future appeals — this question is yet to be resolved at the time of writing.

Overall, the Productivity Commission is not convinced that the additional complications that labour hire may pose for enterprise bargaining are sufficient to warrant a legislative response. However, there may be merit in further evaluating whether the FWC is giving adequate consideration to prospective employees and the possibility for changes in circumstance when approving agreements for labour hire firms (appendix J).

Multi-employer bargaining

Given the limitations of an enterprise-based approach, some participants argued for the ability to bargain across enterprises. The ILO considers that parties should be free to choose the level at which collective bargaining occurs, rather than be restricted to bargaining at the enterprise level. The ACTU has argued that the FW Act should allow access to multi-employer bargaining (beyond access to the low paid bargaining stream) based on a simple 'public interest' test (ACTU 2012c, p. 57). The National Union of Workers said that:

The Act's collective bargaining provisions need to be expanded to better facilitate multi business, industry and sector level bargaining. A strict focus on enterprise level bargaining permits irresponsible economic behaviour in which the legal identity of the employer is separated from the real source of economic power and control. (sub. 125, p. 6)

A public interest test could limit the potential for such a system to revert to pre-1993 collective bargaining arrangements, but there is insufficient evidence that the risks and challenges posed by new employment arrangements are sufficient to warrant a new bargaining framework.

⁵⁵ (2015) FCAFC 16.

Small businesses

Others questioned the suitability of collective bargaining for every type of business. In particular, several participants pointed out that enterprise bargaining is not very suited to small businesses (ACCI, sub. 161; Council of Small Business of Australia, sub. 115). In response to a survey conducted by an inquiry participant, some small business owners indicated that they perceived enterprise bargaining as too complex or costly (Chamber of Commerce and Industry Queensland, sub. DR311). Sectors in greater need of flexibility such as retail trade and accommodation/food services have a greater concentration of small business employers (ACCI, sub. 161, p. 99). ACCI said that:

The small business proprietor is not contemplated in commentary concerning the evolution of collective bargaining because collective bargaining did not arise in this context. Bargaining concerned the ability of large groups of workers to take coordinated industrial action.

In the modern era, while larger business may have a dedicated team of human resources and industrial relations specialists representing the business during discussions, small businesses will not typically have access to such resources, nor do they have the time or expertise to dedicate to the complex processes themselves. Equally, they may not be able to fund the engagement of external consultants to represent them during negotiations. The cost of bargaining can take its toll on the profitability of small businesses and they are much more limited in the concessions they can viably make during bargaining. (sub. 161, pp. 96–7)

The data certainly support the notion that enterprise bargaining is mainly the province of larger businesses rather than small businesses. However, this plain fact need not suggest that there is a problem. Enterprise bargaining comes with certain ‘economies of scale’. The time and costs associated with striking a bargain and complying with certain (hopefully reformed) procedural requirements may outweigh any efficiency gains from negotiating and using one EA rather than many individual agreements for businesses with a smaller number of employees. This is why any WR framework must provide employees and employers with multiple mutually beneficial contracting possibilities. The Productivity Commission considers that enterprise bargaining is one of these, but has proposed changes to the FW Act — such as the creation of enterprise contracts (chapter 23) — that would widen the available options to parties.

21 Greenfields agreements

Key points

- Greenfields agreements are unique within the bargaining framework, as they involve negotiation between employers and unions with no existing employees or members onsite.
- Recent amendments have been made to reduce inefficiencies and end stalemates in greenfields agreement negotiations.
- The Productivity Commission has identified a range of improvements.
 - A three month negotiation period for greenfields agreements should be adopted.
 - After the bargaining period has elapsed, greenfields stalemates resolved by Fair Work Commission intervention should be determined using 'last offer' arbitration.
 - Alternatively, after the negotiation period has passed, an employer should be able to seek approval of a 12 month agreement, subject to a no-disadvantage test against the relevant award.
 - Project proponent greenfields agreements should be available to subcontractors that do not wish to negotiate a greenfields agreement of their own.

Greenfields agreements pose a unique policy challenge in the enterprise bargaining framework. The very notion of enterprise bargaining (chapter 20) sits somewhat uncomfortably when there is no workforce yet to bargain with. Employers setting up new enterprises do not have to use a collective agreement to set the terms and conditions of employment on the project — they can rely instead on the relevant award or an individual arrangement. However, if they wish to have a long-term statutory agreement in place prior to the project commencing, the only means of doing so is obtaining a greenfields agreement.

Greenfields agreements are especially important in project specific employment arrangements in the construction and resources industries. Data from the Department of Employment shows that over two thirds of greenfields agreements are in the construction industry. Greenfields agreements can be important for negotiating finance, as project risk is influenced by labour costs and any barriers to the efficient and speedy completion of projects. Accordingly, any weaknesses in the arrangements have potentially large impacts on major project investment in Australia. The 2012 review of the *Fair Work Act 2009* (Cth) (FW Act) shared these concerns (McCallum, Moore and Edwards 2012, recommendations 27-30).

21.1 Current arrangements

The previous arrangements gave unions excessive bargaining power

Prior to the Productivity Commission's draft report, a greenfields agreement could only be created if an employer reached agreement with one or more relevant union/s. In the draft report, the Productivity Commission noted a number of concerns with the greenfields agreement arrangements in place at the time, including that:

- the absence of any good faith bargaining requirements during greenfields negotiations is likely to have exacerbated bargaining stalemates
- the arrangements gave unions excessive bargaining power and the ability to use delay as a negotiating tool. Employers were required to reach agreement with the relevant union/s in order to obtain a greenfields agreement, and there were limited avenues to resolve bargaining stalemates. Because agreement delays can potentially jeopardise the starting date and viability of projects, employee representatives held a unique position of bargaining power in such situations — the imperative to settle an agreement just to get a project underway meant employers had an incentive to accede to various union demands. Unions could thus use their excessive bargaining power to impose standard terms and conditions on an industrywide basis.

Recent amendments

Since the publication of the draft report, the Australian Government has passed the *Fair Work Amendment Act 2015* (Cth), which contained a number of amendments to greenfields agreement processes.

The first of these was an extension of the good faith bargaining requirements to greenfields agreements. This was recommended by both the Productivity Commission's draft report and the 2012 review of the FW Act (McCallum, Moore and Edwards 2012).

Second, the amendments added an avenue for employers to access a determination by the Fair Work Commission (FWC) to break prolonged bargaining stalemates. Where greenfields negotiations have lasted at least six months, an employer has the option of applying to the FWC to approve the agreement. To pass the agreement, the FWC must be satisfied that the agreement, when considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work (including having regard to the prevailing pay and conditions in the relevant geographic area).

21.2 Further improvements are recommended

While the recent amendments are likely to result in more expedient and balanced greenfields negotiations, the Productivity Commission continues to see merit in further changes — including those identified in the draft report — such as:

- adopting a three month negotiation period
- using ‘last offer’ arbitration for FWC determinations after the negotiating period
- offering a wider suite of options at the end of the negotiating period
- making a project proponent option available for large-scale projects.

These recommended changes are each discussed further below.

Adopting a three month negotiation period

Securing a greenfields agreement can be important for negotiating finance and securing investment for a project. Requiring parties to negotiate greenfields agreements for a lengthy period can therefore impose a disproportionate delay on the commencement of new projects. The challenge is in identifying a negotiating period that suitably balances the goal of encouraging negotiated outcomes and the desire to avoid imposing costs and delay.

As noted in chapter 20, almost half of projects in construction (the sector where greenfields agreements are primarily used) have durations of less than two years (although the average duration of current greenfields agreements is 3.2 years). As such, the Productivity Commission considers a three month period to be a proportionate negotiating period before other agreement options are available. This was supported by numerous inquiry participants, though others suggested that two months would be more appropriate (Australian Industry Group, sub. DR346).

‘Last offer’ arbitration

A number of inquiry participants expressed support for some form of FWC arbitration of stalled greenfields negotiations (Australian Council of Trade Unions, sub. 167; Australian Petroleum Production and Exploration Association, sub. 209; Rio Tinto, sub. 122), while others were strongly opposed to it (Australian Mines and Metals Association (AMMA), sub. 96).

A broad arbitration function would be undesirable and would run counter to the goal of privately undertaken negotiations. Arbitrated outcomes are also more likely to be exposed to variations in decision making between FWC members, and can be costly and time consuming.

Where FWC intervention is to be used to break bargaining stalemates, ‘last offer’ arbitration would better facilitate bargaining, and provide a more balanced means of weighing the parties’ offers against each other. Last offer arbitration (also called ‘pendulum’ arbitration), would limit the FWC to choosing between the employer and union’s last proposals as the final agreement outcome. This approach to greenfields agreement stalemates was also recommended by the 2012 review of the FW Act (McCallum, Moore and Edwards 2012). A primary advantage of this form of arbitration is that it would encourage parties to moderate their offers throughout negotiations for fear that the other party’s offer would appear more reasonable and is accepted during last offer arbitration. Thus the parties’ bargaining behaviour in anticipation of a possible arbitrated outcome may in fact lead to a negotiated outcome.

However, such an approach is still vulnerable to institutional fallibilities. Arbitration can create undesirable incentives to hold out if a party anticipates that the FWC’s arbitrated outcome would be preferred to one it might negotiate privately. The use of ‘last offer’ arbitration is dependent on the FWC being perceived as a neutral body. Adopting the Productivity Commission’s recommendations regarding institutional arrangements should improve perceptions of its impartiality (chapter 3).

Instead of arbitration, the recent amendments provide an option for FWC approval of an employer’s proposal, subject to a benchmark of the ‘prevailing pay and conditions within the relevant industry’. However, an industry-based benchmark carries the risk of undermining the decentralised and enterprise oriented focus that underpins the enterprise bargaining framework. This process also does not offer unions (as proxy employee representatives) the opportunity to have their alternative greenfields agreement proposal considered by the FWC. A number of inquiry participants were critical of this benchmark (AMMA, sub. 96; Master Builders Australia, sub. 157; Association of Mining and Exploration Companies, sub. DR340). For example, AMMA argued that the prevailing industry standards test:

... appears to give the FWC a wide discretion to decide what the prevailing pay and conditions are and potentially require employers to amend their offers accordingly. The provision would seem to allow comparisons with numerous other agreements that are not relevant to the enterprise in question. (sub. 96, p. 122)

A prevailing industry wages and conditions test is also backwards looking — by definition, it is a test that compares a proposed greenfields agreement with wages and conditions in agreements that have already been struck in the past. This may pose a barrier to downward moderation of wages and conditions in industries where economic circumstances are beginning to worsen (for example, as a resource or construction boom winds down).

A wider suite of options should be available to break greenfields impasses

There are two primary concerns from having a determination by the FWC as the only means of breaking greenfields bargaining stalemates. The first is that it may provide little incentive for parties to reach mutual agreement prior to expiry of the negotiation period, particularly if a party believes that they will achieve a more favourable outcome from the FWC than from private negotiation. The second is that it may place substantial strain on the FWC in having to make a determination for every greenfields project where parties cannot reach mutual agreement among themselves.

Some employer groups called for the availability of employer greenfields agreements that employers could put in place without any negotiations with a union (Australian Chamber of Commerce and Industry, sub. 161; AMMA, sub. 96; Business SA, sub. 174; National Retail Association, sub. 144; National Electrical and Communications Association, sub. 159).

Whether this would lead to excessive bargaining power is likely to depend on a number of factors.

On the one hand, bargaining power may not be as unbalanced for greenfields projects, meaning that an employer would still have to offer a reasonable suite of wages and conditions, as:

- the main priority for many greenfields employers is to commence a project as soon as possible. This means they must place greater emphasis on offering sufficiently high wages to attract new workers to their project
- an employer must also offer wages that are high enough to encourage their employees to remain on the project, given that the costs of losing workers to other employers and delaying the project may be high. Indeed, one greenfields employer noted that they must pay market rates to attract and retain experienced and competent employees (Victorian Employers' Chamber of Commerce and Industry, sub. 79, p. 56). The incentive for employers to offer competitive wages, at least in the long run, also appears to have been accepted by the Australian Workers' Union in its own arguments against employer greenfields agreements, saying:

... to enable a new employer to unilaterally determine conditions at Greenfield sites would only mean that employment costs down the line become hard to forecast if the employees' conditions are out of kilter with those of their peers — workers will rightly expect and ask for the same as their peers and their conditions will have to increase. (sub. 74, p. 23)

- because potential employees for a greenfields project are not yet engaged by the employer, they are likely to face comparatively lower 'switching' costs from seeking an alternative employer if faced with a poor pay and conditions offer

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- where a greenfields project takes place as part of a major project or during a substantial expansion in investment, there may be a substantial increase in economic activity and employment in the region or industry where the project is occurring. This may lead to a skills shortage that increases the bargaining power of employees
 - it can be easier for some greenfields employers to offer temporarily higher wages and conditions to employees during ‘boom’ periods, as these terms are only preserved for the life of the project, and employees are then discharged.

On the other hand, employees may not have greater bargaining power if:

- there were relatively few alternative projects available to potential employees. This may not necessarily be undesirable where the lack of projects arises from a slowdown in the relevant region or sector: wages and conditions should generally reflect the economic circumstances of a sector (subject to the safety net). However, concerns would arise if a small number of employers with substantial market power were able to use employer greenfields agreements to drive down industry wide wages and conditions below the competitive market level
- policy changes led to the greater use of greenfields agreements in non-project settings where timing is not as critical, or where employees may be less mobile or skilled, meaning that imbalances in bargaining power may persist. This is a conceivable outcome. While greenfields agreements are currently predominantly used in project based sectors, such as construction, they can be used anywhere there is a genuinely new enterprise that has not yet employed any persons for its normal operations. The introduction of employer greenfields agreements under the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) led to a significant expansion in their use in sectors such as accommodation and food services, retail trade and health care and social assistance, and changes to greenfields arrangements under the FW Act led to a corresponding decline in use in these sectors (McCallum, Moore and Edwards 2012).

There is some empirical evidence that employer greenfields agreements under WorkChoices led to overall reductions in wages and conditions. In a study of employer greenfields agreements in the first year following the introduction of WorkChoices, Gahan (2007) revealed a significant reduction in entitlements for employees, particularly through the removal of protected award conditions, with employees generally not receiving equivalent compensation for the loss of these conditions. However, these agreements were made in the absence of a no-disadvantage test and, as noted by Gahan, it is likely that most of them would not have been approved were such a test in place.

On balance, the Productivity Commission does not recommend a return to wholly unilateral employer greenfields agreements. Employers that wish to make variations to award conditions without any form of union negotiation could consider using the Productivity Commission’s proposed enterprise contracts (chapter 23) — though using an enterprise contract would not preclude a majority support determination, bargaining and industrial action from occurring at any later date.

Alternatively, some participants suggested that where an employer had negotiated with a union for a set period of time, the employer should be able to have their proposed terms and conditions approved, subject to a no-disadvantage test (Business SA, sub. 174; Civil Contractors Federation, sub. 62; Minerals Council of Australia, sub. 129).

Such a proposal would provide a strong incentive for unions to reach agreement with employers within the negotiation period. However, employers may have an incentive to take a ‘hard bargaining’ approach (passing the good faith bargaining requirement), holding out until the negotiating period had elapsed and having its proposed terms approved (Maritime Union of Australia, sub. 121). Approving the employer’s terms for a long term period — thus precluding any further bargaining or industrial action — would likely shift the bargaining pendulum too far in favour of employers.

Rather than approving employer-only proposals for five years or the life of the project, a shorter duration — such as 12 months — would help safeguard employees’ terms and conditions. These 12 month arrangements could effectively act as a stopgap until a longer term agreement can be reached with employees once the project is in operation. This would be similar to the previous role of 12 month employer greenfields agreements, but with greater employee safeguards (such as union representation during the negotiating period, as well as the no-disadvantage test). Under this approach, employers would still have an incentive to reach agreement with the union during the negotiating period in order to secure a long term deal.

Parties should choose the option that fits the circumstances

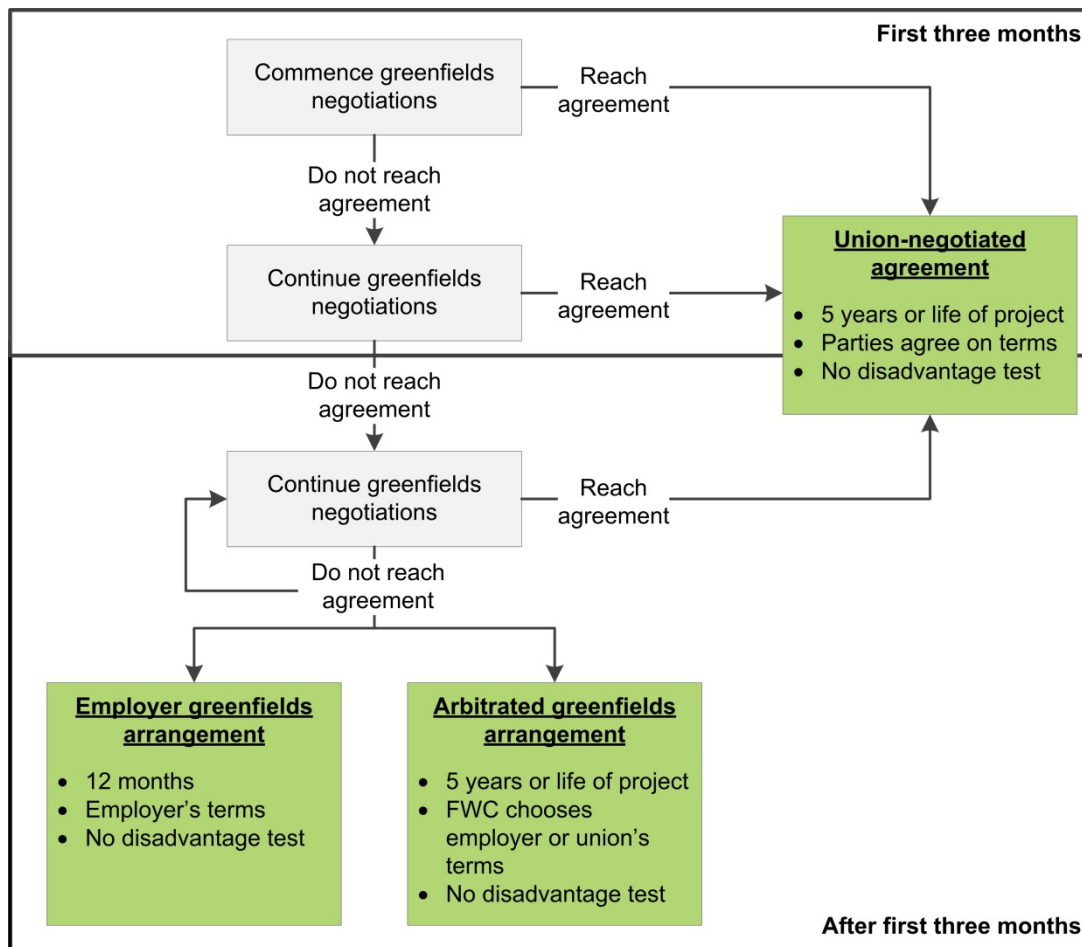
The greenfields options discussed above should feature as part of a menu of options (figure 21.1). Were an agreement not reached between the parties after the negotiating period, the employer could choose to:

- continue to negotiate with the relevant unions to reach an agreement
- apply for ‘last offer’ arbitration by the FWC
- put forth their own proposal for FWC approval with a 12 month expiry date.

Regardless of the option chosen, the resulting employment arrangements would need to pass the Productivity Commission’s proposed no-disadvantage test (chapter 20).

This approach should help encourage privately negotiated settlements within the negotiating period. Employers would have an incentive to reach a long term agreement that matches the lifetime of the project, without being exposed to arbitration by the FWC. Unions would also have an incentive to reach an agreement, lest the employer choose to put forward its own agreement for approval and thus bypass the union’s involvement in the agreement’s content. If the parties do not reach agreement, this proposal allows employers to choose the most appropriate option for the circumstances of their firm, while providing safeguards for employees’ wages and conditions.

Figure 21.1 **Greenfields agreement making process**



Were an employer to choose the option of last offer arbitration by the FWC, they would have greater stability over the life of the project, but would be exposed to the initial uncertainty of the FWC's chosen outcome. The possibility that an employer may choose this option would help moderate both parties' claims during the initial bargaining period, while the FWC's arbitration role would help ensure that employees would not be disadvantaged.

Employers that choose the final option — a 12 month greenfields agreement — would be exposed to potential delays and industrial action following the 12 month expiry date. The size of this risk is likely to vary between employers. For some employers, the risk of industrial action may be minimal — as noted previously, greenfields agreements are not exclusive to the construction and resource sectors — and therefore this option may be preferable to an arbitrated outcome. The shorter lifespan may also provide an important check (in addition to the no-disadvantage test) on employers offering insufficient wages and conditions, as doing so may lead to employees demanding catch-up wages once bargaining for a longer term agreement has commenced. For many employers, the costs or risks of renegotiating mid project would be too great — an advantage of a menu approach

is that these employers can avoid these risks by choosing the other available options, such as arbitration or a union negotiated agreement.

These proposed greenfields arrangements were supported by numerous employer participants⁵⁶ (notwithstanding that some sought a longer term than 12 months for employer agreements), while other participants, including some employer groups, were opposed.⁵⁷ The Productivity Commission considers that this proposal strikes the right balance between creating incentives for agreements between employers and unions, preventing the inefficient delay of projects where stalemates occur, and safeguarding employees' terms and conditions.

RECOMMENDATION 21.1

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.

Project proponent arrangements

At present, the FW Act allows multiple employers for a single project to negotiate a multi-enterprise greenfields agreement with the relevant union(s). However, a related question is whether, once a head contractor has secured a greenfields agreement prior to a project's commencement, subcontractors that subsequently join the project at a later date should also be required to undergo the same greenfields agreement process to negotiate their own agreement.

⁵⁶ Including the National Farmers Federation, sub. DR302; Australian Hotels Association, sub. DR303; Allens, sub. DR310; Toll, sub. DR312; AMMA, sub. DR322; National Disability Services, sub. DR325; Aged and Community Services Australia and Leading Age Services Australia, sub. DR328; Business Council of Australia, sub. DR337; Australian Chamber of Commerce and Industry, sub. DR330; Australian Industry Group, sub. DR346.

⁵⁷ Including Victorian Government, sub. DR274; Australian Services Union, sub. DR283; Australian Workers' Union, sub. DR315; Master Electricians Australia, sub. DR304; Master Builders Australia, sub. DR290; Queensland Government, sub. DR338.

Some employer groups put forward proposals on this issue. For example, the Australian Industry Group (sub. DR346) suggested that once a head contractor has established a greenfields agreement for a project, the minimum negotiation period should not apply to subcontractors when negotiating their own agreements. Alternatively, AMMA (sub. 96, sub. DR322) proposed that ‘project proponent greenfields agreements’ should be available. Under this proposal, once a project proponent (such as a head contractor) has secured a greenfields agreement, other employers that join the project at a later date should be able to choose to opt-in to the terms of the agreement.

While the WR framework should generally encourage parties to negotiate agreements, the reality with greenfields agreements is that there are no current employees to negotiate with, and thus the relevant union occupies a proxy role. Once the main proponent for a project has already obtained an agreement covering the types of work to be performed on a project, there would seem to be little or no benefit in requiring parties to duplicate the delay and transaction costs of negotiating with the same union, for the same project and types of work, every time a new subcontractor joins. AMMA (sub. DR322, p. 30) noted that some major projects can have up to 250 greenfields agreements in place.

The proposal for project proponent greenfields agreements may address this duplication and delay, but also raises concerns about its impacts on competition. It would certainly increase the capacity for a single head contractor (potentially in conjunction with a union) to influence wages and conditions on a project-wide basis — similar to the existence of ‘jump up’ clauses in some agreements at present (noting that the Productivity Commission has recommended in chapter 25 that such clauses be barred from inclusion in enterprise agreements), but wider still.

Unlike ‘jump up’ clauses, which *require* contractors to receive equal wages and conditions to other workers, a subcontractor joining a project still has the choice of joining the head contractor’s agreement or not. As such, safeguarding competition may hinge on the FWC, along with other regulators such as ACCC, and possibly the Fair Work Ombudsman and Fair Work Building and Construction, collectively ensuring that subcontractors are signing onto such agreements willingly. This reflects similar observations made elsewhere in this report regarding pattern bargaining (chapter 20).

Overall, the Productivity Commission is convinced that there is a case for allowing subcontractors to sign on to greenfields agreements negotiated by a head contractor, provided that there are adequate safeguards to protect both employees of subcontractors as well as competitiveness. Such safeguards should include:

- at the time of FWC approval, the project proponent would need to set out the employee classifications and types of work expected to be covered by the agreement throughout the project and satisfy the FWC that the agreement passes a no-disadvantage test against all the relevant awards
- a project proponent agreement could not override an existing, non-expired enterprise agreement that a subcontractor has in place for the relevant employees

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- to be covered by a project proponent agreement, a subcontractor would need to apply to the FWC to establish that:
 - they do not have an existing enterprise agreement in place covering their employees on the project
 - they were not coerced or forced into joining the project proponent agreement
 - the project proponent greenfields agreement would pass a no-disadvantage test against the relevant award for their employees (this is unlikely to be an onerous exercise, as the agreement would have already passed a no-disadvantage test for the project as a whole).

RECOMMENDATION 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.

22 Individual arrangements

Key points

- Individual arrangements let employees and employers negotiate variations to pay and conditions based on personal circumstances and business needs to benefit both parties. Individually tailored arrangements based on genuine negotiation are intended to provide mutual gains, but uneven bargaining power can undermine this outcome — consequently, regulation is needed.
- The main questions that arise in assessing the effectiveness of statutory individual arrangements relate to their scope and whether they are fit for purpose. The use of the current form of individual statutory arrangement (individual flexibility arrangements (IFAs)) has been quite limited (at around 2 per cent of employees).
- Some employees (such as working mothers) and employers have made IFAs to vary full time hours, and increase hourly pay rates, leave or flexible hours. But other employers are uncertain whether an IFA would be compliant with the *Fair Work Act 2009* (Cth) (FW Act) were it to be subsequently tested. Furthermore, awareness of IFAs is generally low, especially among employees and small businesses.
- Nonetheless, IFAs provide flexibility and could be more widely adopted if awareness was higher and risk lower. The main regulatory impediments to parties using IFAs are:
 - that the notice period for either party to terminate an IFA is exceptionally short, which increases the risks — particularly, but not exclusively — to employers
 - IFAs are not exposed to independent scrutiny, which may make employees concerned about whether they are disadvantaged by their terms
 - the better off overall test (BOOT) is not simple to apply and consequently reduces the possibility of effective beneficial tradeoffs. In turn this may expose employers to compliance risks.
- These disincentives could be addressed by:
 - amending the FW Act to allow employees and employers to agree a unilateral termination period of up to one year, with 13 weeks the default if no termination period is specified
 - the Fair Work Ombudsman providing better targeted information to assist with compliance
 - the adoption of a 'holistic' no-disadvantage test rather than the BOOT to determine if an IFA makes an employee worse off overall.

With boundaries between work and life increasingly porous, individually tailored arrangements are a way for employees to manage their work and family or other personal commitments, or to negotiate a salary that is more directly related to their skills and experience than a standard, such as an award.

For employers, the desire for individual arrangements can arise from an intent to:

- enhance a cooperative and accommodating workplace
- improve alignment with the characteristics of the individual business or industry, such as size, capital intensity and competitive pressure
- offer greater incentives linked to performance.

It falls to individual arrangements to meet this need.

The main questions that arise in assessing the effectiveness of statutory individual arrangements relate to the degree to which they may authorise movement away from an award or enterprise agreement via an arrangement (an individual flexibility arrangement (IFA)) and whether they are fit for purpose. This chapter examines the role of individual arrangements and statutory arrangements in the workplace relations (WR) system and their effectiveness.

Section 22.1 examines why individual arrangements are used and section 22.2 sets out types of statutory individual arrangements, including those observed within the existing framework. Section 22.3 investigates the merits and shortcomings of the current arrangements and advances possible proposals to address the specific concerns identified, and section 22.4 explores the potential impacts.

22.1 Why employees and employers use individual arrangements

Potential benefits

An individual arrangement puts the employer's relationship with an individual employee at the heart of the employment arrangement. This has benefits for the employer and employee as it:

- provides greater scope for taking account of individual circumstances
- is a more practical way to achieve these outcomes than trying to negotiate all these individual concerns into a collective agreement
- enables employers to offer above award rates to attract and retain staff, and provide different pay outcomes for staff, taking into account their skills and experience
- provides flexibility in terms of rostering or other operational matters to suit the needs of the business.

A frequently stated rationale for individual arrangements is that they develop productive and competitive employment systems based on trust, performance, and employee empowerment (Gollan 2004; Mitchell and Fetter 2003). The trust relationship was also

apparently central to the introduction of individual employment contracts in New Zealand (as discussed further below), where the *Employment Contracts Act 1991* (EC Act) made a fundamental break from the previous regime of collective agreements to one based on individual contracts that was intended to provide mutual benefits to employers and workers (Brook 1991).

At the firm level, individual arrangements may be driven by both market conditions or business structure. In capital intensive industries (such as mining), arrangements that determine the utilisation of labour can have a crucial influence on capacity utilisation (Topp et al. 2008). Heiler and Pickersgill (2001) reported that thinner profit margins in the coal sector from lower commodity prices led employers to extract optimum flexibility, including through the use of individual arrangements. In a survey of employers in Australia and New Zealand, Gilson and Wagar (1996) found that organisations in the service sector were more likely to pursue individual employment contracts. Other evidence on individual arrangements suggested that in Australia they were more commonly associated with workplaces where communication structures were well developed — such as quality circles and semi-autonomous work groups (Wooden 2000). However, the relevant arrangements mainly related to well-paid managerial and professional employees — a circumstance that does not hold for all subsequent variants of individual arrangements.

Improving productivity has often been advanced as a benefit of individual arrangements. However, there are differing views on whether, by promoting greater flexibility and efficiency in the labour market, individual arrangements improve aggregate productivity. Contributing to these differences is the difficulty in drawing definitive conclusions given the need to isolate the benefits of reform from other drivers of productivity improvements (Evans et al. 1996) (also discussed in chapter 33).

In Australia, the regulation impact statement for the 2005 WorkChoices legislation stated that individual bargaining would lead to agreements that accommodated productivity offsets, which the award system did not do (Australian Government 2005). However, Peetz (2012) cites studies that show little relationship between individual contracting and productivity outcomes.

There may be several reasons for this finding. It is possible that the particular form of individual arrangement did not increase productivity because it eroded some employee benefits, with the demotivating effects this can entail. Alternatively, the type of changes sought were only indirectly related to productivity, and more directed towards responding to external factors such as changes in market preferences. Moreover, while Peetz cites several studies, the empirical work at the enterprise level in this area is relatively thin and it is difficult to control for possible selection bias effects.⁵⁸

⁵⁸ These would occur where businesses pursuing individual arrangements have different traits to those that do not, and where those traits are themselves correlated with productivity.

The evidence also does not convincingly demonstrate any robust link to the new contracting arrangements (or other aspects of the WR system) that were introduced at that time. That may be because there were no or few effects, or simply that amongst all of the other factors determining productivity, it would be highly unlikely to find an effect even if there was one.⁵⁹ The inability to verify or reject any productivity effects would be further reinforced by the relatively small uptake of individual arrangements in that period.

The main reason for preferring a statutory individual arrangement is that it can provide a 'safe harbour' for arrangements that deviate from awards, particularly if there is some trading off of wages and conditions.

Possible drawbacks

Individual arrangements are not a panacea for all ills of the WR system, for either employers or employees.

For employers, having all or most employees on genuinely individual arrangements will, for an employer with more than a handful of employees, be complex and add to management costs. Gains need to be significant to offset this. Moreover, such an approach may require more constant attention to renegotiation than a three year enterprise agreement or simply sticking to the award.

For employees, individual arrangements can require negotiating skills and knowledge that relatively few possess and potentially invites exposure to criticism in the workplace if it appears special deals have been done.

In the absence of sufficient safeguards, employers' uneven bargaining power could lead employees to accept lower wages and conditions than under collective arrangements, because the employee is forced to 'take it or leave it'. The risk would be greatest where employees could trade off the minimum conditions provided by awards against other asserted (but actually illusory) benefits for them, since this could take them effectively below the award safety net. The outcomes may not only involve redistribution between the parties, but also could contribute to the inefficient wage suppression that can occur under dynamic monopsony (chapter 12). Moreover, short-sighted decisions by some businesses to form employment arrangements that overly disadvantage employees can undermine trust, discourage efficient practices and adversely affect workplace harmony. Such businesses may ultimately lose their employees or fail, but the transition can be costly for people and the economy.

⁵⁹ In its analysis of the construction sector, the Productivity Commission faced a similar empirical issue. The asserted substantial gains to aggregate productivity from particular institutional changes in that industry did not withstand critical scrutiny (PC 2014c). But that finding did not rule out the possibility of smaller benefits that could not be expected to show up in aggregate data.

The net benefit calculation for the two parties may differ, too, explaining at least in part why statutory individual arrangements were not at any time in the last twenty years as widespread as lore suggested (see data later in this chapter).

Individual arrangements in New Zealand and other countries

Individual arrangements (either statutory or using the common law) are used widely in some jurisdictions, but do not feature prominently in the WR systems of many other countries (table 22.2). New Zealand is particularly interesting from an Australian perspective because it had a very similar system to Australia prior to the 1990s, and has made large changes since, commencing with the EC Act. For example, awards were abolished and the system of collective bargaining shifted to the enterprise level. The EC Act was replaced by the *Employment Relations Act 2000*, but many of the fundamental changes to the system created by the EC Act were preserved.

In New Zealand, individual employment agreements (IEAs) are now an established feature of the employment relationship. Employees can choose either to negotiate an individual arrangement (which must be in writing) or be covered by an enterprise based collective agreement. An employee joining a business that has a collective agreement must be offered the conditions of that agreement, but must join the union that negotiated that agreement within 30 days if they wish to maintain those conditions. If they choose not to, or the enterprise does not have a collective agreement, then the employee negotiates an IEA.

IEAs have a mandatory set of clauses and must not offer conditions that are worse than a statutory set of benefits. The latter are similar to the National Employment Standards (NES), covering matters such as recreational, parental and personal leave, break entitlements, statutory rights to vary hours of work (which employers can only refuse on certain grounds) and a requirement to at least pay the minimum wage. There is no requirement for premium wage rates for weekend work, overtime or shift work, nor any mandatory allowances. Any of these may be negotiated between employees and employers. Agreements vary, with different premiums for overtime across different agreements. The *Minimum Wage Act 1983* specifies the maximum hours of work to be 40 hours per week, exclusive of overtime. As for the NES, this can be exceeded if deemed reasonable. As in Australia, there are protections for unfair dismissal (and to a lesser extent, elements of Australia's General Protections).

Collective bargaining density (and union density) collapsed after the EC Act. In 2011, collective agreements (now at the enterprise level) covered less than one in ten New Zealand private sector employees (New Zealand Treasury 2012). Most employees covered by private sector enterprise agreements are in larger firms (Blumenfeld 2010). Individual arrangements are therefore the dominant employment type in New Zealand. (In that respect, while Australia also moved away from bargaining at the industrywide collective level, enterprise bargaining in Australia has gained much greater traction than New Zealand, and correspondingly, individual arrangements less so.)

Non-guaranteed hours contracts, often called ‘zero hours contracts’, are an emerging and controversial individual contract type in the New Zealand system, and a more established one in the United Kingdom following the global financial crisis (box 22.1, Acas 2014). Such contracts offer no guarantee of hours of work but require the employee to be available to work. They are also legal in Australia, though their penetration into the labour market has not to date registered in Australia in the same fashion as elsewhere. There is a concern in New Zealand that such contract types — appealing as they may be to employers wishing high levels of flexibility in labour contracting — may fall foul of the requirement under employment contracts for mutuality of obligations (Dundas Street Employment Lawyers 2014).

Box 22.1 Zero-hours contracts

Zero hours contracts do not guarantee a minimum number of hours, but employees agree to be available for work when required by the employer.

Compared with standard casual employment contracts they present two major problems. The employee is still tied to an employer and cannot readily engage in multiple job holding even if no hours are offered (the ‘exclusivity’ problem) and the lack of a clear definition of a zero hours contract, which makes it hard for employees to know about the consequences of signing such an agreement (the ‘transparency’ problem). The restriction on multiple job holding, and limit on the capacity of a person to engage in other activities that have routine scheduled hours, such as education, can lead to underutilisation or reduced acquisition of skills.

Those against zero hours contracts (employees) say it is just a way of avoiding them receiving the benefits of permanent employment (for example, leave entitlements). Employer organisations in the United Kingdom have argued that they are crucial for keeping people in employment. While employees are not obliged to accept work, they are concerned that not accepting work will lead to work no longer being offered.

The United Kingdom Government has legislated to make exclusivity clauses unenforceable. In New Zealand, both the Opposition Labour Party and Government have proposed legislative amendments to address concerns about the use of zero-hours contracts, for example, in the fast food industry. The Minister for Workplace Relations and Safety introduced legislation in August 2015 to prevent employers from demanding that employees be available for work, and not providing work, and from placing unreasonable restrictions on employees taking a second job.

Zero-hours contracts can be drafted for use in Australia. Net Lawman, a United Kingdom company which operates in a number of countries, including Australia and New Zealand, can draft a zero-hours contract for use in all Australian states and territories for a \$59 fee.

Sources: Acas 2014; Lees-Galloway 2015; Net Lawman nd; Pyper and Dar 2015 (Woodhouse 2015).

22.2 Forms of statutory individual arrangements

Australian Workplace Agreements

There have been three forms of statutory individual arrangements in Australia — Australian Workplace Agreements (AWAs) (pre and post WorkChoices) and IFAs.

AWAs were first introduced at the federal level as part of the *Workplace Relations Act 1996* (Cth) as an alternative to collective negotiation (state based arrangements had been in place prior to 1996). The objective of the arrangements was to place primary responsibility for industrial relations on employees and employers, thereby removing third party involvement (including removal of the right to protected action for employees with an AWA) (Minister for Industrial Relations 1996). Parties to the agreement were able to register the AWA so long as it complied with the requirements set out in legislation (Minister for Industrial Relations 1996).

The increased flexibility and self-regulation available under AWAs was accompanied by an approval process that aimed to ensure that employees were not disadvantaged relative to the award. Employers were required to provide an information sheet prepared by the Employment Advocate to employees and the AWA was signed and filed with the Employment Advocate within 14 days. The Employment Advocate ensured that the AWA passed a no-disadvantage test relative to the award, or where concerns arose, sought undertakings from the employer, or referred the AWA to the Australian Industrial Relations Commission for its approval. However, the approval process was considered to be weakened by a lack of transparency as AWAs were not published and were not available to a third party (McCallum 1997).

AWAs could be made before or after an employee commenced employment, so terms and conditions of employment could be set as a condition of employment. AWAs made under duress could be invalidated (Minister for Industrial Relations 1996).

AWAs were concentrated in communication services, government, mining, cultural and recreational services and the electricity, gas and water industries. Most AWA employers were small and medium sized businesses (Mitchell and Fetter 2003).

In 2005, under the WorkChoices legislation, AWAs were altered so that the statutory minimums were reduced to five minimum standards covering minimum rates of pay, leave entitlements and maximum hours of work (which could be averaged over 12 months (Australian Government 2005). These AWAs were contentious and widely criticised by employee organisations as undercutting worker entitlements. Most research tends to find that wages and conditions were lower under AWAs than collective agreements (van Barneveld 2006) and that AWAs under WorkChoices were approved even though they reduced pay rates below the applicable minimum (Sutherland 2009).

Statutory individual arrangements have also been used to reduce union influence over the setting of employment terms and conditions, or to de unionise the workforce (Peetz 2002; Roan, Bramble and Lafferty 2003). An early survey of organisations in Australia and New Zealand found that some employers saw individual contracts as an important device for reducing union influence (Gilson and Wagar 1996).

Estimates of the take-up rate for AWAs vary between 1.9 per cent and 7 per cent (ABS 2008c; McCallum, Moore and Edwards 2012; Mitchell and Fetter 2003). ABS data suggest that, at their peak, registered individual agreements covered 3.1 per cent of employees and in 2008 (prior to their abolition), they covered 2.2 per cent of employees and were the second least common method of setting pay. However (the then) Department of Education, Employment and Workplace Relations estimates suggest that between 5 to 7 per cent of Australian employees had an AWA by February 2008 before their abolition under the *Fair Work Act 2009* (Cth) (FW Act).

Under transitional arrangements, agreements lodged before 31 December 2009 could continue to operate. Given AWAs had a nominal expiry date of up to five years, the last AWAs will have expired on 28 March 2013, five years from the date of effect of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*. As with enterprise agreements, an expired agreement still has force unless terminated by either the employee or the employer, so that a small number of AWAs (in aggregate) may still be in operation. The conditions set down by the NES, and basic pay rates in modern awards, override any lesser conditions embedded in AWAs.

While there was some acknowledgment that changes to IFAs would make them more usable (Australian Metal and Mines Association, sub. DR322) a common view from some employer groups (Chamber of Commerce and Industry of Western Australia (sub. DR323), Australian Chamber of Commerce and Industry (sub. DR330)), was that the take-up of IFAs would remain small.

Many participants sought a return to AWAs, or in their continued absence, suggested approaches (such as being able to offer an IFA as a condition of employment) that would make IFAs more like AWAs.

Individual flexibility arrangements

IFAs were introduced in the FW Act as part of a broader shift away from AWAs which is reflected in the object of the FW Act:

The object of this Act is ... ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system ... (*Fair Work Act 2009* (Cth), s. 3(c))

Accordingly, unlike AWAs which could be offered as an alternative to a collective agreement, an IFA stems from, and remains rooted in, the terms and conditions of the

relevant award or enterprise agreement. This is because the IFA is made under an overarching ‘flexibility term’ that must be included in all awards or enterprise agreements. The IFA is taken to be a term of the enterprise agreement or award and takes effect as though it varies the award or enterprise agreement. The IFA does not change the effect of the award or enterprise agreement and is not a contract in its own right.

Several boundaries are placed around the making of an IFA which restrict its scope and effect.

First, the IFA must have the purpose of meeting the ‘genuine’ needs of the employee and employer. ‘Genuine’ is not defined in the FW Act for the purposes of making an IFA.

Second, the terms and conditions varied by the IFA must fall within those specified in the flexibility term. A model flexibility clause, developed during the award modernisation process and included in all modern awards, permits flexibility around when work is performed, overtime rates, penalty rates, allowances and leave loadings (McCallum, Moore and Edwards 2012).

The flexibility term must specify how an IFA can be terminated. IFAs under enterprise agreements and modern awards have different notice periods for either party to terminate the arrangement — 28 days for an enterprise agreement, and 13 weeks for a modern award. IFAs under both instruments can be terminated by mutual agreement in writing at any time. The IFA could specify a maximum period or, in the absence of a prescribed maximum, it would align with the term of the overarching enterprise agreement or award.

Where arrangements do not meet the requirements of the flexibility term, they still continue to operate but may contravene the general protections under the FW Act, for which sanctions may apply.

In addition, IFAs:

- must identify the terms being varied
- must be genuinely agreed between the employee and employer
- are in writing and signed by both parties with a copy given to the employee.

Whereas AWAs in their different forms were subject to a no-disadvantage test or provided a safety net of minimum pay and conditions, employers must ensure that an IFA makes the employee better off overall than if there were no IFA (the better off overall test (BOOT)). Employers must satisfy the BOOT twice in relation to IFAs made under an enterprise agreement — first when the enterprise agreement itself is made, and then again with respect to the IFA. The BOOT for IFAs, unlike the BOOT applied to enterprise agreements, is not specifically compared with the relevant award. That is, the BOOT compares the IFA to the employee’s existing employment conditions, which could be those under an enterprise agreement, or above the award.

While the BOOT for IFAs and enterprise agreements can take into account intangible benefits, the explanatory memorandum to the FW Act suggests that IFAs are specifically intended to foster such arrangements.

IFAs are not required to be lodged or subject to third-party scrutiny or consent. Rather, protections are provided through the prohibition on making an IFA a condition of employment and the ability for an employer or employee to unilaterally terminate the IFA.

Take-up of IFAs

In 2012, the Fair Work Commission (FWC) published its first assessment of IFAs based on survey data which found that IFAs are most often used to vary awards rather than enterprise agreements (O'Neill 2012b).

Productivity Commission estimates based on subsequent Australian Workplace Relations Survey data indicate that around 2 per cent of employees had an IFA in effect between February and July 2014. Overall the take-up has been low and broadly in line with that of AWAs.

The likelihood of making an IFA increases with employer size (O'Neill 2012b) which suggests that the design of IFAs is best suited to larger enterprises with more sophisticated human resources processes (or with greater awareness of their existence).

Overall, employees with an IFA reported that they had initiated the IFA (56 per cent compared with 44 per cent that were employer initiated) (O'Neill 2012b, p. 56).

22.3 Issues with individual flexibility arrangements

Survey data suggest that IFAs have some benefits for employees and employers but are not widely used. Participants in this inquiry suggest a number of shortcomings that appear to be inhibiting their wider use, which restricts the potential value of individual flexibility in the workplace.

Instances of beneficial use

The main benefits of IFAs to employees are more flexible working hours and increased take home pay (O'Neill 2012b). Employers with one employee on an IFA indicate that IFAs have created incentives to attract or retain staff and clarified employment conditions (O'Neill 2012b). Employers with multiple IFAs identify the main benefits as clarity about conditions, the capacity for staff to work hours as needed by the employer, and increased rostering flexibility (O'Neill 2012b). Employers with multiple IFAs also nominated formalisation of an existing arrangement as a benefit.

The majority of employees consider that they are net beneficiaries of the arrangement (O'Neill 2012b).

IFAs have also benefited at least one major group for whom flexible working arrangements are paramount — working mothers. Productivity Commission estimates based on Australian Workplace Relations Survey employee data suggest that whereas 9 per cent of all employees are female part time employees aged between 25 and 44, 15 per cent of IFAs are made by this group. The conditions most likely to be varied in an IFA are arrangements about when work is performed, increases in penalty rates and overtime rates (O'Neill 2012b). Such variations can produce tailored arrangements that provide significant flexibility benefits to this group.

Evidence from participants suggested that IFAs were delivering benefits to classes of employees beyond the niche individually tailored arrangements contemplated by the explanatory memorandum to the FW Act.

Tasmania's Own Redline Coaches (Redline) uses IFAs as a means for casual employees to smooth their income by banking hours during periods of peak activity and drawing down on those hours during down periods. At the Hobart public hearing, Ms Kathy Dwyer stated:

We use it specifically for banking of hours, so it's a specific agreement and it is well utilised. As a matter of fact, if we lost the ability to do that, we would probably lose a lot of our casual workforce. Our casual workforce, particularly when they do the school runs, obviously have a big downtime for weeks during school holidays. They utilise the banking of hours to that they can actually have that money during those down periods of time. (trans., p. 102)

A broad look at the shortcomings of IFAs

Several deficiencies limit the benefits of IFAs, and consequently they were widely criticised by participants — what the Victorian Employers' Chamber of Commerce and Industry (VECCI) (sub. 79, p. 40) termed a 'consensus of disenchantment'.

The Australian Mines and Metals Association (AMMA) (sub. 96, p. 80) summed up the position of employers as:

... [facing] considerable legislative and other impediments to achieving genuine flexibility under IFAs. Any resulting flexibilities are generally hard won and in many cases illusory.

Employee groups (the Australian Workers Union sub. 74, the Shop, Distributive and Allied Employees' Association (SDA) sub. 175, the Australian Council of Trade Unions (ACTU) sub. 167 and the Textile, Clothing and Footwear Union of Australia (TCFUA) sub. 214) also criticised aspects of IFAs, and that they were another form of individual arrangement that would disadvantage workers. The SDA considered IFAs to be inconsistent with the object of the FW Act to ensure that the safety net cannot be undermined by individual statutory arrangements. The ACTU saw multiple disadvantages, stemming from its view

that the unsupervised character of the arrangements meant that the safeguards were not effective or observed.

IFAs are being used by employers in a similar fashion to AWAs — that is, to drive down wages and conditions and exploit vulnerable employees. (ACTU, sub. 167, p. 284)

In effect, while all parties were disenchanted, their perspectives emanated from opposite concerns. Employee groups identified all the deficiencies of AWAs in IFAs while employer groups saw too little of AWAs in IFAs. Some employers and employer groups, particularly those in the construction and resources sectors and some peak bodies representing employers, sought a return to individual statutory arrangements both in addition to IFAs, and as an alternative to the proposed enterprise contract (chapter 23). AMMA estimated the take-up rate for IFAs in the resource industry was less than 5 per cent of all employment arrangements, compared with more than 80 per cent for AWAs (AMMA, sub. DR322).

Employers' primary concerns about IFAs related to the business risks they posed, including the financial risk of the arrangements arising because an employee can unilaterally terminate the arrangements with 28 days' notice. Several participants including Clubs Australia Industrial (sub. 60) and Manufacturing Australia (sub. 126) said that employers need greater certainty that they can rely on flexible arrangements. In contrast, the ACTU saw unilateral termination as an important safeguard for an agreement that does not genuinely meet the employees' needs (sub. 167).

Some participants (Brickworks Limited sub. 207 and Clubs Australia Industrial sub. 60) considered the scope of IFAs (which are restricted to matters laid out in the flexibility terms in enterprise agreements or awards) too narrow to be effective as a means to achieve flexibility. Enterprise agreement negotiations often can and do act to reduce the scope for IFAs such that future employees and the employer are constrained in using this approach to improve the workplace arrangement outside collective bargaining. The scope of flexibility terms is discussed further in chapter 7 (on awards) and in chapter 20 (on enterprise bargaining).

Many participants maintained that there was an ongoing need for individual statutory arrangements, which IFAs failed to meet, and some called for a return to pre WorkChoices style AWAs.

Employer organisations have also called for the capacity to negotiate IFAs as a condition of employment (which is currently prohibited under the FW Act), to provide certainty about flexibility in a workplace. Notwithstanding this prohibition, FWC data show that 35 per cent of employers with one IFA and 55 per cent of employers with multiple IFAs required that employees sign an IFA to commence or continue employment (O'Neill 2012b). The 2012 post-implementation review recommended an additional statutory prohibition against making IFAs as a condition of employment (McCallum, Moore and Edwards 2012).

Employees and employers are not realising the potential value of individual flexibility in the workplace because of the various shortcomings of IFAs. The question is how to address these shortcomings. The solutions need to be multi-tiered and respond to their specific deficiencies. They also need to recognise that there are good practical reasons why individual arrangements are not a panacea, as noted earlier in this chapter.

The specific deficiencies

The notice period for termination is too short

One of employers' main concerns about IFAs was that the capacity for an employee to unilaterally terminate the arrangements with 28 days' notice exposed businesses to financial and operational risks. For example:

... IFAs can be unilaterally cancelled by either party on the giving of notice. This kills certainty. (Ports Australia, sub. 249, p. 7)

While [IFAs] are free from many of the procedural complexities associated with enterprise bargaining, they do not offer the same level of certainty and stability as they may be terminated unilaterally. (Housing Industry Association, sub. 169, p. 45)

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 of several IFAs 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.

There were divided views as to whether this inflexibility harmed or helped employees. Employee representatives were generally hostile to IFAs. The ACTU (sub. 167) saw unilateral termination as an important safeguard for an agreement that does not genuinely meet the employees' needs. Professionals Australia (sub. 212) submitted that extending the notice period would unfairly impact on employees.

However, employers can also terminate IFAs and that capacity might sometimes disadvantage employees. Clubs Australia Industrial (sub. 60, p. 28) provided an example where reform aimed at 'locking in' an arrangement could benefit employees:

The continuing challenge that these unilateral termination provisions presents for both parties to an IFA is the lack of certainty. For example, an employee may be relying on a higher rate of pay only available under an IFA in order to meet mortgage repayments. An employer who is looking at ways to reduce a wages bill may decide, without any obligation of consultation with the employee, revert to the base Award or Enterprise Agreement conditions and the employee is placed in a situation where they can no longer meet their mortgage repayments.

How often IFAs are terminated to the disadvantage of either party to an arrangement is unclear, and claims about either instances rely substantially on anecdote and assertion.

However, there is some information on the incidence of termination of IFAs (O'Neill 2012b):

- The bulk of employers with one IFA (71 per cent) reported that IFAs had not been reviewed, modified, or terminated since their commencement.
- A relatively small share of employers with one IFA indicated that IFAs had been modified (1 per cent) or terminated (15 per cent). In more than two thirds of cases where IFAs had been modified or terminated, the employer was the instigator of change. In very few cases (1.4 per cent) was an agreement to terminate or modify an arrangement a mutual decision of the employer and employee.
- Not surprisingly, the share of employers with multiple IFAs indicating any modification or termination of an IFA in their enterprise was higher (at 7.2 and 13.1 per cent respectively) simply because there were more IFAs subject to that likelihood. As with employers with one IFA, the majority of modifications/terminations (70 per cent) were initiated by the employer and in 8 per cent of cases by both the employer and the relevant employee.
- A somewhat different story emerges when information is collected at the employee level. As for employers, the bulk of employees (again more than two thirds) reported that IFAs had not been reviewed, modified, or terminated since their commencement. However, unlike the employer based data, employees claimed that they initiated three quarters of modifications and 40 per cent of terminations, with around 40 per cent terminated by the employer, and 8 per cent by mutual consent. 15 per cent of employees could not recall the initiator of termination for the remainder of terminated agreements.

Of course, these figures relate to IFAs with varying durations and so do not provide an accurate measure of the probability of termination or modification. It would be desirable to have data on the probability of termination and modification of agreements for different periods after their commencement (the 'hazard' function).

Overall, the picture provided by the survey evidence is inconsistent, but it indicates that employees are not the primary instigators of termination. This does not mean that employer concerns about termination risks are unwarranted because the data do not reveal whether the outcomes of any terminations were adverse for employers or employees. The available evidence does not confirm employer concerns, but nor does it necessarily mean their concerns are unfounded.

Without solid evidence, only judgment can be used to set a termination period. The 2012 post-implementation review noted that a short termination period was inconsistent with an IFA that was the product of genuine agreement and recommended a 90 day period for unilateral termination of an IFA (McCallum, Moore and Edwards 2012).

Amendments to the FW Act propose a minimum 13 week notice period for unilateral termination of an IFA, which would align the termination period for an IFA made under an enterprise agreement with that made under a modern award. While 13 weeks reduces the

financial risk to businesses, it appears arbitrary given the lack of consensus from businesses on a termination period. An alternative is for the 13 weeks to be used as a default period for awards and enterprise agreements, with parties to an IFA able to specify a longer termination period where that suits their individual circumstances. However, there would be risks to employees, particularly if apparently mutually agreed termination periods were completely open ended. This suggests that employees and employers should be able to unilaterally terminate arrangements at any time after a certain period has elapsed. One year appears reasonable.

Employers and employer groups generally supported a negotiated unilateral termination period of a year with a default period of 13 weeks while unions generally supported the status quo. Stewart, McCrystal and Howe (sub. DR271) questioned the need to allow for a unilateral termination period of up to one year as IFAs, which were designed to provide for genuinely individual needs would be an unlikely instrument to manage broader work scheduling arrangements. However, evidence from participants, such as Redline on their use of IFAs, suggest that they provide genuine flexibility to employers for a range of purposes not outlined in the explanatory memorandum to the FW Act.

Business SA (sub. DR360) surveyed its members on the use of IFAs and the proposed termination period. The survey confirmed that the take-up of IFAs is low and that 68 per cent of members who responded would consider using IFAs if the notice period for termination was extended to at least one year.

On balance, the Productivity Commission considers that one year, while it will not suit all types of businesses, provides additional flexibility for employees and employers to agree to IFAs that suit their business and personal circumstances while retaining the protection of a default where the employer and employee cannot agree on, or do not see the need for, an alternate termination period.

RECOMMENDATION 22.1

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.

The ambiguities and challenges of the 'better off overall' test

The purpose of the BOOT is to ensure that IFAs do not undermine minimum employee entitlements. The BOOT under IFAs differs from that for enterprise agreements. The latter is assessed against the award and its particular form has raised concerns about adverse effects on the efficiency of agreement making (chapter 20).

IFAs must leave the employee better off overall than they would have been if no IFA were agreed to. This means better than the award or enterprise agreement for employees paid exactly in accordance with one of these instruments or better than their terms of conditions of employment for award-covered employees receiving above-award conditions.

Many participants criticised the BOOT for IFAs as impractical, complex, and inflexible because the extent to which non-financial benefits should be taken into account is unclear and quantifying these is difficult. VECCI (sub. 79, p. 8) said that:

Members report an overwhelming lack of familiarity and/or hesitance in implementing [IFAs] due to systemic issues including the ... inconsistency and uncertainty over the operation of the 'better off overall test' ("BOOT").

Sources, including participants, suggested that the example in the explanatory memorandum to the FW Act, which purports to illustrate how to pass the BOOT, may, in practice, fail the test.

In this example the Explanatory Memorandum states, quite tellingly, that "it is intended that, in appropriate circumstances, such an arrangement would pass the better off overall test". It is not apparent to me why that would be so. (Amendola 2009, p. 157)

The practical effect of this ambiguity would be that businesses have poor incentives to seek tradeoffs of any substantive kind.

However, Stewart, McCrystal and Howe (sub. DR271) maintained that the explanatory memorandum permitted consideration of who initiated the arrangement (employer or employee) as relevant to determining whether the employee was better off overall. An associated concern was the compliance risks of agreeing to an IFA that, if subsequently tested, was found to fail the BOOT. The Fair Work Ombudsman (FWO) website (FWO, nd) highlights the employer responsibility to ensure that an IFA is properly made:

If an employer fails to ensure that an IFA is properly made in accordance with the FW Act, they may be liable to a penalty of up to \$10,200 for an individual or \$51,000 if the employer is a body corporate.

The Australian Chamber of Commerce and Industry (ACCI) (sub. 161, pp. 101–2) illustrated the potential compliance risk:

Employers are discouraged from using IFAs to confer a non-monetary benefit on an employee in exchange for a monetary benefit in the manner contemplated by the FW Act's Explanatory Memorandum as there is an element of risk that they may be breaching the award terms should a court conclude that the IFA does not meet the BOOT as against all award conditions. A FWC Full Bench decision ... has cast doubt that they can be used in this way ...

In an attempt to fix some of the problems identified with the BOOT in the 2012 post-implementation review, the Australian Government introduced amendments, but these were not passed as part of the *Fair Work Amendment Act 2015*. These amendments were likely to have been limited in their effect. They proposed a legislative note to confirm that an IFA can confer a non-monetary benefit in exchange for a monetary benefit. It is unclear

what further guidance this would provide that would reduce the uncertainty for employers, as the FW Act already permits non-monetary benefits to be taken into account when determining whether an IFA passes the BOOT and this has not provided certainty to employers.

While the peak bodies and some lawyers consulted by the Productivity Commission considered that the ambiguities of the BOOT raised significant compliance risks, a large scale survey of firms did not support those views. The 2012 FWC survey suggested that fewer than 1 per cent of employers were averse to IFAs because of the risk of penalties (O'Neill 2012b). Another large, more recent workplace survey commissioned by the FWC found that of those that did not use IFAs, only 0.5 per cent were concerned about future penalties if they used IFAs incorrectly. Preference for alternatives, including continuing existing informal undocumented arrangements instead, were overwhelmingly more important (FWC 2015d).

There have also been very few instances where the FWO has acted against an employer in respect of an IFA (even though many IFAs appear to be formed as a condition of employment, in breach of the FW Act). The notable exception was *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd*⁶⁰ in which the Academy attempted to coerce two employees to agree to an IFA as a condition of employment (in one case by threatening to dismiss an employee if he did not sign the IFA and, in the other, providing no work to an employee because he refused to sign). The conduct was unambiguously in breach of the FW Act and the business recognised it was at fault (and apologised). In reality, the compliance risks would appear to be relatively small for employers that set out to reach flexible arrangements in good faith with their employees.

Moreover, the most likely remedy for an employee who, after initially consenting to an IFA, decided ex post it had failed the BOOT would be to terminate the arrangement (and thereby automatically revert to the pre-existing arrangement). It is unlikely that, without evidence of coercion preceding the arrangement, the FWO would intervene any further (and this appears to be its practice).

Accordingly, on the issue of compliance risk, there is a gap between the perceptions of employer representatives, the views of individual businesses, and the compliance measures adopted by the FWO. Nevertheless, there appears to be no harm in eliminating those risks where they do not undermine the protection of employees.

⁶⁰ *Fair Work Ombudsman v Australian Shooting Academy Pty Ltd* (2011) FCA 1064.

Employee representatives were also concerned about the BOOT

The fundamental concern of employee representatives⁶¹ was that the BOOT was not applied with rigour by employers and that the ambiguity of the BOOT might allow an unfair tradeoff between monetary (or other important) entitlements and intangible benefits:

... it is difficult to quantify a non-monetary benefit and ... if this amendment of the Fair Work Act 2009 (Cth) was to pass and become law ... employees may be significantly disadvantaged, to the extent that employers will try to trade off entitlements for non-monetary benefits that employees already receive. (Professionals Australia, sub. 212, p. 34)

... employer organisations frequently assert that non-monetary entitlements such as arrangements that provide ‘the opportunity to earn extra income’ or that otherwise ‘meet employee needs’ can be used to offset the loss of financial entitlements such as penalties and loadings. (ACTU, sub. 167, p. 288)

In fact in many cases, the BOOT appears not to have been applied at all — 18 per cent of employers with one employee on an IFA, and 27 per cent of employers with multiple IFAs, did not assess whether an employee was better off overall (O’Neill 2012b).

Views on proposed new provisions to address compliance risks

A new provision in the FW Act which was introduced, but not passed in the *Fair Work Amendment Act 2015*, sought to address compliance risk by providing a defence to an alleged contravention of a flexibility term where the employer reasonably believes that the term was complied with at the time an IFA was made. Supporting evidence was to be provided via a ‘genuine needs’ statement from the employee setting out why they believed that the IFA met their genuine needs and satisfied the BOOT.

However, this would have required the employee to identify how the IFA met the BOOT. As 42 per cent of employees reported that they made IFAs without knowing whether they were altering an enterprise agreement or award (O’Neill 2012b), the reliability of a genuine needs statement could be questionable in a number of cases.

Further, the ACTU (sub. 167, p. 291) expected that a lack of guidance would adversely affect employees:

There is no protection offered to an employee through the genuine needs statement, rather the genuine needs statement has the opposite effect, denying an employee the ability to assert that they were not fully informed of what they were agreeing to.

AMMA (sub. 96, p. 84) was concerned that the requirement would have the unintended consequence of reducing the incentive to use IFAs:

⁶¹ Such as the TCFUA (sub. 214) and the National Foundation for Australian Women (sub. 154).

... AMMA members are extremely concerned about how this requirement will operate in practice. This threatens to create such a level of complexity and administrative burden on businesses that it will dissuade them from using IFAs.

In light of the foregoing, a key consideration is whether there are other changes that could be made to the BOOT that could make it work, or whether an alternative approach is needed to make IFAs more attractive.

Increasing transparency (see below) by exposing IFAs to independent scrutiny is suggested by participants as essential to ensuring the BOOT does not undermine wages and conditions. However, while this would provide some measure of comfort to employees and employers after the arrangement is made, getting to that point still requires the sifting and weighing of monetary and non-monetary benefits.

AMMA (sub. 96, p. 84) considered that the while changes to provisions relating to flexibility clauses and IFAs were positive, this was:

... within an IFA architecture that is flawed and in need of more fundamental re-examination rather than piecemeal amendment ...

Changing the BOOT to a no-disadvantage test

While there are questions about the extent to which the BOOT really acts as an impediment to the formation of IFAs, the BOOT has some intrinsic difficulties, not just in its application to IFAs, but more generally to collective agreements (chapter 20). Further guidance from the FWO on meeting the BOOT and the circumstances in which it would take compliance action against an employer where it subsequently led an IFA to breach to the FW Act could allay the concerns of some employers. That said, it is only realistic to recognise that the FWO is in an invidious position with a test as opaque as the BOOT. As noted in chapter 17, no code can substitute for clear and consistent legislation.

A no-disadvantage test (NDT) is likely to be a more workable protection for employees while being less ambiguous. A NDT assesses whether the terms and conditions of employment disadvantage an employee relative to a stated benchmark.

On face value, the BOOT is similar to the NDT that preceded it. In theory the difference should be marginal with an arrangement passing the latter if the employee is at least as well off, and passing the former if it improves the employee's overall position (if only by a dollar). However, one concern is that a BOOT may be interpreted in practice as making an employee materially better off — a much harder test to satisfy. A NDT appears to be more straightforward to apply. It also has the great advantage over the BOOT of being clearly an aggregated test, that is, one that balances potential advantage and disadvantage, rather than being capable of interpretation as requiring all elements of an arrangement to be unambiguously favourable to an employee.

The NDT is also a well-established concept which has been extensively used under federal and state jurisdictions, albeit in different forms (chapter 20).

The new NDT should compare the terms and conditions as a whole for employees relative to a benchmark but be able to operate in the context of the FW Act.

The proposal for a NDT, effectively implemented, appears on its face not to be inconsistent with section 3(c) of the FW Act as it would prevent the undermining of ‘fair, relevant and enforceable minimum wages and conditions’.

The Productivity Commission heard from one employer organisation that the FWO had provided oversight of a process to make IFAs, which provided confidence that it had satisfied the BOOT. While using this approach for a NDT would provide a high degree of certainty to employers, it is resource intensive and would displace other compliance activities.

Instead, and accompanied by legislative reform as recommended, the FWO should provide more detailed, practical guidance on the NDT, including a template arrangement and a step by step guide to compliance or checklist.

A shift to a no-disadvantage test was generally supported by employees and employer groups as being more workable, but rejected by unions and other participants as variously unnecessary (as the difference was marginal) (CPSU, sub. DR270) or potentially significant (Victorian Government, sub. DR274). Participants, including the Australian Hotels Association (sub. DR303), the Housing Industry Association (sub. DR319), and SDA (sub. DR306) were also concerned about the difficulties in making an IFA that passes a no-disadvantages test where non-monetary benefits were part of the tradeoff due to difficulties in weighing the gains and losses.

Existing technology — the FWO’s Pay Calculator — could provide the basis for assessing non-monetary benefits and thereby addressing some of this uncertainty. The Pay Calculator provides hourly pay rates in awards under different assumptions including hours of work. This tool could be used as the basis for determining the monetary gain or loss to be traded off. For example, if the shortfall (or additional) or monetary tradeoff were quantified before the IFA was entered into, and the employee freely agreed to the arrangement, it should be accepted that the IFA implicitly makes them at least as well off as they were without the IFA and therefore would be likely to pass a no-disadvantage test.

Subject to examining feasibility and the costs and benefits, the pay calculator could be adapted to enable employees and employers to assess the overall effect of IFAs.

To reduce uncertainty for employees and employers the NDT should be accompanied by practical guidance from the FWO to employees and employers. This was supported by Master Electricians Australia (sub. DR304), VECCI (sub. DR339), and the Minerals Council of Australia (sub. DR363). At present, the FWO best practice guide to making

IFAs is the main source of information on its website. It contains one case study and very basic examples which provides minimal guidance on monetary and non-monetary benefits.

RECOMMENDATION 22.2

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.

Lack of awareness

A lack of awareness may also contribute to the low take-up of IFAs. A significant number of employees and employers are not aware of their existence. Around 65 per cent of employees, and around 45 per cent of employers were not aware that those who had their employment conditions set by an award or enterprise agreement could agree to an IFA (O'Neill 2012b). Small businesses and younger employees were more likely not to be aware of IFAs. Most employees who were aware of IFAs had received this information from their employer or manager.

The FWO has invested in its online resources and these are heavily accessed; however, the FWO website provides only limited information on IFAs. In any case, the online information is only useful for those employees and employers that already know about the existence of IFAs. It does not solve the problem that many parties are not even aware they exist ('You don't know what you don't know'). Targeted promotion of IFAs would be one way to increase employer and employee awareness. As most employees receive information on workplace relations from their employer, efforts should be directed at employers, particularly small businesses, and the effectiveness of the communication strategies assessed periodically by the FWO.

Businesses that are aware of IFAs are more likely to use them. But whether they would actually do so depends on the potential administrative burden of making individual arrangements (this is further discussed in chapter 23, on the enterprise contract).

Participants agreed that there was a need for the FWO to provide more information in relation to IFAs and there was unanimous support for the recommendation that the FWO

develop an information package, particularly as meeting the needs of small businesses. The specific information need for small businesses in making IFAs was raised at the Ipswich public hearing by Jason Wales of the Chamber of Commerce and Industry Queensland:

I guess in terms of flexibility and IFAs and what employers can and can't do, they don't understand what they can and can't do when it comes to rostering and how they can maximise their opportunities to the current hours that they have. For example if you were going to enter into an IFA, there's an assumption you must know minimum entitlements and what can be traded off in the first place, and most small businesses don't understand that generally. (trans., p. 647)

Worksite Resolutions (sub. DR265) noted the deterrence effect of high-profile cases (such as those cited earlier) and that the outcomes could have been more beneficial to employees and employers had assistance been provided in the specifics of drafting, formulating and implementing an agreement.

Master Electricians Australia (sub. DR304) considered employer groups would be well placed to deliver material and training to small businesses. Aged and Community Services Australia (sub. DR328) suggested that training, a direct enquiry line for enquiries and examples of acceptable clauses would help employees and employers to understand IFAs and increase their take-up.

While supporting the recommendation, ACCI (sub. DR330) considered that it would not be sufficient to overcome all the perceived limitations of IFAs.

RECOMMENDATION 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.

Do individual flexibility arrangements need independent scrutiny?

The recommendations in this chapter are primarily aimed at reducing the disincentives to the use of IFAs. Participants had differing views on the need for, and benefits of greater scrutiny.

Some participants (from both employer and employee groups) considered that independent scrutiny would provide greater protection to both parties to the agreement.

The Printing Industry Association of Australia (sub. 139, p. 6) said that independent scrutiny of IFAs would:

... provide certainty and thereby assurance to both employers and employees.

The ACTU (sub. 167, p. 287) cited widespread non-compliance with the prohibition of IFAs as a condition of employment (amongst other concerns) as highlighting:

... that existing safeguards on the use of IFAs are relatively ineffectual as a means of protecting employees. The absence of external scrutiny in relation to the content of IFAs and the process of making them enables employers to pressure employees to accept substandard IFAs that reduce wages and conditions.

David Peetz (sub. 133, p. 22) noted that the absence of scrutiny cloaked non-compliance:

IFAs are not routinely scrutinised by anybody ... If the FWO comes to a workplace to inspect the wage records, and an IFA is below standard, then the employer is in breach of the award. But this only happens if they are found out.

Stewart, McCrystal and Howe (sub. DR271, p. 14) noted the unlawful use of IFAs as a condition of employment showed clear evidence of a need for greater scrutiny.

Besides supporting the need for greater scrutiny of IFAs ... this evidence should at least cause us to question whether such employers are complying with the content requirements of IFAs, by ensuring that they leave each employee better off.

The 2012 post-implementation review recommended that employers notify the FWO of IFAs to enable it to investigate at its discretion whether IFAs were being abused, and to provide data about the incidence of IFAs (McCallum, Moore and Edwards 2012).

However, AMMA (sub. 96) did not support the requirement for notification, as it would raise concerns that employees would be pressured by unions that did not want employees to enter into individual arrangements at the expense of enterprise agreements.

The Productivity Commission considers that the recommendations of this inquiry address incentives to use IFAs unlawfully (whether deliberately or inadvertently) and reduce the need to rely on independent scrutiny to deter the misuse of IFAs. The enterprise contract (chapter 23) provides an additional option to modify awards while better-targeted information from the FWO (recommendation 22.3) should provide greater clarity to employees and employers on the use of IFAs. In addition, the FWO can already conduct random audits.

Compliance and enforcement should be proportionate to their costs and benefits. Compliance (including education and enforcement) is already a significant budgeted expense for the FWO, representing around 61 per cent of its total resourcing in 2013-14 (FWO 2014d) but further resources may be required.

22.4 Retained safeguards

The proposals in this chapter retain the following safeguards in the current legislation that IFAs:

- must be genuinely agreed to by the employee and employer
- are only made after the employee has commenced employment
- are in writing and signed by the employer and employee (or their parent or guardian if under 18)
- still involve a termination option of no longer than one year.

Table 22.1 sets out how the safeguards proposed by the draft recommendations in this chapter respond to some concerns raised in submissions, particularly in relation to an imbalance of bargaining power between employees and employers.

Despite greater information and modifications, IFAs may not suit some businesses (particularly small and medium sized businesses). Use of the enterprise contract model discussed in chapter 23 could provide a mechanism to allow such businesses and their employees access to revised arrangements.

Table 22.1 Safeguards to making individual flexibility arrangements

<i>Concern</i>	<i>Possible impact without safeguard</i>	<i>Safeguard</i>
Mutually agreed unilateral termination period up to one year. Default unilateral termination period of 13 weeks	Employee is locked into an arrangement that does not benefit them for up to one year.	The no-disadvantage test and guidelines as to its operation.
Increased scope of flexibility term (chapter 20)	A greater range of matters could be covered in IFAs than in some existing enterprise agreements	The no-disadvantage test and guidelines as to its operation
IFAs made as a condition of employment	Employees have been offered 'take it or leave it' IFAs that undermine wages and conditions	FWO information campaign

Table 22.2 Individual arrangements: international comparison

<i>Jurisdiction</i>	<i>Arrangement</i>
Australia	All employees have a written or implied common law contract, with the scope determined by the boundaries of statute and relevant awards and enterprise agreements. Individual flexibility arrangements on a limited basis are permitted under the <i>Fair Work Act 2009</i> (Cth).
Canada	Wages and conditions are set through collective bargaining, which does not make provisions for individual arrangements to override or exclude collective arrangements.
European Union	Employers must advise employees of the terms and conditions of employment in writing within two months of employment commencing, unless they are provided with a document referring to a collective agreement or a written contract.
Germany	Terms and conditions are mainly regulated by statute, collective agreements or works agreements. As employment contracts must comply with these arrangements, there is little scope for individual arrangements, except for senior managers.
Japan	Individual employment contracts must not contravene collective agreements.
New Zealand	Where there is no collective agreement, an employer and employee negotiate an individual employment agreement. Individual arrangements must be offered in writing and include a number of mandatory clauses detailing, for example, duties, working hours, salary and how to resolve employment relationship problems. Employers must provide the minimum employment entitlements for workers as set out in the employment legislation, including payment of at least the minimum wage, four weeks' annual holidays and receiving wages without deductions. Where there is a collective agreement and the employee is not a member of the union that negotiated the agreement, the employer and employee can have an individual arrangement based on the collective agreement.
Sweden	Individual contracts and collective agreements are mutually exclusive. Individual protections are provided under law and apply to all employees, except those in managerial positions. If the employer is a member of an employers' association or has signed a collective agreement for a particular sector, individual contracts are prohibited. Employers are obliged to provide employees with information about salary, working hours and other terms and conditions within one month of the starting date of employment.
United Kingdom	Around a third of employees are not covered by collective agreements and may have individual arrangements with their employer. Certain 'particulars of employment' (terms and conditions) must be provided to the employee in writing under the <i>Employment Rights Act 1996</i> . Employees can apply for flexible working arrangements if they have worked continuously for the same employer for 26 weeks. They can make one application a year. The application must be in writing, to the employer, with a decision to be made within three months, although this can be lengthened if the employee agrees. If the employer agrees to the request, it must be reflected in the employee's contract. Where an employer refuses the request, they have to provide business reasons for the refusal in writing.
United States	Most employees do not have a written employment contract. Individual arrangements are common among professionals and executives, as well as sports people, entertainers and scientists.

Source: Bamber and Pochet (2010).

23 The enterprise contract

Key points

- Some employers seeking to modify award wages and conditions lack options for making agreements. Some firms report the process of enterprise agreement negotiations is too daunting and data show that small businesses overwhelmingly do not take-up this form of arrangement.
- Consequently, these employers use individual arrangements — either individual flexibility arrangements (IFAs) or more often common law contracts — to modify award terms and conditions, or otherwise remain on awards. But IFAs are not helpful for some types of employers and common law contracts do not offer the certainty to employees and employers of an approved statutory arrangement.
- A new statutory arrangement — an enterprise contract (EC) — could be used to vary awards for classes of employees, as nominated by the employer. The protections of the *Fair Work Act 2009* (Cth) (FW Act) would remain. It could not vary the National Employment Standards or minimum wage, nor deny workplace rights as specified under the FW Act. While the EC is likely to be primarily attractive to small and medium-sized businesses, extending the EC to all award-based businesses is preferable.
- The principle is that an EC would not make any employee worse off compared with the award. The same no-disadvantage test (NDT) to that applied in enterprise agreements would be used, such that in net terms relative to the award members of the class of employees would not suffer an erosion of their benefits.
- The EC would not be used to vary enterprise agreements.
- Consistent with awards, the EC would be offered on a ‘take it or leave it’ basis to new employees.
- As a variation to awards, all employees would retain the rights under the FW Act to commence bargaining toward an enterprise agreement. Existing award-covered employees in the relevant class could join the EC if they chose. It would be unlawful to coerce these employees to join the EC.
- A template would be provided by the employer to the Fair Work Commission (FWC) and Fair Work Ombudsman (FWO) before an EC came into effect. A statement outlining how the EC meets the NDT would be provided to each employee and signed by the employee before that employee joins the EC.
- Employers will be able to choose whether to have the FWC approve the EC against the NDT (except where the NDT depends on non-cash benefits) or to act at their own risk, including providing back pay if later found to be in breach by the FWO. In addition to penalties for coercion, the Act would specify penalties for firms that engage in wilful misconduct in relation to the use of ECs.
- The EC would operate for a nominal term of three years but would then require renewal. Employees would be able to opt out and fall back to the relevant modern award after 12 months on the EC, as an additional protection.
- For transparency, ECs should be open to third-party scrutiny through lodgment with the FWC and subsequent publication. The FWO would be able to audit ECs as required.
- The EC will be the joint responsibility of the FWC and FWO. Consistent with its awareness-raising function, the FWO should undertake a six-month education campaign before the EC is implemented.

The workplace relations (WR) system should offer employers enough choice to enable them to structure their employment arrangements consistent with their business operations, while preserving the necessary employee protections. Under the current system, employers seeking to modify awards have two options — an arrangement negotiated collectively under an enterprise agreement, or an arrangement negotiated individually using an individual flexibility arrangement (IFA) (as part of an award or enterprise agreement) or common law contract.

There may be a gap in contracting options, since, depending on the scope of any variations in employment arrangements, both of these options may impose excessive administrative costs on smaller businesses. The WR system can be particularly daunting to smaller employers.

One approach to fill this gap is to introduce a new statutory arrangement for businesses to vary awards for a given class of employees, but in a way that would maintain the safety net for employees. Such an arrangement would occupy the ground between enterprise agreements and awards. This hybrid arrangement — an ‘enterprise contract’ (EC) — would allow an employer to vary the award for a class, or a particular group of employees using a template contract. This resembles the arrangements that currently apply in enterprise agreements (and particularly the new 12 month greenfields agreement option discussed in chapter 21). It would give businesses the tailored outcome normally only achieved through enterprise bargaining, but without the complex and costly process of bargaining, while maintaining safety net conditions for employees. In some cases, it could improve on safety net conditions because it would require businesses to use written personal statements, rather than oral employment contracts.

The new arrangement would improve the existing system, without disrupting existing arrangements. It is best suited to businesses with limited human resources capacity. It would also tend to be most suitable for businesses with employees paid above the award, since variations in their working arrangements are more likely to pass a no-disadvantage test (NDT) assessed against the award. Nevertheless, there may be circumstances in which a business with award-reliant employees could craft an EC that improved business flexibility, but still met an NDT.

Section 23.1 discusses the factors that identify the need for a new type of employment instrument. Section 23.2 outlines some of the likely benefits of the enterprise contract, and some issues identified by participants to be addressed in the design. Section 23.3 outlines the elements of the new instrument’s scope and operation.

23.1 The gap in employment arrangements

Businesses seeking to modify the default entitlements of awards can either:

- use options specified in some awards (such as annualisation and time off in lieu) for varying the default terms of the award

-
- undertake a collective negotiation with staff through an enterprise agreement
 - reach an agreement using a common law contract, or
 - negotiate an IFA.

The first option is at best incomplete because the scope for variations in arrangements is not uniform across awards.

The second is, as noted below, not well suited to small to medium-sized enterprises, and of limited value to an individual firm seeking a small, practical variation.

The third remains an option, but will be less certain than an approved statutory agreement.

The fourth is dealt with elsewhere in this report, but is by its nature about individuals, whereas this proposition is about classes of employees.

Some firms in this inquiry process have stated that small businesses are reluctant to use enterprise agreements, and data show that collective arrangements are generally not used by small businesses to set wages and conditions. In 2014, only around 6 per cent of non-managerial employees in small enterprises (employing less than 20 employees) were covered by enterprise agreements compared with around 80 per cent for the largest enterprises (table 23.1). Data based on a different survey find qualitatively similar results, with enterprise agreements covering only 7 per cent of enterprises in businesses employing 5-19 employees (figure 23.1).

Enterprise agreements are least likely to be made in the rental, hiring and real estate services and professional, scientific and technical services industries. Small businesses (20 employees or less) are highly concentrated in these industries — they comprise 16.7 per cent of all small businesses in Australia and generate 9.4 per cent of value added production (ABS 2015b, 2015c).

Hourly wage rates for small businesses that did use enterprise agreements were the highest for all methods of setting pay for that group of businesses (table 23.2). This suggests that the segment of small employers using such agreements is quite distinctive. Nevertheless, there are many small businesses paying well above the award that rely on individual contracts rather than enterprise agreements.

Smaller employers tend not to have the backroom resources, such as sophisticated human resources systems or in-house legal or financial advice that help to smooth the enterprise bargaining path for larger entities. Smaller enterprises cannot spread such fixed costs of negotiating arrangements across many employees. Nor do smaller enterprises necessarily have an established relationship with experienced employee representatives (often unions), which may often underpin efficient bargaining at the enterprise level. Over 60 per cent of enterprises employing 200 or more workers communicated to their employees through employee representatives or union delegates. The comparable figure for a business employing 20 to 199 employees was around 27 per cent (data were not collected on

employee representation in businesses with less than 20 employees, somewhat unfortunately for this context) (FWC 2015d, p. 29).

Table 23.1 Methods of setting pay

Share of employees by employment size of businesses, 2014

<i>Employee size (non-managerial)</i>	<i>Award only</i>	<i>Collective agreement^a</i>	<i>Individual arrangement</i>	<i>All methods of setting pay</i>
	%	%	%	%
Under 20 employees	33.4	5.9	60.7	100.0
20 – 49 employees	32.3	17.5	50.2	100.0
50 – 99 employees	24.7	28.2	47.1	100.0
100 – 999 employees	14.7	52.2	33.2	100.0
1 000 and over employees	9.5	79.7	10.8	100.0
Total	20.4	43.5	36.1	100.0

^a The ABS refers to enterprise agreements as collective agreements.

Source: ABS 2015, *Employee Earnings and Hours, Australia*, May 2014, Cat. no. 6306, table 5, released 22 January.

Table 23.2 Relative hourly rate of pay by method of setting pay

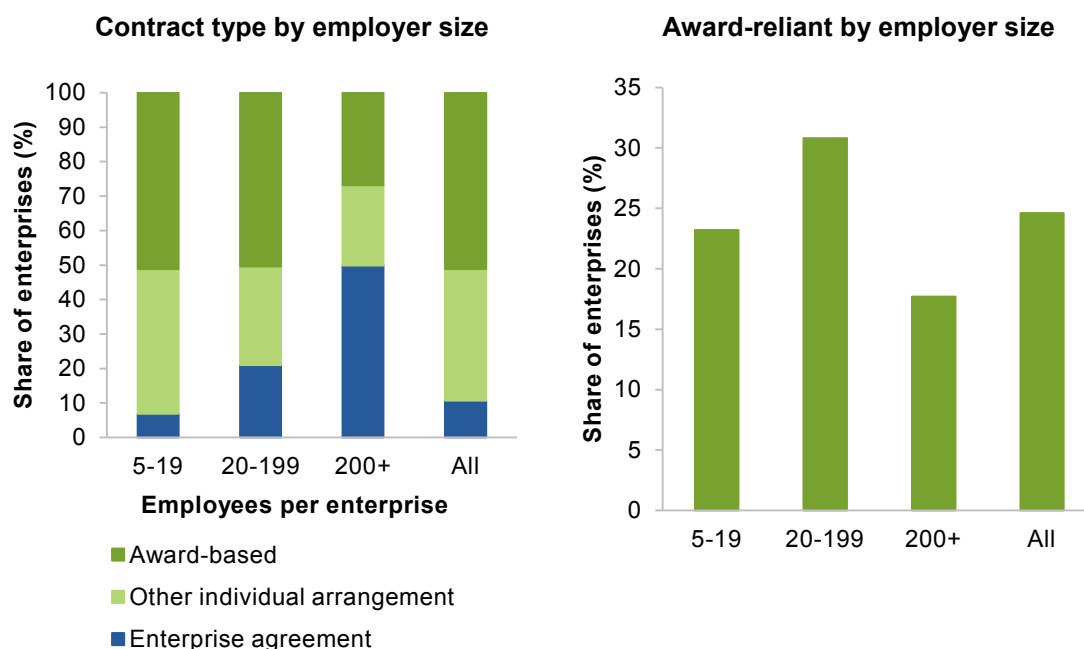
Relative rates of pay by employment size of business, 2014^a

<i>Employer size (non-managerial)</i>	<i>Award only</i>	<i>Collective agreement^b</i>	<i>Individual arrangement</i>	<i>All methods of setting pay</i>
	%	%	%	%
Under 20 employees	63.2	95.5	87.8	81.0
20 – 49 employees	67.7	93.5	93.5	86.1
50 – 99 employees	69.7	97.2	106.5	96.6
100 – 999 employees	73.7	105.4	118.4	106.2
1 000 and over employees	105.4	111.3	139.9	114.4
Total	73.4	107.1	104.0	100.0

^a The table measures the rate of pay by method of setting pay by employer size relative to the rate applying to all enterprises for all methods of setting pay. For example, award only non-managerial employees in small businesses have an hourly pay rate that is 63.2 per cent of the average rate for all enterprises. ^b The ABS refers to enterprise agreements as collective agreements.

Source: ABS 2015, *Employee Earnings and Hours, Australia*, May 2014, Cat. no. 6306, table 5 released 22 January.

Figure 23.1 Contract type by employer size
Share of enterprises by employer size, 2014^a



^a Unlike the ABS data, the AWRS has data on the nature of the award. Award-based agreements cover both award-reliant agreements (where the employee entitlements are exactly equal to the award) and above-award agreements (in which the award is the benchmark agreement, but with additional wages). AWRS excludes micro employing businesses.

Source: AWRS 2014 from the Fair Work Commission.

The experiences of employers and employer groups also suggest that complexity and culture are reasons for the reluctance of smaller businesses to use enterprise bargaining:

The use of external bargaining agents often goes against the culture of a small business, where employer and employee relations are established and maintained on personal interaction. Further to this, collective bargaining is cost inhibitive to small businesses, and our members tell us that they see entering into a collective agreement as unnecessary and more geared towards larger organisations that can find efficiencies in agreement making on a larger scale. (Business SA, sub. 174, p. 11)

... employers in small and medium sized businesses often find the prospect of enterprise bargaining daunting, and for many it is difficult to justify the cost. (National Farmers Federation, sub. DR302, p. 28)

... one aggressive bargaining representative (which may represent only a minority of the workforce) dominating the process, particularly against inexperienced or poorly resourced employers. (Peabody Energy, sub. 241, p. 2)

The Shop, Distributive and Allied Employees' Association (SDA) disputed that small businesses could not make enterprise agreements:

The SDA has successfully negotiated Enterprise Agreements in the fast food industry which predominately covers franchises which operate as small businesses. There are many similar models of business operating in retail and pharmacy however these businesses have been reluctant to enter into negotiations for an enterprise agreement. (Shop, Distributive and Allied Employees' Association, sub. DR306, p. 40)

However, the issue is not that smaller businesses never can, but simply that the evidence above shows that they mostly do not, and for good reason.

In light of the above, employer representatives suggested that Australia's WR system tended to give undue emphasis to enterprise agreements as the preferred vehicle for establishing flexibility — despite such agreements being ill suited for smaller employers.

The system must offer viable alternative mechanisms for setting wages and conditions for small business ... enterprise agreements are not the dominant mode of engagement for small business employers and their employees. (ACCI, sub. 161, pp. 98–9)

... whilst enterprise bargaining has a role to play for some businesses and employees ... it is not an appropriate, necessary or accessible option for the majority in Australia, being the small to medium enterprise. (Clubs Australia, sub. 60, p. 13)

Existing options to fill the gap

Employers can vary an award in a similar manner for a number of employees using a common law contract. They tend to do so when the wages and conditions specified in the contract are unambiguously above the award and therefore unlikely to be subject to a dispute as to whether they meet the minimum award wages and conditions. A common law contract is not a stand-alone document, as its overall effect relies not only on the terms included in the contract, but the effect (express or implied) of the relevant statute or award, including the safety net.

In this circumstance the outcome under a common law contract, where it diverges from a statute or award, depends on the effect of the statute and this is not always straightforward to determine:

What is the legal status of a contractual term that differs in content from a provision of a statute or award dealing with the same subject matter? Loose language is rife: for example, the authorities speak of awards rendering “inoperative” or “unlawful”, “displacing”, “modifying” or “suppressing” contractual provisions dealing with the same subject matter ... The correct position is that there is no universally necessary or true answer to the question with which this paragraph began: the answer, in every case, depends on the express or imputed effect of the relevant statute. (Neil and Chin 2012, pp. 96–7)

As such, a common law contract is, in theory, always subject to an ex-ante test at law (although, in practice, the cost of pursuing this course in the event of a dispute may be prohibitively high).

While some employers by necessity already rely on common law arrangements to vary awards, they do not offer the certainty to employees and employers of an approved statutory agreement. One employer highlighted an undesirable consequence of the interaction of the common law and complex regulatory requirements:

The Australian workplace relations framework is complex because of the interaction of the common law, the Fair Work Act, state/territory legislation, enterprise agreements, awards, and in many cases, a signed 'Contract of Employment' document each employee has executed with his/her employer. This layered set of rules is a recipe for error. A major problem arises because too many parties to employment contracts operate under the misapprehension that such a document displaces regulatory oversight and all the layers of red tape. (Ports Australia, sub. 249, p. 8)

Stewart, McCrystal and Howe noted the limits of common law contracts and IFAs:

A common law contract cannot derogate from any award entitlement, regardless of whatever compensation the employee may agree to accept in return ... We also believe, consistently with what we have said earlier, that IFAs should continue to be (lawfully) available only for genuinely *individual* variations and trade-offs. (sub. DR271, p. 16)

However, the Catholic Commission for Employment Relations (CCER) considered that a combination of IFAs, awards and common law contracts already provided employers with sufficient flexibility, and enabled the inclusion of provisions specific to the ethos of their organisation (CCER, sub. DR289).

Contracts or deeds may possibly also be made as collective arrangements which purport to supplement the National Employment standards in the FW Act. Bluescope Steel suggests that a 'deed poll' can be used to provide terms and conditions of employment (sub. 58). A deed poll is not an employment arrangement that is recognised under the FW Act and accordingly the rules concerning bargaining under the FW Act are not generally relevant in terms of entering into such an arrangement. Bluescope Steel, which had used deed polls, indicates that it has had positive experiences with these instruments, although their use was relatively rare (sub. 58).

Although common law contracts suit some businesses, others have found that they do not provide sufficient certainty for either themselves or their employees. In contrast, an approved statutory template can provide greater certainty for employees and employers that it meets the requirements of the *Fair Work Act 2009* (Cth) (FW Act), particularly in circumstances where there are any doubts that the employment arrangement would pass an NDT.

Other options

Participants also proposed changes to existing elements of the workplace relations system to vary awards by making enterprise agreements simpler for businesses to use and providing greater award flexibility.

Stewart, McCrystal and Howe proposed that consultants, unions or employer groups could formulate and seek pre-approval from the FWC for template enterprise agreements, or for the FWC to promote specific or innovative clauses to provide flexibility to businesses, while meeting a NDT (sub. DR271).

On awards, they also considered that the FWC could be required to develop new options or sets of alternative conditions that could be used by particular types of employers, such as greater flexibility over scheduling where an employee is paid an allowance. They acknowledged that there needed to be a balance between keeping awards simple and general and providing flexibility, but considered that there were still possibilities that could be explored in this area (sub. DR271). PricewaterhouseCoopers suggested small business schedules for awards as an addition to the current award system (sub. DR318).

In sum, a number of submissions identified the same issue but proposed other ways to solve it.

CCER noted that some modern awards provided for variations and that applications to include these in additional modern awards were currently under active consideration as part of the FWC's four yearly review of modern awards (sub. DR289).

Some participants (the Australian Mines and Metals Association, the Chamber of Commerce and Industry of Western Australia and Teys Australia Pty Ltd) proposed a return to individual statutory contracts (AWAs) as a preferred solution.

23.2 A means to bridge the gap — the enterprise contract

While there are some signs that the system of awards may already be moving towards the provision of greater flexibility to businesses, the experience with modern award reviews suggests that the pace of reform is uncertain, and the precise nature of the benefits is unclear. This is unlikely to be sufficient to meet the current demand evident for flexibility. The Productivity Commission considers that this demand would be met more quickly and provide more tailored opportunities for simplification of complex award language or innovative approaches by using an EC, provided there were adequate protections in place.

The Chamber of Commerce and Industry of Western Australia (CCIWA) viewed enterprise contracts as being of most use to small and medium-sized business that used semi-skilled or unskilled labour and where there were standardised work practices (sub. DR323). These types of employers were likely to be in the manufacturing, retail and wholesale, hospitality, service-based industries and for commercial or residential trades-based services (CCIWA, sub. DR323). The CCIWA considered that ECs were least likely to be used by micro businesses (those with less than five employees) as they were less likely to have a distinct class of employees. CCIWA also considered that they would not be widely used for professional employees or salespersons who have a strong

preference for individual contracts that are able to tailor remuneration to their skills (CCIWA, sub. DR323).

The National Retail Association had some reservations about the likely take-up of an EC in retail — most major or national retail chains used an enterprise agreement (trans., pp. 658, 662). However, this is quite consistent with the thinking behind the EC — that is, a design for firms who do not have enterprise agreements. BHP Billiton considered that an EC could be used at remote sites, or where awards operated but employers had little interest in enterprise agreements (sub. DR362).

It is difficult to quantify a possible take-up rate for ECs. Businesses would need sufficient information and guidance on the EC (such as that provided in a dedicated information campaign as discussed below) to determine the opportunities it might open up. There will be a fear that bureaucracy will take over.

Early adopters will need to demonstrate the scope for gains and industry associations may take up this role. Special arrangements would apply to them (see test ECs below). While some participants offered survey data to attempt to quantify the potential use for an EC, in the absence of detailed information this is only indicative of a possible level of interest from employers, rather than any certainty of take-up.

In September 2015, the Chamber of Commerce and Industry Queensland (CCIQ) surveyed Queensland businesses on aspects of the Productivity Commission's draft report, including the EC. While the survey was not able to specify a developed EC for businesses to react to, there appeared to be a need for greater flexibility, particularly for businesses with between 6 and 20 employees and 21 and 49 employees (figure 23.2). The CCIQ surmised that:

... in respect to the enterprise contracts, there is significant interest in it. The feedback also was, though, that businesses wanted to see how the rubber hits the road, so to speak, in terms of what are the practical illustrative examples of how this could benefit my business ... (trans., p. 649)

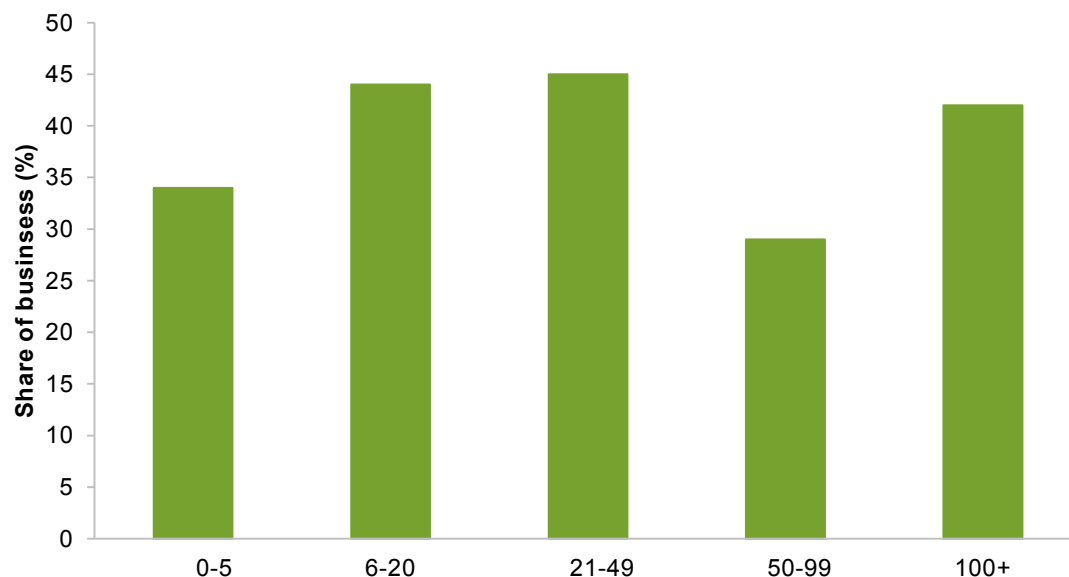
In a similar vein, the 83 per cent of respondents to a Business SA survey who indicated they would consider using an EC (Business SA, sub. DR360) should be viewed as indicating interest in, rather than a firm indicator of potential business use of, an EC.

Take-up also depends on whether the EC meets the perceived demand by employers for 'flexibility'. Stewart, McCrystal and Howe (sub. DR271, p. 15) suggested that what some employers were really seeking when they sought 'flexibility' was a means of undercutting awards.

It is not entirely clear to us what problem the introduction of an 'enterprise contract' (EC) option ... is intended to solve ... [a] possible explanation might be that the EC is intended to meet the demands of certain employers for the 'flexibility' to employ workers on sub-award conditions.

Figure 23.2 Queensland businesses seeking greater flexibility in employment arrangements, by business size

Based on CCIQ survey results ^a



^a The CCIQ survey question asked 'Do the existing options for making agreements with your employees (for example, enterprise agreements, individual flexibility arrangements, common law contracts) provide sufficient flexibility to your business?'.

Source: Productivity Commission estimates based on CCIQ September 2015 survey data.

Some participants (mainly unions) also sought to cast the EC as a new form of AWA that would undermine employee wages and conditions, although the evidence offered was less than compelling. ECs are quite different from any of the various incarnations of AWAs that have applied in the workplace relations system:

- new employees are the focus; existing employees cannot be compelled to join
- all employees who join an EC may withdraw and revert to the award after 12 months experience of it
- ECs are subject to a NDT the same as that used in enterprise agreements, with a minor variation for incumbent employees to indicate willingness to join
- ECs are published by the FWC
- the EC is a variation to the award or awards and only applies to the extent of the stated variation(s), rather than displacing the relevant award or awards
- where a non-approved EC is found to be in breach of the NDT the EC will be declared void and the FWO will work to recover lost wages.

The differing views between employees and employers appeared to stem from the perception of the balance of bargaining power between employees and employers. Unions

were concerned that the EC would inevitably lead to the exploitation of workers and destabilise a workplace relations system that was underpinned by collective bargaining.

Professionals Australia submitted the EC might be used to exploit apparently well-off award-based workers, given that 82 per cent of their members had little say in the negotiation of their individual contracts of employment:

Leaving aside issues to do with the application of the national employment standards, the way that this was achieved was that the HR leaders in particular sections would have individual one-on-one conversations explaining the company's rationale for the proposal. The overwhelming majority of people signed. An enterprise contract would make that a lot easier to do. (trans., p. 828)

This concern would not apply as an NDT would require that unilateral arrangements did not force employees into below-award conditions.

Other participants (mainly employers) preferred to return to individual statutory arrangements. However, the Productivity Commission sees risks in this. Re-designed IFAs provide an adequate statutory individual contract. ECs are intended to occupy a quite different niche in the workplace relations system, and as emphasised above, are not substitutes for old forms of statutory individual agreements.

23.3 Design of an enterprise contract

The EC has been designed as a package to provide flexibility and ease of use for businesses, supported by information and education, and protections for employees and employers.

The EC system: employees and employers

Who can make an enterprise contract?

Businesses of all sizes would be able to use the EC to vary the wages and conditions of employees. While figures 23.1 and 23.2, and information from participants, suggests that an EC is most likely to be attractive to small and medium-sized businesses, larger businesses should not be prevented from the potential benefits of innovation that may be achieved by using an EC. Permitting larger businesses to use an EC also avoids the distortions that can arise when trying to define a threshold.

Stewart, McCrystal and Howe also suggested that permitting ECs with enterprise agreements, in combination with an existing 'loophole' in the FW Act's bargaining provisions, would enable unscrupulous employers to make a new enterprise agreement, use it to create security against protected industrial action and then hire new workers on conditions lower than those under the enterprise agreement, using an EC (sub. DR271).

This would be a legitimate concern if it were permitted. However, the Productivity Commission proposes that the legislation would not permit employers to make an EC with employees covered by an enterprise agreement (or in the case of new employees who would otherwise be employed under an enterprise agreement). The EC consequently could not be used to undermine established relationships between employees and employers that have been achieved through enterprise bargaining.

The EC could be offered on a ‘take it or leave it’ basis to new employees. Existing employees (not covered by an enterprise agreement) could opt to be covered by the EC (rather than the relevant modern award), provided they were not coerced into doing so. While an employer could form an EC unilaterally without consultation with employees or third parties about its terms, nothing in the proposed statute should preclude employers from doing so.

Unions were concerned at the ‘take it or leave it’ aspect of the EC. Michele O’Neil (Textile, Clothing and Footwear Union of Australia (TCFUA)) described it as a ‘gift of exploitation’ to unscrupulous employers (trans., p. 271) while Reg Carmody (TCFUA) said it would divide the workforce by forcing new employees onto an EC to get a job (trans., p. 274). In fact, most existing new employment offers are ‘take it or leave it’, for example, when a new employee is offered a position fixed at award rates or, indeed when there is an existing enterprise agreement.

Where an employer did not seek the FWC’s pre-approval of an EC, there would be several measures that provided strong incentives for employers to ensure the EC met the NDT. First, the EC would be transparent by being available for union or other third-party scrutiny on the FWC website. Second, existing employees could decide to opt into the contract, which they would only do if its terms were favourable. As noted by the CCIWA:

The requirement to offer the enterprise contract to a class of workers also means new employees will benefit from the bargaining position of existing employees. In implementing enterprise contracts, employers will seek to encourage all relevant employees to agree to the new arrangement. Because existing employees have the option to sign or not sign the agreement, their bargaining power is improved. This will influence the level of entitlement contained in the enterprise contract. (CCIWA, sub. DR323, p. 27)

Furthermore, the FWO would handle complaints about ECs and would undertake risk-based periodic audits.

What content would be permitted in the EC?

ECs are intended to vary, not replace, award terms and conditions. As such, the EC would operate alongside the award and therefore would not need to include all terms in the award. This should assist to reduce complexity and therefore ongoing compliance costs. ECs may contain terms that are able to supplement, but not vary or undermine the National Employment Standards (NES) or the minimum wage. All of the existing protections of the

FW Act, such as unfair dismissal arrangements and the General Protections, would continue to apply.

Using the relevant award or awards as a benchmark, employers could use an EC to vary the terms and conditions to a set that promote the efficient operation of the business without disadvantaging employees overall.

The EC is not intended to be used for individually-based arrangements, that is arrangements in relation to an employee's unique, personal circumstances. Examples are flexible arrangements to accommodate family or non-work commitments. Employees and employers would be expected to use IFAs for such tailored arrangements (chapter 22).

However, ECs could be used where a *group* of employees would receive a similar benefit, such as the capacity to 'swap' public holidays for leave. A hypothetical example might be a panel beating workshop in North Queensland where, in the hot summer months, it would suit the employer and employees to start work early in the morning outside the award core hours, and finish early. The employees would trade off more comfortable working conditions for loadings that would otherwise apply for commencing work at an earlier time.

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 penalty rates in exchange for low-quality accommodation). Accordingly, where an EC relies on non-cash benefits to meet the NDT, the business would be required to seek the approval of the FWC.

An EC could reduce loadings, penalty rates and allowances for employees under an award, but only if this was compensated for, consistent with the NDT. The scope for making an EC is likely to be greater where existing arrangements are above, rather than at, or close to, the award. Therefore it is expected that ECs will be mainly used by employers that already pay above the award.

The lodgment template for ECs should be designed to assist employers to understand the scope of what can be included in an EC, require them to consciously consider whether the tradeoffs do not disadvantage the relevant employees, and inform employers of the consequences of the EC not passing the NDT. It would also assist the FWC and FWO with basic information and an ability to evaluate how the EC is operating. An example of the matters that should be included in the lodgment template is at table 23.3.

For an employee, the EC template must result in provision of a written statement to each employee joining the EC class, setting out in clear and simple terms the variation to the award created by the EC. For example, in the case of a firm changing hours due to seasonal heat, the potential loss of additional shift or penalty payments may be made up by shorter working hours later in the year, or time off in lieu. Equally, improved lifestyle gains, that is no work in the afternoons may also play a part.

Table 23.3 Matters for inclusion in an enterprise contract lodgment template

<i>Purpose</i>	<i>Information required</i>
Identify the firm and relevant contact	ABN Address Contact details
Identify class of employees	The classification of the employees under the relevant award or details of the class as prescribed by the employer
Specify the award/s being varied and the specific clauses	List the award or awards and within the awards the specific clauses sought to be varied under the EC
Specify the variation to the award	Indicate the offsetting gain/s to the relevant employees. The signed personal statement for each incumbent employee joining the EC would be sent to the FWC.
Specify the commencement date (on publication if not specified)	The proposed commencement date.
Identify that the EC complies with the NES	A declaration to this effect
Identify that the class of employees are not covered by an enterprise agreement, nor that one is under negotiation	A declaration. The FWC may require more detail where cases are complex, as ECs may not be used to replace EAs.
Identify that the EC does not restrict existing bargaining rights or rights to industrial action under the award	A declaration to this effect
Identify whether the EC is based on an existing EC	The EC number or other identifier
EC approval and lodgment: Identify that the employer seeks approval for the EC / EC lodgment: identify that the EC is to be lodged for publication	Indicate if the employer seeks to have the FWC apply the no-disadvantage test before the EC comes into operation / Declaration that there is no net disadvantage to the employees that are the subject of the enterprise contract and description of how this is calculated. Note that the risk of compliance resides with the employer where they do not choose FWC approval

Who would be covered by the enterprise contract?

The enterprise contract would apply to a class of employees, as nominated by the employer. The class could, but need not, align with the definition in the relevant award or awards, and this would depend upon the individual characteristics of the business. The ability to prescribe a class of employees is expected to be useful to employers, such as members of the South Australian Wine Industry Association and the Winemakers' Federation of Australia, who are covered by more than one award (sub. DR352).

No maximum would be set on the number of employees that could be party to an EC, as this would depend on the class of employees (as defined) and the size of the business.

However, there are grounds for a minimum. The prospect that an EC could be sought to be made for a single employee was raised by the South Australian Wine industry Association and the Winemakers' Federation of Australia (sub. DR352, p. 47). In the Productivity Commission's view, it would be essential to set a statutory minimum of two employees in a class, primarily to avoid the use of an EC as a form of individual statutory agreement, which would be contrary to its intended use as a collective arrangement, and would not be in the interests of transparency where publication of an individual contract could require alteration to privacy laws.

A related issue is that if the number of employees is sufficiently small in an enterprise, then there may be concerns that revealing the identity of the business would incidentally reveal the identities of the relevant employees. Privacy concerns could be overcome by providing an identification number for a submitted template rather than explicitly identifying it. A party wishing to complain about the relevant EC would cite the identification number, which the FWO could match to the employer in its auditing processes.

What would be the rights (of employees) and obligations (of employers) under an EC?

An EC would not supersede any of the workplace rights enshrined in the Fair Work Act, such as the General Protections, unfair dismissal provisions and rights of entry. Employers and individual employees could still negotiate individual flexibility arrangements as carve outs from the EC if they mutually agreed.

The no-disadvantage test

The NDT is the principal means of preventing erosion of employees' entitlements relative to the award when they join an EC. The NDT would be based on that applying to enterprise agreements and would have the following features:

- It would apply to a class of employees. The concept of a 'class of employees' is used for enterprise agreements (both for existing workplaces and for greenfields sites) and is applied by the FWC. The FWC provides the following guidance to its members in determining a class of employees:

The phrase class of employees is intended to refer to a group of employees covered by the enterprise agreement who share common characteristics that enable them to be treated as a group when the [Fair Work] Commission applies the better off overall test. An example is where the employees are in the same classification, grade or job level, with the same working patterns. (FWC 2015e)

- The NDT would be able to be applied for existing and new employees, drawing on the current arrangements for determining whether a class of employees are better off overall under the agreement.

As is currently the case for enterprise agreements and greenfields agreements, an EC would meet the NDT if a class of employees — as understood by the FWC — covered by an EC would not be disadvantaged compared with the relevant modern award. For the purpose of determining the outcome for an individual employee, the FWC is entitled to assume, in the absence of evidence to the contrary, that an employee would not be disadvantaged if the class would not be disadvantaged (similar to that already specified in s. 143 of the FW Act).⁶² As a consequence of the application of the NDT test, as outlined, no employee should be worse off under an EC than if they remained on the award or awards.

For example, where an employer sought to have a new employee join the EC, if that new employee's particular rostering arrangements fell outside those contemplated by the EC at the time the EC was made, the EC could not apply and the award or another arrangement must be used.

In cases where the EC is not approved, it would be open to an affected employee or third party to complain that the EC did not pass the NDT, and the FWO would consider the complaint. As is currently the case for enterprise agreements, the NDT would be applied as at the time the EC was lodged. If unapproved, the employer will bear the responsibility for any failure to meet the NDT as determined by the FWO.

Seeking approval in advance of using an EC will be a wise step in cases of complex ECs (for example, when varying multiple awards, due to shifting work structures over a calendar year), or where the employer is unsure of how to apply the NDT. And it will provide the additional benefit of certainty, once approved.

The existence of two routes — approval and non-approval — is not unique in Australian law. This would be similar to the ability to seek rulings under the tax laws or the ability under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to self-assess whether a proposed action will have a significant impact on a matter of national environmental significance and hence needs to be referred for approval.

While there was some support from participants for mandatory approval of ECs, the Productivity Commission considers that optional approval in combination with transparency and compliance for the non-approved path balances the need to protect employees with the provision of a new avenue for flexibility for employers. Risk-averse employers will seek approval, but where employers feel sufficiently resourced to self-assess, the option to proceed will allow for innovation without engaging with the process of the FWC.

⁶² As this is an essential point, the definition of a class for the purposes of undertaking an NDT would be that deemed appropriate by the FWC and — as with EAs — may not necessarily be the 'class' as defined by the employer. For example, an EC that classified all casuals and permanent workers on all working time arrangements into a single 'class', and put in place wage averaging for this broad group would almost certainly fail an NDT, because the asserted 'classes' are not ones that could ever be the basis for a properly undertaken NDT.

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.

This will also allow rapid take-up, if industry associations pioneer the way via test ECs.

Transparency

The employer would be required to provide the EC to the FWC for either approval for the NDT and then lodgment, or for lodgment only. In both cases, the EC template would be published on the FWC website, and be provided to the FWO for its risk-based compliance and audit purposes.

For the individual (either a new or existing employee) the personal statement provides them with the means to see what the EC provides relative to the award or awards. For most ECs it is anticipated that the tradeoff will be set out clearly in monetary terms. In other cases (as discussed previously) there may be non-cash tradeoffs, and these would also need to be set out in the personal statement.

For transparency (and where required for later auditing) this personal statement should be signed by the employee. The presumption by the FWC and the FWO should be that if the employee signed then they agreed and saw value in it.

For employers seeking approval for the EC prior to lodgment, a recent decision of the Full Bench of the FWC⁶³ which sets out the requirements for record keeping in relation to time off in lieu (TOIL), provides a precedent for managing personal statements. The Full Bench proposed to add a schedule to each modern award which incorporated a model TOIL term setting out a template TOIL agreement. While the template agreement was in the form of a signed hard copy document, a TOIL agreement made under the template could be done through an exchange of emails or other electronic means.

For employers that do not seek approval for the EC prior to lodgment, signed personal statements should be retained and a comprehensive list of all employees who were members of the EC class during its term would be maintained. Failure to provide the list and accompanying signed personal statements to the FWO on request would be an offence.

Incumbent employees who are joining the EC at its inception should also have their personal statements supplied to the FWC, regardless of whether approval is sought or not. These statements would not be published but must be available to the FWO, on request.

⁶³ *4 yearly review of modern awards — Award flexibility common issue — time off in lieu of payment for overtime — model term* (2015) FWCFB 6847.

Protected action and bargaining

Employees on ECs retain unaltered their rights to bargaining and protected industrial action under the FW Act. It should remain possible for employees (with majority consent) to initiate an enterprise bargaining process during or upon expiry of the EC. In these circumstances, the EC may become a transitional contract type and could facilitate a higher penetration of enterprise agreements.

Opt out safety valve

Similar to the ability for employees and employers to unilaterally terminate an IFA, employees on an EC could choose to opt out after 12 months and would then have their wages and conditions determined by the award. This provides a further protection for employees.

What is the term of an EC?

It is proposed that the EC operate from the date of publication by the FWC if no later date is specified.

The nominal term of an EC should be three years from its commencement date. While this is shorter than the five years proposed for enterprise agreements, three years reduces the potential for the wages and conditions in an EC to lag those in awards over time, which would reduce the entitlements of employees under ECs relative to award-reliant employees. This means that ECs should not be able to be automatically rolled over at their expiry.

Some participants were concerned that a 12-month opt out (discussed above) would effectively prescribe the minimum term of an EC as 12 months, and would create uncertainty for employers. However, the 12-month opt out will act as an incentive to employers to ensure the agreement is attractive compared with the award.

How is an EC made?

The EC process would be instigated by an employer, which would identify the class of employees (and therefore which employees) the EC would apply to and the terms and conditions of the EC, with reference to those in the relevant award or awards.

The employer could choose to make their own EC based on the particular needs and characteristics of their businesses, or use another employer's EC (as published on the FWC website) as a model.

The process would be as follows:

-
- The employer would download and complete an EC lodgment template that would be available on the FWC website (table 23.3).
 - The employees would consider a personal statement prepared by the employer that identified the variation to the award and why they are not disadvantaged. The employees would sign the personal statement.
 - The employer and employees would then sign the template, which would include the nominated variation, and send it to the FWC for approval (if requested by the employer) and/or lodgment.

The FWC would receive all ECs and undertake a NDT for those seeking approval before publication. For ECs intended only for lodgment, the FWC would need to check the template was completed correctly (but would offer no assurance that it met the NDT).

The FWC would be expected to assist employers through the lodgment process, and this could include the provision of informal advice to the employer in relation to compliance, before the EC was lodged and passed to the FWO.

The FWO and FWC should encourage the use of approved, rather than non-approved ECs.

And employers would still need to consider, if adopting another business's approved EC, that the specific matters traded off, when applied to their own business, resulted in no net disadvantage to each of its employees. Industry associations may be able to help with this process, as may FWO advice. Where a lawyer drafted a business's EC, the lawyer's liability should be limited only to that business.

What happens if an EC does not meet the no-disadvantage test?

ECs that do not meet a NDT may, upon complaint of the employee, be varied to achieve that outcome and ensure that the employee is no worse off under the EC. To assist in compliance, the FWO should be able to order that the contracts of other employees that contain similar clauses be varied. Compliance in relation to the EC is discussed further below.

There is the potential for some employers to engage in wilful misconduct in using non-approved ECs, and the coercion of employees to sign an EC could occur. In addition to penalties for coercion, the FW Act should specify penalties for firms for wilful misconduct in relation to the use of ECs. Businesses that misused ECs could be barred from their future usage for some period. Consistent with other powers available to the FWO, orders for the back pay of wages (including penalty rates, overtime and allowances) should be able to be made, where breaches were found.

RECOMMENDATION 23.1

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.

The EC system: the Fair Work Commission, Fair Work Ombudsman and Workplace Standards Commission

What are the roles of the Fair Work Commission and Fair Work Ombudsman?

The EC will be the joint responsibility of the FWC and the FWO, although individual responsibilities with respect to compliance and enforcement (consistent with their statutory roles) should be managed through a memorandum of understanding between the agencies.

The FWC will have overall responsibility for assessing the NDT for pre-approved ECs and for the lodgment and publication of ECs. The FWO will be responsible for education and compliance, including the conduct of audits and handling complaints. Introduction of an EC will require careful sequencing and design to establish systems and protocols and to ensure employers, employees and other parties are well informed prior to its introduction.

The Fair Work Commission

The FWC should establish systems that facilitate streamlined lodgment and approval (where employers request this), and transparency of published ECs.

For ECs that are lodged but not pre-approved, the FWC would check that the EC template was filled in correctly, providing an additional check and protection for employers prior to publishing the EC. All ECs would be passed to the FWO as a matter of course (see below).

The Australian Taxation Office rulings database, which publishes numbered rulings, and has a search function, may offer a model for the FWC to publish ECs. This model would already be familiar to many, if not most, employers and their advisers, providing a precedent that could assist with implementation.

The database could be accompanied by an alert service for subscribers that would advise of new ECs. This would enable employers to monitor ECs in their industry for potential adoption or modification, or be used by third parties as a way of monitoring ECs.

The Fair Work Ombudsman

While transparency itself increases the likelihood that employers will comply, it is not sufficient to ensure adequate compliance. Accordingly, the FWO should independently undertake auditing and compliance in relation to the EC.

In consultation with the FWC, the FWO should provide information about the EC and its compliance regime in advance, and put in place systems for managing compliance and audit. A six-month campaign of education and awareness targeted to the specific needs of employers, employees and their representatives should occur before the EC's implementation. Particular attention should be given to potential areas of uncertainty to

employees and employers around processes, the identification and prescribing of classes of employees and the operation of, and self-assessment under, the NDT.

The role of the FWO will be important to confidence in the system, particularly in relation to post-lodgment scrutiny. Consistent with its risk-based approach to compliance, the FWO should audit ECs with particular characteristics. For example, this would include complex arrangements where it appears that employers may have limited capacity to self-assess. Modern automated data analytics could also reveal ECs that warranted closer examination. Early identification of error or breaches of standard would protect employers by limiting the potential for large back payments, but would also signal a low tolerance of employers misusing ECs.

The FWO would also need to allocate resources to undertake compliance, including examining complaints in relation to any ECs that appear to breach the FW Act.

Resourcing

The introduction of an EC will require additional resourcing for both agencies to provide confidence in the new system and is essential to underpin the protections as outlined.

The FWC already has the capacity to apply the NDT (now the better off overall test), but will need to upgrade its systems to provide for lodgment, approval and publication of the EC, such as in a searchable database (as raised previously).

Although for a different arrangement, a review of the registration process for individual agreements in Western Australia, which had to pass a NDT, found that delays occurred during the initial registration period as there was little knowledge or experience of the new agreements in the community or within the registrar office. Allocating sufficient resources reduced the turnaround time and allowed the establishment and further development of the system processes and procedures (Coleman, Beech and Smith 2004). The fact that an EC is not an individual agreement will also considerably reduce the costs of any pre-approval process.

Information and education by the FWO in advance of the EC's implementation, and the avoidance of unnecessary complexity in the EC lodgment template or needless steps in the lodgment and approval processes will assist to reduce the turnaround times for businesses.

The FWO will also require additional resourcing to reflect its additional education and compliance responsibilities.

RECOMMENDATION 23.2

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.

An outline of the EC system is at figure 23.3 and a comparison of the EC and other statutory arrangements is at table 23.4.

Enterprise contracts and the awards system

The capacity presently exists for employer or a union to approach the FWC to seek a variation in an award to better suit the circumstances of the firm and its employees. Outside of standard review processes, few firms have sought award variations and very few have been approved.

The EC system would allow the FWC to directly identify from submitted templates where pressures to vary awards are greatest, and models to do this. This will provide both valuable intelligence not present in the current system; and an incentive to persist with award reform or see the alternative mechanism become the preferred means of innovation in awards.

ECs will be useful for modifications of awards in two ways. First, in some cases, the Workplace Standards Commission (WSC) may take terms and conditions in approved ECs and make them schedules to awards.

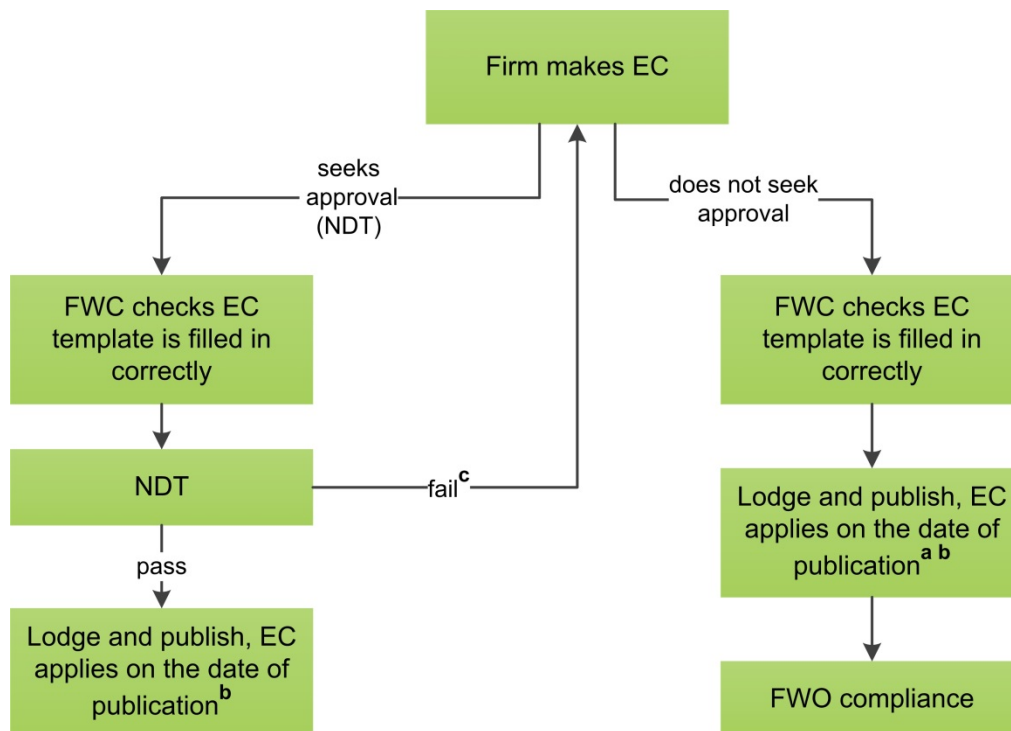
Second, over time, ECs will provide a useful picture of the types of awards clauses that employers wish to vary and the types of replacement clauses that they prefer. In some cases, the replacement may be innovative and have wider potential application than the workplace it was designed for. Accordingly, the WSC should monitor ECs in the context of its award reform work. Some EC clauses may be suitable for inclusion in the award; others, which alter arrangements for a sub-group of employees in the industry or occupation, or employees working particular hours, may be better incorporated as a schedule to the relevant award. On the other hand, some enterprise contracts will be very enterprise-specific with no implications for the industry or occupation generally.

For some employers, the enterprise contract will provide the level of flexibility they desire faster than the pace of the WSC's award reform process. Other employers, however, will not be attracted to the enterprise contract (for a number of reasons), so it is important that award reform deliver the types of improvements achieved through enterprise contracts, where the improvement has industrywide application.

Enterprise contracts and enterprise agreements

The Commission proposes ECs to fill a gap, and not to replace enterprise agreements (EAs) (current or expired). In the event of a claim of conflict between an EA and EC (a rare event, but mergers may see it arise) the EA would prevail

Figure 23.3 **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.

Table 23.4 Comparison of the enterprise contract with other statutory arrangements

	<i>Enterprise Contract</i>	<i>Enterprise Agreement</i>	<i>Award</i>	<i>Individual Flexibility Arrangement</i>
Coverage	The employer determines which employees the EC will apply to	As specified in the agreement	Generally all employees in the relevant industry or occupation	Individual employee
No-disadvantage test	All ECs must meet the no-disadvantage test against the award. The FWC can approve the EC prior to lodgment at the employer's request	The FWC applies the test to all enterprise agreements against the award	N/A	IFAs made as part of an award must meet the no-disadvantage test against the award
Condition of employment	Yes — new employees	Yes — new employees	Yes — statutory minima for award-covered employees	No
Negotiated	Not required to be negotiated, but could be at the discretion of the employer	Yes	No	Yes
Maximum term	3 years	Up to 5 years proposed	No expiry	Can be negotiated by the employer/employee. Otherwise depends on the overarching enterprise agreement/award
Regulator approval	Yes — at the employer's discretion	Yes	Yes	No
Bargaining rights and protected industrial action available	Yes	Not during the life of the agreement	Yes	Not able to be varied by an IFA

24 Public sector bargaining

Key points

- Commonwealth, state and local government workers comprise 16 per cent of the total workforce.
 - At least 37 per cent of these are covered by the national workplace relations system. The remainder are covered by state laws.
- As centralised budget holders, governments have an inherently greater capacity to shape wage bargains with their employees, even though bargaining in the national system takes place at the agency level. However, while there are exceptions, wage growth has largely exceeded that in the private sector since 1998. There is also evidence suggesting that, as a group, public sector employees receive higher wages.
- Delegation of the authority to bargain involves a tradeoff between the cost of reaching an outcome and the degree of control over the process. Governments need to make this tradeoff with regard to the costs of the bargaining process to all parties.
- There is little scope in the public sector for either the good faith bargaining requirements to be tightened to force parties to negotiate more effectively, or for the Fair Work Commission to intervene at an earlier stage to force an outcome.
- A number of issues complicate the measurement of productivity in the public sector. These can be attributed to the nature of the work, where outcomes are often longer term and multifaceted, and the absence of markets. As a result, there are likely to be circumstances in which strongly linking pay and productivity may not be practical.
- There is some evidence that the management of underperformance is a concern across the Commonwealth public service. The removal of terms that specify unnecessarily lengthy, costly and inflexible performance management and termination processes from agency enterprise agreements may go some way towards rectifying this. However, this is likely to come at some cost.

Public sector bargaining is the process by which an agreement is reached between the management and employees of government departments, statutory authorities and public financial or non-financial corporations over the terms and conditions of employment.

In Australia, public sector bargaining shares many characteristics with bargaining in the private sector. In the national workplace relations (WR) system, it involves the striking of an enterprise agreement in which the minimum standards stipulated in the National Employment Standards (NES) must be met, while any trading off of terms and conditions must satisfy a better off overall test (BOOT) with reference to the Public Sector Award.

The most notable difference⁶⁴ is that, in the public sector, a few key players have substantial influence over the terms and conditions of a large number of workers.⁶⁵ While in some regions, Commonwealth, state and local governments vie for quality public servants, in many there may only be one level of government. This is only partly mitigated by competition for labour from the private sector, especially for employees who have acquired skills largely relevant to public sector jobs. Since they face limited competition for public sector workers, governments are, *if they wield it*, likely to have stronger bargaining power than the majority of employers in the private sector.

Beyond their role as the only employer of public sector workers, governments also fulfil other tasks. Not only do governments hire workers, but in many cases they make employment laws, set policies and enforce compliance. As the Australian Education Union put it:

... the State – whether Commonwealth or state – is in a unique and unbridled position of power. It is legislator, executive, employer, policy controller or formulator and funder/purchaser. (sub. 63, p. 7)

This chapter does not canvas issues unique to the current Australian Commonwealth public service bargaining round, but instead seeks to identify a preferred approach to future public service workplace arrangements, accepting that governments, as employers, have different obligations and responsibilities than other employers. It focuses on longer term questions about governments' roles as dominant employers in their sectors, and how this may sometimes conflict with their other roles. To facilitate this, the chapter outlines some characteristics of the public sector in Australia, including an examination of the market structure and outcomes (section 24.1). It then examines bargaining processes (section 24.2), the capacity of the Fair Work Commission (FWC) to intervene in public sector bargaining (section 24.3), productivity (section 24.4) and performance management (section 24.5), as well as some other issues particular to the public sector (section 24.6).

⁶⁴ This is not the only distinguishing feature of public sector employment arrangements. There are also a number of employment statutes at the state and federal level that cover public sector employees. In this sense, the public sector has some regulations that the private sector does not (Australian Council of Trade Unions sub. 167, p 247).

⁶⁵ The strong position of the Australian Government when it comes to public sector employment is made clear by the *Public Service Act 1999* (Cth) which emphasises that Agency Heads have all the rights, duties and powers of an employer (s. 20), yet while they may engage employees for the purposes of their Agency, they do it on behalf of the Commonwealth (s. 20). Most state public service acts are similar in effect.

24.1 Some features of public sector bargaining

The public sector is large

In 2013-14, there were just under 2 million Commonwealth, state and local government public sector workers, accounting for just under 16 per cent of Australia's total workforce (ABS 2014d) — a figure in line with the average 15 per cent share apparent in other developed economies (Gregory and Borland 1999). Since WR systems relate to employees, not all workers, the importance of government employers is even higher at 18.8 per cent in May 2014.⁶⁶

Of the people employed in the public sector, just under 250 000 were employed on behalf of the Australian Government and almost 1.5 million on behalf of state governments (table 24.1). To put this in context, the five largest states (New South Wales, Victoria, Queensland, South Australia and Western Australia) and the Commonwealth were responsible for the employment of over 1.6 million workers or just over 14 per cent of the total workforce (or around 17 per cent of employees).

Table 24.1 Public sector employees by jurisdiction^a
June 2014

<i>Jurisdiction</i>	<i>Commonwealth public sector</i>	<i>State public sector</i>	<i>Local Government</i>
	Number	Number	Number
New South Wales	56 500	469 700	56 100
Victoria	47 200	333 200	51 300
Queensland	28 200	298 100	41 700
South Australia	16 000	114 100	10 600
Western Australia	13 400	167 300	22 000
Tasmania	5 100	39 200	4 000
Australian Capital Territory	75 700	24 400	..
Northern Territory	4 300	26 900	3 200
Total	246 400	1 472 900	188 900

^a These figures exclude permanent defence force personnel (whose pay is set by the Defence Force Remuneration Tribunal), employees of overseas embassies, employees based overseas, workers on workers compensation and unpaid directors of public sector organisations.

Source: ABS, *Employment and Earnings, Public Sector, Australia, 2013-14*, Cat. No. 6248.0, released 13 November 2014.

⁶⁶ This is based on a different ABS survey (ABS, *Employee Earnings and Hours, Australia, May 2014*, Cat. no. 6306.0, released 22 January 2015) from that used in table 24.1. The EEH survey separates total employee numbers into the public versus the private sector and records 1.864 million public sector employees at May 2014, whereas the total number of public sector employees (including local government) was 1.908 million in June 2014.

The sheer size of the sector means that public sector bargaining processes have the capacity to affect a large number of workers and may even have broader macroeconomic consequences.

Not all public sector employees are covered by the *Fair Work Act 2009* (Cth) (FW Act), reflecting the ‘patchwork’ of referrals over the last 20 years (table 24.2). In addition to those of the Commonwealth, public sector employees in Victoria (box 24.1), the Australian Capital Territory and the Northern Territory are also covered by the national WR system. ‘Constitutional corporations’, which includes some state owned trading entities, are also captured by the national system, as are local government employees in Tasmania. All other state and local government workers in the other states remain covered by State laws.

Box 24.1 The Victorian referral

Victoria first referred its power to regulate workplace relations to the Australian Government in 1996. A similar referral was again made in 2009 with the passage of the FW Act, and the predication of the FW Act on the corporations power (rather than the conciliation and arbitration power).

The referral exempted a number of matters, including the number, identity, appointment and redundancy of public sector employees, and issues related to the police and other essential services employees. The intention of these exemptions was to give state governments the capacity to function without impairment from Commonwealth laws, having regard to the constitutional limitations expressed in *Melbourne Corporation* and *Re AEU*. Some participants, including the Police Federation of Australia (sub. DR320), have argued the current referral provisions mean that some public sector workers in Victoria have significantly fewer rights compared with other workers.

The recent decision in *United Firefighters’ Union of Australia v Country Fire Authority* has led to further uncertainty about the limitations of state referrals. In the decision, the Full Federal Court found that the constitutional limitations from *Melbourne Corporation* and *Re AEU* did not apply where the Country Fire Authority had voluntarily entered into an enterprise agreement.

The Victorian Government (sub. 176) is currently developing a proposal to amend the Referral Act to provide the FWC with jurisdiction to approve agreements containing matters that are otherwise excluded from the referral of powers, taking into account the *United Firefighters* decision.

Sources: Melbourne Corporation v Commonwealth (1947) 74 CLR 31; *Re Australian Education Union* (1995) 184 CLR 188; *United Firefighters’ Union of Australia v Country Fire Authority* [2015] FCAFC 1.

While it is possible that other states will ultimately refer the industrial powers that cover their public services to the Commonwealth, the lack of public discussion about this makes the prospect of this occurring in the near future unlikely.

Table 24.2 The patchwork of referrals between the state and Federal systems

<i>Jurisdiction</i>	<i>Who is covered by the Fair Work Act?</i>	<i>Who is covered by state laws?</i>
NSW	Private sector employees and employees of constitutional corporations	State public sector workers and local government employees
Qld	Private sector employees and employees of constitutional corporations	State public sector workers and local government employees
SA	Private sector employees and employees of constitutional corporations	State public sector workers and local government employees
Vic	All employees	
WA	Employees of constitutional corporations with some additional areas where employers and employees have other connections with the federal system	All other employers
Tas	Private sector employees, local government employees and employees of constitutional corporations	State public sector workers
ACT	All employees	
NT	All employees	

Source: CPSU SPSF Group (sub. 90, p. 12).

The federal workplace relations system captures 246 600 Commonwealth public sector employees, 384 500 state public sector employees⁶⁷ and 80 500 local government employees (using the figures from table 24.1 and the coverage detailed in table 24.2). Given this, a conservative estimate suggests the system covers at least 37 per cent of all public sector employees⁶⁸, equivalent to over 6 per cent of the total number of employees.

While the assessment in this section is restricted to the public sector agreements struck under the FW Act, the defining feature of public sector bargaining — a single employer with considerable bargaining power — is consistent across all jurisdictions.

In theory, the Government has purchasing power

The strength of a government's bargaining position largely derives from the fact that it is the most substantial employer of public servants in a particular region.⁶⁹ While there can be some competition for these workers from private companies or from other governments,

⁶⁷ The Northern Territory police operate under a discrete Tribunal directly provided for in the *Police Administration Act* (Police Federation of Australia, sub. 106, p. 2)

⁶⁸ The estimate may exclude employees of some state-owned 'constitutional corporations' which fall into the national WR system.

⁶⁹ The exception is when Commonwealth and state governments both have a significant presence in the same region and can effectively compete against each other and local Government for workers.

it may be reduced by a reluctance by employees to move to the private sector or interstate.⁷⁰

In some situations, an employee's choice of occupation limits their ability to find employment outside the public sector. This is largely because governments are the major providers of health, education, emergency and corrective services. So, for example, if a police officer wishes to remain a police officer, they have no choice but to do so as a public sector employee, strengthening the Government's bargaining power.

In other circumstances, public sector workers are restricted in their ability to take industrial action. The FW Act stipulates that the FWC may make an order to suspend proposed industrial action where it is likely to endanger a person's health, safety or welfare, or cause significant harm to a third party or to the economy (chapter 27).⁷¹ Because of this, the parts of the public sector that are focused on service delivery to the vulnerable or in maintaining public safety (such as police officers, firefighters, prison officers and child protection workers) may find it difficult to take industrial action and, as a result, cannot so easily countervail the Government's bargaining power.

Several inquiry participants cited examples illustrating these points. The Australian Education Union gave the example of teachers in the Northern Territory, who proposed industrial action in pursuit of an enterprise agreement. Rather than take the attendance roll electronically, they proposed to take it manually, and not provide it to school administrators. The proposal was found to threaten endangerment to personal health and safety or welfare, and the action was suspended by the FWC under s. 424 of the FW Act (sub. 63, p. 9). Similarly, the Police Federation of Australia observed that:

Police officers, due to our Oath of Office, can be prejudiced in their capacity to fully participate in enterprise bargaining, particularly as they are an essential emergency service. To achieve a desired outcome, enterprise bargaining clearly envisages that negotiations may develop into more than a discussion around claims or a debate on wages policy, but may eventually test the resolve of parties around the principles of supply and demand. To not have the legal ability to fully extract the potential of a bargaining position is to enter into the exercise without the necessary tools to effectively participate. Whilst there is a perception that police unions possess significant industrial strength, they are unable to engage in industrial action in the same way as other members of the workforce. (sub. 106, p. 4)

Public servants are not entirely bereft of options. They can take industrial action, or threaten to take industrial action that causes irritation and increased costs, so long as it does not endanger life or the economy. For example, anecdotal evidence suggests increased

⁷⁰ Features of the Australian labour market such as safety nets, organised labour and enterprise bargaining have evolved over time to offset market power on the part of the employer. Ensuring the employee is not driven away to another employer is one of the major considerations of employers in any enterprise agreement or individual contract negotiation.

⁷¹ It can also suspend industrial action where it considers that the bargaining process may benefit from the suspension — or a 'cooling off' period.

numbers of passengers, mail and cargo were selected for screening as a part of industrial action taken by quarantine officers at the Department of Agriculture. Where industrial action typically leads to a strike or a cessation of work, in this instance it resulted in them working harder. While this led to delays, it did not weaken Australia's quarantine controls.

In addition to the differing nature of industrial action between sectors, exposure to market forces also varies, with implications for bargaining outcomes:

- In the private sector, the risk of firm closure in response to weak market conditions is a key constraint on employees' wage demands (Australian Public Service Commissioner, sub. DR299, p. 2). On the other hand, strike action may be more effective in the private sector, where there is potential to extract a share of employer profits.
- In the public sector, the pressures exerted by employees differ in form and degree. While markets cannot force a public sector agency to close, the threat of outsourcing, staff losses, privatisation and the abolition of government agencies may still act to partly constrain the demand for higher wages and conditions. And strike activity and public campaigns can still have a significant community impact and place political pressure on governments (Australian Public Service Commissioner, sub. DR299, p. 3).

Nevertheless, to the extent that it enjoys some purchasing power, the Government could, in theory, drive the terms and conditions of employment in enterprise agreements closer to the safety net wages and conditions specified in the Public Service Award.

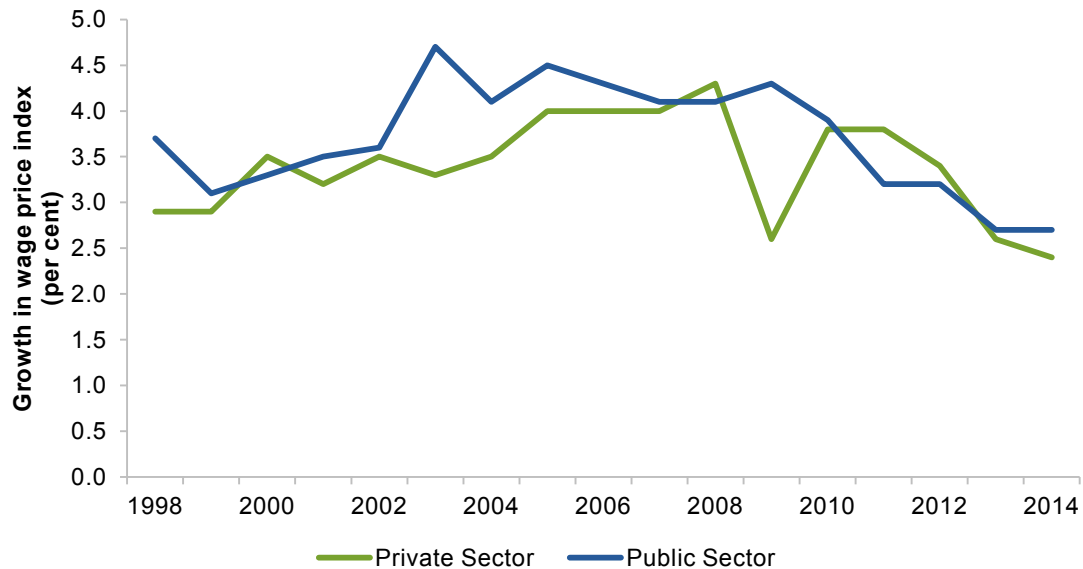
In practice, wage outcomes have not generally been poor

Notwithstanding the strong market position of Commonwealth and state governments, public sector workers have enjoyed higher wage growth than the private sector. Since 2001, aggregate annual wage growth in the public sector has been lower than that of the private sector on only four occasions (figure 24.1). Over this period, average annual wage growth has been 3.7 per cent in the public sector, compared with 3.4 per cent in the private sector. To put this in perspective, if two workers – one in the public sector and one in the private sector – commenced work in 1998 on the same wage, the illustrative differential in wage growth would lead to the public sector worker's wage being 63 per cent higher by 2014, compared with 58 per cent higher for the private sector worker.

This data (and the ratio data examined below) suggest that governments have not, in any systematic sense, been either excessively growing or shrinking public sector wage levels at the aggregate level.

Figure 24.1 **Public vs private sector wage growth^a**

Wage price index, 1998-2014



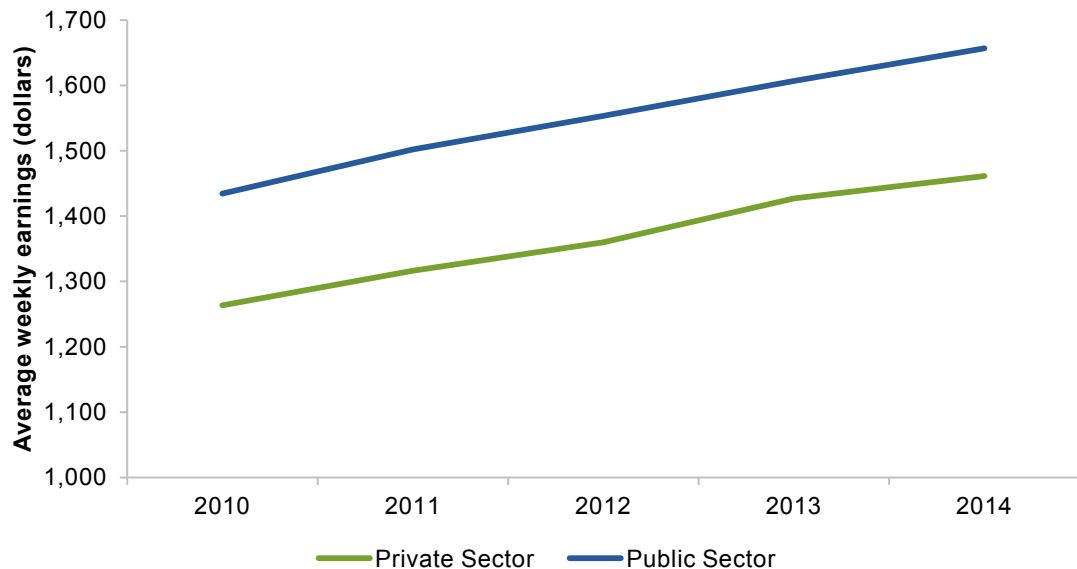
^a Annual wage growth is determined from the percentage change from the corresponding quarter of the previous year, commencing with December 1998. It excludes bonuses.

Source: ABS, *Wage Price Index, Australia, Dec 2014*, Cat. No. 6345.0, released 24 February 2015.

However, trends alone cannot indicate whether Australian governments may use their market power to lower average wage levels at any point in time. To assess this requires a comparison between employees in the private and public sector who otherwise share common skills and aptitudes. The most recent assessment of this issue suggests that female government public sector workers receive wage premiums over their private sector counterparts, not discounted wages. There is little evidence of a statistically significant premium for males (Siminski 2011).

Aggregate wage levels, while offering less of a like-with-like comparison, also show that workers in the public sector in Australia are typically more highly remunerated than those in the private sector. From 2010 to 2014, public sector workers maintained a wage gap of almost 14 per cent on average above private sector counterparts (figure 24.2). This result was broadly consistent across the states, with the average public sector premium being just under 16 per cent in 2014 (figure 24.3), and with no state offering a premium of less than 12.5 per cent.

Figure 24.2 Private vs Public Average Weekly Earnings^a



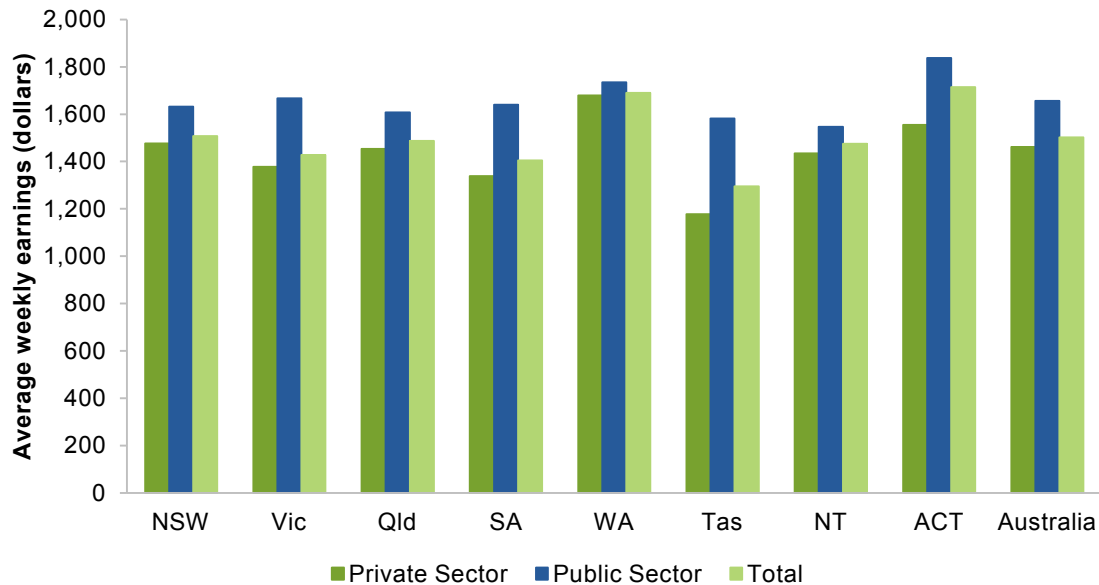
^a Figures are full time, adult, ordinary time cash earnings.

Source: ABS, *Average Weekly Earnings, Australia, November 2014*, Cat. No. 6302.0, released 25 February 2015.

Accordingly, the basic evidence is not strong that governments systematically use their bargaining power to restrict wage growth. Several factors may contribute to this. The public sector is more highly unionised than the private sector. While private sector unionisation rates fell to around 13 per cent in 2011, the rate in the public sector rates was still over 43 per cent (figure 24.4). This suggests that public sector workers have buttressed their own bargaining position, countering the market power of the government with some of their own.

One of the core functions of government is the provision of public goods and services. Given many public sector workers are intrinsic to this, the Government has an incentive to not restrict wage growth for fear that it may affect, or may be perceived to affect, either the number or the quality of goods and services provided to the wider community. In this sense, it is in the Government's interests to attract and retain high calibre workers, with wages being a key mechanism for doing so.

Figure 24.3 Private, Public and Average Weekly Earnings^a
May 2014



^a Figures are full time, adult, ordinary time cash earnings.

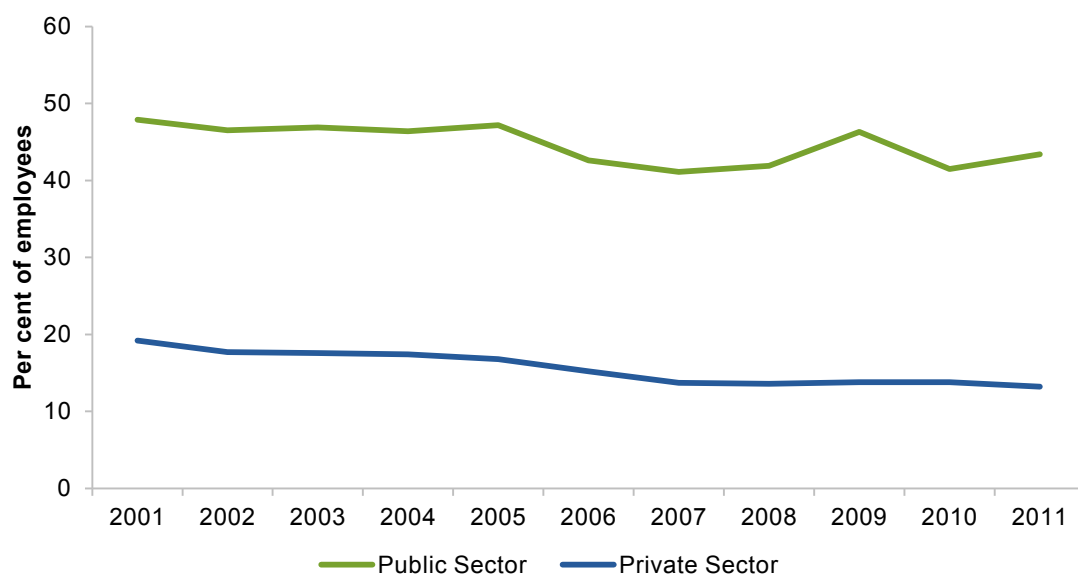
Source: ABS, *Average Weekly Earnings, Australia, November 2014*, Cat. No. 6302.0, released 25 February 2015.

Moreover, the incentives to use their market power are weaker for governments because of the way they fund their expenditures. While both private and public sectors face financial constraints on the wages they can offer, the nature of those constraints varies. As briefly noted earlier, private enterprise bargaining is influenced by the profitability of the business — which reflects business costs and customer revenues. If there are downturns in sales (say due to increased competition, macroeconomic shocks or management errors) or cost pressures (say from higher rents or energy prices), then managers and employee representatives are aware that any deal struck cannot involve high wage rate increases without risks to employment or enterprise viability. Australia has seen considerable reductions in wage pressures in recent years as economic growth has faltered.

However, there are many parts of the public sector where there is no, or only partial, pricing for services. Since they cannot recover the cost of producing these services through markets, governments cover the shortfall with tax revenues. This has the effect of linking government wage bargains to tax revenues, rather than the price returned in the market. Accordingly, there are times in the business cycle where it may be more (or less) pressing for governments to relinquish their greater bargaining power and to agree to wage demands.

Figure 24.4 Public vs private sector unionisation rates

Employees in main job, by sector, 2001-2011



Source: ABS, *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2011*, Cat. No. 6310.0, released 24 February 2015.

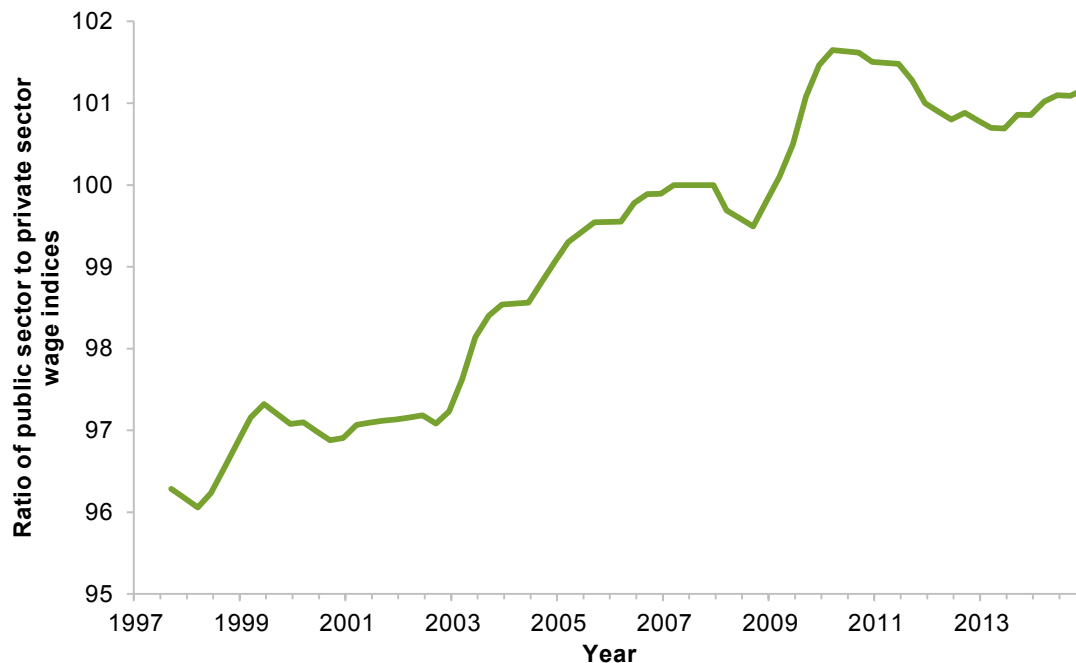
In the wake of the Global Financial Crisis, some governments overseas have frozen public sector wages or even cut nominal wages (Hall 2010; Lamo, Moral-Benito and Perez 2014). While prolonged enterprise bargaining has incidentally frozen nominal wage increases in some parts of the public sector, Australian governments have not deliberately followed a policy of freezing public sector wages.

Nevertheless, the *ratio* of public sector to private sector wages has fallen at times of severe budget pressure, as in 2008 (figure 24.5), and with low growth in recent years. In the case of the Australian Government, there have been policy initiatives to reduce public sector employment and to reach enterprise bargains that permit only slow wage growth over the life of new agreements. This is consistent with responses to cyclical budget pressures, not the continuous use of market power.

That said, this is an ‘average’ result. In some public services, governments keen to contain budget costs may set portfolio budgets (or special purpose payments in the case of the Australian Government) that restrict feasible pay rises. This may not only have immediate effects on motivation and productivity, but also reduce the inflow of quality employees. This issue is considered further in the inquiry’s discussion of awards (chapter 8).

Figure 24.5 **Ratio of public sector to private sector wage indices**

September 1997 to December 2014, Trend adjusted^a



^a The graph is based on trend adjusted data from the ABS Wage Price Index. The index takes account of compositional shifts in labour, and so is a better measure of relative wages than standard wage measures.

Source: ABS, *Wage Price Index, Australia, Dec 2014*, Cat. No. 6345.0, released 24 February 2015.

24.2 Bargaining with the decision maker

One concern about public sector bargaining has been that, while negotiations for enterprise agreements occur at the agency level, decisions affecting bargaining are largely driven by governments, which adopt an ‘across the board’ approach.

In the case of the Australian Government, it generally provides guidance to its bargaining representatives in individual agencies through documents such as the Australian Government Public Sector Workplace Bargaining Policy (Bargaining Policy) and its precursors. In the notes to one of these precursors, the Australian Public Service Commission (APSC) noted that the document:

... provides a framework for the management of workplace relations in Australian Government employment consistent with both the broader principles of Australian Government workplace relations policy, and legislative requirements. (APSC 2009)

The Bargaining Policy sets out the guidelines for all enterprise agreements or common law contracts in the Commonwealth public sector. It provides guidance on employment arrangements; affordability and funding; remuneration and productivity; employment

conditions and arrangements; performance management; enterprise agreement content and the approval requirements for enterprise agreements.

This places some restrictions on the Australian Government's bargaining representatives. When bargaining, they are able to neither offer nor reach agreement on any term that is not consistent with the Bargaining Policy without special dispensation from the agency's Minister and the Public Services Minister (APSC 2015).

The practice of providing guidance to agencies is neither new nor controversial. The Australian Public Service Commissioner noted that delegated bargaining, albeit with some guidance, is common in the private sector. He noted that:

... [s]uccessive governments have determined a workplace bargaining policy that establishes the parameters in which bargaining in the APS is to occur. In this respect, the APS is like large and multi-faceted private sector employers that devolve responsibility for bargaining to individual business unit managers within a head office approved framework (sub. 170, p. 3).

While the necessity of delegation is not contentious, the degree of control governments sometimes choose to exercise through the Bargaining Policy has raised concerns (CPSU PSU Group, sub. 160, p. 6). This is particularly the case at the Commonwealth level, given there are no businesses that have as many 'subsidiaries' and employees as the Australian Government.

Where governments exercise a high level of control, negotiations may be prolonged. The agency's bargaining representatives have reduced scope to negotiate. Subsequently, time is required to receive the Government's imprimatur for counter offers, concessions and approvals. All Australian Government agreements must go through multiple steps outside the relevant agency. (The scope for improvements to the EA approval process is more generally mooted in chapter 20).

Ultimately, the best balance between the freedom of delegates undertaking negotiations at the agency level and the reasonable need for the ultimate employer to control costs is a judgment issue that should take account of:

- the costs of negotiations
- the fact that delegates at the agency level have better information about, and control of, the operations of their agency than government as a whole. Reducing delegates' negotiating freedom limits the scope for negotiating parties at the agency level to make improvements whose dividends may be shared between government and employees.

24.3 Good faith bargaining in the public sector

A further concern raised by a number of submitters to the inquiry has been the current requirements for, and effectiveness of, good faith bargaining across enterprises generally (chapter 20), and for the purposes of this chapter, in the public sector.

Currently, the requirements for good faith bargaining are largely procedural. Section 228 of the FW Act specifies that bargaining representatives can meet the requirement to bargain in good faith by participating in meetings, disclosing relevant information, considering and responding to claims made by other bargaining representatives, giving genuine consideration to the proposals of other bargaining representatives, refraining from conduct that undermines freedom of association or collective bargaining and recognising other bargaining representatives.

Good faith bargaining does not require a bargaining representative to either make concessions or reach agreement on the terms that are to be included in the agreement.

In this vein, the CPSU PSU Group noted that:

... [t]his underlines a significant weakness in the Act. The situation in Commonwealth bargaining is not directly addressed by the good faith bargaining provisions. Instead, the good faith bargaining provisions provide a procedural check list that an employer can meet without ever having any intention of genuinely negotiating and reaching agreement with employees. The system needs to be significantly re-worked so that it is geared towards genuine bargaining rather than mere compliance with procedure (sub. 160, p. 4).

The concern raised is that without forcing representatives to make progress towards an outcome, negotiations may be drawn out. Protracted negotiations are not a problem *per se* (particularly where longer negotiations are a means of obtaining efficient outcomes or where the stakes dwarf the cost of a longer process). There may be instances where ‘holding out’ or refusing to make concessions may be a viable negotiating tactic, particularly where one side has a significant amount of market power. In the public sector, this may enable a government in pursuit of its preferred fiscal outcome⁷² to apply pressure on employees by drawing out the bargaining process, rather than finding agreement through genuine back and forth negotiating.

Should the FWC have a role in bringing public sector negotiations to a conclusion?

The FWC has various powers to step in and resolve protracted negotiations (chapter 20 and Stewart 2013). Some participants have argued that the capacity of the FWC to intervene in the public sector is too limited and that ‘the suite of powers of the Fair Work Commission to deal with bargaining disputes is not sufficient to deal with the range of issues that come before it’ (CPSU SPSF Group, sub. 90, p. 7).

The CPSU SPSF Group go on to suggest that, as a consequence, poor outcomes have resulted. It argued:

⁷² Drawing out negotiations can save governments money in two ways. It can lead to lower wage increases, and, because they are typically not backdated, it can take longer before the pay increase comes into effect.

... [t]he operation of the bargaining system in the [Fair Work Act] has entrenched a war of attrition. In order to progress bargaining claims, bargaining representatives are forced to escalate to more disruptive industrial action in order to either force concessions or to move towards a workplace determination (sub. 90, p. 7).

However, as noted earlier, there is little evidence that, over the span of a year, the average outcomes of enterprise bargains result in pay rates that are excessively low by private sector standards. The concerns appear to mainly reflect the current round of enterprise bargaining in the Australian Government public service. The grounds for changes to the FW Act to deal with a perceived set of problems for one aggrieved party in one round of bargaining are not compelling, unless this pattern were to persist. As shown in figure 24.5, periods where public sector wage growth has not kept up with the private sector are typically followed by subsequent periods of more rapid growth. This issue is also considered in chapter 20 (in the context of enterprise bargaining more generally).

24.4 Productivity in the Public Sector

Enterprise agreements can be used by employers to obtain productivity improvements from their workforce. They do this by including terms and conditions (such as changed work practices or patterns) that lead to higher output per worker, in exchange for wage increases. In this way, employers and workers share the benefits from increased productivity.

Measurement challenges

The difficulties in measuring productivity poses a barrier to this type of bargaining in the public sector. The Department of Finance and Deregulation in Australia, and the Office of National Statistics in the United Kingdom have argued that there is currently no agreed way of measuring productivity in the public sector (ACTU sub. 167, p. 260). The problem is also recognised in the Australian Bureau of Statistics measures of productivity in the Australian National Accounts.

The measurement of productivity requires relating quantities of inputs to outputs. But, in a number of instances, the *nature* of some public sector work — where it involves longer-term, multifaceted, and intangible outcomes that may be shared across agencies — does not easily lend itself to a neat definition of outputs.

Even if this could be overcome, since most services produced by the government are not traded in markets⁷³, the absence of a market price complicates aggregation across the sector into a single, relatable output measure (Simpson 2006). Faced with this, some organisations use partial measures, such as the number of visits to the doctor, as proxies for

⁷³ There are a number of exceptions to this. For example, Australia Post has paying customers and is subject to government wage policy.

output volume when attempting to measure productivity. However, this neglects the other services they may offer, any differences in the quality of the service as well as any deficiencies associated with the chosen measure. In this particular illustration, more visits to the doctor could equally be argued as a measure of a *failure* to prevent illness, and thus, could be considered a conflicting measure. Statistical organisations like the Australian Bureau of Statistics often assume that, in the public sector, inputs equals outputs (ABS 2000, p. 363). Both approaches reveal the extent of the challenge, when linked to pay outcomes.

Current approaches in bargaining frameworks

Despite this, in what has been a feature of successive governments, the Bargaining Framework for the Commonwealth public service has routinely required that *all* pay increases reflect ‘productivity’ enhancements. This has also been the practice of several states not covered by the FW Act. While it is common for enterprise agreements negotiated in the private sector to include either general or specific productivity measures (chapter 20), the practice is nowhere near as extensive as in the public sector. Nor is the stated link between productivity and pay as strong.

There are several general concerns associated with directly linking pay increases to productivity, including:

- flaws in its underlying premise
- questions about what should be the prerogative of management and therefore that should not be exchanged for pay increases
- the perverse incentives it may create for employees, during the life of agreements, to delay productivity improvements until a future round of bargaining
- practical concerns about the ability of the FWC to evaluate productivity-related clauses in enterprise agreements
- enforcement.

However, many of these apply to both the public and private sectors and, as such, are discussed in more detail in chapter 20.

The concern most specific to the public sector is the interpretation of productivity improvement (box 24.2). Some interpretations suggest that a reduction in entitlements (such as a reduction in sick days), or agreements to work longer hours (for example, by reducing Christmas shutdowns) are productivity enhancements. Using any standard definition of productivity, such as those used by professional economists generally and statistical agencies worldwide, these interpretations are ill-founded (box. 24.2). Further, as discussed in chapter 4, exchanging entitlements for cash simply trades one form of compensation for another with little gain to either party (assuming the worker is compensated exactly for the loss of the entitlement) or to productivity.

Box 24.2 **Productivity**

As noted by the Community and Public Sector Union [PSU Group] (sub. DR332), the concept of productivity is commonly misinterpreted and misapplied in the workplace relations context. Throughout this inquiry, numerous participants, particularly employer groups, have characterised reductions in entitlements or increases in working hours as improvements to productivity. Before the productivity effects of a cost reduction can be inferred, the effect on inputs and outputs must be known.

Productivity is the ratio of output produced to inputs used. It measures how efficiently inputs, such as capital and labour, are used to produce outputs, and is sometimes referred to as productive efficiency. Productivity increases if output grows faster than inputs.

Given the above definition, increases in required working hours per person would not lead to improvements in productivity unless there was a correspondingly *greater* increase in output (in violation of the conventional outcome in economics that there are diminishing marginal returns to inputs). Moreover, paying an employee to work longer could actually harm productivity if the worker's effectiveness falls in those additional hours (for example, through reduced commitment to an agency for a reduction in conditions that may be perceived — incorrectly or not — as unreasonable). The Australian Public Service Commission (sub. DR299) argued that it would be a fanciful assertion to suggest that an extra few minutes of work a day would harm productivity. However, even if the effect of a few extra minutes of work on workers is minimal, at best the overall level of productivity would remain the same, while at worst it may decline.

For more information on how productivity measurements are calculated, see PC (2013c).

A genuine productivity increase requires a change in the *way* a public sector organisation uses its resources to better perform its core activities, including improved quality of its outputs. This relates more to the adoption of new processes and technologies, rather than simply working harder or changing the mix of entitlements in a worker's overall compensation. A well-publicised example is scope for the reduction in travel expenditures resulting from more widespread use of video and teleconferencing (fuelled by technological improvements) and the complete demise of the large typing pools that existed in the 1980s.

Consequently, some changes to EA terms in bargaining may improve productivity if they allow for more flexible or optimal allocations of labour and capital, for example to better avoid capacity constraints or idle inputs. The Australian Public Service Commissioner (sub. DR299) suggested that some EA terms may improve the ability for employers to flexibly manage and mobilise human resources, for example changes to terms that give employees veto powers over changes to working hours or work location.

However, even with an appropriate interpretation of productivity, the difficulty in measuring outputs mean that the overall effect of a productivity clause is largely speculative. This, along with the concerns outlined in chapter 20, mean that there are fundamental impracticalities in strongly linking pay and productivity in the public sector.

Productivity enhancements are important, and sometimes bargaining may be necessary for their realisation. But where direct links with pay are infeasible, an alternative way of

enabling productivity enhancements is to align the incentives of the employer and the employee. While the absence of shareable profits and the lack of bargaining authority for the agency representatives makes this approach less effective than in the private sector, building trust and fostering engagement between employers and employees, with the understanding that all parties will benefit over the longer term, generally does enhance productivity. Where this becomes a part of the culture of the agency, both employers and employees have an incentive to find ways to improve productivity.

24.5 Performance management in the public sector

Anecdotal evidence, presented throughout the course of the inquiry, suggested that it is more difficult to terminate the employment of underperforming public servants than their counterparts in the private sector. Similarly, management of underperformance and sick leave (and thereby its incidence) seems to be source of concern, especially in some large agencies.

Responsibility for these difficulties is often directed at the culture of the public service. In particular, participants have cited the need for the government to be a ‘model employer’, high unionisation rates, risk aversion on the part of management and human resources staff, as well as the attitude of the regulator to the public service as contributing factors. However, there is little documented evidence to substantiate any of these.

Few dispute, however, that the requirement to provide procedural fairness to the employee in instances where they are facing possible termination has probably greater prominence in the public sector than in the private sector. Overextending this requirement may have resulted in unnecessarily lengthy, costly and inflexible performance management and termination procedures.

Results from the Australian Public Service Commission’s *State of the Service* survey point to ongoing problems with performance management in the Commonwealth public service. For example, the 2013-14 survey indicated that only 37 per cent of employees surveyed agreed that their supervisor managed underperformance well (APSC 2014a). Prior to the leaving office, the former Australian Public Service Commissioner, Steven Sedgwick, noted:

... [t]he need to afford an employee procedural fairness is deeply enshrined in administrative law and APS practice. Similarly the need to provide an individual with reasonable opportunity and support to lift their contribution is deeply entrenched in APS culture. Neither of these requires, however, the adoption of interminable or excessively bureaucratic processes. (Sedgwick 2014)

The grounds for the termination of an ongoing public service employee are outlined in the *Public Service Act 1999* (Cth) (PS Act). These include being excess to requirements, loss of an essential skill or qualification, non or unsatisfactory performance, failure to meet a condition of engagement or breaches of the APS Code of Conduct. Further guidance about

the legal framework governing the termination of employment is published by the Australian Public Service Commission (APSC) (APSC 2014b), in addition to policies covering issues such as the redeployment of staff and the handling of code of conduct violations.

In accordance with the PS Act and the guidance provided by the APSC, Commonwealth agencies have agency-specific policies for the management of underperformance and code of conduct violations. In some cases, these policies are shaped by the agency's enterprise agreement. For example, the enterprise agreement of the Department of Human Services specifies a performance process, a 'back on track' process and formal performance counselling for the management of underperformance.

To the extent that these terms shape agency policy, they can make it difficult to get better performance outcomes out of the public sector workforce over time, impinge on managerial prerogative, and create a barrier to the termination of employment (even where it is warranted). Sedgwick noted that:

... [i]f an employee is not sufficiently responsive and performance expectations remain unfulfilled, then the Public Service Act is clear that an 'agency head may at any time, by notice in writing, terminate the employment of an [ongoing] employee ... [for] non-performance or unsatisfactory performance, of duties'. However an examination of agency enterprise agreements has highlighted that many agencies have, over time, surrounded the performance management process with excessive procedural and other encumbrances (Sedgwick 2014).

Removing these terms from enterprise agreements could restore managerial prerogative over performance management and termination processes.

One complication is that it is difficult to ascertain at the centre of government the impacts on an agency of excising such terms from its enterprise agreement (how much are the present arrangements valued by the staff and therefore what is it worth in terms of compensation, and from a management point of view will the culture of the place really change).

Consequently, the decision to remove such provisions should involve a hard-headed practical assessment of the tradeoffs, a task best undertaken at the agency level.

24.6 Other public sector concerns

Several other public sector issues have emerged in this inquiry, including:

- the effects on public sector employees of changes in state laws
- the degree to which 'corporatisation' moves employers from the state to the national system.

The first of these centres on the effects of law changes in the state systems, and the potential for these changes to adversely affect public sector workers. The Australian Education Union noted that:

... [s]hould a state operate to unfairly constrain the powers and functions of its industrial tribunal or to remove the capacity for industrial awards or enterprise agreements to contain certain subject matter, state based employees are left no capacity to resolve issues associated with significant terms and conditions of their employment. (sub. 63, p. 7)

In support of this argument, the Australian Education Union cited the passage of legislation in both NSW and Queensland that affected industrial relations processes and, as a result, outcomes in those states. (sub. 63, p. 8).

With regard to the second of these concerns, in its submission to the inquiry, the Australian Council of Trade Unions (ACTU) expressed concern about the extent of the national system. It noted that:

... [t]here are many State owned corporations that have been sucked into the Federal system even though they have more in common with the Aboriginal Legal Service than with Rio Tinto. Many of these corporations are formed for the purposes of implementing State Government policy rather than trading or making a profit. (sub. 167, p. 256)

In a number of instances, it is not trivial to determine what constitutes a ‘trading or financial’ corporation, and, as a result, whether the corporation in question is covered by the national system or remains in the state system. While the ACTU concedes that, to some degree, this issue will be resolved by common law precedent, it argued that ‘it is not good policy to wait for developments in the common law of Australia to give more clarity around the meaning of ‘trading or financial corporation’ for the purposes of s 51 (20) [of the Constitution]’ (sub. 167, p. 256).

However, there may be circumstances in which states can prevent employers from automatically being shifted into the national system. The Australian Education Union noted that:

... [e]ven when corporatisation does occur, this does not necessarily mean the ‘transfer’ of employees and the new ‘corporate’ employer into the federal jurisdiction. Section 14 of the Fair Work Act 2009 [Cth] contains a mechanism enabling a state or territory to declare, and for the Commonwealth Minister to endorse, that a particular employer is NOT an employer for the purposes of the federal Act. This occurred in 2014 with respect to TAFE employees in Queensland who were transferred from employment by the relevant state department to that of a new corporate entity, TAFE Queensland. (sub. 63, p. 7)

While not unimportant, these examples are not sufficient to bring into question the extension of the national system, particularly where states retain the power, through s. 14(2)(b) of the FW Act, to keep employers in their own industrial system should they see fit.

Moreover, throughout this inquiry, the Productivity Commission has decided to only consider state WR issues where they provide some lessons for the Commonwealth system, where coverage issues arise (as above), or where there are troublesome interactions. A comprehensive analysis of all features of state systems — which would have to not only consider public sector employees, but also employees in unincorporated enterprises in Western Australia — is beyond the scope of this inquiry.

That said, in principle the FW Act should provide a guiding framework for all industrial relations law throughout Australia, even where the states have not ceded their powers in respect of the employees of non-constitutional corporations, public sector employees or employees of unincorporated corporations. Therefore, the Productivity Commission's view is that, experimentation aside, the FW Act should serve as the fundamental template for any residual roles of the states in industrial relations matters.

25 Alternative forms of employment

Key points

- Independent contracting, labour hire and casual workers comprise just under 40 per cent of the workforce. This figure has decreased slightly over the last five years.
- The prevalence of these alternative forms of employment can be partly attributed to the ways in which they differ from standard, ongoing employment. It is these differences that make them attractive to some workers and employers.
- Workers who are employed under these alternative employment forms 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 2009* (Cth) (FW Act).
- Sham contracting is the practice of misclassifying employees as independent contractors. It can occur with the worker's consent, or through misrepresentation or coercion.
 - Sham contracting is most prevalent in the construction, cleaning services, hair and beauty and call centre industries.
- The existing common law definition of a subcontractor may not always be easy to apply, but alternatives such as a legislative definition or test have their own problems.
- The requirement that an employer must have been 'reckless' for them to be prosecuted for misrepresenting the nature of an employment contract is too high a 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.
- Under the FW Act, terms in an enterprise agreement that prohibit an employer from engaging with independent contractors, labour hire and casual workers have no legal authority. However, it is lawful to include provisions that permit unions to influence the terms of any engagement.
 - These terms can take the form of jump up clauses — which ensure that all workers receive the same terms and conditions — and requirements to interact with the union ahead of any potential engagement.
 - These terms are not purely redistributive, but can also have adverse effects on productivity by restricting flexible work practices.
 - Terms that either restrict the engagement of independent contractors, labour hire and casual workers or regulate the terms of engagement for independent contractors or labour hire workers should constitute unlawful terms under the FW Act. The FW Act should also specify that enterprise agreement terms could not restrict an employer's prerogative to choose the employment mix suited to their business.
- There are currently few grounds for changing the way in which unpaid internships and work experience arrangements are regulated.

While the majority of workers are engaged on an ongoing basis, there are some common alternatives. These alternatives have characteristics that appeal to some workers and/or employers, offering them an improvement over the standard employment relationship.

The more substantial of these employment forms include:

- independent contractors, who supply their services on a job-by-job basis
- workers contracted to labour hire firms, who are then hired out to a ‘host’
- casual workers
- owner-managers of incorporated and unincorporated businesses, who are not independent contractors.

There are a number of other forms of work that comprise small but significant proportions of the workforce. These include fixed term employees, piece or outworkers, interns, apprentices and trainees.

Each of these employment forms has become an established aspect of the Australian workplace relations (WR) landscape and, collectively, they have grown as a share of the workforce over the last few decades (Louie et al. 2006). But the move away from more traditional employment relationships has led to concerns about their regulation (box 25.1).

Some of these concerns have been explored in recent reviews and inquiries. The nature of independent contracting and labour hire was examined ahead of the introduction of the *Independent Contractors Act 2006* (Cth) (IC Act) (Australian Government 2006). The prevalence and implications of sham contracting in several industries was examined by the Fair Work Ombudsman (FWO) (FWO 2011), the Australian Building and Construction Commission (ABCC 2011) and the Productivity Commission (PC 2014c), while a broader review of the overarching framework was undertaken by the post-implementation review of the *Fair Work Act 2009* (Cth) (FW Act) (McCallum, Moore and Edwards 2012). The Victorian and South Australian Governments are also undertaking inquiries into labour hire. Outside government, the Australian Council of Trade Unions (ACTU) conducted an inquiry into ‘insecure work’⁷⁴ – a term that largely captures independent contractors, labour hire and casual workers (ACTU 2012a).

This chapter details some characteristics of these alternative forms of employment (section 25.1), before examining concerns about the definition of an employee (section 25.2) and whether clauses that affect a business’s use of independent contractors or labour hire should be permitted in the FW Act (section 25.3). Issues associated with other forms of work are discussed in section 25.4.

⁷⁴ It is questionable whether the term ‘insecure’ aptly applies to contractors, since by the nature of their chosen employment, they shift from job to job. Security would then depend on any unwanted waiting period between jobs, not attachment to an employer.

This chapter does not discuss owner-managers in any detail. By definition, their employment conditions are outside the WR system. It also does not examine issues concerning the expansion of entitlements to casual workers (chapter 16) or whether or not labour hire workers should be able to negotiate a joint enterprise agreement (EA) with a labour hire agency and their host employer (chapter 20). The issues associated with migrant workers are discussed in chapter 29.

Box 25.1 Comments on the regulation of alternative forms of employment

Submitters to this inquiry have expressed a wide variety of concerns about the regulation of alternative forms of employment in the *Fair Work Act 2009* (Cth) (FW Act).

Submitters such as the Australian Chamber of Commerce and Industry, the Australian Industry Group and the Housing Industry Association among others stated their unease with the regulation of alternative forms of employment via enterprise agreement. They argued that ‘in the interests of a competitive environment, businesses should generally be free to supply goods and services, including contract labour, if they choose’ (Australian Chamber of Commerce and Industry sub. 161, p. 160).

A number of employee groups such as the Queensland Council of Unions, National Union of Workers and the Australian Council of Trade Unions argued that there is a lack of protection for non-permanent workers that results from the inadequate regulation of labour hire workers. To this end, the Australian Council of Trade Unions argued that:

... [I]labour hire exists purely as an avoidance strategy and its continued operation in the present regulatory settings is untenable unless one accepts that the workers who are engaged by the labour hire agencies are second class citizens. A first order issue is ensuring that labour hire workers engaged in a workplace — however temporarily — have the same level of industrial citizenship as the employees they work with. (sub. 167, p. 3)

The National Union of Workers suggested that the FW Act could better protect these workers by offering them the same wages and conditions as the employees of the host organisation through a joint agreement or a dual employment guarantee (sub. 125, p. 6). Joint agreements are discussed in more depth in chapter 20.

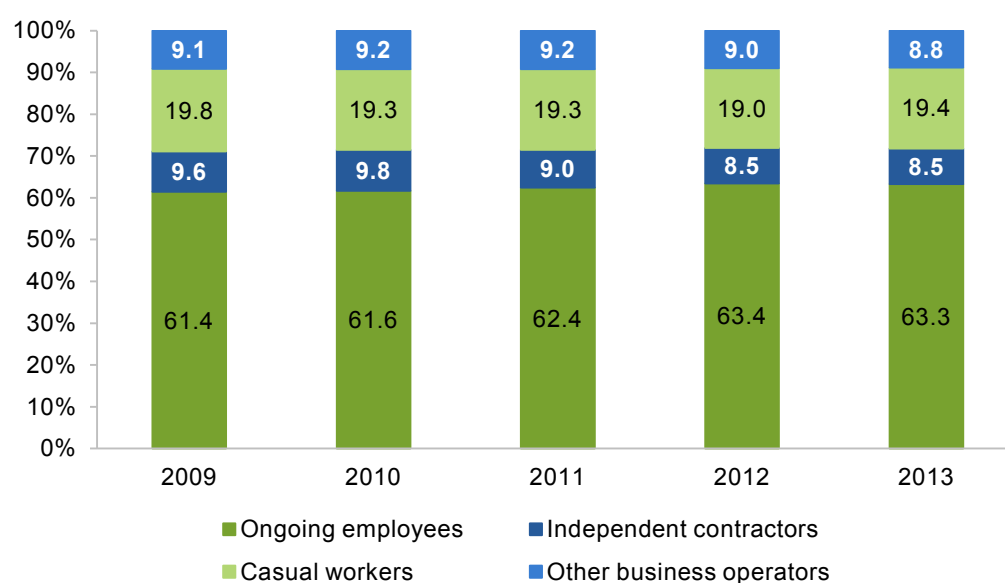
Others suggested that there are issues with the way in which the FW Act regulates the employment of casual workers. In particular, they suggested casual workers should have greater access to the National Employment Standards and stronger rights to convert from casual to permanent positions (the Work and Family Policy Roundtable and the Women + Work Research Group sub. 130, pp. 10–11; ACTU sub. 167, p. 102). Casual workers are discussed in more detail in chapter 16.

25.1 Some characteristics of alternative forms of employment

Prevalence of alternative employment forms

While the use of alternative forms of employment in Australia increased significantly in the two decades prior to 2000, it has been relatively stable since (figure 25.1) (Shomos, Turner and Will 2013). According to Burgess and de Ruyter (2000), the amount of casual or non-employee workers increased from 28 per cent of the workforce in 1982 to 40 per cent in 1999. Between 2009 and 2013, however, the proportion of the workforce engaged under alternative employment forms fell marginally from 38.4 to 37.7 per cent (ABS 2014e). Since this covers the period immediately before and after the introduction of the FW Act it suggests that the current WR settings may not have had a dramatic effect on the way in which workers are engaged. If anything, there has been a slight movement back towards ongoing employment⁷⁵.

Figure 25.1 **Stability in the forms of employment**
2009–2013, per cent of total workers



Source: ABS 2014, *Forms of Employment, Australia, November 2013*, Cat. No. 6359, released 7 May 2014.

Over this period, ongoing employees accounted for over 60 per cent of the workforce while casual employees comprised around 20 per cent and independent contractors and

⁷⁵ It should be noted that these estimates are for national and state employees combined.

business operators each accounted for around 10 per cent. A recent estimate suggests that labour hire employees make up around 1 per cent of the workforce (Shomos, Turner and Will 2013). However, this category of worker is not uniquely identified by Australian Bureau of Statistics (ABS) survey methods. Depending on the nature of their relationship with their labour hire agency, they may be classified as ongoing employees, independent contractors or casual workers.

The benefits of alternative employment forms

The prevalence of alternative forms of employment depends on the degree to which they meet the needs of employers, match the preferences and circumstances of workers and are affected by institutional factors. Whether or not an employer seeks to use a certain form of work depends on their assessment of how productive and how costly the workers might be. For workers, the attractiveness of various forms of work depends largely on the associated financial and non-pecuniary benefits. While there are also a number of institutional factors such as the tax and transfer system and organisation-specific factors which affect the prevalence of each form of work (Shomos, Turner and Will 2013), the major focus of this chapter is labour market regulation and the national WR system.

Workers value different employment forms

Independent contracting differs from ongoing work in that it offers greater autonomy. Because they contract out their services on a job by job basis (most are single person owner-operated businesses), independent contractors can usually choose what jobs to take, the hours they work, and the way in which they complete the job. They can also work for a number of clients simultaneously. Independent contracting arrangements developed unaided as an alternative to the standard employment form and, by 2006, they had become such an intrinsic aspect of the WR system that the IC Act was introduced. The purpose of this Act was to:

... recognise and protect the unique position of independent contractors in the Australian workplace. This Bill will enshrine the freedom of independent contractors to enter into arrangements that are primarily commercial relationships, free from prescriptive workplace relations regulation. (Australian Government 2006)

In contrast to the standard form of employment which is generally described as being ongoing, casual work is generally characterised as being informal, uncertain and irregular (Stewart 2013). Rather than work a regular schedule, casual workers can be rostered on or off at the discretion of the employer. Typically, casual work appeals to workers who value flexible hours, with the option of declining work (Shomos, Turner and Will 2013) as well as workers who are either just entering or close to leaving the workforce. Adding to this appeal is the higher hourly rate, or casual loading (discussed subsequently).

While some casual work is genuinely uncertain — such as bar staff or shop assistants who are called in whenever needed, or students who work at special events — there are many

examples of regular casual work. Indeed, nearly 59 per cent of casuals work the same hours every week, while 40 per cent of casual workers had been with the same employer for more than two years, indicating that there are a large number of casual workers who have the benefit of regular work as well as the higher wage rates associated with the loading. Moreover, casuals also have legal conversion rights that allow them to request a move from casual to ongoing work after a certain period of employment.⁷⁶ However, few such requests are made (Stewart 2013).

Labour hire requires a three-way arrangement between the worker, their employer — the labour hire agency — and the business that ultimately uses their services (the host). The worker, capitalising on the agency's ability to procure work, is supplied by an agency to the host. They then work at the direction of the host for an agreed period. Instead of paying the worker directly, the host pays the agency the costs of the worker's services, plus a profit margin. The agency then pays the worker. As a result, labour hire workers are generally either ongoing or casual employees of the agency, although in some instances they have been engaged as independent contractors.

Fixed term work features an agreement by the employer and employee about when the work relationship will end. It is generally preferred by employees who enjoy changing jobs periodically, enjoy having a finite horizon for their work relationship, but do not want to be self-employed.

Given that not everybody wants to work under the same conditions, these alternative employment forms partly satisfy the wide variety of preferences across the workforce. Whether it be the autonomy of independent contracting, the flexibility and the higher wage rate of the casual worker or the reduction in job search costs for the labour hire worker, each of these employment forms has some appeal to a large number of workers.

Employers benefit too, with implications for the wider community

Employers value these alternative forms of employment because they can improve productivity or lower costs in some circumstances. They can provide intermittently required skills and can act as more flexible sources of labour than ongoing employees.

- For a task that requires substantial training or experience (and is not expected to occur frequently or on a continuous basis), it will often be less costly for an employer to engage an independent contractor or labour hire worker with specialist skills on a short-term agreement.

⁷⁶ Some stakeholders suggested that the capacity to change from casual to permanent status was problematic because it constrained the ability of the employer to manage flexible resourcing. Moreover, the casual loading meant some casuals were not interested in moving to permanent employment.

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- Where the employer's need for labour is sporadic, short term or uncertain in the future and the skill and training requirements are low, they will often prefer casual workers (Shomos, Turner and Will 2013).
 - For project-specific work or work with a definable end date — where a particular task assembles a group of workers for a particular project — employers may prefer to use contractors, labour hire and fixed-term employees. This partly explains the relatively high prevalence of subcontractors in the construction industry.
 - Such workers provide a more flexible source of labour where work has a cyclical or seasonal element (such as in fruit picking, a peak tourist season, or for infrequently scheduled maintenance of equipment) or where a firm's internal labour market is inefficient due to work practices outside the control of management.
 - Labour hire and subcontractors have low 'firing' costs, as they are only temporary workers.
 - Where union bargaining power is high, subcontractors may provide a lower cost form of labour. However, in cases where this applies, unions will sometimes attempt to maintain their bargaining strength through restrictive terms in EAs (section 25.3)

Labour hire and subcontracting are less well suited to activities where there is a need for complex coordination of employees, there are difficulties in monitoring the performance of people acting independently, firm-specific training is required, working in teams accentuates learning and skill diffusion, or where a constantly available workforce is required.

Where using alternative labour forms does lower costs then, in any workably competitive market, the wider community will typically capture most of the benefits through lower prices.

Different forms of employment have different protections

The FW Act only regulates the terms and conditions of 'employees' in the national WR system. It sets out different entitlements and protections for ongoing employees and casual employees. Independent contractors are outside the scope of the FW Act. (table 25.1).

As employees, all ongoing and casual workers in the national system are covered by the FW Act. Nonetheless, there are key differences in the way they are covered. Minimum wage orders and awards generally specify loadings for casual workers, taking their hourly wage rate above that of ongoing employees (box 25.2). This compensates casual workers for not only the uncertainty of their work, but also for the fact that they do not have the same entitlements under the National Employment Standards (NES) as permanent, ongoing employees (chapter 16). Casual workers have access to flexible working arrangements and parental leave in some circumstances and to unpaid leave for caring responsibilities or on compassionate grounds, or for community and jury service. They may also have the right to use the unfair dismissal protections of the FW Act.

As they are not employees, the pay and conditions of independent contractors are determined outside the FW Act. Rather than have their wage rates specified by an industrial instrument, they negotiate a payment for their services on a job-by-job basis. Because of this, as well as their inability to access any of the minimum entitlements set out in the NES, there is only a limited safety net for independent contractors. However, the FW Act does protect independent contractors from adverse action, coercion and abuses of freedom of association. Furthermore, under the national unfair contracts scheme in the IC Act, independent contractors can request a court to set aside a contract if it is harsh or unfair.

Table 25.1 Entitlements by form of employment

<i>Protections</i>	<i>High Earners^a</i>	<i>Ongoing employees</i>	<i>Independent Contractors</i>	<i>Casual Workers</i>	<i>Self employed / owner – managers</i>
38 hour week max	✓	✓	x	✓	x
Flexible work arrangements	✓	✓	x	✓ b	x
Unpaid parental leave	✓	✓	x	✓ b	x
Annual leave	✓	✓	x	x	x
Personal / carers leave	✓	✓	x	✓ c	x
Community service leave	✓	✓	x	✓ c	x
Long service leave	✓	✓	x	✓ d	x
Paid public holidays	✓	✓	x	✓ c	x
Termination notice / redundancy pay	✓	✓	x	x	x
Fair Work Information Statement	✓	✓	x	✓	x
Fair dismissal	✓	✓	x	✓ e	x
Subject to minimum wage	x	✓	x	✓	x
Subject to Award conditions	x	✓	x	✓	x

^a High earners are defined by the FW Act as those whose annual earnings exceed the high income threshold. From the 1st of August 2014, this threshold was set by the Fair Work Commission at \$133 000 per year. ^b Casual workers have a right to request flexible work arrangements and unpaid parental leave after being employed for 12 months on a regular and systematic basis. ^c Casual workers are able to access unpaid personal / carers and community service leave, and an unpaid day off on a public holiday. ^d Casual workers may be able to access long service leave, if their jurisdiction defines continuous service in a way that includes a regular series of casual engagements. ^e Casual workers are also protected from unfair dismissal provided they can demonstrate they have an ongoing employment contract that their employer has terminated.

Sources Fair Work Ombudsman (2015h, 2015k), and Stewart (2015).

Box 25.2 The Casual Loading

The *Fair Work Act 2009* (Cth) allows each award to specify its own casual loading. Most use 25 per cent. A few, like the Seagoing Industry Award 2010 or the Fire Fighting Industry Award 2010, which cover occupations that are incompatible with casual work, do not specify a loading at all. In addition, as part of its annual wage review, the Fair Work Commission determines a loading for all casual workers not covered by an award. This is typically 25 per cent.

The magnitude of the loading is not arbitrary. Rather it is calculated to compensate casual workers operating under each award for the entitlements they do not receive as a result of their lack of coverage by the National Employment Standards. It pays them a higher wage rate in lieu of entitlements like personal, annual and long service leave, as well as termination and redundancy provisions (Shomos, Turner and Will 2013, p. 13).

As noted by submitters, a number of decisions by various tribunals over a long period of time have established precedents for determining the components of the loading. Graham (sub. 117, p. 5) suggested that, if these precedents were adhered to, foregone annual and personal leave would add 15-20 per cent to a base pay rate, while foregone redundancy payments and termination notice together would add 4 per cent. The rest of the loading is attributable to the loss of promotion and training opportunities, the lack of rostering certainty as well the likelihood of termination. Each of these are far more difficult to quantify.

The calculation of the old Pastoral Industry Award undertaken by the Australian Industrial Relations Commission (2003) illustrates the composition of the casual loading.

Comparison of permanent versus casual employment by entitlement to payment, in days (Pastoral Industry Award)^{a, b, c}

Permanent Employee	Days
Total Days (5 days * 52 weeks)	260
<i>Plus accrued entitlements</i>	
Annual leave	20
Leave loading (17.5 per cent of annual leave)	3.5
Long service leave	4.3
<i>Equivalent in days for which an entitlement accrues after one year</i>	287.8
Casual Employee	
Total Days (5 days * 52 weeks)	260
<i>Less days allowed for benefits not received</i>	
Payment for public holidays	10
Allowance for short time (time lost due to travel between engagements)	10
Allowance for sick/personal leave	5
Allowance re notice of termination / redundancy	5
<i>Equivalent in days for which an entitlement accrues after one year</i>	230
<i>Ratio of equivalent in days for which an entitlement accrues after one year</i>	1.25

^a Figures presented for station hands. ^b Assuming 1 year of work with 5 day weeks but with no work on public holidays. ^c This is indicative. The composition of the loading may change over time (for example, to reflect that there are typically more than 10 public holidays in a year).

Source: AIRC (2003).

The regulation of a labour hire worker's conditions depends largely on whether they are employees (with full rights under the FW Act) or independent contractors (with the limited rights outlined above). While, strictly speaking, the contract is between the worker and the labour hire agency, there have been instances of host organisations being held accountable for the wages and conditions of workers.⁷⁷

Improving productivity and strengthening worker's rights can conflict

While some protections or enhancements to workers' rights can improve productivity, in other circumstances the two goals may conflict.

Where the strengthening of a certain regulation or entitlement increases the unit cost of production, it is imperative to balance the financial and non-pecuniary interests of employers, workers, consumers and taxpayers to deliver the greatest benefit to the community as a whole. This task is complicated by effects over and above the transfers between employers and workers that can arise from such changes. Properly evaluating them requires careful judgment and consideration.

In the simplest sense, restrictive workplace regulations can constrain employers' ability to get the most out of their workforces, leading to higher costs. On the other hand, weakening workers' rights and entitlements can undermine their willingness (and ability) to work productively. Since both employers and workers (via greater job opportunities and future wage increases) share the profits, compromising businesses' productive capacity is of little benefit to either party.

There can also be significant effects on 'outsiders', or those who would like a job, but who are currently not employed by the business. For example, substantially increasing the benefits of work can lead to employers hiring less (assuming it increases the cost of labour) while simultaneously inducing more workers to enter the workforce. Where this occurs, increased unemployment can result (discussed in chapter 4).

Moreover, enhancing the conditions of certain forms of work (relative to others) may lead employers to choose to use one form over another, with consequences for certain types of workers. For example, moving to give casual workers a legal right to become permanent employees may be attractive to casuals looking for permanency and prepared to give up the loading, but where it dampens the employer's motivation to hiring casuals and instead leads to an increased use of labour hire staff, it will likely disadvantage the workers with few skills and experience that welcome casual work and the associated loading (particularly when the alternative is unemployment).

⁷⁷ As part of an Enforceable Undertaking entered into in October 2014, Coles acknowledged it 'is responsible with compliance across all aspects of the law across its business operations and welcomes the opportunity to work closely with the FWO to ensure ongoing compliance with Commonwealth workplace laws in respect of contractors of trolley collection services and their employees who conduct such services for and on behalf of Coles' (FWO 2014b)

It is reasonable and entirely rational for employers to work to reduce costs and lift productivity, even if this does involve moving to the use of alternative forms of employment like casual workers, labour hire or genuine independent contractors. It becomes problematic when businesses sham contract or do not take reasonable steps to ensure that labour hire workers receive the appropriate pay and conditions. Arrangements like these are unlawful, and have a number of adverse effects. Not only do they hurt the workers that are directly involved, but they place pressure on the pay and conditions of other lawfully engaged employees by weakening their capacity to bargain. Moreover, because it lowers their labour costs, businesses may obtain an unlawful competitive advantage over other firms in their market. Finally, these arrangements can also adversely affect the broader population where they lead to tax avoidance by either employers or employees.

25.2 Sham contracting

Since employees have many aspects of their pay and conditions determined by the FW Act, while those of independent contractors are substantially less regulated, one concern is that some employees are misclassified as independent contractors. This practice is called sham contracting.

An employee who is classified as a contractor would not receive the entitlements and protections of the FW Act, or the relevant award or EA. Such employees would also miss out on superannuation and worker's compensation.

Sham contracting disproportionately affects vulnerable workers who are at risk of exploitation or who have little bargaining power. It may sometimes involve coercion and deception by the employer. Nevertheless, in some cases it may involve consensual arrangements between the parties. For example, there is compelling evidence that sham contractors avoid taxes (ACTU 2011), which means that it is possible for a genuine employee and a sham contractor to earn the same *after-tax* incomes, although the costs to the employer are lower in the latter case.⁷⁸

The practice of misclassifying employees as independent contractors appears to be common in some industries. For example, up to 13 per cent of self-defined contractors in the building and construction industries may be misclassified (FWBC 2012).

A targeted audit⁷⁹ of 102 employers in 2011 in the cleaning services, hair and beauty and call centre industries found that:

⁷⁸ In most states, business payments to contractors are liable for payroll tax (Payroll Tax Australia 2015).

⁷⁹ The FWO emphasised that the sample for the audit was not representative of the broader industry. Instead it was targeted at employers that had either been referred to the FWO for potential sham contracting or recently advertised for workers with an ABN.

... 11 had employee-only workforces or did not engage contractors. Of the remaining 91 enterprises that were trading and did engage contractors, 21 (23%) were assessed as having misclassified employees as independent contractors and one third of those were assessed as either knowingly or recklessly having done so and are therefore suspected of having contravened the sham arrangement provisions of the FW Act (FWO 2011).

Suspected sham arrangements are investigated by the FWO and, in the construction industry, Fair Work Building and Construction (FWBC). Where they are confident that a contract for services is actually of employment, or a worker effectively operates as an employee despite having a contract for services, the regulators can advise the employer that they are non-compliant and work with them to fix the arrangements. Where the employer refuses to address the situation, they can also choose to take action through the courts to restore the contract of employment. In instances where they consider the employer to have acted inappropriately, as opposed to having made a simple mistake, they may also take actions against the employer for civil remedies (discussed later).

Where the regulator does investigate potential sham arrangements, the majority of cases do not result in court action. For example, in 2014-15, the FWO finalised 301 complaints relating to misclassification and sham contracting — 29 per cent of complaints were sustained (the contravention rate), the FWO issued 23 letters of caution, and commenced six sham contracting matters in court (FWO, pers. comm., 23 November 2015).

Several submissions to both the 2012 post-implementation review of the FW Act (box 25.3) and to this inquiry (box 25.4) have expressed a variety of concerns about sham arrangements. These concerns centre on the practical difficulties in differentiating between employment and contracting arrangements, and the extent to which employers can escape sanctions when found to be at fault. These concerns, and potential solutions to them, are considered in turn below.

Could a definition or a test provide clarity?

One of the challenges in enforcing sham contracting arrangements is ascertaining whether a worker, having agreed to a contract for services, is actually working as an employee. The existing test is based on the common law rather than statute, with courts using a multi-factor test, rather than making a ruling based on any single feature of the work relationship. The tests include:

- length of employment — ongoing employees are appointed on a permanent part time or full-time basis, while the employment of an independent contractor generally lasts as long as the job they are contracted for
- choice of work — ongoing employees are allocated to jobs by their employer, while independent contractors choose what jobs they will accept
- manner of work — ongoing employees may be directed by their employer how to perform a job, while independent contractors are generally able to undertake their work

in any way that they see fit (a test that is given considerable weight in the holistic assessment of the courts) (FWBC 2015)

- payment for work — ongoing employees draw a regular wage, while independent contractors negotiate a fee for the services they provide on a per-job basis
- hours of work — ongoing employees work standard hours, while independent contractors can choose their own hours of work
- employment entitlements — whereas employees are currently able to access a number of workplace entitlements (such as minimum wages, minimum work requirements, penalty rates, leave loading and unfair dismissal protections), independent contractors are not.

Box 25.3 2012 post-implementation review and sham contracting

Several submissions to the 2012 post-implementation review of the *Fair Work Act 2009* (Cth) argued that the current legislation was ineffective at curtailing sham contracting.

In particular, the Australian Council of Trade Unions asserted that sham contracting is a growing problem and the current provisions are failing to deal with it (ACTU 2012c), while the Construction, Forestry, Mining and Energy Union complained that there is nothing in the FW Act that explicitly prohibits sham arrangements (CFMEU 2012).

Some submissions claimed that the existing common law test of independent contracting is ambiguous. In particular the Australian Services Union and United Voice argued that a definition of a genuine independent contracting arrangement might help to restrict sham contracting practices (ASU 2012, (United Voice 2012a). Others articulated a need to tighten the wording of the current provisions. For instance, the Textile Clothing and Footwear Union of Australia argued that currently the evidentiary burden is too high for the prosecution of suspected sham arrangements (TCFUA 2012).

There were mixed reactions from submitters representing the views of employers. Despite the major employer associations arguing that the current provisions were sufficient (ACCI 2012, Ai Group 2012). Spotless Group Ltd noted that, to the extent that it helped an employer to reduce their labour costs, sham contracting represented a unfair advantage to employers acting unlawfully, with harmful implications for the ongoing viability of lawful employers and, in this sense, changes may be warranted (Spotless 2012). This notion was supported by the ACT Government (ACT Government 2012).

Box 25.4 **Selected comments on sham contracting**

Several submitters to this inquiry expressed concerns about the prevalence of sham contracting. They contended that it was common in several industries and allowed employers to routinely avoid paying statutory entitlements.

Submitters pointed to two enablers of the practice — the lack of clarity associated with the common law interpretation of what actually constitutes an independent contractor and the relative ease for an employer to escape sanction for sham contracting.

With regard to the first of these, a number of submitters (including Job Watch (sub. 84, p. 18), Footscray Community Legal Centre (sub. 143, p. 23) and the Australian Services Union (sub. 128, p. 18)) proposed the incorporation of an unambiguous statutory definition. For instance, the Housing Industry Association suggested that the 'Independent Contractors Act 2006 could be amended to provide a statutory definition of a contractor based on the current APSI (Australian Personal Services Income) criteria. This is a proven, workable definition that reflects and codifies the common law' (sub. 169, p. 63).

While this approach has strengths, there are also weaknesses. While acknowledging that it would reduce ambiguity, Norton Rose Fulbright cautioned that:

First, were a statutory definition to be created, it would likely amount to a series of factors — some mandatory and some optional, with weightings applied. In doing so, this approach would have circled back to the common law test.

Second, this approach would likely re-create a new basis for subjective interpretation, in this case, of the statutory definition by regulatory bodies and their staff, and would suffer from the same problems as the interpretation of the common law.

Third, the legislative process may not be able to keep pace with workplace developments (for example, if amendments to the definition cannot be passed through the Parliament. A statutory approach may therefore result in the codification of old factors, frozen in time (sub. 61, p. 2).

They ultimately recommended against a definition, and their position was echoed by a number of other participants (such as Professionals Australia (sub. 212, p. 43), the Australian Mines and Metals Association (sub. 96, p. 480) and the Australian Industry Group (sub. 172, p. 88)).

Moreover, Stewart, Gahan, McCrystal and Chapman noted that even though there are difficulties with the common law approach, it is necessary for an independent body (in the form of a court or a tribunal) to adjudicate on the issue (sub. 118, p. 18).

A number of submitters also argued that it was relatively easy for employers found to have misrepresented a contract for employment as a contract for services under s. 357 of the FW Act to escape penalty by demonstrating that they did not act recklessly. The Australian Workers' Union (AWU) argued that:

... [t]here are three distinct problems we have identified with the defence in s. 357(2) of the Act, that invariably provide employers a valid legislative defence in all but the most blatant and egregious of breaches:

- There is no clear definition of the term 'reckless';
- Once the employer relies on the subjective defence, the onus of proving the employer knew or was reckless, rests with the person alleging the breach; and
- The defences are made out on purely subjective grounds (sub. 74, p. 39).

The AWU suggested that a test of reasonableness, rather than recklessness, would not suffer the same problems. While the Australian Council of Trade Unions agreed with the nature of the problem, it offered broader policy prescriptions (sub. 167, p. 96).

Several submitters to this inquiry have argued that the current reliance on the common law has proved problematic. In particular, in their submissions, the ACTU noted the complicated nature of the current common law multi-factor test and queried ‘whether there might be a more certain or reliable mechanism for the law to give effect to what is, essentially, an effort by the courts to give primacy to substance over form’ (sub. 167, p. 93), while Legal Aid NSW argued that a definition could:

... more simply articulate the difference between an independent contractor and an employee than existing common law definitions. This would allow both workers and employers to better understand the legal meaning of an independent contractor, and therefore more easily assess the true nature of work arrangements (sub. 197, p. 21)

To the extent that these definitional problems have any substantive effects, there are several alternatives. A strict definition similar to that used in the *Income Tax Assessment Act 1997* (Cth) (ITA Act) could be incorporated into the FW Act or other legislation.⁸⁰ An alternative might be a hybrid model, in which the common law approach was guided by a number of essential criteria in legislation.

This is not the first examination of these options. In 2005, the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, looked at the issues surrounding the definition of an independent contractor as part of a broader inquiry prior to the introduction of the IC Act. It recommended that the common law approach be adopted, with aspects of the personal service income tests of the ITA Act written into the legislation (Parliament of Australia 2005). More recently, while the 2012 post-implementation review (McCallum, Moore and Edwards 2012) noted that some stakeholders were concerned about the difficulty in distinguishing between employees and independent contractors, ultimately they made no recommendation on the matter.

The benefits (and costs) of being more specific

By more clearly demarcating between genuine and sham arrangements, a stricter statutory test has some appeal. It might make it easier for parties to identify the genuine status of employment arrangements, provide a better basis for efficient enforcement (thereby creating stronger incentives to avoid sham arrangements) and reduce the risks of inadvertent errors.

Nevertheless, there are several concerns about moving away from the current arrangements.

⁸⁰ The personal services income provisions of the ITA Act impose a series of tests on contractors who are performing work, to establish they are genuinely running a ‘personal services business’. These tests include obtaining less than 80 per cent of their income from a single source. Given these tests vary from the holistic approach of the common law, it is possible that workers who are determined to be independent contractors by the common law may be taxed as employees and vice versa.

First, it is not clear the extent to which the prevalence of sham contracting reflects uncertainty in the definition, compared with the desire for the parties to conceal a relationship (however defined) that confers advantages to one or both of them. The critical question is whether a statutory provision would make much difference to the prevalence of some agreed definition of sham contracting. This is unknown.

Second, there remains a quandary about how any alternative definition would be tested for its validity. The common law definition has evolved to capture a subtle set of factors shaping different employment relationships. No single element of the multi-factor test is decisive. Subtlety is closely related to ambiguity, and getting rid of the latter may also eliminate the former. So, for example, while many independent contractors have the ability to choose their own hours, not all do. Similarly, not providing their own tools is not a plausible indication of sham contracting in clerical services where the contractor often works in the office of the client and, as a result, is not required to bring their own computer to work. However, it may be a much stronger sign of sham contracting if the worker is a carpenter.

Without a set of characteristics common to all independent contractors, the development of a definition to accurately categorise workers becomes less feasible. Were one implemented, it could lead to classification errors. Too narrow a definition of an ‘independent contractor’ would exclude genuine arrangements, while too broad a definition would encompass arrangements that are actually ‘sham’.

Such classification errors could have perverse efficiency effects. For example, it might have the effect of dissuading employers and genuine contractors from including certain mutually beneficial terms in the contract in order to better comply with what is set out in the legislation. For example, if a definition specified that a worker was an independent contractor only if they had a reasonably diversified list of clients (reflecting one part of the personal services income test in the ITA Act), it might discourage relationships that otherwise might be efficient.⁸¹ Alternatively, independent contractors might turn down work that they could reasonably undertake at the lowest cost to avoid breaching a threshold in the legislation.

There is also a presumption in shifting away from the common law approach that either:

- (a) the outcomes of a carefully drafted statute would reach the same conclusion as that found through a court’s subtle judgments based on the common law, but at a lower cost.

⁸¹ If all independent contractors place high value on their tax status, then it may be the case that eliminating the disparity between tax and WR laws would have no effect, as most would already be meeting the requirements of the ITA Act. However, anecdotal evidence suggests that a number of independent contractors value other aspects of the contracting relationship and, as such, are content to work one way and be taxed another.

(b) the common law definition somehow deviates from a ‘true’ definition of independent contracting.

Testing (a) would require judges to confirm that for a wide spectrum of cases, the outcome of the common law and some ideal statute gave the same result. It would be useful to apply that test were any change to be envisaged.

The Commission has not seen any evidence of (b), and an inherent problem would be that different interest parties would pressure government for a version of truth that suited their interests.

Finally, a further potential drawback of a statutory approach to the regulation of what are inherently ambiguous employment relationships is that once they are formally elaborated in legislation, loopholes invariably are found and exploited. This issue is common to many rule or law based regulatory approaches and reflects the difficulty of drafting legislation that addresses all the features of the employment relationship (Hulett 2005). Workers and employers that are intent on disguising an employment relationship as independent contracting may shape their arrangements to meet the criteria in the legislation. As long as their arrangements met those conditions, they could be a sham in other ways.

The current common law approach avoids the above pitfalls. Since they can examine the entirety of the relationship, judges are in a position to assess the aspects of an arrangement that are most indicative of its true nature. And since this may vary from contracting relationship to contracting relationship, they have the flexibility to change the importance they place on these aspects on a case by case basis.

In conclusion, while a statutory definition is superficially attractive, there would be considerable difficulties and risks associated with a policy shift involving the rigid adherence to such a definition, and all to solve a problem of unknown dimensions.

Is it enough not to be reckless?

While the FW Act does not define sham contracting, it does incorporate sections that outlaw it. Currently, there are three sections in the FW Act that are aimed at curbing the incentives for employers to instigate sham arrangements. These provisions prohibit an employer from:

- misrepresenting an employment relationship or a proposed employment arrangement as an independent contracting arrangement (s. 357)
- dismissing or threatening to dismiss an employee for the purpose of engaging them as an independent contractor (s. 358)
- making a knowingly false statement in order to persuade or influence an employee to become an independent contractor (s. 359).

Where an employer has been found to have violated any of these, then they may be pursued for civil remedies in the Federal Court system under actions brought by the worker, their representative or an enforcement agency (FWO 2015k).

However, while s. 358 and s. 359 are strict liability offences, an employer is able to avoid penalties under s. 357 if they can demonstrate that they did not know that the contract was for employment rather than for service and that they were not acting recklessly. For example, this might mean that an employer who had sought and acted on incorrect advice and had, as a result, misrepresented a contract for employment as a contract for service could not be pursued for sham contracting.

Some submitters to this inquiry, and to previous inquiries, have argued that this provision needs to be narrowed. With reference to the highest profile instance of the ‘reckless defence’ being used successfully⁸² — *CFMEU v Nubrick* (2009) — both the Sham Contracting inquiry report (ABCC 2011) and the 2012 post-implementation review (McCallum, Moore and Edwards 2012) recommended that a test of ‘recklessness’ be replaced with ‘reasonableness’. Or, specifically, that the provision:

... be amended to provide a defence to the prohibition on misrepresenting a contract of employment as a contract for services only when the employer proves that at the time the representation was made, the employer believed that the contract was a contract for services rather than a contract of employment, and could not reasonably have been expected to know otherwise (McCallum, Moore and Edwards 2012).

The post-implementation review suggested that this might have two effects. First, it would remove some ambiguity resulting from the absence of a universal common law definition of ‘recklessness’ in relation to civil matters⁸³ and, second, make it harder for an employer to defend sham contracting allegations. Ultimately, the provision has not been strengthened by the current or former government.

On face value, a conservative stance seems appropriate given the small number of cases mounted under s. 357 and the even smaller significance given to the issue of ‘recklessness’. Since the inception of the FW Act, 35 cases involving potential contraventions of s. 357 of the FW Act have been decided⁸⁴ (LawCite 2015). In very few of these cases did the defendant rely on what is termed the ‘reckless defence’. On fewer occasions still has it been integral to judgments in the employer’s favour.

On the other hand, the high burden of proof required to establish ‘recklessness’, combined with the significant resources required to take any action, may discourage the FWO/FWBC or any aggrieved party from taking court action. By definition, cases that do not proceed

⁸² This case was not under the FW Act, but under the preceding Workplace Relations Act in which the relevant provision was similarly worded.

⁸³ In the case of *CFMEU v Nubrick Pty Ltd* (2009) FMCA 981 the judge contrasted the respondent’s actions with two separate legal definitions of ‘recklessness’.

⁸⁴ By way of contrast, four cases featuring s. 358 and two cases featuring s. 359 had been decided.

are not observed. The main recourse left to regulators is to cooperatively work with the business to set aside the contract for services (which would entail no penalties). They could also issue a non-compliance notice, but this is only enforceable by a court (raising again the problem posed by the high burden of proof). Consequently, the status quo weakens incentives of businesses to avoid sham contracting, or for regulators to issue notices when infringements occur.

There do not appear to be any obvious disadvantages from switching to a ‘reasonableness’ test given that such tests are frequently applied in many other civil contexts without much concern. Such a shift would address the weaker incentives under the current regime. It may also help regulators to rectify sham arrangements out of court because any infringing business would be aware that it would have a lower probability of winning the matter in court. As noted earlier, litigation forms only a small part of the work of the FWO in relation to sham contracting. Moving to a ‘reasonableness’ test would not undermine this.

RECOMMENDATION 25.1

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.

25.3 Limitations on the use of subcontractors and labour hire employees

The capacity of an employer to contract with lower cost or more flexible forms of labour may undermine employees’ collective bargaining power in reaching EAs. It is therefore understandable that employee representatives sometimes seek to discourage such contracting by seeking terms in agreements that effectively raise the costs of employing alternative forms of labour.

As it is currently written, the only restrictions on terms that apply to alternative forms of employment are in the list of permitted matters in s. 172 of the FW Act. This section specifies that EAs can only include:

- matters pertaining to the relations between each employer that will be covered by the agreement and its employees
- deductions from wages for any purpose authorised by an employee covered by the agreement; and
- matters relating to how the agreement will operate.

The FW Act also permits matters pertaining to the relations between each employer and any unions that are covered by the agreement to be included in an EA. The Productivity Commission recommends that this provision be removed (chapter 20).

The extent of these permitted matters has been tested on numerous occasions by cases before the Federal Court and Fair Work Commission (FWC) (see chapter 20 on enterprise bargaining for a detailed discussion). Among other things, these tests have determined that agreements cannot include an outright prohibition or prevention on the engagement of alternative forms of labour.⁸⁵ Nor can they include terms that restrict an employer's engagement of contractors to those who have union agreements.⁸⁶

However, the full bench of the FWC found that EAs are able to regulate the terms under which independent contractors and labour hire workers are engaged.⁸⁷

So while a union cannot directly bar an employer from engaging an independent contractor or a labour hire worker, it may be able to subtly exert pressure and affect the terms under which those workers are engaged.

One way of achieving this is to ensure that the employer's EA contains terms that give the union more control over the employer's engagement with independent contractors and labour hire agencies. This is typically done by requiring an employer to disclose to employees and their representatives:

- the name of any independent contractor or labour hire agency proposed for work
- the type of work
- the duration of work; and
- the qualifications of the independent contractor or labour hire workers.

Furthermore, while independent contractors or labour hire workers remain on the payroll the employer may not be permitted to make ongoing employees redundant.

Another way of achieving this is to ensure that the terms of engagement of these alternatives are roughly the same as those of ongoing employees. This is generally done through the insertion of 'jump up' clauses, which ensure that the terms and conditions of an independent contractor or labour hire worker's engagement are no less favourable than those of ongoing workers.

The circumstances under which these conditions find their way into enterprise agreements varies. Where they do not make regular use of independent contractors, labour hire or

⁸⁵ *Australian Post Corporation v Communications Electrical and Plumbing Union of Australia* (2009) FWAFFB 599.

⁸⁶ *Airport Fuel Services Pty Ltd v Transport Workers' Union of Australia* (2010) FWAFFB 4457

⁸⁷ *Asurco Contracting v Construction, Forestry, Mining and Energy Union* (2010) FWAFFB 6180 and *Australian Industry Group v ADJ Contracting Pty Ltd* (2011) FWAFFB 6684.

casual hire, businesses may willingly agree to such arrangements (particularly if they obtain changes in work practices that offer productivity improvements or wage restraint in exchange). In other instances, where there is an imbalance of bargaining power, businesses may have little alternative but to cede some authority over the use of alternative forms of employment to the unions.

Should terms that affect the use of alternative employment forms be ‘unlawful’ terms?

As noted in chapter 20, some types of agreement terms may warrant explicit prohibition, such as terms that discriminate against individuals. These terms are prohibited on the basis that there are no sound public policy grounds for their inclusion in enterprise agreements.

Some submitters to the 2012 post-implementation review (box 25.5) and to this inquiry (box 25.6) have contended that terms that discourage the use of alternative employment forms should not be included in an EA.

Evidence presented in the 2012 post-implementation review suggested that the use of such terms had declined. The number of EAs that featured terms restricting the use of independent contractors and labour hire workers was considerably lower under the FW Act than in the period before amendments to the *Workplace Relations Act 1996* (Cth) (WR Act) in 2006.

However, it is not clear that a lower incidence under one WR regime provides much of a basis for allowing the persistence of an inherently problematic term.

Moreover, while ‘jump up’ clauses are not a strict impediment to hiring contractors, they do act to regulate the price of contract labour, and presumably when such clauses bind, must indirectly discourage the employment of contract labour. In some industries, this can be important. Around 70 per cent of a random sample of construction sector EAs contained jump up clauses. Around 29 per cent of workers in the sector were classified as independent contractors (PC 2014c).

The principal argument for prohibition is that the employer should have the prerogative to determine the mix of employment forms that provide the flexibility and choice to minimise costs or maximise productivity. While it could be countered that the complete freedom to contract could shift the balance of bargaining power too much in favour of the employer (and, in the process, undermine one of the fundamental tenets of a WR framework — a reasonable share of income for labour), independent contracting (and even more so, labour hire) is far from a perfect substitute for ongoing labour. As a result, the freedom to contract is unlikely to undermine employee bargaining power to any great extent.

The effects of these agreement terms, and conversely of prohibiting them, can in part be characterised as redistributive. Where they are included and exercised, the benefits accrue to current employees (who might get extra hours) or potential employees (if more workers

are needed). This comes at a cost to independent contractors, labour hire and casual workers, who may miss out on jobs. Alternatively, were these terms to be excluded, workers under alternative employment forms would enjoy increased employment, but possibly to the detriment of current and potential ongoing employees.

Elsa Underhill (sub. DR321) was also concerned that the freedom to contract promotes wider use of low-wage workers to the detriment of investment in skills and knowledge (and by implication productivity). But, as noted earlier in this chapter, alternative employment arrangements can increase productivity and lower costs, with benefits that ultimately flow to the community as a whole through lower prices. Further, as discussed in chapter 2, non-traditional forms of labour have been associated with higher rates of job satisfaction for some workers.

The effects of the current agreement terms are suboptimal for employers, independent contractors and labour hire and casual workers. Together with the fact that alternative employment arrangements are unlikely to significantly reduce collective bargaining power, this provides a sound basis for excluding terms in enterprise bargains that have the effect of limiting the hiring of subcontractors, labour hire workers or casuals.

To the extent that any change would have a widespread effect, one option for restricting the inclusion of these terms is to have them written into the legislation as unlawful terms. As discussed in chapter 20, the FWC cannot approve EAs that contain unlawful terms.

Box 25.5 The 2012 post-implementation review and constraints on alternative employment forms

Submissions to the review — largely by employer groups — argued that terms which were making it more difficult to engage with independent contractors and labour hire agencies had begun to creep into enterprise agreements. Of these, the Business Council of Australia observed:

... that some unions have been seeking the inclusion of terms in enterprise agreements that purport to regulate the terms and conditions to be observed by contractors and labour hire agencies in such a way as, in effect, to control the engagement of contract and agency staff (BCA 2012).

Furthermore, these submissions suggested that, from the unions' perspective, these terms were having the desired effect. In particular, Australia Mines and Metals Association argued that 'Fair Work Australia's approval in industrial agreements of clauses restricting the use of contractors is a huge issue for resource and construction industry employers' (AMMA 2012). The Institute of Public Affairs concurred. They noted that the 'fair work system enables unions to demand enterprise agreements that severely limit the use of independent contracting' (IPA 2012).

Ultimately, the review did not make a recommendation in relation to these concerns.

Box 25.6 **Selected comments on the constraints on alternative employment forms**

A number of submissions to this inquiry noted that it was common for unions to try to regulate the use of alternative employment forms. They achieve this through the insertion of terms in enterprise agreements that give the union some say over a business' use of independent contractors, labour hire and casual workers. For example, the Australian Mines and Metals Association stated that 'in most states, particularly in Victoria, unions will insist on a contractor's clause in every agreement to which they are a party'. (sub. 96, p. 153)

While these clauses can have positive effects for ongoing workers, they come with broader costs. For example, Qantas argued that:

... [e]mployee associations in EA bargaining routinely seek restrictions that if agreed would fetter business strategy, and obstruct change — and thus negatively impact productivity. A clear example of this is claims on the use of contractors or labour hire (the total prohibition of which is not a permitted matter) under the guise of 'job security' clauses (which may be found to be permitted matters). (sub. 116, p. 9)

The Australian Mines and Metals Association concurred. It submitted that:

'... [i]n AMMA's experience, a union's stated justification for contractor restrictions in bargaining will primarily be 'job security' but this ignores the reality of a contractor losing a contract over an uncompetitive deal and the job losses and other employment benefits that invariably go with it'. (sub. 96 p. 153)

To the extent it is a substantial issue, there is a range of policy options that may work to prohibit enterprise agreements from restricting the engagement of alternative forms of employment. Of these, the Australian Chamber of Commerce and Industry argued for:

- Amending the definition of 'permitted matters' under s. 172 of the [Fair Work] Act so that the terms of enterprise agreements are strictly limited to matters pertaining to the employment relationship; and
- Tightening the list of 'unlawful terms' contained in s. 194 of the FW Act to make it clear that unlawful matters include matters which are not 'permitted matters' and in particular terms which seek to restrict the engagement of contractors or imposing conditions upon their engagement.
- Requiring that non permitted, unlawful or designated outworker terms are excised from agreements before or when they are approved. (sub. 161, p. 160)

The Australian Industry Group (Ai Group) and Manufacturing Australia each supported aspects of this position. Ai Group argued that terms in enterprise agreements that restrict the engagement of independent contractors, establish requirements relating to the conditions of their engagement or require the provision of information to unions about the use of independent contractors, labour hire and casual workers should be made 'unlawful' (sub. 172, p. 46) while, with regard to labour hire, Manufacturing Australia submitted:

... [l]imiting the matters that can be included in enterprise agreements to 'matters pertaining to the employment relationship' and making terms about labour hire unlawful would ensure enterprise agreements' terms are about employment matters of direct relevance to the parties to the agreement (the employer and employees). (sub. 126, p. 5)

The Housing Industry Association proposed that independent contractors be regulated by commercial law, rather than workplace law. (sub. 169, p. 58)

In support of the ability of firms to develop more productive working arrangements, the Productivity Commission considers that terms in enterprise agreements that act to restrict

an employer's prerogative to choose the employment mix suited to their business should not be permitted under the FW Act. This will improve potential outcomes for employers, independent contractors and labour hire and casual workers, without significantly constraining bargaining power. It will also improve the ability of firms — in this case, firms being contractor entities — to compete as openly as possible, and improve innovation.

RECOMMENDATION 25.2

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.

25.4 Other forms of work

There are a number of other forms of work. These include outworkers, apprentices or trainees and interns. Since they have characteristics that distinguish them from permanent ongoing, casual and contract work, they each have slightly different regulatory arrangements within the national WR system.

Most of the issues raised by submitters to this inquiry in relation to apprentices and trainees concerned the determination, level and effects of trainee and apprentice wages. As a result, they are discussed alongside other wage issues in chapter 5.

Outworkers

Outworkers are employees or contractors who perform their work at home, or somewhere other than standard business premises. They are most common in the textile clothing and footwear (TCF) industry.

A key characteristic of contract outworkers in the TCF industry (compared with independent contractors in other industries) is that the FW Act treats them as employees in

most regards. This means that they can have their terms and conditions of employment outlined by an industrial instrument and are able to access the NES.

The major reasons for giving TCF contract outworkers the same entitlements as employees were, according to the ACTU, their ‘position of vulnerability, proven exploitation and the thorough and effective advocacy of their union on their behalf’ (sub. 167, p. 90). The change was formalised by the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* (Cth) (the TCF Amendment). The TCF Amendment:

- extended most provisions of the FW Act to contract outworkers
- enabled outworkers to recover unpaid amounts up the supply chain
- extended right of entry rules that apply to suspected breaches affecting outworkers
- allowed for a textile clothing and footwear code to be issued (Australian Government 2012b)

Since a regulatory impact statement was not done at the time, a post-implementation review of the amendment was undertaken in 2014. The Productivity Commission understands that although it has been completed, it is yet to be made publicly available by the Australian Government.

While the Productivity Commission received relatively few submissions regarding outworkers, presentations were made by outworkers and their union highlighting their concerns (trans., pp. 267–286). In contrast, the main concerns articulated in submissions to the post-implementation review of the TCF Amendment were that there was limited evidence to support the changes and that they had had adverse effects on businesses and a number of genuine contractors (box 25.7). This section will examine this contention in some detail.

In theory, there is little to suggest that the FWO could not target and rectify sham contracting and exploitative behaviour in the TCF industry, much in the same way it does in other industries. To the extent that exploitation is pervasive in the industry, it would attract more of the regulator’s resources, particularly given its risk-based approach to enforcement.

In practice, however, there may be some characteristics that prevent the industry or outwork more generally from being effectively monitored and regulated. One explanation may be that some aspects of the work (such as working from home or workers providing their own equipment) challenge the common law distinction between contract and employee outworkers. This inquiry has not received compelling evidence of this, nor are the submissions to the post-implementation review of the TCF Amendment persuasive in this regard. Without such evidence, there is little justification for the changes.

Box 25.7 **Selected comments about outworkers from the post-implementation review of the Fair Work Amendment**

Submissions to the post-implementation review of the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* (Cth) offered a range of views.

Several submitters endorsed the legislative changes. Fair Wear Inc submitted that:

... the regulation is performing as intended, is still relevant and needed and strongly recommends retaining the FW Act rights and protections for outworkers in the Textile, Clothing, Footwear and Associated Industries. (FairWear Inc 2014, p. 13)

In a similar vein, the Law Committee of the Law Society of NSW submitted that:

... [t]he TCF Act plays an important regulatory role in extending the rights and protections of TCF outworkers. In light of the vulnerable nature of TCF outworkers, the Committee supports the continuation of the TCF Act in its current terms. (Law Society of NSW 2014, p. 3)

The Textile, Clothing and Footwear Union of Australia (TCFUA) cautioned against repealing the amendment. It argued that:

... [i]t would be a highly deleterious outcome if, via the process of the [Post-Implementation] Review, provisions of the TCF Act were removed at the very time the TCFUA is beginning to see positive changes in the working lives of TCF outworkers. (TCFUA 2014, p. 6)

Some questioned the need for the amendments. The Australian Industry Group (Ai Group) submitted:

Whilst no one doubts the importance of having adequate protections within Australia's workplace relations laws to prevent the exploitation of individuals, the FW Act 2009 (FW Act) already contained very substantial protections for outworkers prior to the TCF Act being implemented. (Ai Group 2014d, p. 3)

The Australian Chamber of Commerce and Industry noted:

... [m]any parties, including ACCI, were of the view that there was no evidentiary basis for the FW (TCF) Bill. In the absence of such evidence, it is ACCI's view that the FW (TCF) Bill was not relevant and in turn the FW (TCF) Act is similarly not relevant. (ACCI 2012, p. 5)

Others argued that the amendments had gone too far. Textile, Fashion Industries of Australia (TFIA) argued:

This is an unprecedented development in Australian Industrial history. No other industry has, with the stroke of a pen, seen such a substantial shift in regulation of the way, and by whom, work is carried out. No other industry has seen, overnight, such a substantial proportion of its workforce become subject to common rule industrial instrument regulation. (TFIA 2014, p. 6)

Critics also submitted that the changes caused problems. The TFIA also argued that 'the legislative solution is disproportionate, as it has substantial impacts on all TCF [textile, clothing and footwear] industry outworker contractors' (TFIA 2014, p. 3), and effectively barred some workers from engaging in their preferred work relationship. Ai Group concurred. It argued that 'the TCF Act is operating against the interests of TCF businesses, TCF workers and the broader community' (Ai Group 2014d, p. 3).

Even if there were compelling arguments for alternative regulatory arrangements, their benefits would need to be contrasted with the costs associated with bringing genuine contractors under the umbrella of the FW Act. As discussed previously, some employers and workers prefer and benefit from genuine contracting relationships. Preventing these could adversely affect productivity, production costs and, by extension, the viability of the

business. Effectively barring workers from contracting in the TCF industry could affect their livelihoods as well as level of comfort with their work relationship. However, as is the case with evidence supporting the changes, the Productivity Commission has not received compelling evidence on the magnitude of these costs.

Moreover, it should be emphasised that even if their benefits were to exceed the costs, the existence of alternative arrangements for TCF contractors should not be treated as a pilot scheme for bringing independent contractors into the national workplace system more generally. This would have serious consequences, including substantial adverse effects on productivity.

In the absence of compelling evidence as to the costs of alternative arrangements for TCF contractors, the Productivity Commission does not propose any changes in the TCF Amendment.

Internships and work experience

An internship or a work experience placement is an arrangement where a person gains experience at performing a particular job or working in a particular industry. While they are often unpaid (Stewart 2015), they can represent an important first step for a worker — particularly young workers, or those contemplating a career change — into a new business, profession or industry. It can be a source of valuable experience, and can bolster a resume or form the basis of a positive reference — both of which can also benefit the worker in obtaining employment in the future. From the perspective of the business, hosting an intern or a work placement student can be an important way of getting more information about prospective hires, supporting students and providing a service to the community.

Unpaid work experience has become increasingly integrated into programs of study, and has become a formal part of many state school systems and vocational educational and training courses (Qld DET 2015a) Vic DET 2015, TAFE NSW 2012). This reflects a broad acceptance that work experience, in combination with course work, can improve a student's transition from school or vocational and educational training to the workforce. To this effect, a United Kingdom study found that young people taking part in a government backed work experience were 16 per cent more likely to be off benefits 21 weeks after starting than their peers who did not take part (UK DWP 2012). Other industry level studies have also suggested there are numerous benefits to work placements (Paisey and Paisey 2010, Wilton 2012).

These arrangements are not employment relationships, and as such, are not captured by the national WR system.⁸⁸ Specifically, several sections of the FW Act provide that a person

⁸⁸ Other state laws dealing with education and training, child employment, workers compensation, anti-discrimination and superannuation may also apply to unpaid work arrangements (Stewart and Owens 2013).

is not to be considered an employee if they are on a ‘vocational placement’. Simply put, workers undertaking a requirement of an education or training course (which is authorised under a federal, state or territory law or administrative arrangement) are not eligible for the minimum wage, the NES or the terms of any award or any enterprise agreement they might otherwise be covered by.

The Productivity Commission received little advice about problems with unpaid work placements in the context of a curriculum (where WR are concerned), despite seeking it.

There are concerns, however, about unpaid internships outside the requirements of a training course. Internship arrangements can vary quite markedly depending on the individual, the business and the industry. Interns Australia noted that:

... [s]urveys conducted by Interns Australia have reflected a diverse range of internship practices, with significant variance in: hours of work performed; length of the internship; supervision of work; whether remuneration is provided; whether the internships is part of a formal education course (sub. 66, pp. 3–4).

The basis for this concern is the perceived lack of clarity about when a worker should be compensated (and regulated by the FW Act) for their efforts. In the absence of a definition or test for ascertaining this, a body of case law has determined that unpaid work arrangements constitute employment (and should be recognised as such) where the ‘objective reality’ of the arrangement is one of employment (Stewart 2015). Typically, a number of indicators guide the courts (and the FWO) in this assessment, including the reason for the arrangement, its length of time, its significance to the business, the tasks involved and who benefits from the arrangement (FWO 2015s). The fear is that some employers may exploit this opacity to use unpaid interns to do the work of a paid employee.

Participants’ comments did provide some support for this concern. In an informal comment to this inquiry, an employee from NSW echoed the concern that interns were occasionally used as a substitute for employees. They wrote:

... I have undertaken internships where the tasks I was carrying out could have very easily been done by a paid employee. I was not gathering any new experiences or skills through being at the workplace, and was treated like free labour. There was one in which I was filling shoe orders and packing boxes all day, and others in which I have known I was hired as an intern after someone had been made redundant. There are many workplaces who use interns instead of paid employees under the guise that the interns are being paid in ‘experience’. (comment no. 90, employee)

Over the last five years, the FWO has taken a number of steps to clarify the regulatory framework for these arrangements. As well as developing an educational program, in 2011

the FWO commissioned a report into what it considered to be an emerging concern.⁸⁹ The report found that:

... [t]here is reason to suspect that a growing number of businesses are choosing to engage unpaid interns to perform work that might otherwise (and perhaps in other businesses is otherwise) be done by paid employees, especially in occupations that are considered particularly attractive or for which there is an oversupply of qualified graduates. (Stewart and Owens 2013)

In response to the report, the FWO has implemented a number of measures designed to foster a broader understanding of unpaid work arrangements, and the obligations employers may have to interns and work experience workers. These include an expansion of their web based resources on unpaid work, a consultative process with stakeholders through the Young Workers' Team and the development and implementation of the Unpaid Work Education Program (delivered through universities and training organisations).

In addition, the FWO has tightened its compliance and enforcement processes by using a risk-based monitoring framework (which works with job-finding websites to better direct resources towards employers that advertise unpaid positions). This includes undertaking investigations, seeking rectification from employers, initiating legal proceedings and appearing as a 'friend of the court' on some occasions where an unpaid worker has made a claim against an employer (FWO 2015s).

Since pursuing these measures, there has been a substantial increase in the number of inquiries relating to internships and unpaid work. The FWO received 117 requests for assistance in 2014-15, 126 requests in 2013-14 and 137 in 2012-13 (FWO, pers. comm., 26 November 2015). This more than doubled the 53 reported in 2011-12.

These figures are not sufficient to indicate a trend. They may reflect greater community awareness of the issues involved and the role of the FWO, but they give little indication of the scale of the problem. However, if the growth was sustained, it could indicate a larger problem, and that a substantial number of employers are still either unaware of their obligations or that they are not dissuaded from acting unlawfully.

There are also factors other than the activity of the regulator that may limit the extent of any problem. Once the promises that are used to procure the efforts of unpaid workers lose their currency, there is little to keep them at a company. Without a wage to bind them, there is little cost to leaving. Moreover, advancements in information and communication technologies (such as the internet and social media) have meant that business reputations, while hard won, are easily lost. Those contemplating an unpaid arrangement are more forewarned than at any time in the past. Plus the potential damage associated with an investigation by the FWO or an adverse finding in a court case is far greater than just a

⁸⁹ The report itself notes that the FWO was prompted by a newspaper article advocating the 'free labour' offered by interns.

payout to the affected worker, with potential impacts on a business's workforce and customer base.

Solutions are also not immediately obvious. Barring employers from offering unpaid internships will genuinely affect a known class of individuals whose gains from work experience set them (and thus some industries or sectors) on a path towards a better economic outcome. Below that sweeping shift, further changes to regulation would need to be tailored to specific circumstance; and for that purpose the depth and width of the issue here is not yet definable.

There should be some confidence induced by the fact that the FWO is not seeing large numbers of irresolvable cases. This is the first best canary in the coal mine.

Accordingly, the Productivity Commission is reluctant to make any recommendations on the regulation of unpaid work arrangements in this report.

26 Transfer of business

Key points

- The potential for poorly performing businesses to be bought out (whether before or after failure), and/or to transfer work to new businesses, is important for productivity, innovation and structural change.
- When a firm (or of a business area within a firm) is transferred to a new owner, there can also be pressures to reduce the pay and conditions of the existing workforce.
- The transfer of business provisions in the *Fair Work Act 2009* (Cth) provide protections to employees when a business changes hands.
 - The provisions purposely capture a wide range of business restructuring activities, including some insourcing and outsourcing arrangements, and some changes of employer within corporate groups.
 - Transferring employees retain the terms and conditions of their previous employment, unless the Fair Work Commission grants an exemption or variation.
- Protecting employee entitlements may also reduce employment opportunities, not least because the new employer may be reluctant to take on employees under the same conditions that contributed to poor business performance for the old employer. Internal restructures within conglomerates of firms also may result in more redundancies than is necessary.
- Transfer of business provisions need to balance competing goals. They should not frustrate structural adjustment or limit employment opportunities; but nor should they allow an employer to restructure their business specifically to avoid the application of an industrial instrument (typically an unwanted enterprise agreement).
- Currently, the provisions protect the latter at the expense of the former and some re-balancing should occur.
 - The object of the provisions — currently to provide a balance between the protection of employees' terms and conditions and the interests of employers in running their enterprises efficiently — should be expanded to also encompass the interests of continuing employment for the transferring employees.
 - Any employment agreement transferred to a new business should automatically terminate 12 months after the transfer, except for transfers between associated entities.
 - Voluntary movements between associated entities, at an employee(s) initiative, should be exempt from the provisions entirely, with the transferring employee(s) automatically covered by the new employer's employment conditions.

Economies are always in flux. There is often rapid change in consumption patterns, production techniques, business structures, the shape and complexity of value chains, and the cost and sources of inputs. Associated with this, businesses also adapt. New businesses

may form and existing businesses may enter new markets, restructure their operations and outsource functions. As part of the competitive process, a proportion of existing firms will fail in any one year. This dynamic creates incentive for businesses to contain costs, operate efficiently and be innovative. It promotes efficient resource allocation and higher productivity and, correspondingly, provides a basis for higher wage rates and higher living standards for the community.

Accordingly, laws must not overly constrain this process of adjustment, while ensuring that it is orderly and efficient. Insolvency laws, for example, are intended to preclude ‘fire sales’ of assets that would affect the willingness of parties to provide debt or equity to a firm. In the workplace relations arena, a major rationale for oversight of the transfer of businesses is to avoid circumstances in which a business can extricate itself from an employment contract by restructuring legal entities (Payten 2015). Some are more generally concerned that the transfer of a business may result in lower wages and conditions than under the previous employment agreement, although, as discussed later, this is a fraught argument (especially against the background of the more general protections offered by the award system and the National Employment Standards).

This chapter explores the effectiveness of the ‘transfer of business’ provisions in the *Fair Work Act 2009* (Cth) (FW Act), commencing with the description of the current provisions (section 26.1). The impacts of these provisions have proven to be a fertile area for disagreement between business and employee interests (section 26.2). Employers are sometimes concerned about the impacts of the provisions on efficient structural change in their enterprises and the economy generally. Others dispute these concerns and some argue for strengthened protections. The direction of change depends on achieving a reasonable balance between the various goals of the provisions (section 26.3). As in so many other areas of workplace relations, there is also a need to ensure adequate monitoring of arrangements and to effectively gather information (section 26.4).

26.1 How the present provisions work

Under the FW Act, an award or agreement or another type of ‘transferable instrument’ follows the employee and becomes binding on the new employer when there is a transfer of business. The stated purpose of the relevant provisions ‘is to ensure employees’ wages and conditions are not diminished in circumstances where for example, a business changes hands or a business restructures its operations’ (Australian Government 2008a, p. xxxvii).

In contrast to past formulations, the transfer of business test under the FW Act focusses on the activities of the employees and the work being performed rather than the character of the business. The result is that the transfer of business rules capture a wider range of business restructuring activities than the transmission of business test under the *Workplace Relations Act 1996* (Cth) (WR Act) (box 26.1).

Box 26.1 From 'transmission of business' to 'transfer of business'

The transfer of business provisions in the FW Act differ significantly from the transmission of business provisions in the WR Act. The most substantial changes include:

- a new test for when a transfer of business occurs, which captures insourcing and outsourcing arrangements and movements between associated entities
- removal of the automatic cessation of a transferred instrument after 12 months.

Under the WR Act, the test for a transfer focused squarely on the nature of the *business*. A transfer occurred when one person became the 'successor, assignee and transmittee' of the whole, or a part, of another person's business. The courts were left to determine much of the scope of these provisions. The High Court developed the 'business characterisation' test, which had the effect of excluding many outsourcing arrangements.

Under the WR Act, the transmission of business rules would apply if an employee's employment with the old employer was terminated and they were employed by the new employer within *two* months of the time of transmission. If an instrument transmitted to a new employer, it would automatically cease to have effect after 12 months.

The transfer of business provisions in the FW Act shifted the focus to the *work* of the employee. They provide for a transfer to occur when an employee moves between employers, performs substantially the same work and the two employers are connected in one of a number of ways.

Under these provisions, the transferring instrument lasts until it is replaced or terminated. As in the WR Act, employees who had not taken up (or been offered) work immediately after the transfer of business had a brief period in which they could subsequently commence employment with the new entity and still obtain the benefits of previous employment arrangements. Under the FW Act this period is three months.

Sources: Fair Work Act 2009 (Cth); Workplace Relations Act 1996 (Cth).

Under the FW Act, there is a transfer of business if:

- an individual's employment is terminated by one business (the old employer);
- within three months, the employee has become employed by the new employer;
- the individual performs the same, or substantially the same, work for the new employer as they did for the old employer; and
- there is a connection between the old employer and the new employer. There is a connection if:
 - there has been a transfer of assets
 - the old employer has outsourced the transferring work to the new employer;
 - the new employer ceases to outsource work to the old employer; or
 - the new employer is an associated entity of the old employer (FWO 2015r).

There is no transfer of business for the purposes of the FW Act unless at least one employee moves to the new employer. Box 26.2 contains examples of the types of arrangements that are deemed a 'transfer of business' for the purpose of the FW Act.

Where there has been a transfer of business, certain workplace instruments (transferable instruments) that covered the old employer and a transferring employee cover the new employer and the transferring employee in relation to the transferring work. ‘Transferable instruments’ include enterprise agreements, workplace determinations and named employer awards. The transferable instrument will cover a transferring employee while they are performing the transferring work until it is terminated, or until a new workplace instrument commences that can cover the transferring employee. The transferable instrument may also apply to new (non-transferring) employees if there is no modern award or enterprise agreement in place that covers them.

Box 26.2 Illustrative examples of transfer of business

Tom’s Building Supplies (Tom’s) enters into an arrangement with Edwards DIY Construction (Edwards) under which Edwards agrees to buy part of Tom’s construction business. Edwards employs some of the employees of Tom’s who work in the construction business through its subsidiary, Edwards MYOB (Staffing) Construction (Edwards Staffing). Edwards Staffing would be the ‘new employer’. There would be a transfer of business, even though some of the transferring staff are moving between associated entities.

Perks and Partners is a human resources consultancy firm in Victoria. Perks employs four security guards who staff its reception desk and keep the business’s premises secure. Perks decides that it no longer wishes to employ security guards itself, and enters into a contract (an outsourcing arrangement) with Holloway Security Pty Ltd (Holloway Security) under which Holloway Security will provide security services to Perks’ premises. Holloway Security offers employment to the four security guards employed by Perks and they accept the offers. They perform substantially the same work for Holloway Security as they performed for Perks. This would be a transfer of business.

After two years Perks decides that it no longer wishes to outsource the security work at its premises and wishes again to engage employees itself to perform this work. Perks terminates the outsourcing contract that it made with Holloway Security and offers employment to the security guards employed by Holloway Security. They accept the offers and perform substantially the same work as employees of Perks as they performed as employees of Holloway Security, namely, providing security services at Perk’s premises. This would be a transfer of business.

Ian establishes the Cutty Sark Kayak Company (Cutty). Before hiring any of its own employees, Cutty buys Titanic Kayaking Expeditions Pty Ltd (Titanic). Cutty agrees to employ Titanic’s kayaking instructors, who are covered by the Titanic Enterprise Agreement. Cutty does not have its own enterprise agreement and is not covered by a modern award at the time it purchases Titanic, so Titanic’s enterprise agreement will cover Cutty and the transferring employees. A month later, Cutty decides to expand its business, so it employs Ralph and Anthony as kayaking instructors. Because there is no other enterprise agreement or modern award that covers these employees at the time they are employed, the Titanic Enterprise Agreement will also cover Ralph and Anthony in relation to their work for Cutty.

Source: Explanatory Memorandum to the Fair Work Bill 2008.

The Fair Work Commission (FWC) can make certain orders relating to the application of transferable instruments, including that:

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- a transferable instrument will or will not cover the new employer and its employees (both transferring and non-transferring)
 - an enterprise agreement, named employer award or modern award that covers the new employer will or will not cover transferring and non-transferring employees who perform or are likely to perform the transferring work
 - a transferable instrument is varied to remove terms that are not or will not be capable of meaningful operation in the new employer's business, or to remove ambiguity or uncertainty about how a term of the transferring instrument applies.

These orders can be sought and made pre-emptively and in respect of multiple employees.

The transfer of business provisions were examined during the 2012 post-implementation review of the FW Act. At that stage, the provisions had been in operation for only about three years and there was little objective evidence of the impact they caused. The post-implementation review concluded the provisions afforded better protections for employees than the previous arrangements and they provided significant flexibility to employers by allowing the FWC to make the range of orders outlined above. The post-implementation review included one recommendation to improve the provisions:

... [t]hat s. 311 be amended to make it clear 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 (McCallum, Moore and Edwards 2012, p. 25).

This recommendation was not part of the package of reforms pursued by the then Australian Government following the release of the post-implementation review. Following a change of government, it was introduced to the Parliament in the Fair Work Amendment Bill 2014 (Cth) but failed to pass through both Houses.

In 2012, the then Australian Government did make one significant change to the transfer of business provisions. The *Fair Work Amendment (Transfer of Business) Act 2012* (Cth) (2012 Amendment Act) expanded the application of the transfer of business provisions to transfers from a non-national system employer that is a state public sector employer to a national system employer.⁹⁰ As a result, where there is a transfer of business from an old state public sector employer to a new national system employer, transferring employees will retain the benefit of existing terms and conditions of employment in state awards and agreements and their accrued entitlements.

⁹⁰ Prior to 2012, the transfer of business provisions in the FW Act applied only to transfer of business between national system employers. This includes transfer of business between Commonwealth, Victorian, Australian Capital Territory and Northern Territory public sector employers and another national system employer. This reflects Victoria's referral of power to extend the FW Act to most of its public service and the Commonwealth's power to legislate with respect to territories under the Constitution (Australian Government 2012a, p. 2).

A Regulation Impact Statement was not prepared during development of the 2012 Amendment Act, so the Department of Employment was required to undertake a post implementation review of the amendments (Department of Employment 2015b). Although the review is complete, it had not been released publicly by the Government at the time of the completion of this inquiry report.

26.2 Impacts of the transfer of business provisions

Provided existing employees facing a potential transfer are able to retain their employment, they will generally be better off (or, at least, not worse off) than in the absence of the provisions. In this respect, unions generally favoured the existing arrangements. The Australian Council of Trade Unions (ACTU) submitted that ‘the transfer of business provisions are operating generally appropriately and as anticipated’ (sub. 167, p. 109), although it and the Australian Services Union (sub. 128, p. 18) both provided examples of how the provisions should be tightened.

Few employer groups in this inquiry argued against the retention of transfer of business provisions in some form, although some advocated the reinstatement of the provisions that were in place prior to the FW Act (the Australian Chamber of Commerce and Industry, sub. 161, p. 166; and the Master Builders Association, sub. 157, p. 69). More generally, the concern was to weaken the extent to which the existing provisions created undue barriers to the transfer of business. This concern was echoed in the results of a survey by the Australian Human Resources Institute (sub. 46, p. 23). Of the 254 businesses surveyed that have experienced involvement in the transfer of business provisions in the FW Act, 33 per cent rated the transfer of business provisions as negative or strongly negative, compared with 12 per cent who rated them favourably.

The transfer of business provisions create several potentially high frictions for labour mobility (and associated with that, the mobility of physical capital, since the two are often interdependent).

A new employer may face significant costs even if it agrees to employ some or all of the transferring employees. For instance:

- unit labour costs may be higher
- an employer may have to operate multiple payroll systems
- the period of service of an employee is carried over from the previous employer, with effects on entitlements and the application of unfair dismissal provisions
- productivity may be lower if the employment arrangements for the transferring employees are only partly compatible with the operating environment of the new enterprise. For example, the incompatibilities may impose restrictions on the nature of, and way in which tasks can be performed, scheduling, rostering and leave

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- differences in the conditions of employees undertaking the same work may create conflict
 - differences in the nominal expiry date of the agreements can also lead to multiple agreement negotiations which will add to costs.⁹¹

Transfer of business provisions may also discourage the reallocation of employees within an entity. Large firms are sometimes covered by multiple industrial instruments at different sites or for different associated entities. These separate business entities may have different working environments that require different skills and work practices. Under current regulatory arrangements, movements between the entities can make it difficult to maintain efficient operating arrangements, which can impede the movement of employees to jobs where their skills are best used (even in circumstances where the worker gives their consent and there is no threat of job loss if they do not accede). For instance, Asciano noted that these provisions ‘cause considerable complexity when our employees seek to access opportunities within other employer members of the Asciano group, and therefore have the potential to restrict career progression and redeployment opportunities within the group’ (sub. 138, p. 13).

The complexity of within-group transfers has also prompted the use of ‘workarounds’, including temporary secondments.

Further, if the transfer of business provisions are, or are perceived to be, burdensome, they may discourage new employers from recuperating a failing business or even more generally, business acquisitions.⁹²

... [t]here are circumstances where provisions in an enterprise agreement have contributed to poor business performance, and the present provisions of the Act that preserve the agreement, combined with the fact that it would remain in force after its nominal term (if not replaced by agreement) are a major disincentive to a prospective buyer. The outcome can be business failure and the loss of jobs, instead of the possibility of an acquisition and turnaround and maintenance of jobs (Bluescope Steel, sub. 58, pp. 8–9).

The current transfer of business rules are acting as a disincentive to employment by imposing foreign and inflexible [workplace relations] arrangements from previous businesses, including bureaucratic public sector entities, onto new businesses, preventing them from being more efficient than the old (Australian Mines and Metals Association, sub. 96, p. 341).

Given public sector awards and agreements have traditionally been more favourable to employers than those in the private sector, the risks to employment may be substantial

⁹¹ Section 320(2)(c) of the FW Act provides some relief in these circumstances in that a person covered (or likely to be covered) by the transferable instrument (including the new employer) can apply for an order varying the transferable instrument to enable the instrument to operate in a way that is better aligned to the working arrangements of the new employer’s business.

⁹² Many of these concerns were also raised in the Australian Industry Group’s submission to the Productivity Commission’s Business Set-up, Transfer and Closure inquiry (Ai Group 2015a, pp. 22–23).

when public sector entities are privatised or their functions outsourced to the private sector. The Chamber of Commerce and Industry of Western Australia noted that:

... [a]s part of the amendments to the [Fair Work] Act in 2013, the transmission of business provisions were extended to provide that state instruments transfer where government services are outsourced. Our discussion with employers affected by these provisions has revealed that they have a very clear policy of not engaging any existing employees. This is due to the incompatibility between public sector agreements and the operation of private sector organisations. This inevitably means loss of employment for these workers (sub. 134, p. 69).

This can lead to higher unemployment, inefficient utilisation of capital, and adverse outcomes for creditors and for customers. In the worst of circumstances, a well-intentioned regulation may create losers all round.

These potential problems would be mitigated if applications to the FWC to vary the transfer of business arrangements were timely and efficient. Some have contested the effectiveness of the arrangements allowing the FWC to issue orders about transfers of business (a matter discussed further below). Qantas said that:

[u]nder the Fair Work Act, Qantas has been required to make numerous costly and resource intensive applications to the FWC for orders to prevent the transfer of instruments in these circumstances. In some cases, staff have lost opportunities as a direct result of these provisions because of the time periods involved in seeking union cooperation in any approach to the FWC. No Qantas application has been rejected; equally each application takes considerable resources to process for what, in all cases, are voluntary moves. It is a clear example of the Fair Work Act working to restrict flexibility (sub. 116, p. 14).

26.3 Finding the right balance

The transfer of business provisions need to strike a balance between:

- on the one hand, discouraging businesses from structuring their affairs to avoid their prior contractual obligations to employees, and
- on the other hand, stymying legitimate restructuring of businesses and orderly takeovers of failed entities.

Even where an appropriate balance can be pinpointed, the wide range of circumstances under which a transfer of business can conceivably occur make it difficult to design a regime that is not susceptible to interpretations that, while they may fall within the letter of the law, do not adhere to its spirit.

While the Productivity Commission considers that the current provisions have merit in the broad, its assessment is that there are several problematic aspects where some rebalancing is desirable.

The object of the transfer of business provisions

The object of the transfer of business provisions in Part 2-8 of the FW Act also refers to a need to balance two goals, but in a much less nuanced way than that articulated above. The stated object is to provide a balance between:

- (a) the protection of employees' terms and conditions of employment under enterprise agreements, certain modern awards and certain other instruments; and
- (b) the interests of employers in running their enterprises efficiently.

The first element of this objective sits oddly with other features of the workplace relations system.

- Jobs are lost all the time, and in many cases, there will be no potential for people to maintain the terms and conditions of their previous jobs. There is no particular reason to privilege one group of employees over another because of the existence of a particular kind of pre-existing agreement, *except insofar that the intent is to discourage strategic divestiture*. But the FW Act does not make clear that the prevention of the latter is the (most compelling) rationale for the provisions.
- The award system, minimum wages and the National Employment Standards create the safety net, not above award conditions.
- At the expiry of an enterprise agreement, it is entirely conceivable that the next agreement will involve significantly poorer terms and conditions if the economic environment has worsened. The collective bargaining system is intended to allow periods of contractual certainty for employers and employees (for the life of any agreement), but with re-negotiation at that point. The transfer of business provisions can result, somewhat perversely, in circumstances where a contract that would have lapsed had a person stayed with their old employer is preserved in a new one.

It is of course not easy to create a system for the transfer of business that specifically targets strategic behaviour by employers to avoid their contractual obligations. Accordingly, (a) above might act as a rough and ready mechanism for achieving this goal. It somewhat increases the costs of transferring employees but gives employers with clearly legitimate reasons for restructuring a capacity to set these costs aside at the order of the FWC.

However, (a) is vague at best, and the biggest concern is that the object does not give much weight to the potential for employees to lose their jobs. This is reinforced by the fact that when considering whether to make any of the orders it can make in relation to the application of transferring instruments, the FWC is not required to take into account the interests of continuing employment for the transferring employees. (Past decisions reveal the requirement to take into account 'the public interest' in ss. 318 and 320 includes a consideration of potential job losses but the requirement is not explicit.)

These problems are illustrated by a recent transfer of business from Medibank to Sonic HealthPlus.⁹³ In August 2015, Sonic HealthPlus (the new employer) made an application under s. 318(1)(a) that the Medibank Health Solutions Enterprise Agreement 2012 (Medibank being the old employer) not cover it or the transferring employees who will perform, or are likely to perform, the transferring work. Another order was sought that the Sonic HealthPlus enterprise agreements would cover the transferring employees. Upon selling the relevant part of their business, Medibank indicated 300-400 of its employees would be made redundant. Sonic HealthPlus indicated if the orders sought were made, it could offer employment to 159 of these employees. However, if the applications were not granted, it could only offer employment to 60 of the redundant workers.

The FWC member hearing the matter concluded that the factors weighing against the making of the orders (that the transferring employees would be disadvantaged, that the company would not incur significant economic disadvantage, among others) on balance, outweighed the public interest of continuing employment for more employees. That the company could make more offers of employment if the orders were made was found to be, in general, in the public interest, but only 'slightly'.

The employees likely to be made redundant in this case worked in regional areas where alternative employment may be hard to secure. Given this, and the fact that the Sonic HealthPlus agreements were approved and therefore more generous than the relevant modern award, the best outcome from a community-wide perspective would be for as many employees as possible to continue in employment with the new employer. Ultimately, unemployment is worse for an individual and the community than employment on terms and conditions less than the individual's previous job (but still above the safety net).

The object of Part 2-8 of the FW Act should be amended to give greater weight to opportunities for continuing employment in transfer of business cases.

RECOMMENDATION 26.1

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.

⁹³ *Sonic HealthPlus Pty Ltd T/A Sonic HealthPlus* [2015] FWC 6460.

Obtaining an order about the application of a transferable instrument

In instances where coverage by a transferable instrument is unwanted or impractical, an affected party can apply to the FWC for an order that the instrument not apply (s. 318) or that it be varied in a certain way (s. 320). Mutual consent is desirable but not necessary. This contrasts with a variation to an enterprise agreement, which requires the consent of the affected workforce.

In deciding whether to grant such an order, the FWC is required to take into account a range of factors (box 26.3). These include several that explicitly reference the productivity and economic circumstances of the new employer, as well as the degree to which the transferrable instrument works alongside the other instruments in operation at the new workplace.

Applications can be made in advance of likely transfers, or at some point after the transferrable instrument has come into effect (ACTU, sub. 167, p. 3), which provides greater certainty for a business looking to effect a transfer of business and employees.

These provisions are used quite frequently. Since 2009, 446 applications have been brought under s. 318 in addition to 33 under s. 320, indicating a broad awareness of their usefulness. In most instances, they seem to be used in conjunction with the transfers of small numbers of employees.

Box 26.3 Criteria guiding decisions on transferrable instruments

When deciding on the merits of an application for an exemption (under s. 318) or an application for the variation of a transferable instrument (under s. 320), the FW Act requires the FWC to take into account:

1. the views of the employer (or likely employer) and the affected employees
2. whether any employees would be disadvantaged by the order or the variation to their transferrable instrument
3. the nominal expiry date of any agreement (if the order or the transferable instrument relates to an enterprise agreement)
4. whether the order or transferrable instrument would have an adverse effect on the productivity of the new employer
5. whether the new employer would incur significant economic disadvantage
6. the degree of synergy between the transferable instrument and any workplace instrument that already covers the new employer
7. the public interest.

Despite the wide range of factors to be taken into account and the equal weight afforded to them in the FW Act, FWC decisions and evidence from participants in this inquiry suggest factors one and two in box 26.3 are given more weight than the other factors in practice.

Few applications have been approved without the support of the affected employees, or at least without some indication that it would not disadvantage them. For example, in one decision it was suggested that:

... [i]f no employee were to be disadvantaged as a result of a s. 318 order, then more weight could be given to factors such as the views of the employer and matters of productivity, cost and business synergy.⁹⁴

Similarly, the Australian Industry Group submitted:

In most of the cases where FWC orders have been issued under s.318, the new employer, the employees and the relevant union/s have supported the order being issued. Where there has been union opposition, applications for orders have often been rejected or the employer has decided not to apply for an order (sub. 172, p. 75).

Protecting the terms and conditions of employment of transferring employees can be important, but it should not occur in all circumstances, given the previously discussed risks for employment, efficient structural adjustment and productivity. Prima facie, the FWC should more frequently order changes to, or relaxation of, transfer of business arrangements, where the cost to the employee of exempting them or varying a transferrable instrument yields greater (yet possibly more diffuse) benefits to the broader community. The recommendations elsewhere in this chapter, especially recommendation 26.1, should encourage the FWC to give more equal weight to all the factors listed in ss. 318 and 320.

Exemption from a transferrable instrument as a condition of employment

In a transfer of business scenario a new employer considering whether to employ some or all workers employed by the old employer may want certainty about the terms and conditions that will apply to the transferring employee before making them an offer of employment.

However, some recent FWC decisions made by single members suggest a new employer cannot make an offer of employment conditional on the FWC granting a s. 318 order providing that a transferable instrument does not cover the new employer and the transferring employees. In *Lend Lease Engineering Pty Ltd and others* [2014] FWC 5499, Hatcher VP found he had no jurisdiction to make a s. 318 order for hypothetical transferring employees — ‘[t]he Commission is not empowered to exercise jurisdiction in relation to a transfer of business which will only occur if it exercises jurisdiction’.⁹⁵ Hatcher VP commented further:

To grant LLE’s application would require a form of circular reasoning. On its case, there will be no transfer of business and no transferring employees unless the Commission exercises its

⁹⁴ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FWA 1171 (15 February 2010), at 101.

⁹⁵ *Lend Lease Engineering Pty Ltd and others* [2014] FWC 5499 (15 August 2015), at 22.

jurisdiction to make the orders it seeks under s.318(1). The Commission cannot exercise that jurisdiction unless it first finds that there is likely to be a transfer of business and transferring employees. Therefore, LLE effectively asks the Commission to conclude that the jurisdictional fact finding which is the necessary prerequisite to the exercise of jurisdiction is established by the likelihood that the jurisdiction will be exercised and the transfer of business will therefore occur.⁹⁶

In light of the above reasoning, Hatcher VP dismissed the application to the extent it related to employees who had only been offered employment with the new employer on the condition that a s. 318 order was made by the FWC. The Vice President's decision was followed in *ABnote Australasia Pty Ltd* [2015] FWC 1032 by Roe C with the Commissioner finding the reasoning in *Lend Lease Engineering* was directly applicable to the situation before him and he therefore had no power to make the orders sought.⁹⁷

Since the *Lend Lease Engineering* and *ABnote* decisions, several s. 318 applications have been granted where offers of employment had been made conditional upon the order being granted.⁹⁸ The majority of these have been made for transfers between Qantas and Jetstar. None of the FWC members granting these orders cited the *Lend Lease Engineering* or *ABnote* decisions.

Qantas submitted that prior to the *Lend Lease Engineering* and *ABnote* decisions, it had a usual practice of making offers of employment for movements between its associated entities conditional on a s. 318 order being granted by the FWC and that the FWC always granted these orders. The *Lend Lease* and *ABnote* decisions and the subsequent inconsistent decisions cast doubt over the outcome Qantas is likely to receive each time it applies for a s. 318 order related to a conditional offer of employment.

To date there is no FWC full bench or court authority on this issue; all decisions have been the subject of differing approaches by different single bench members. Uncertainty and inconsistency will persist until this issue is resolved by a full bench or a court, or by legislative amendment.

Clearly, the current situation should not continue.

If the law is operating to prevent employment offers being made, in these circumstances, it is completely inconsistent with an effectively functioning economy. Employers should be able to make offers of employment contingent on the terms and conditions that will apply (as happens in all other scenarios), rather than making an offer with the terms to be decided

⁹⁶ *Lend Lease Engineering Pty Ltd and others* [2014] FWC 5499 (15 August 2015), at 21.

⁹⁷ *ABnote Australasia Pty Ltd* [2015] FWC 1032 (11 February 2015), at 10.

⁹⁸ *Thiess Pty Ltd T/A Thiess* [2015] FWC 595 (28 January 2015), *Jetstar Airways Limited* [2015] FWC 1426 (3 March 2015), *Jetstar Airways Limited* [2015] FWC 2437 (9 April 2015), *Jetstar Airways Limited* [2015] FWC 2959 (30 April 2015), *Jetstar Airways Limited* [2015] FWC 3689 (1 June 2015), *Jetstar Airways Limited* [2015] FWC 4022 (16 June 2015), *Aero-Care Flight Support Pty Limited* [2015] FWC 4344 (6 July 2015), *Jetstar Airways Limited* [2015] FWC 6232 (14 September 2015).

at a later date by the FWC. Whether or not the instrument (for example an enterprise agreement) transfers or not might materially affect the costs of employing the worker and therefore, the outcome should be known in advance of the offer of employment being made. Aside from safety net conditions, the FW Act should not impose any restrictions on the conditions attached to an offer of employment.

RECOMMENDATION 26.2

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.

How long should transferrable instruments persist?

Several participants have raised concerns with the term of transferrable instruments. As stated earlier, under the WR Act transferable instruments automatically expired after 12 months. However, under the FW Act they remain in effect until terminated or replaced. This means a transferrable instrument could apply for an indefinite period. This presents a range of difficulties for the new employer, most particular that the higher costs of the transferring instrument may endure for an unknown period.

While the benefits for new employers of automatic termination of a transferring instrument are clear, the impacts on transferring employees are mixed. The decision of the transferring workers to enter into a new agreement (or to opt to be covered by their co-workers' agreement) is shaped by a number of factors. On the one hand, employers are generally not obliged to offer pay rises to employees covered by expired agreements. Moreover, if the employees retain the bargaining power that gave them the favourable agreement with their old employer, they may consider it likely that they will be able to strike another beneficial agreement with the new employer. On the other hand, renegotiating may put non-pecuniary entitlements that the employees' value on the bargaining table. The employees' willingness to hold out will depend on the balance of these factors.

The Productivity Commission considers that a reasonable balance would be to have transferring instruments automatically terminate 12 months after the transfer. Upon termination, the relevant modern award would apply, or another enterprise agreement covering the new employer if it is capable of covering the transferring employees. To ensure the transferring employees have a reasonable opportunity to negotiate another enterprise agreement before reverting possibly to the relevant award, the transferring employees and the new employer should be permitted to bargain from nine months after the transfer. This would provide the transferring employees with the opportunity to secure

terms and conditions more generous than the award, while allowing the new employer to negotiate terms and conditions that better suit its needs.

That said, automatic termination of a transferable instrument could provide incentives for employers in a corporate group to restructure their businesses in a way that triggers the transfer of business provisions and results in the termination of an agreement entered into voluntarily by a member of the group.

Non-consensual termination of a contractual obligation (such as an enterprise agreement) through a contrived means is inimical to the underlying principles of any contract. In the workplace relations context, it undermines the goal of collective bargaining and the balance between bargaining power that enterprise agreements are intended to provide. To avoid this outcome, the automatic termination at 12 months rule should not apply to transfers between associated entities, except where on application by a party the FWC makes an order otherwise. Instead, an instrument that is subject to transfer between associated entities should only be capable of cessation by mutual agreement; or if replaced by another instrument determined by mutual agreement.

RECOMMENDATION 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.

Transfers between associated entities on the employee's initiative

When an employee transfers between two associated employers, the transfer of business provisions in the FW Act mean that the employee will keep the terms and conditions from their previous employment unless the new employer successfully applies to the FWC for an exemption or a variation. This is the case even if the employee makes the decision to switch jobs *voluntarily*.

There are two particular considerations for not applying transfer of business provisions to voluntary switches:

- voluntary employee movements between associated employers are not uncommon and in many cases benefit the employee and the employers
- applications for exemptions involve costs to all parties, which, in some cases, may discourage the employer from agreeing to the transfer.

Employees change jobs for several reasons. Where the employee wants to make a change for reasons other than dissatisfaction with their employer (locational preferences, for example), one of the easiest ways of achieving a change is via a transfer between associated employers.

Moreover, some industries have only a few key players, each with a number of associated entities. This means that, for some employees, it can be difficult to find work in their chosen profession outside the umbrella of their current employer. For example, Qantas has several subsidiaries (including Jetstar, Eastern Australia Airlines and Sunstate Airlines) with their own industrial instruments, so, for pilots and flight crew, finding work with a company not associated with Qantas can be challenging.

While there is little empirical data on employee movements between associated entities, evidence in submissions and the foregoing analysis suggest that they are not uncommon. Consequently, the provisions have the potential to effect a large number of employers and employees.

There are also unavoidable costs associated with obtaining an exemption for a voluntarily transferring employee. Applications require the preparation of documentation, coordination with the employee, consultation with the relevant unions and attendance at a hearing before the FWC, meaning that employers need to commit resources to what is generally described as a relatively automatic process.

Despite the apparent ease of obtaining an exemption for a voluntary transfer, in some situations the employer may try to avoid the cost by refusing to facilitate such moves. Where this occurs, employees are prevented from switching jobs even when they consider it to be in their best interests.

Of course, the benefits of exempting voluntary transfers between associated entities from the transfer of business provisions need to be set against any disadvantages of legislative changes.

The concern is that a change may weaken protections for other workers because some employers may respond by transferring employees, denying them their previous terms and conditions of employment and claiming falsely the change of jobs was at the employee's instigation.

However, on balance, the desire to preclude some bad practices should not preclude genuine win-wins in situations where employees volunteer to transfer. Given this, the Productivity Commission supports the recommendation of the 2012 post-implementation review that an employee's terms and conditions of work not be transferred to their new employment when the change is at their own instigation.

The Productivity Commission supports the description in the Explanatory Memorandum to the Fair Work Amendment Bill 2014 regarding the meaning of 'on their own initiative'.

In order to determine whether an employee sought to become employed on his or her own initiative before the termination of his or her employment with the old employer it will be necessary to consider the circumstances giving rise to the creation of the new employment relationship. For example, an employee may be considered to have sought employment on his or her own initiative where an employer provides information about job opportunities within the corporate group which the employee then chooses to pursue for career progression or lifestyle reasons (Australian Government 2014a, p. 139).

RECOMMENDATION 26.4

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.

Transfer between associated entities to avoid a redundancy

The Business Council of Australia and Qantas, among others, submitted that an instrument should not transfer when an employee moves between associated entities because the old employer was going to make them redundant.

Under the unfair dismissal part of the FW Act (at s. 389(2)(b)), if an employer determines that it no longer requires an employee's job to be performed by anyone, it has an obligation to consider whether the employee could be redeployed within the enterprise of an associated entity before making the employee redundant. Under the transfer of business provisions, if the employee is redeployed to an associated entity, their instrument would likely transfer with them.

If an associated employer of the old employer refuses to facilitate the redeployment of the employee due to the costs and burden of inheriting a transferable instrument, the employee may be made redundant. This may incur a greater cost to the individual employee and the community than had the employee been employed by an associated entity on the terms and conditions of employment already applying in the associated entity.

RECOMMENDATION 26.5

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.

Transfers of business when firms are in voluntary administration or liquidation

As noted earlier, if the transfer of business provisions are, or are perceived to be, burdensome, they may discourage potential new employers from acquiring a failing business and trying to turn it around.

The FW Act does not specify whether the transfer of business provisions apply even to a business in voluntary administration or liquidation, but in the absence of a specific exclusion, they would appear to apply. In cases where the industrial instrument has contributed to the poor performance of the old employer, it seems perverse that the new employer be encumbered with the same instrument.

The Productivity Commission did not receive submissions about the application of the transfer of business rules to businesses in voluntary administration or liquidation, and the significance of any problems is unknown. However, it is hard to understand the circumstances in which an old industrial instrument should be preserved when an insolvent entity is acquired. This is because one of the principal motivations for transfer of business arrangements — the strategic avoidance of providing employee entitlements — is unlikely where an insolvency is legitimate. Where it is not, there are general laws relating to phoenixing and other forms of improper business liquidations that would better address the issue.

The Australian Government should determine whether the transfer of business provisions (as currently drafted) apply to businesses in voluntary administration and liquidation and if they do, create a new statutory exclusion for businesses in these circumstances (chapter 29).

Transfers of business between state and national system employers

While transfers of business between national system employers are more common, transfers of business can also occur between state public sector employers and national system employers. The most commonly cited case of this is the privatisation of a state owned asset or corporation. Where these employees join the new employer in a role that is largely a continuation of their previous work, they are entitled to keep the terms and conditions from their state system employer.

The Western Australian (WA) Government opposes the 2012 extension of the transfer of business rules to capture sales by state governments 'on the basis they interfere with the State's ability to effectively manage its financial affairs and deliver public services' (sub. 229, p. 19). Specifically, the WA Government claims that the laws:

- have a significant detrimental impact on the viability or efficiency of alternative models of service and infrastructure delivery in WA and consequently limit the ability of the WA Government to achieve value for money for taxpayers

-
- may, perversely, provide a disincentive to a private sector employer to take on public sector employees.

These concerns mirror the concerns of national system employers, but the adverse effects of the transfer of business rules may be more pronounced in transfers from the state system because state public service awards and agreements are typically more generous than those covering private sector businesses in the national system.⁹⁹ Moreover, the work practices contained in these instruments may be incompatible with work in the private sector. As a result, the prospect of employees transferring with their pay and conditions in tow may reduce a new employer's willingness to offer positions to the old employer's workforce. To this effect, the Australian Chamber of Commerce and Industry noted that:

... these transfer of business provisions materially impact the potential for efficiency gains, and the state public sector employers' decisions about whether to retain, transfer, re size or redirect of close. A clear impact of the amendments is to reduce the likelihood that the new business service provider will engage former state public sector employees. This particularly affects the least specialist of displaced public sector employees (sub. 161, p. 154).

In this sense, it is difficult to obtain the full benefits of privatisation and outsourcing — the reduced cost of providing goods and services to the community — without jeopardising either the jobs or the terms and conditions of those formerly employed by the state-owned enterprise. Assuming the state-based instrument is particularly generous, the less flexible the provisions then the greater the threat of job losses.

Given the concerns and consequences associated with state to national system transfers are substantially the same as those for transfer between national system employers, the Productivity Commission considers the recommendations earlier in this chapter should ameliorate the concerns immediately above and that no specific change is warranted in relation to the rules governing state to national transfers.

26.4 Ongoing monitoring and review

Although a number of employers and employer representatives submitted that the transfer of provisions have serious negative impacts on business efficiency and employment opportunities, there is little robust and independent evidence about the precise size and nature of the provisions' impact. The recommendations in this chapter are proportionate and should restore some balance to the transfer of business provisions but, at this stage, there is insufficient evidence to justify more fundamental reform.

⁹⁹ This issue is most keenly felt when the potential gains from restructuring are the greatest, or when formerly state-owned enterprises with generous industrial instruments move into the national system. It is less of an issue for two national system employers whose industrial instruments reference similar awards and who likely share similar work practices, wages and entitlements.

The Australian Government should monitor the effects of the recommendations in this chapter on:

- the willingness of parties to make applications for orders relating to transferable instruments to the FWC
- 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.

If there is widespread evidence that the transfer of business provisions have a significant negative effect on the economy or that, on the other hand, the incidence of transfers designed to undermine employee protections has increased, further legislative changes should be contemplated.

RECOMMENDATION 26.6

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.

27 Industrial disputes

Key points

- The credible threat of industrial action is an important negotiating tool for parties engaging in enterprise bargaining, helping to reduce asymmetries in information and bargaining power.
- Because industrial action comes at a cost to employees, employers and consumers, and may involve socially unacceptable misuse of market power, it is appropriate that government plays a role.
- The workplace relations (WR) framework distinguishes between the use of protected industrial action for legitimate bargaining purposes, and unlawful industrial action.
 - There are numerous conditions and procedural steps that must be satisfied by employees to obtain authorisation to engage in protected industrial action.
 - There are penalties and remedies available when parties undertake unlawful industrial action, but these should be strengthened in a selected fashion.
- The measured prevalence of industrial action has declined substantially over the past three decades and has remained relatively low in recent years. The available evidence does not suggest that the level of industrial action has meaningfully increased following recent changes to the WR framework.
 - However, some types of industrial action are not captured by official statistics, and therefore the true level of disputation will be somewhat higher than the data suggest.
 - Nonetheless, there is not a case for sweeping changes.
- Improvements recommended include:
 - reducing the complexity of employee ballots to authorise protected industrial action
 - modifying the threshold for Fair Work Commission intervention in some disputes
 - deterring the use of aborted strikes and brief stoppages that impose disproportionate transaction costs on employers
 - allowing more graduated options for employers to respond to employee industrial action.

This chapter begins by providing background on industrial action — how it arises, what forms it can take, and how it is regulated under the *Fair Work Act 2009* (Cth) (FW Act). Section 27.2 outlines the prevalence of industrial disputes in Australia based on the available data, literature and stakeholder inputs, and queries whether this requires further policy intervention. A discussion of proposed policy changes to improve the workplace relations (WR) framework's approach to industrial action is provided in section 27.3 and 27.4.

27.1 Bargaining disputes can lead to industrial action

Industrial action by employees is commonly characterised as a refusal by employees to attend or perform work, more commonly known as a ‘strike’ — although as discussed later, industrial action can take other forms. The only industrial action available to employers is to lock out its workforce for some period.

Disputes involving industrial action come at a short-term cost to all parties. Employers lose profits from the output normally produced by their employees, who in turn must forego the wages that they would otherwise have earned from their labour. However, strike action is not simply a case of employees ‘cutting off their noses to spite their faces’ — they choose to bear the short-term costs of a strike if they perceive holding out to be in their longer-term interests. Similarly, unless they provide some longer-run return, lockouts would be irrational because they would leave capital idle and would relinquish revenue that is not offset by unpaid wages. There are a number of reasons why bargaining participants may find it in their long-run interests to undertake industrial action.

First, parties that engage in bargaining may be in possession of private information about their willingness to pay, or to work for, a given wage offer. By imposing costs on the other side for not reaching agreement, a party can use industrial action to gain information about the other’s willingness to accept a given bargaining claim. A more detailed explanation of the use of industrial disputes as an information gathering exercise is given in box 27.1.

Second, where a firm is obtaining considerable economic rents, an industrial dispute may arise during bargaining over how those rents should be divided between employees and the firm’s owners or shareholders. In these circumstances, parties may engage in industrial action to inflict losses on the other party in an attempt to force a favourable settlement. Where the rents are substantial, this may be rational behaviour — albeit perhaps only temporarily. For example, a resource company that is earning substantial profits from a temporarily high resource price may be willing to direct a share of these resource rents towards wages to avoid or bring an end to strike action, to maximise production while prices are high. In other cases, both parties may be willing to endure a protracted dispute, and find themselves in a situation where both would be better off reaching agreement, but it is in neither party’s immediate interest to concede. This may necessitate outside intervention by an institution such as the Fair Work Commission (FWC).

It should be emphasised that the credible threat of industrial action by bargaining parties is an important way of addressing negotiating impasses and imbalances during bargaining. enterprise agreements (EAs) continue to apply after their nominal expiry date, but employees do not receive any wage increases (unless agreed separately by the employer) until a new agreement is approved by the FWC. Consequently, unless countered by some other threat, there is a risk that a hard bargaining employer can use the expiry provisions to force negotiations that excessively favour itself. The capacity to withdraw labour or engage in other forms of industrial action provides employees with countervailing bargaining power. However, in some other instances, the risk of prolonged industrial action by

employees can put employers at a bargaining disadvantage, which warrants some capacity for lawful industrial action by employers.

Box 27.1 Industrial disputes as an information gathering exercise

While there is no single, widely accepted theory that can fully explain why industrial disputes arise in the labour market, a common explanation is that disputes arise from the incomplete information available to parties when they bargain over wages and conditions.

Generally speaking, there is a maximum value of wages and employment conditions that an employer would be willing to give its employees, while employees will have a minimum level of wages and conditions that they are willing to work for (a 'reservation wage'). In theory, were the labour market perfectly competitive, these two amounts would be the same, and thus wages would equal the value of the output produced by an employee.

In reality, because labour markets are not perfectly competitive (appendix H), the value of the employee's output (and thus the maximum wage an employer is willing to pay) will usually exceed an employee's reservation wage. It is the 'wedge' between these two amounts that gives rise to the bargaining process — employees and employers must negotiate to determine where exactly between these two amounts the final wage outcome will be (and thus the relative share of this wedge that is captured by either side).

If both employees and employers knew the other's willingness to pay and work for a given wage level respectively, then they would easily be able to reach a negotiated outcome and avoid the costs to both parties arising from an industrial dispute. This theoretical outcome — clearly at odds with the observed occurrence of industrial disputes — was first described by Hicks (1932), and is sometimes referred to as the 'Hicks paradox'.

However, employees and employers do not have complete information about each other's bargaining positions. Indeed, both possess private knowledge of — and have strong incentives to misrepresent — the wage level that would be acceptable to them. Thus, industrial action (or the threat of it) can be used by parties as an 'information gathering' exercise — albeit an imperfect one — to better ascertain each other's bargaining positions. The loss of income and profit associated with the industrial action is the price of obtaining information.

For example, imagine an employer makes a wage offer that is less than the amount their employees' suspect they would be willing to pay. The employees cannot know for certain whether this is a 'low ball' offer or genuinely reflects the most that the employer would be willing to pay them. Coupling a threat of industrial action with a demand for a higher wage can help the employees assess the employer's offer, as an employer that is 'low balling' them is more likely to concede a higher wage offer to avoid the loss of profits from industrial action. However, such a course of action is not without risks and costs. In some cases, employees may undertake strike action against an employer that cannot afford a higher wage offer, ultimately leaving both parties worse off. In other cases, employees may extract a slightly higher wage offer, but the earnings foregone from going on strike may make it a hollow victory.

Source: Kennan (2008).

In some sectors, such as construction, industrial action may also be used for non-bargaining related reasons, such as disputes over workplace health and safety. In these disputes, industrial action may be used to draw attention to alleged breaches of workplace health and safety laws, and signal to employers that unacceptable safety conditions will

incur industrial retribution. In some instances, unprotected industrial action over safety issues may be a Trojan horse for other industrial objectives (Cole 2003; PC 2014c).

Of course, the Productivity Commission is well aware that other issues may also motivate disputes, including personalities, and differences between the interests of negotiating parties and the people they are intended to represent. Sometimes workplace rules need to address the conduct that arises out of these motivations.

Where it is used rationally and sensibly, industrial action can be an important bargaining tool to reduce asymmetries in information and bargaining power between parties. However, because industrial action can come at a cost to workers, employers and consumers, and involves the exercising of at least some market power, there is a compelling basis for government to play some role in regulating it as part of the WR framework. Consequently, Part 3-3 of the FW Act contains more than 70 sections that regulate industrial action.

Protected industrial action

Under the FW Act, industrial action can be ‘protected’ if certain conditions are met. ‘Protected’ means employees, unions and employers are immune from civil liability in respect of the action — unless the action involves personal injury or the damage, destruction or taking of property. Employers cannot threaten to dismiss or discriminate against an employee who chooses to take part in protected industrial action (chapter 18). Similarly, employees that do not want to take part in industrial action are under no obligation to do so, and there are laws that aim to protect these individuals from adverse action by other employees or representatives.

Protected industrial action is a modern concept

Legal protection for industrial action is a relatively modern concept in Australia. The distinction between protected and unprotected industrial action was first made in 1993. Prior to this, virtually all industrial action was unlawful in Australia (Briggs 2006). However, despite this illegality, strikes were common and employers rarely sought remedies or attempted to take employees or unions to court (Philipatos 2012). In fact, as discussed further below, Australia’s strike rate was one of the highest in the world prior to the introduction of protected industrial action, and has substantially fallen since that time.

Protected industrial action can take many forms

Industrial action is a negotiating tool that either employees or employers can use to advance a claim in the workplace. For employees, it usually takes the form of a refusal to work. Under the FW Act, industrial action by employees is defined to include:

- performing work in a manner different from how it is normally performed
- adopting a practice that restricts, limits or delays the performance of work
- a ban, limitation or restriction by employees on performing or accepting work
- a failure or refusal by employees to attend for work or perform any work.

While strikes are perhaps the most commonly understood form of industrial action, there are also more graduated lawful options for bringing pressure on employers, including:

- partial work bans, where employees refuse to undertake certain types of work; to work with certain managers, employees and third parties; or to work overtime
- working at a slower pace than usual ('go slows')
- employees refusing to perform work tasks that are not strictly required by their employment conditions ('work to rule')
- picketing (provided it does not involve trespassing, obstruction, coercion, harassment, violence or damage to property)
- other less conventional forms of action (box 27.2).

Some parties may also use other tactics to gain leverage in industrial disputes, including improperly exercising rights of entry (chapter 28) or engaging in unlawful or criminal behaviour. (Unlawful tactics are discussed in more detail later in this chapter.)

As noted above, for employers, protected industrial action is limited to 'lockouts', where they do not allow employees to work. An employer can only initiate industrial action in response to employees' industrial action. The response action does not need to be proportionate to the employees' action.¹⁰⁰

¹⁰⁰ *Australian and International Pilots Association v Fair Work Australia* (2012) FCAFC 65.

Box 27.2 **Unconventional forms of protected industrial action**

In addition to more traditional forms of industrial action, which generally involve reducing the amount of work performed, some employees may engage in action that less directly inconveniences their employer or simply conveys their displeasure with a bargaining process.

More creative industrial actions that have been proposed or staged during industrial disputes in recent years have included:

- performing computer work with the ‘caps lock’ key engaged
- eating meals and drinks during rest breaks in unoccupied management offices
- taking coordinated lunch breaks at particular times of the day
- setting up automated responses to internal emails that include a message relating to the union’s industrial action campaign.

Sources: Lucas (2013b); Towell (2015).

Requirements for protected industrial action

Industrial action is only protected under certain circumstances, and where particular conditions and procedures are fulfilled. Employees can initiate protected action to support their claims when negotiating an EA, while employers can only undertake action (through a lockout) in response to action by employees.

Action will only be protected when taken during negotiations for an EA, and the agreement is not a greenfields agreement or a multi-enterprise agreement (chapter 20). Action taken before the expiry of an EA will be unprotected. Further, other conditions must be met for action to be protected, including:

- the parties must be ‘genuinely trying to reach agreement’
- the party taking action must provide notice of the action to the other party¹⁰¹
- the action must be in support of claims regarding ‘permitted matters’ (chapter 20)
- the action must not be in relation to unlawful terms or pattern bargaining (chapter 20)
- the action must comply with any relevant orders or declarations
- action taken by employees must be authorised by secret ballot (box 27.3).

¹⁰¹ Before taking industrial action, employees must provide three days’ written notice specifying the nature of the action and the date it will commence, unless the action is in response to action by their employer or if the ballot order from the FWC specifies a longer period. Employers taking action must provide written notice to bargaining representatives, and take reasonable steps to notify the employees themselves.

Box 27.3 **The protected action ballot process**

Before industrial action can be lawfully taken by employees, it must be authorised by a protected action ballot, except where the action is in response to employer industrial action. The requirement to put industrial action to a secret ballot was first introduced by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), and was retained in the FW Act.

A ballot can only be conducted if the FWC makes a 'protected action ballot order' after an application by an employee representative for a protected action ballot. The application must outline the types of actions that members will be asked to endorse and the group of employees to be balloted.

If the FWC makes the order, and before the ballot takes place, the ballot agent (usually the Australian Electoral Commission) will prepare a roll of eligible voters comprising employees who would be covered by the proposed agreement and who are represented by the bargaining representative. Following this, the ballot can take place.

For a protected action ballot to authorise industrial action:

- the industrial action must relate to the questions approved in the ballot order
- at least 50 per cent of employees on the roll of voters in the ballot voted
- more than 50 per cent of those valid votes approve the industrial action
- the industrial action must start within 30 days of the ballot result being declared.

Payment during industrial action is prohibited

It is unlawful for employers to pay employees during a period of industrial action or for employees (or unions) to request or accept 'strike pay' while taking action. For example, an employer must withhold two hours' pay if their employees strike for two hours.

Where employees engage in a protected partial work ban, the employer has three options:

- they can give notice to the employees that no payment will be made during the partial work ban period, provided that the employer will not accept any work from the employees until they return to normal work duties
- they can issue the employees with a notice outlining the proportion of their pay that will be withheld in proportion with the partial work ban, and pay employees accordingly
- they can continue to pay employees as usual and accept the partial performance of work.

The provisions against strike pay are more punitive for unprotected industrial action. If employees engage in unprotected industrial action lasting less than four hours, their employer must withhold a minimum of four hours' payment. When action lasts more than four hours, the employer must withhold payment for the full duration of the action.

There is no prohibition on paying locked out workers. However, as noted by Wheelwright (2013), it is difficult to imagine a circumstance where an employer's bargaining position would be advanced by paying locked out employees.

While it may be obvious why employers should not be required to pay their employees for engaging in industrial action, there are also various reasons for having provisions that expressly prohibit strike pay. Some judges have interpreted the purpose of these provisions as preventing employees from taking further strike action to coerce employers to pay them for an earlier strike (Wheelwright 2013). Others have discerned a more general purpose of discouraging industrial action and encouraging negotiated resolution, by requiring parties to bear the costs of their own actions. But the wider principle is the most logical — payment is made in return for work that is performed. Where work is consciously not performed, and yet payment is made, the basis of the employment relationship is corroded.

Suspension or termination of industrial action

The FWC has the power to make orders suspending or terminating protected industrial action (Part 3-3, Division 6), either on its own initiation or on application by a bargaining participant or the Minister for Employment. Such an order to suspend or terminate industrial action can be made on grounds that:

- the action is protracted and is causing (or is going to cause) significant economic harm to a bargaining participant (s. 423) — for example, *Schweppes Australia v United Voice* (box 27.4)
- the industrial action threatens to endanger a person's life, personal safety, health or welfare, or cause significant damage to the Australian economy (s. 424) — for example, in the case of the 2011 Qantas dispute (box 27.5).

Box 27.4 *Schweppes Australia v United Voice*

To date, the only successful application to terminate industrial action on grounds of significant economic harm to a bargaining participant (under s. 423) occurred in a bargaining dispute at a Melbourne factory in 2011 between Schweppes Australia and its employees (represented by United Voice). Interestingly, in this case the employer attempted to have its own lockout terminated by the Fair Work Commission (FWC), on the basis of significant economic harm to Schweppes' employees, to force a workplace determination by the FWC. The company's application largely relied on academic evidence estimating the effect of the lockout on the income, spending and savings of its employees. The FWC rejected this application, mainly on the grounds that the union, and a large majority of the employees, opposed termination and argued they were not at risk of significant economic harm.

Six weeks later, after 155 employees had sustained 58 days of lost wages, the FWC terminated the industrial action after both Schweppes and United Voice jointly argued for termination. A number of the locked out employees wrote anonymously to the FWC requesting that the protected action be terminated.

Sources: Australian Council of Trade Unions (ACTU) (sub. 167); FCB Group (2012); *Schweppes Australia Pty Ltd v United Voice – Victorian Branch* (No.1) (2011) FWA 9329; Smith and Howard (2012a).

Box 27.5 **The 2011 Qantas dispute**

On 29 October 2011, Qantas announced that it would be locking out all of its engineers, ramp staff, baggage handlers and pilots, effective from 31 October. Qantas aircraft currently in the air would complete their sectors, but no further Qantas flights would depart anywhere in the world — grounding the entire Qantas fleet and stranding passengers across the globe.

The lockout was initiated in response to ongoing campaigns of protected industrial action by the Transport Workers Union (TWU), the Australian Licensed Aircraft Engineers Association (ALAEA), and the Australian and International Pilots Union (AIPA). These campaigns included:

- one hour work stoppages by ALAEA members
- various work bans and stoppages by TWU members
- AIPA members wearing red ties and making particular in flight announcements.

Qantas (sub. 116) has described the employee industrial action as a deliberate campaign of aborted stoppages, with unions announcing a stoppage, leading to Qantas cancelling or rescheduling flights as required, only to cancel the action at the last minute. According to Qantas, the employee industrial action leading up to the lockout affected 70 000 passengers, led to the cancellation of 600 flights, the grounding of 7 aircraft, and cost the airline \$70 million.

Within hours of Qantas' announcement to lock-out its employees, the Minister for Employment made an application to terminate the industrial action on the grounds it was threatening to cause significant damage to the economy. After a two day hearing, a Full Bench of the then Fair Work Australia delivered its decision on 31 October, terminating all industrial action at Qantas (including the lockout) and triggering arbitration of the dispute.

Sources: Friedman (2012); *Minister For Tertiary Education, Skills, Jobs And Workplace Relations* (2011) FWAFFB 7444; Qantas Group (sub. 116); Smith and Howard (2012b).

In other circumstances, the FWC's only option is to suspend action. This occurs where:

- the bargaining participants would benefit from a cooling off period (s. 425)
- the action is adversely affecting the employer or employees and is threatening to cause significant harm to a third party (s. 426).

The Minister for Employment can also make a declaration to terminate protected industrial action if satisfied that the action threatens to endanger people or the economy (s. 431). Following a declaration, the Minister can also direct bargaining participants to take (or not take) specified actions.

If the FWC terminates protected industrial action, a post industrial action negotiating period commences. Generally, this period lasts 21 days, but can be extended to 42 days if the parties jointly apply to the FWC for an extension. If at the end of that negotiating period the parties have not settled all of the matters that were at issue during bargaining, a Full Bench of the FWC must make an 'industrial action related workplace determination'. This amounts to compulsory arbitration.

Unprotected industrial action

Any industrial action that is not protected (that is, unprotected) is unlawful. The FWC can, by itself or through an application, make an order to stop or prevent unprotected industrial action. Where the FWC has issued an order to stop or prevent unprotected industrial action, it is unlawful for that industrial action to occur or continue in contravention of the order. Contravening an order made by the FWC can result in penalties of up to \$10 800 for an individual and \$54 000 for a corporation. The Fair Work Ombudsman can investigate allegations of unprotected action and, where there is sufficient evidence of unlawful behaviour and it is in the public interest to do so, it may commence litigation.

Employers, employees and bargaining representatives who take unprotected industrial action can face other consequences too — for example, being sued by anyone affected by the action for damages for losses suffered as a result of the action.

Other actions and tactics used in industrial disputes

Aborted strikes

Employees may cancel a proposed period of industrial action, even if they have obtained authorisation for protected action and notified their employer. In some instances, the withdrawal of strike action can be beneficial to the employer, or at least benign. For example, impending industrial action may be called off by employees as a sign of good faith in pursuit of further discussions (Asciano, sub. 138), or where the parties reach agreement on the disputed matter that gave rise to the industrial action. There has been at least one recent case where a strike was aborted because the organisers had accidentally scheduled it for a time that would have been outside a protected action period (MacDonald 2014).

However, numerous employers have also highlighted the deliberate use of ‘aborted’ strikes as a tactic in industrial disputes (Asciano, sub. 138; Qantas Group, sub 116; Qube Ports, sub. 123; BHP Billiton, sub. 168). Often, in these cases employees obtain authorisation for protected industrial action and notify their employer of pending action, with no intention of carrying out the strike. After the employer has borne the costs of preparing for the expected disruption, the employees call off the action at the last moment — at little or no cost to themselves.

Aborted strikes can be an effective weapon when the costs to the employer of preparing for the loss of services or output anticipated to arise from the strike are substantial. This will particularly be the case for employers in sectors where the timing or consistency of its services or output is critical — for example, an airline or an electricity generator.

Unlawful conduct

Some types of unlawful activities can give parties leverage in an industrial dispute by inflicting (or threatening to inflict) substantial harm (which may be economic or personal) on the other party, unless the offending party's demands are met. While unlawful conduct is relatively rare in the WR system, it remains a significant problem in some sectors, such as the construction industry (PC 2014c).

Aside from unprotected industrial action, other examples of unlawful conduct include:

- delaying or blockading of workplaces and sites (box 27.6)
- bullying, verbal abuse and other coercive conduct
- unlawful entry to sites.

While there is a risk that parties may use criminal behaviour as a weapon in some industrial disputes, the FW Act, as a civil legal structure, is not appropriate for dealing with such matters. The Royal Commission into Trade Union Governance and Corruption is currently examining claims of criminal conduct by some parties. Fair Work Building and Construction — the construction industry equivalent to the FWC — may refer concerns about possible criminal conduct to the police (though such referrals amounted to less than one half of one per cent of its total referrals in 2013-14).

Box 27.6 **Delaying tactics**

Disruption of construction sites can take many forms, with formal strike actions being only the most visible examples. During its previous inquiry into public infrastructure, the Productivity Commission found various cases of less visible, but still highly costly, delays. These included:

- blocking access to work sites through a range of means, including the dumping of debris or materials at work gates, or parking of machinery or trucks for the same purpose
- delaying the delivery or use of materials (including concrete pours), by either preventing access to sites or preventing the further handling of materials once on site
- stopping the removal of waste from sites
- placing 'bans' on the use of critical equipment, such as cranes.

While some instances involved relatively short disruption, others were lengthy, involving multiple days or even weeks.

Source: Productivity Commission (2014c).

Secondary boycotts

In the WR context, a secondary boycott involves a group of people (such as union officials and/or employees) hindering a third party from either supplying or purchasing goods or services to or from a business, where the targeted third party is not the employer of the people imposing the boycott. For example, if employees use a picket (or other means) to

block a supplier from delivering materials to their employer, those employees may be enacting a secondary boycott of the supplier.

While secondary boycotts are generally unlawful, the ability to use them to pressure an employer during an industrial dispute still occurs from time to time and works by jeopardising the employer's interactions with other firms or customers. A more detailed discussion of the secondary boycott provisions, and proposals to improve them, is provided in chapter 31.

27.2 How well are the current arrangements performing?

Because industrial action comes at a cost to employees, employers and consumers, high levels of industrial disputation are generally not in the best interests of the wider community. That does not imply that no or few disputes is necessarily efficient either. Were one party or the other to wield overwhelming bargaining power, then this could result in no disputes, simply because the threat of them would be enough to secure concessions. Therefore, it is important to assess the extent to which the WR system helps parties avoid industrial disputes, while preserving equitable bargaining outcomes that satisfy both employees and employers.

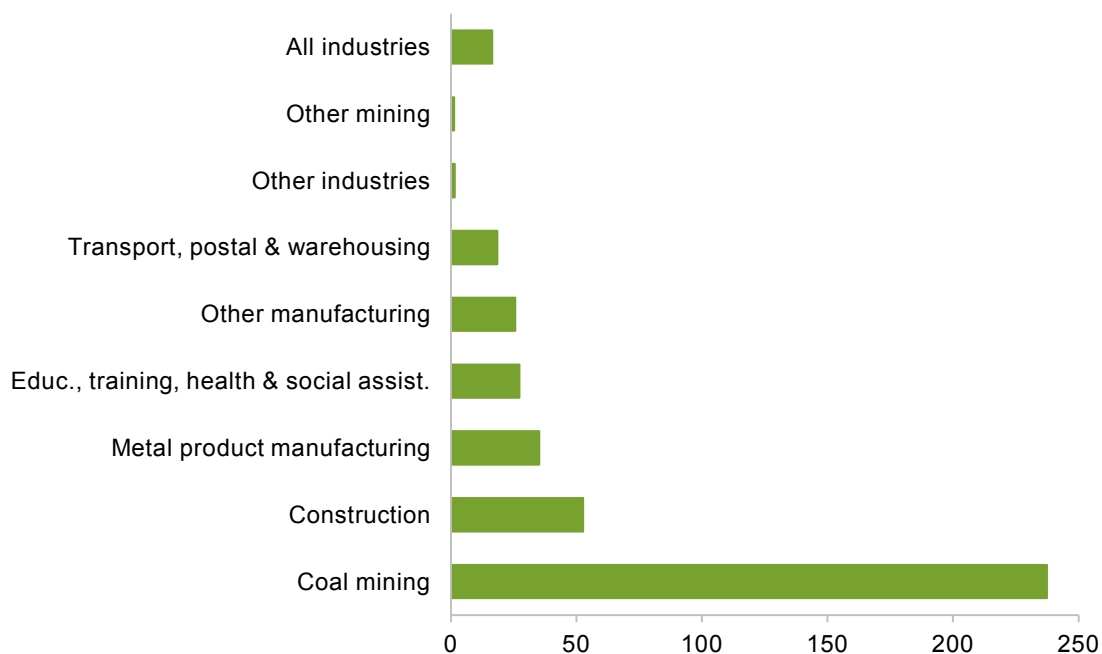
In considering how current arrangements are performing, and assessing the need for further changes, the Productivity Commission has considered the available quantitative evidence on the prevalence and costs of industrial disputes, and evidence put to the inquiry by employers and employees involved in bargaining and industrial action. This evidence is outlined in the following section.

Data suggest that industrial action is uncommon in Australia

One approach to evaluating the effectiveness of a WR system in addressing industrial disputes is to measure the prevalence of disputes within the economy. While quantitative measures of prevalence do not necessarily capture the full impacts of industrial action (discussed further below), they nonetheless allow for some empirical comparisons — for example, comparisons over time or between countries.

The prevalence of industrial disputation in an economy is often measured by the number of working days lost to industrial action per 1000 employees. The economywide rate has not exceeded 30 days per 1000 employees since 2004, and was around 7 days per 1000 employees in 2014. Rates can vary widely between different industries (figure 27.1) and from year to year (figure 27.2). In recent years, working days lost to industrial action per 1000 employees has been highest in the coal mining industry, followed by the construction and metal product manufacturing industries.

Figure 27.1 **Average number of working days lost annually to industrial disputes per 1000 employees, 2010 to 2014**
By industry



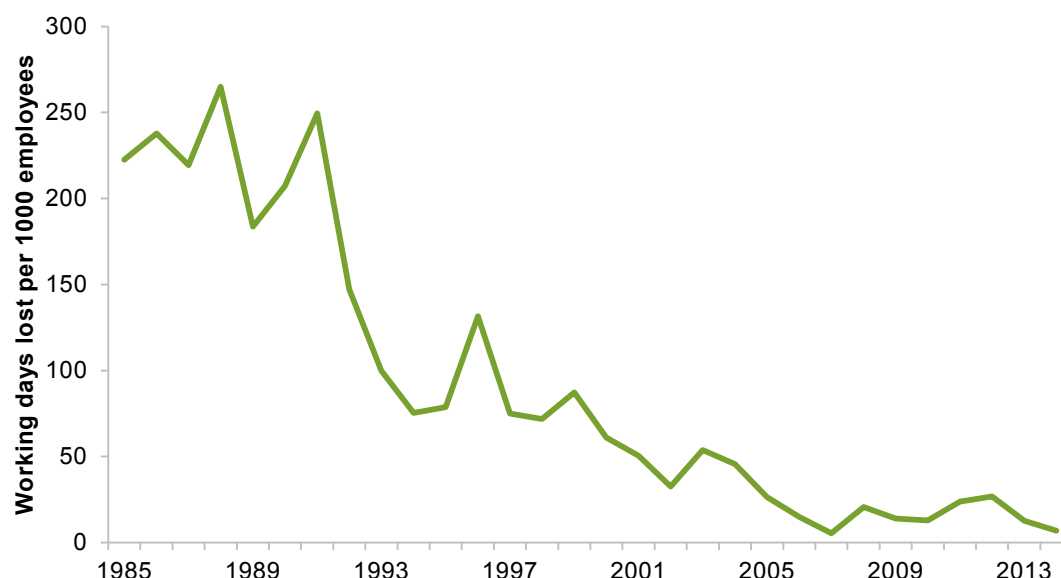
Source: ABS (*Industrial Disputes, Australia, December 2014*, Cat. no. 6321.0.55.001, released 12 March 2015).

The prevalence of industrial disputes has substantially declined in recent decades

Industrial disputation, as measured by working days lost per 1000 employees, has declined markedly over the past three decades (figure 27.2). 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. Similarly, the total number of industrial disputes, the number of employees involved in industrial disputes, and the total number of working days lost to industrial action, have all declined substantially over this period, notwithstanding the substantial increase in employment over the ensuing decades (ABS 2015d).

Figure 27.2 Working days lost to industrial disputes per 1000 employees

All sectors, annually, 1985 to 2014



Source: ABS (*Industrial Disputes, Australia, December 2014*, Cat. no. 6321.0.55.001, released 12 March 2015).

Some employer groups have expressed concern that the rate of industrial dispute has increased following the introduction of the FW Act. For example, the Chamber of Minerals and Energy of Western Australia has argued:

Since the implementation of the FWA in 2009, the scope for protected industrial action has grown. This 'Fair Work Act' period has shown an increase in the overall working days lost from the previous period 2006–08 on average of 60 per cent ... (sub. 199, p. 8)

However, these concerns may be based on quite selective comparisons drawn over a short timeframe, by comparing more recent 'spikes' in the rate of dispute around 2011 and 2012, with low levels observed in 2006 to 2008. In doing so, they overlook the similarly low rates of dispute that were subsequently observed in 2013 and 2014, and fail to acknowledge that the apparently high levels of dispute in 2011 and 2012 were roughly the same as the level in 2005, just one year prior to the chosen reference period. As the OECD (2007, p. 110) has noted, because levels of industrial dispute can vary substantially from year to year, the most reliable way to monitor trends in dispute is through averages taken over consecutive years. Indeed, the OECD has previously used five-year averages of strike rates to make comparisons.

It is also worth noting that a substantial share of the higher rates of dispute measured in 2011 and 2012 can be attributed to a small number of particularly large state and territory public sector disputes — which largely occur outside the operation of the FW Act.

Therefore, higher rates of disputation in these particular years cannot reliably be attributed to alleged underlying problems with the FW Act.

Moreover, at a conceptual level, an increase or decrease in industrial disputes associated with a change in WR laws does not, by itself, say anything about the desirability of the change. Low dispute rates might occur in quite different regimes (on the one hand, near prohibitions of industrial action, or on the other hand, systems that give such unchecked protection to strike, that the threat never needs to be exercised). Accordingly, the efficacy of the current arrangements should not be evaluated purely by measures of the prevalence of industrial action. This is discussed further later in this chapter.

Australia's level of industrial disputation is not atypical compared with overseas

The decline in disputes over the last few decades has not been unique to Australia. Similar decreases have been observed across the developed world — though Australia is amongst a few countries that have experienced particularly strong declines (OECD and Organisation for Economic Cooperation and Development 2007). The available evidence suggests that Australia's current level of industrial disputation is typical when compared with other developed countries.¹⁰²

According to estimates from the OECD (2007), Australia's average level of disputation over the years 2000 to 2004 (in terms of days lost per 1000 workers) was the 11th highest out of 25 member states — with a lower level of disputation than a number of comparable countries, including Canada, Norway, South Korea and France, but a higher level than others such as New Zealand, the United Kingdom and the United States. Using figures provided by Hale (2008), the Productivity Commission has estimated a similar ranking — 11th highest out of 26 OECD members — for the period of 2002 to 2006.

Why has the rate of industrial action declined?

The decline in strike activity in recent decades is likely to have reflected changes to the WR framework and its institutions, shifts in the structure of industry and employment, and broader macroeconomic developments. Many of these factors are not unique to Australia, and have been observed in other developed countries where industrial action has declined.

Reforms to the WR framework during the 1990s, such as the introduction of enterprise bargaining and protected industrial action, have been identified by some as the most important factors in the decline in industrial disputes (Hodgkinson and Perera 2004; Philipatos 2012). Prior to this period, unlawful strike activity was widespread, but largely went unpunished. The introduction of protected industrial action brought not only a set of conditions to be met for protection, but also introduced more effective and accessible

¹⁰² Noting that the exact approaches taken by countries to collect data on industrial action vary somewhat, meaning that comparing rates of disputation can be an imperfect exercise.

penalties and pathways to legal action against unprotected action (Briggs 2006; Philipatos 2012). Thus, perhaps counterintuitively, the legalisation of industrial action in some circumstances has led to an overall reduction in its use.

The level of dispute has also been influenced by changes to the role and power of institutions in the WR framework over the past few decades. This includes declines in trade union membership, which has been falling consistently since the early 1970s (Healy 2002; Perry 2013; Philipatos 2012). The move away from conciliation and arbitration by industrial tribunals has also played a role, as previously employees often had an incentive to undertake industrial action to instigate tribunal proceedings (Briggs 2006). Improvements in workplace health and safety standards, and increased enforcement by independent government agencies rather than by unions themselves, are also likely to have contributed to reductions in industrial dispute in some sectors (discussed below).

Industrial dispute is also shaped by structural changes in the economy. The OECD (2007) has noted that shifts in employment from industrial sectors (such as manufacturing and construction) towards service sectors, which generally have lower rates of industrial action, can partly explain recent declines in dispute. Changes in the structure of employment towards casual and part time work may also be a factor, as these workers have less job security and may not be able to sustain a loss of income from industrial action as easily as those in full time employment (Philipatos 2012).

Macroeconomic conditions also have influenced the declining prevalence of industrial disputes. Perry (2013) has pointed to numerous studies that have found a link between inflation and industrial disputes, with employees engaging in strikes to maintain real wage levels. Low levels of inflation in recent decades have therefore been a likely contributor to the lower incidence of industrial action. A number of studies have found that the Prices and Incomes Accord (chapter 2) also played an important role in reducing industrial dispute (Chapman 1998; Morris and Wilson 1999; Perry 2013).

While the literature has generally found that the incidence of strikes increases with stronger economic conditions (Kennan 2008), Hodgkinson and Perera (2004) have also noted that the restriction of industrial action to periods after the expiry of an agreement has limited the ability of employees to time their wage claims and strike activity to take advantage of favourable economic conditions. The increased exposure of the Australian economy to trade and competition with firms overseas has eroded the economic rents previously captured by some firms, reducing the ability for employees to demand higher wages and their incentive to attempt to extract these demands using industrial action.

Improvements in workplace health and safety may have reduced dispute

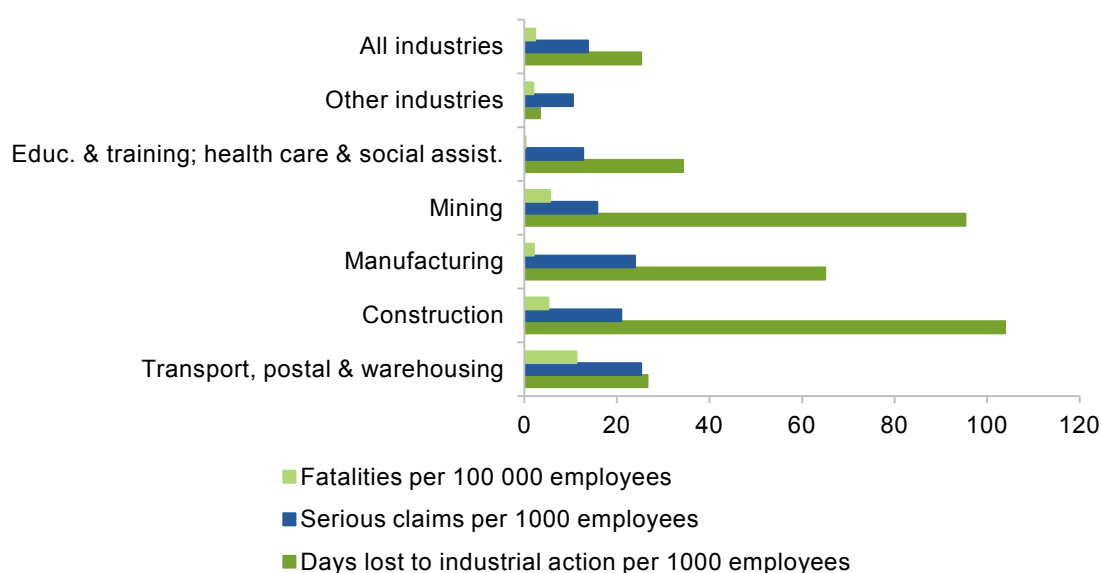
Workplace health and safety issues can be a flashpoint for industrial disputes. In some cases these disputes reflect genuine concerns for the wellbeing of employees, while in others safety issues can be used as a tool for industrial leverage — similar observations

have previously been made by the Productivity Commission (2014c) and the Royal Commission into the Building and Construction Industry (Cole 2003).

Some have speculated that safety issues, workplace injuries and fatalities can contribute to the rates of industrial disputation in particular sectors, such as construction (Perry 2006). Indeed, safety has been a prevalent issue in a recent dispute in the construction sector in Victoria, with one union singling out safety concerns, specifically a dispute over the appointment of safety officials, as the motivation for its strike actions (Setka 2014).

Figure 27.3 Comparison of safety incidents with industrial action

Averaged from 2001 to 2013, by industry



Sources: Safe Work Australia (2014a, 2014b); ABS (*Industrial Disputes, Australia, December 2014*, Cat. no. 6321.0.55.001, released 12 March 2015).

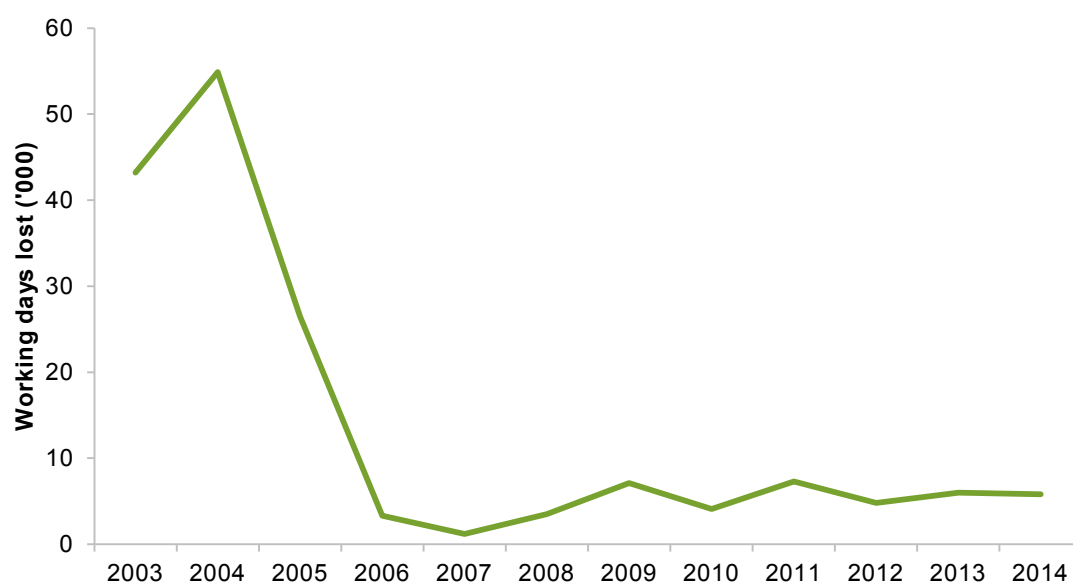
The available evidence suggests there may be a link between safety issues and industrial disputation, but is not sufficient to establish a clear causative relationship. Industries with relatively high rates of industrial activity over the past decade or so have generally had higher rates of safety incidents (figure 27.3). However, these levels are not proportional when compared across industries. For example, the transport, postal and warehousing industry has a higher rate of safety incidents and fatalities than the mining, manufacturing and construction industries, but a much lower rate of industrial disputation. This reflects the numerous factors that can contribute to industrial disputation.

Given this relationship between safety and disputation, employers may be able to reduce their exposure to safety related disputes (and other industrial action taken under the guise of safety concerns) by consciously improving workplace safety. Similar observations were made by some commentators following the Cole Royal Commission:

... if you could reduce occupational health and safety problems — in particular, if you could reduce deaths — then you would be able to reduce the strike figures. (Dabscheck 2004, p. 41)

Indeed, there appear to have been substantial improvements in reducing the prevalence of safety incidents over the past decade, especially in high dispute sectors. From 2000-01 to 2012-13 the prevalence of safety incidents declined by 55 per cent in mining, 38 per cent in construction, 34 per cent in manufacturing and 35 per cent in the transport, postal and warehousing industries. These improvements were reflected in a decrease in the number of working days lost to disputes over health and safety issues (figure 27.4).

Figure 27.4 **Working days lost ('000s) to disputes over health and safety**
Annually, all sectors



Source: ABS (*Industrial Disputes, Australia, December 2014*, Cat. no. 6321.0.55.001, released 12 March 2015).

Traditional measures of industrial action do not capture the full extent of industrial disputes

The estimates presented above suggest that the prevalence of industrial action in Australia is relatively low. Nonetheless, these estimates will underestimate the level of industrial dispute, as:

- some types of industrial action are either not included in current estimates, or do not translate into a measurable loss of hours worked
- in some cases, industrial action can impose costs on employers other than a loss of hours worked by employees

-
- the occurrence of a strike or lockouts is not a direct indicator of industrial disputation, but rather occurs when one party fails to have their demands met in a dispute.

Some types of protected industrial action have not been included in measures

Some forms of industrial action permitted under the FW Act are not currently included in the ABS estimates of industrial disputes. While the Australian Worker's Union (AWU) (sub. 74, p. 36) argued that this was a 'wildly speculative' assertion, the ABS explicitly notes that its current estimates do not include industrial actions such as work to rule, go slows and partial work bans (ABS 2015d). As discussed later in this chapter, the Productivity Commission has estimated that partial work bans are approved by employees in three quarters of protected action ballots, suggesting that they may form a substantial share of the industrial action that is undertaken by employees.

Further, ABS data only include a dispute if it amounts to an equivalent of 10 or more working days lost. This means that some brief work stoppages among large workforces, or longer stoppages among a small number of employees, might not be counted. For example, if 150 employees engaged in a 30 minute strike, or 25 employees engaged in a three hour strike, both would amount to less than 10 working days and not be counted (assuming a 38 hour work week).

The ABS has noted the above shortcomings with the existing measures of industrial disputation, and has signalled its intention to extend these measures in the future to include work bans and all stoppages (regardless of the number of working days lost) (ABS 2015h). While this should improve the accuracy of these measures in the future, at this stage the existing data still paints only a limited picture of this part of the industrial landscape.

The costs of industrial action are not necessarily proportionate to working days lost

Some forms of industrial action impose costs on employers that are not directly proportional to the amount of lost working time. As such, measures of prevalence based on working days lost will not account for the practical impacts of these incidents of industrial action.

In many workplaces, an employee may perform a multitude of tasks that are not all equally critical to the operation of the business. The importance of any given task may also not be proportional to the amount of time required to carry out the task. This means that the full cost and impact of the industrial action on the parties will not be captured by a measure of time lost. Some employers have provided examples of situations where relatively minor work bans can have large impacts on output:

This allows unions to place bans on work that takes little time to perform but has a very high effect on operational efficiency and customer needs. Bans such as a limitation on processing student assessment results, which may take a mere matter of minutes to apply, can have a major

effect on an educational institution (Australian Higher Education Industrial Association (AHEIA), sub. 102, p. 6)

Protected industrial action may currently take the form of a strike or a selective work ban. The situation loses balance, however, if the industrial action is a selective work ban. It enables considerable damage to the employer's operation (for example, shutting down a critical production process only) but does not result in any significant economic impact on employees imposing the ban. (BHP Billiton, sub. 168, p. 11)

In other workplaces — such as a major construction project — a project may run on a tight schedule, and the costs associated with late completion may be substantial. Thus, for these types of projects, a lost working day may be more costly when compared with other circumstances. If the greenfields agreement negotiated at the commencement of a project expires prior to completion, industrial action may arise while a new agreement is negotiated. Some employers have argued that in these circumstances, even relatively short stoppages may lead to substantial costs (Australian Petroleum Production and Exploration Association (APPEA), sub. 209).

Brief work stoppages and minor work bans can also impose administrative costs on the employer that are relatively fixed, and not proportional to the time lost to industrial action. The Qantas Group has provided an example of the cost of making pay adjustments to comply with strike pay provisions:

In service based industries, bans that do not involve stoppages can also be very damaging to the business without any real countervailing consequence for employees. ... the 2011 dispute in Qantas provided an extreme example of how the current rules can be exploited. In this dispute, the union notified a one minute stoppage, knowing that the complexity and administrative cost of making the required one minute deduction from pay would exceed the actual amount of the deduction, while also exposing the employer to the risk of prosecution for any error in calculating the numerous deductions involved. (sub. 116, p. 11)

Aborted strikes

As mentioned previously, some employees can use aborted strikes as an industrial tactic, by withdrawing notice for an impending industrial action after their employer has already borne the costs of preparing for the strike. This tactic was illustrated in examples provided to the Productivity Commission by numerous inquiry participants.

In one instance, the management of a meatworks plant received notice of multiple stoppages for a single day (Allens, sub. DR310). For reasons relating to animal welfare, food safety, product quality, and health and safety, the employer decided that they would need to defer delivery of stock for the day, and thus closed the plant for the day. The FWC found that the employer had engaged in unprotected industrial action because the closure occurred before the notified work stoppages had commenced.¹⁰³ As noted by Allens:

¹⁰³ *AMIE v JBS Australia Pty Ltd* (2014) FWC 2254

This clearly left the employer in an invidious position of having to keep the plant open, and choosing between:

- (a) allowing for the delivery of stock to go ahead, and be faced with animal welfare and food safety issues, should the stoppages occur; or
- (b) halting the delivery of stock, and risk having a workforce with no work to do for the day, if the stoppages did not go ahead. (sub. DR310, p. 4)

In another example, BHP Billiton experienced aborted stoppages during a dispute:

... the economic impact of industrial action was enhanced by threatening action with the prescribed three days' notice, but withdrawing the notice at the last minute.

The statutory purpose of the notice of intention to take industrial action is to enable employers to minimise economic damage – BMA ceased plant and equipment, supplier deliveries and service providers in line with these notices. The late withdrawal of notices or failure to carry through became a weapon in itself, and created significant loss and damage for BMA with no direct impact on employee earnings. (sub. 168, p. 14)

The Qantas Group has also reported similar experiences of withdrawn strike actions:

Another tactic used by both the ALAEA and the TWU in Qantas in 2011, was to repeatedly notify a stoppage and then cancel the action at the last minute, after schedules had been recut, passengers advised and other staff disrupted from their normal rosters. Such behaviour caused significant loss of revenue and cost to Qantas, inconvenienced customers and other staff and came at no cost to the union or its members directly involved in the 'action'. As one example of this tactic, the TWU notified a two hour stoppage for all airports to take place between 16:00 to 17:59 on 7 October 2011. The notice was subsequently withdrawn, but the timing of the notification and withdrawal still meant that this 'action' by the TWU affected 4343 passengers and resulted in the cancellation of 17 flights and the rescheduling of 19 other flights. As a second example, the ALAEA provided separate notices of four hour stoppages at different times of the day in Brisbane, Sydney and Melbourne. Each of these notices was subsequently withdrawn but this 'action' by the ALAEA affected 8318 passengers and resulted in the cancellation of 38 flights and the re scheduling of 27 flights. The average delay for re scheduled passengers was 95 minutes. (sub. 116, p. 12)

Although aborted strikes impose costs on an employer, these costs do not translate into working days lost. As such, they will not show up in measures of disputation — by definition, no industrial action has occurred.

Industrial muscle can be flexed without taking action

The Chamber of Minerals and Energy of Western Australia also argued that the existing measures cannot account for threats of industrial action, which arguably can be a sufficient means to gain leverage in a dispute:

The aforementioned statistics on lost time do not cover the threat of industrial action, which has been used by unions to win concessions from employers whilst also causing reputational damage and causing uncertainty. (sub. 199, p. 8)

Indeed, the occurrence of a strike indicates the failure of a union to have its demands met. As noted by Norris:

Although strike activity is an intuitively appealing guide to militancy, it is not ideal, as a strike is in a sense the outcome of the failure of militancy to achieve its aims. Thus, a powerful militant union may win wage increases simply through the threat of a strike. (1996, p. 264)

Does the evidence indicate that change is needed?

Some employee groups have pointed to low measured rates of disputation as an indicator that the existing arrangements governing industrial disputes are adequate:

The QCU would rely upon the current, historically low level of disputation to suggest existing dispute resolution is working effectively. (Queensland Council of Unions, sub. 73, p. 32)

Indeed, while numerous inquiry participants¹⁰⁴ have suggested that the WR framework currently encourages an adversarial approach to bargaining, the low rate of disputation suggests that reforms over the past two decades have improved its performance with respect to industrial disputes. However, this begs an important question — what level of industrial disputation should be considered desirable from a policy perspective?

While it is preferable for parties to bargain and reach agreement without the need for disputation, industrial action can be an important mechanism for bargaining participants to exercise a degree of bargaining power. Therefore, the sole policy objective of the industrial action provisions should not be to minimise the rate of industrial disputation. The logical conclusion from such an objective would be to place as many restrictions on industrial action as possible. While this could possibly reduce the rate of disputation to almost zero (though the high levels of disputation prior to 1993 when all industrial action was unlawful may suggest otherwise), it would likely lead to inequitable bargaining outcomes.

Rather than focusing on increasing restrictions on industrial action, the WR framework should seek to ensure that parties' incentives to engage in action are appropriately aligned. An observed low rate of disputation is desirable where industrial action can be credibly used, but without giving either party too much bargaining leverage. Low rates would then indicate that parties were able to reach mutually satisfactory bargains, rather than being pressed into an agreement through lack of power.

A particular concern arises where one party or another is lawfully permitted to undertake industrial action that involves few penalties for themselves, while imposing high costs on the other. As noted above, to the extent that they occur, aborted strikes would be an example. Section 27.3 explores a number of proposals to reduce such behaviour.

¹⁰⁴ For example, Klaas Woldring (sub. 2), NECA (sub. 159), Busselton Chamber of Commerce and Industry (sub. 65), BCA (sub. 173), CCIWA (sub. 134), AIER (sub. 140) and HopgoodGanim Lawyers (sub. 225).

27.3 Proposals to improve the framework

There is scope to improve the industrial action provisions in the FW Act, particularly to weaken some of the avenues that allow for the excessive strategic use of industrial action. The prime areas for possible change were identified through analysis of evidence in the literature and from various stakeholders. They include:

- changes to the conditions and processes for authorisation of protected industrial action
- changing the threshold for termination of protected industrial action by the FWC
- reducing the impact of aborted strike actions on employers
- changes to strike pay arrangements to reduce the impact of brief stoppages
- increasing penalties for unlawful industrial action.

Conditions for authorising protected industrial action

Stakeholder views on the appropriate conditions to be met for the FWC to authorise protected industrial action are generally divided along employer and employee lines. Employer groups generally sought to further restrict employee access to protected industrial action — either by adding more conditions for authorisation, or raising the burden that must be satisfied to meet existing conditions. On the other hand, employee groups have argued that the existing provisions are already quite onerous, and should be wound back, or at least not added to further.

Various stakeholders raised a number of proposed changes to the conditions for authorising protected industrial action, including:

- requiring bargaining to commence before protected industrial action can be authorised
- simplifying the processes involved in applying for a protected action ballot
- raising the bar to determine that a party is ‘genuinely trying to reach agreement’
- introducing requirements for employees’ bargaining claims to be ‘reasonable’ or ‘not excessive’ for protected action ballot orders to be granted
- introducing a maximum income threshold for access to protected industrial action.

These suggestions are addressed, in turn, below.

Requiring bargaining to commence before authorising protected industrial action

The Australian Government recently amended the FW Act to explicitly specify that protected industrial action cannot be taken until bargaining has commenced.¹⁰⁵ Prior to

¹⁰⁵ *Fair Work Amendment Act 2015* (Cth).

this, the FW Act allowed employees to seek authorisation for protected industrial action where bargaining had not yet formally commenced due to a refusal by their employer to bargain. A similar amendment was recommended by both the 2012 post-implementation review of the FW Act (McCallum, Moore and Edwards 2012, p. 177) and the Productivity Commission in its draft report. Numerous employer groups also supported such a change.¹⁰⁶

This change was opposed by some employee organisations (Australian Council of Trade Unions (ACTU), sub. 167; ETU, sub. DR300; QNU, sub. DR309), as well as other participants (Stewart, McCrystal and Howe, sub. DR271; Queensland Government, sub. DR338). Some opponents argued that this would place an individual's right to take protected industrial action at the behest of a majoritarian vote (Stewart, McCrystal and Howe, sub. DR271; QNU, sub. DR309). It is worth noting that Australia's WR framework already uses a majoritarian model to some extent — strikes must already be approved by a majority vote of the employees seeking to undertake action, and an individual loses their right to strike if an EA covering them is approved by a majority vote.

The recent amendments mean that majority support determinations are now the sole avenue for employees to compel a reluctant employer to bargain. Some participants said that this will effectively reward employers that refused to bargain (ACTU, sub. 167; Stewart, McCrystal and Howe, sub. DR271; QNU, sub. DR309). A related concern is the capacity for majority support determinations to become a greater flashpoint in bargaining, with greater incentives for anti-organising behaviour and legal disputes over the outcome of a vote. The Electrical Trades Union argued that the change 'would result in the introduction of a US style 'union recognition' system widely abused by anti-union forms' (sub. DR300, p. 21). As noted in chapter 20, it is important that the majority support determination process remain as accessible as possible.

Simplifying protected action ballot order procedures

Employees are required to vote in favour of industrial action in a secret ballot to gain FWC approval for protected industrial action (box 27.3). The costs of ballots are borne by government — the estimated cost of conducting protected action ballots in 2013-14 was \$863 000, at an average cost of roughly \$1500 per ballot — and also the parties themselves, particularly employee representatives.

Some have claimed that regulatory requirements unnecessarily raise these costs. For instance, the Australian Services Union described the protected action ballot process as:

¹⁰⁶ Including Manufacturing Australia, sub. 126; BHP Billiton, sub. 168; Australian Federation of Employers and Industries, sub. 219; Chamber of Minerals and Energy of Western Australia, sub. 199; AHEIA, sub. 297; MEA, sub. DR304; Aged and Community Services and Leading Age Services Australia, sub. DR328; VECCI, sub. DR339; Ai Group, sub. DR346; SAWIA and WFA, sub. DR352.

... a laborious exercise which usually gives the employer 4 weeks (and more) notice before action is taken, i.e. The union must firstly apply to the FWC and then have a hearing in the Commission regarding the application for industrial action (this may take up to 1 week), then the FWC orders a ballot which usually takes 20 days or more to conduct. Then another day for the result to be known and then the union must give 3 clear business days' notice to the employer before taking industrial action. (sub. DR283, p. 12)

The ACTU has also argued that the complexity of the existing laws governing protected industrial action creates numerous opportunities for employers to challenge industrial action on procedural grounds. In particular, the ACTU has identified the seeking of approval for a ballot of union members and the issuing of a notice of intention to take industrial action as the main points where employers exploit the rules to mount legal challenges against employee actions (sub. 167). Some academics have remarked that the existing ballot provisions have 'proved to be a fruitful source of revenue for the legal profession' (Creighton and Stewart 2010, p. 822).

Given these procedural difficulties and costs, some participants suggested that the existing protected action ballot arrangements could be simplified:

The AWU would like to see more streamlined bureaucratic processes in relation to secret ballots for protected industrial action. This would not lead to an increase in industrial action but rather make the bargaining process more efficient, which is beneficial for both employers and employees. (Australian Workers' Union, sub. 74, p. 36)

Empirical evidence suggests that most protected action ballots are 'landslides'

While protected action ballots notionally exist to prevent employee representatives from declaring industrial action without the support of employees, some commentators have argued such behaviour is rarely observed. As noted by Stewart and Creighton:

... there is a singular absence of credible evidence of workers being led into taking industrial action against their will. This seems to be borne out by the fact that protected action ballots very rarely lead to the rejection of proposed industrial action. On the contrary, the proposed action is almost invariably overwhelmingly supported ... (2010, p. 822)

To empirically test this, the Productivity Commission analysed the results of a random sample of 133 protected action ballots that were held between January 2013 and May 2015. The results of this analysis confirm that most ballots approve industrial action in 'landslide' majorities. Among the 82 per cent of ballots that met the quorum requirement,¹⁰⁷ more than 98 per cent of ballot questions were approved by employees. The majorities of votes approving ballot questions were also decisive — the average share of 'yes' votes for each ballot question was around 90 per cent of voting employees. Where

¹⁰⁷ Requiring at least 50 per cent of eligible voters to participate in the ballot for the action to be approved.

ballots were not successful, a failure to meet the quorum requirement was the reason in almost all cases.

The 2012 post-implementation review of the FW Act found similar results in a sample of 50 ballot result declarations. The panel found that 90 per cent of the ballots authorised protected industrial action, while in the remaining ballots, industrial action was not authorised because of a failure to meet the quorum requirements (McCallum, Moore and Edwards 2012). Preliminary results from a study being conducted by some inquiry participants reveal similar trends, with roughly 10 per cent of ballots failing to meet quorum requirements (Catrina Denvir and Shae McCrystal, pers. comm. 28 October 2015).

It is also worth noting the frequency of different options for industrial action in ballots. Almost 95 per cent of ballots analysed by the Productivity Commission contained at least one question proposing some form of work stoppages, while questions on overtime bans and partial work bans were each in roughly three quarters of ballots (figure 27.5). Roughly 90 per cent of ballots included at least two of these three main types of industrial action, and 56 per cent of ballots contained all three types. In many ballots, the range of questions was very comprehensive, and asked employees to vote on almost every conceivable type and duration of action available.¹⁰⁸ Preliminary research by Creighton et al. (sub. DR273) found similar trends, revealing that on average ballots proposed roughly seven types of action for approval. Some included as many as 40 different types of action.

Ballots also do not appear to have a moderating or filtering impact on the actions approved by employees. More militant strike actions, such as lengthy or indefinite work stoppages, were approved by employees equally as frequently as less drastic actions. Among ballots that contained at least one question regarding work stoppages, 95 per cent approved stoppages of more than 7.5 hours duration (figure 27.6). Employees also do not appear to discriminate between different proposed actions when voting. Out of a sample of 109 valid ballots, in only one instance did employees vote to approve and reject different actions on the same ballot.¹⁰⁹

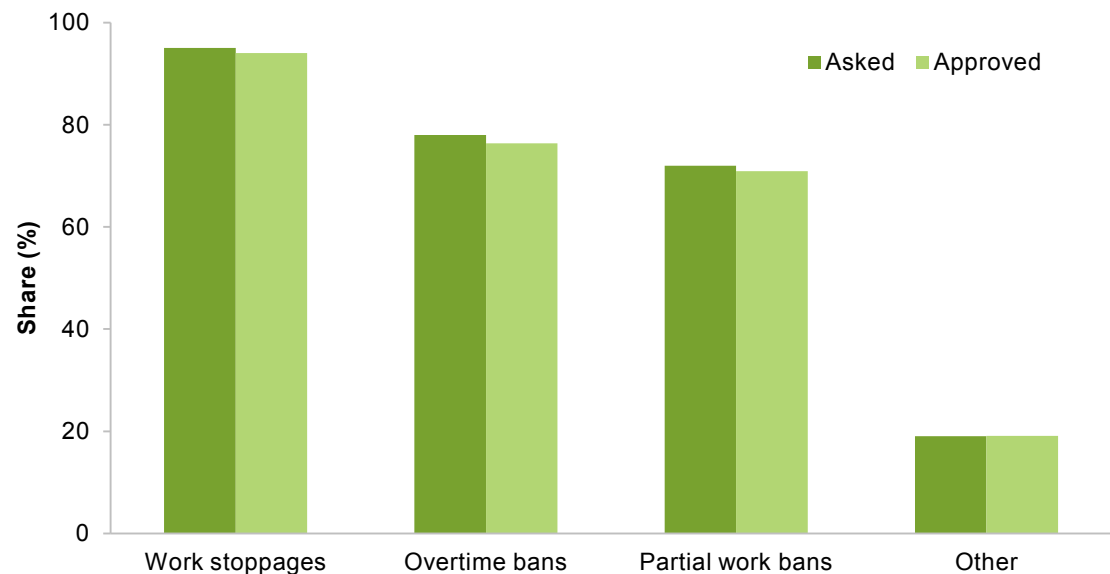
The relative level of support for different types of actions has varied in some ballots. This was not substantial on an aggregate level. On average, work bans, overtime bans and stoppages of four hours or less, each with an average level of support of 90 per cent, had only slightly higher average levels of support than stoppages of between four and 24 hours (89 per cent) and more than 24 hours (86 per cent). However, on the individual ballot level, varying levels of support were more apparent in some. In just under half of the ballots

¹⁰⁸ Ballots also differed in specificity of questions — some gave the option to vote yes or no on stoppages of different lengths (for example, two hours, four hours and six hours) individually, while others contained a single question asking employees to vote yes or no on stoppages of an unspecified, variable length.

¹⁰⁹ Again, this matches preliminary results obtained by Creighton et al. (sub. DR273; pers. comm., 28 October 2015), who found that among 93 ballots analysed, in only one ballot were minor actions approved by employees while more severe actions were not.

analysed by the Productivity Commission, there was no difference in the share of votes between the most popular and least popular forms of strike action, while in another quarter of ballots this margin was 10 per cent or less (figure 27.7). In the remaining 26 per cent of ballots, the difference in votes was greater than 10 per cent, though in only two cases was this difference decisive in approvals (noting that in both these cases, only three individual employees were voting in the ballot).¹¹⁰

Figure 27.5 Proportion of ballots asking and approving various actions
Proportion of all valid ballots in sample^a, by type of industrial action



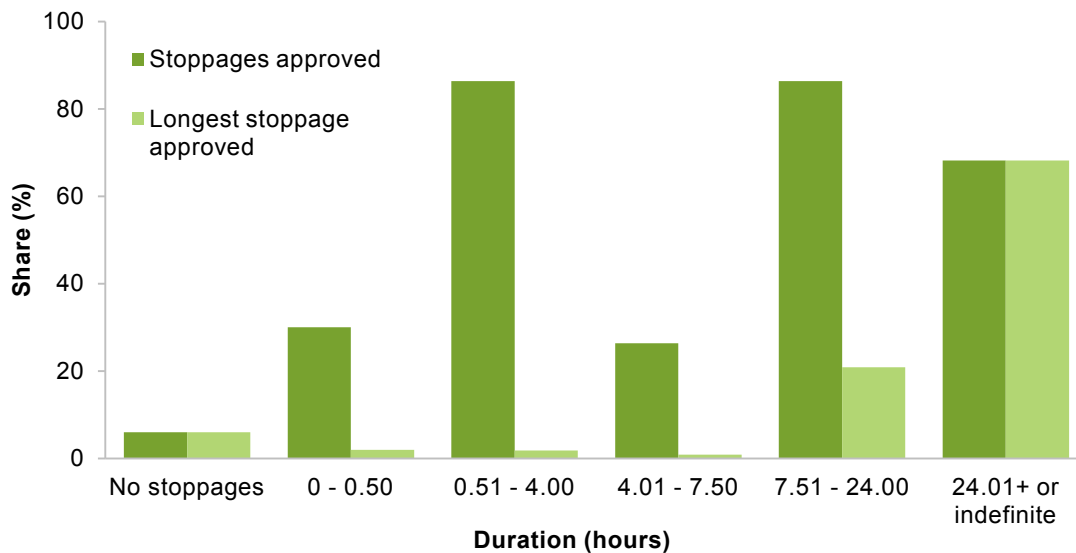
^a Ballots that met the quorum requirement of 50 per cent of eligible voters voting in the ballot (n=109). 'Other' includes questions that proposed types of action that did not constitute a stoppage or ban, such as employees making a public statement, announcement or recorded message in support of industrial action. Percentages add up to more than 100 per cent as ballots can contain more than one question.

Source: Productivity Commission analysis of a random sample of 133 ballot results published by the Fair Work Commission.

¹¹⁰ These findings resemble preliminary results from Creighton et al. (sub. DR273; pers. comm., 28 October 2015), who found that the average share of 'yes' votes for actions was just over 90 per cent for more minor actions, while this share was slightly lower on average (around 85 per cent) for more militant actions. They also identified some individual examples of ballots where the level of support declined gradually for more militant types of action — for example, with 17 voters opposing and 124 supporting overtime bans, 24 opposing and 116 supporting job function bans, and 34 opposing and 107 supporting 4 hour strikes.

Figure 27.6 Durations of work stoppages approved by ballots

Proportion of all valid ballots in sample^a

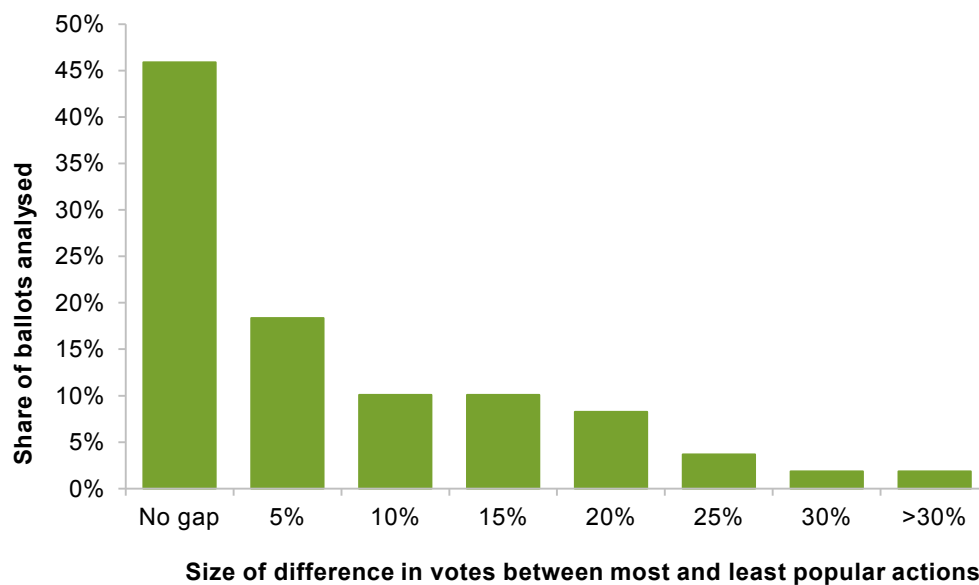


^a Ballots that met the quorum requirement of 50 per cent of eligible voters voting in the ballot (n=109).

Source: Productivity Commission analysis of a random sample of 133 ballot results published by the FWC.

Figure 27.7 Differences in votes between most and least popular actions

Share of ballots, by size of difference in margin, rounded up to next 5 per cent



Source: Productivity Commission analysis of a random sample of 133 ballot results published by the FWC.

These findings are unsurprising given the current arrangements. First, given the costs and effort associated with holding a ballot, employee representatives have little incentive to put action to a vote unless they think it is likely to lead to approval. Second, it costs nothing extra for representatives to propose any given action in a ballot, and employees have little to lose by giving themselves the option of potentially exercising each type of action in the future. The critical decision about whether an approved action is actually carried out is then deferred to when employees decide whether to give notice of industrial action to their employer. As one submission observed:

While some unions ask members to vote to support only action that they are prepared to take, others treat the ballot as a two-step process. In the first, individuals are asked to support the industrial action – not necessarily because it will be taken, but because it can offer leverage in the negotiations. It is only after a ballot is approved that actual action will be contemplated, and at this stage, workers must necessarily be consulted via the union’s informal democratic procedures, to determine if they still support certain action-taking place on a certain day. (Creighton et al., sub. DR273, p. 9)

Secret ballots should be maintained ...

Secret ballots have a strong foundation:

- They give employees democratic input into the decision to take industrial action, while providing anonymity to reduce potential pressure from representatives or peers to support (or from employers to oppose) the proposed action. This can ensure that the decisions of employee representatives more closely align with the wishes of the employees themselves.
- They make threats of strike action more credible, as a positive ballot result provides confirmation that employees are in favour of industrial action (or at least, having the option to undertake it). Thus, ballots decrease the possibility of ‘hollow’ strike threats. This can benefit both employees and employers.
- Requiring parties to apply for a ballot order provides a stage at which the FWC can apply criteria for action, such as the ‘genuinely trying to reach agreement’ test.

As such, secret ballots should be maintained as a prerequisite for approval of protected industrial action. However, there nonetheless remains a case for simplifying the rules that govern the ballot process.

... but could be simplified

Currently, industrial action can only be protected if the action taken by employees reflects the questions asked and approved in the ballot. This may help prevent disputes from escalating beyond the level of industrial action that employees are willing to undertake. However, this can also lead to employers disputing the validity of employee actions because the proposed action does not match the content of a ballot. The ACTU (sub. 167) raised the example of a dispute at the Yallourn Power Station, where the employees were

dragged into a long running legal dispute due to a semantic challenge by an employer as to whether notified industrial action by the employees met the definition of a work ban as proposed in the protected action ballot. The employees eventually carried out a second ballot that contained questions that satisfied the more precise definition of a ban, and industrial action recommenced.

This raises the question of whether proposed actions should be required to be specified in ballots. The empirical evidence outlined above suggests that most ballots canvass a wide range of actions that are approved by the majority employees on a rather indiscriminate basis. As such, simply requiring ballots to approve the taking of unspecified protected industrial action may achieve the same outcome as the existing arrangements, without the potential for semantic legal disputes.

Employer groups generally opposed simplification of protected action ballots. Many argued that they require details of the types of action proposed in a ballot so they can devise contingency plans to respond to protected industrial action (Qantas Group, sub. DR295; Master Electricians Australia (MEA), sub. DR304; Australian Chamber of Commerce and Industry (ACCI), sub. DR330; Australian Industry group (Ai Group), sub. DR346). However, there are several counterpoints to this:

- the wide breadth of the types of industrial action frequently canvassed in ballots suggest that they provide very little information to employers. By covering almost every conceivable action possible, many existing ballots effectively provide as much information as a single generic question. Thus, the capacity to prepare contingency plans to anticipated industrial action should be virtually the same
- the most relevant information for developing a contingency plan, such as the timing and type of action to be taken, is already provided when employees fulfil the notice requirements
- the purpose of protected actions ballots should be to ensure that the decision to take industrial action is democratic and free from coercion. The understandable desire by employers to be able to prepare contingency plans (and thereby minimise the effectiveness of industrial action) is nevertheless a secondary concern.

On this last point, some participants argued that a lack of specificity could undermine the democratic process of a vote, as employees may not be aware of what they are voting for, or may support some types of action, but not others (Queensland Government, sub. DR338; Ai Group, sub. DR346). This concern could be valid in theory if ballots formed the only point at which representatives communicate and consult with employees about the proposition of taking protected industrial action. However, as noted by some participants, employee representatives will always have a strong incentive to engage in more direct consultation with employees on the types of action to take (Creighton et al. sub. DR273). Ultimately it is the employees themselves who choose whether or not to carry out the industrial action. Indeed, were employee representatives not already engaging in this sort of consultation, it would logically follow that more protected action ballots would fail at present. Finally, these concerns do not appear to play out in practice. As

mentioned above, employees do not appear to be particularly discriminating between different types of action when voting.

The Qantas Group (sub. DR295) argued that not specifying types of action in ballots would undermine the capacity for employees to anonymously opt out of actions that they do not wish to engage in. However, the potential for this problem still largely exists under the current arrangements, as action is approved by a simple majority of votes. This means that unless each action is approved by all employees, or rejected by a majority of them, individual employees still have to publically opt out of taking action under the current arrangements. Further, while groups of employees theoretically have the ability to opt out of particular actions, this is not a pattern of voting that has been empirically observed (it is extremely rare for employees to approve some types of action and not others). It also is unlikely that an engaged union representative would be unaware that a majority of their members did not support a particular action, and pressure them to undertake it.

Nevertheless, specifying individual action types may be useful for unions in providing a more precise and objective quantitative measure of employees' enthusiasm for particular actions. Empirical analysis by the Productivity Commission and some participants reveals that the level of support for more moderate actions can be higher than for more militant actions — though generally this gap is relatively small, and overall support for each action remains high.

However, this is not a reason for a regulated requirement. Employee representatives could have the option of including specific types of action on a ballot if they wish to gauge employee support. This may be particularly useful for representatives in larger workplaces where detailed consultation may be more challenging. Alternatively, if they are confident that they have broad support for particular types of action and wish to avoid the potential complications of asking specific ballot questions, they should be able to do so.

Removing or extending the 30 day 'use it or lose it' rule

Some inquiry participants were also critical of the current provision that stipulates industrial action is only protected if it commences within 30 days of the ballot result (with a possible extension of up to 60 days). This provision is intended to prevent employees from holding the threat of industrial action over an employer indefinitely once approval is obtained. There are a number of criticisms of this rule.

First, the rule can encourage unions to 'rush' to take protected industrial action within the 30 day period in order to maintain the ability to take protected action subsequently (Qube Ports, sub. 123; Australian Education Union, sub. 63; Creighton et al., sub. DR273). This incentive has arguably been worsened by legal decisions¹¹¹ dictating that only those

111 *United Collieries Ltd v CFMEU* (2006) 153 FCR 543

specific actions on a ballot that are taken within 30 days will remain valid (Stewart, McCrystal and Howe, sub. DR271).

The 30 day rule also undermines the capacity for employees to use industrial action in a *gradually* escalating fashion. Ideally, parties would use industrial action where necessary as a signal in response to developments in bargaining, starting with more graduated actions, and escalating to more serious actions if the other party is not willing to compromise. The rule instead requires employees to utilise the full spectrum of actions within 30 days if they wish to maintain access to them later without holding another ballot.

Alternatively, where action is not taken, it can lead to greater compliance costs for employees in applying for an extension or a new protected action ballot order. One group of participants noted from the FWC's quarterly reports and their own research that roughly one quarter of ballots require an extension (Creighton et al., sub. DR273).

Finally, other parties may avoid the need to rush, or apply for an extension, by strategically circumventing the 'use it or lose it' rule (although this will still lead to suboptimal outcomes for all parties). Employees can arrange for a single person to engage in industrial action to satisfy the requirement that it be undertaken. Employee representatives can also strategically word ballot questions, such that they allow industrial action to be taken 'separately, concurrently or consecutively', meaning that a single 8 hour strike could also validate a subset of shorter stoppages (for example, four hour and two hour strikes) if notice is provided for all of them. This strategic behaviour means that the efficacy of the 30 day rule is questionable, while still creating artificial behaviours and costs on parties that would otherwise not exist.

Given these concerns, there are several possible alternatives to the existing rule, including:

- removing the rule altogether, giving protected action ballot results an unlimited lifespan. This would likely create the incentive to simply seek a ballot result at the outset of bargaining, and subsequently maintain the constant threat of industrial action. Such a scenario is unlikely to foster a productive bargaining process
- shortening the 30 day period, as suggested by the National Farmers' Federation (sub. DR302). While this would strengthen the incentive for parties to only undertake a ballot if they had an intention to take industrial action imminently, it would also reduce the post-ballot window in which parties could further bargain to avoid industrial action being taken, and would increase the incentive to rush to take action
- removing the requirement established by the *United Collieries* case that each type of action must be taken to remain valid (Stewart, McCrystal and Howe, sub. DR271; Creighton et al., sub. DR273). However, this could seemingly be easily circumvented by employees undertaking a single form of very miniscule, effectively costless industrial action (for example, a one second strike or work ban) in order to gain access to further action. It would thus appear to effectively make the rule largely ineffectual
- lengthening the initial period to 60 days without requiring parties to apply for an extension (Creighton et al., sub. DR273). The incentive to rush to take action would be

lowered, giving more time for bargaining to occur between the declaration of a ballot and its expiry, and lowering the expected compliance costs for parties

- altogether removing the dependence of the validity of a ballot result on whether action has been taken. This would eliminate the pernicious influences that a ballot's impending expiry could have on parties' behaviour. However, it would not be an advisable option under a 30 day lifespan, as employees would have to continually be applying for a new ballot. Rather, the lifespan of a protected action ballot result could be extended to a longer period, such as 120 days. This may still require multiple ballots to be conducted for some long-running disputes. However, having to periodically conduct another ballot may also provide parties with the opportunity to reassess their bargaining position and decide whether they want industrial action to continue.

Some participants,¹¹² primarily employers, expressed opposition to any changes to the existing arrangements. Many of them argued that the 30 day period was necessary to assist employers and employees in knowing when industrial action would take place. However, as noted above, a successful ballot does not guarantee that industrial action will happen within the immediate timeframe — this occurs when notice is supplied to an employer (unless a strike is aborted).

RECOMMENDATION 27.1

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.

Determining whether a party is 'genuinely trying to reach agreement'

To issue a protected action ballot order, the FWC currently must be satisfied that the party applying for the ballot order is 'genuinely trying to reach agreement' with the employer in question.

¹¹² Including MEA, sub. DR304; AMMA, sub. DR322; CCIWA, sub. DR323; ACCI, sub. DR330; Queensland Government, sub. DR338; Qantas Group, sub. DR295; AHEIA, sub. DR297; Ai Group, sub. DR346.

Numerous employers have submitted that the current requirement is inadequate, making protected industrial action too accessible at the early stages of bargaining (APPEA, sub. 209; Australian Shipowners Association, sub. 206; BHP Billiton, sub. 168; Australian Federation of Employers and Industries, sub. 219). For example, the Australian Shipowners Association has argued:

It is exceedingly easy for a bargaining representative (usually a union) to obtain a secret ballot order from FWC. It has become largely a form filling exercise. The ‘genuinely trying to reach agreement’ test in section 443(b) of the Act is satisfied by showing that claims have been made and pressed, and to some extent explained, and assertion that the applicant bargaining representative really wants what is claimed. (sub. 206, p. 9)

It has been argued by employers that industrial action should only be available as a ‘last resort’, where negotiations have stalled or reached an impasse (Minerals Council of Australia (MCA), sub. 129; Chamber of Minerals and Energy of Western Australia, sub. 199; South Australian Wine Industry Association and the Winemakers’ Federation of Australia (SAWIA and WFA), sub. 215; Australian Mines and Metals Association (AMMA), sub. DR322; BHP Billiton, sub. DR362). One employer group suggested that protected industrial action should not be possible unless there has been a period of six months of negotiation (APPEA, sub. 209), while others suggested that the FWC should be satisfied that negotiations have reached an impasse before authorising protected action (AHEIA, sub. 102; BHP Billiton, sub. 168; AMMA, sub. DR322).

It is not self-evident that these suggested changes would lead to desirable bargaining outcomes. If a party is determined to strengthen their bargaining claims by credibly threatening or undertaking industrial action, a legislated threshold is unlikely to be effective. For example, if industrial action were only permitted after negotiations have stalled, a party may simply refuse to compromise on ambit claims in order to manufacture an impasse in negotiations and trigger access to industrial action. Further, this proposed solution ignores the role that industrial action (or the threat of it) can play in preventing negotiations from stalling in the first place, by compelling parties to reach agreement in order to avoid or bring an end to industrial action.

In certain cases, a six-month moratorium would place employees at a significant bargaining disadvantage given that no pay rises can occur after the nominal expiry date of an EA. Moreover, a union wanting to retain its bargaining power under such a rule would have to credibly commit to a high-cost strike at the end of the six months in the event that no satisfactory bargaining occurred in the interim. Credibility can often only be achieved by sometimes acting on the threat. A six-month rule might therefore either undermine reasonable bargaining power or inadvertently prompt high cost, infrequent strikes, neither of which would be desirable. Some employers (ACCI, sub. DR330; Ai Group, sub. DR346) argued in favour of a recent proposal¹¹³ to add a new subsection 443(1A) to the FW Act, setting out what the FWC must have regard to when considering whether a

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party applying for a protected action ballot order is ‘genuinely trying to reach agreement’ as follows:

For the purposes of paragraph (1)(b), the FWC must have regard to all relevant circumstances, including the following matters:

- (a) the steps taken by each applicant to try to reach an agreement;
- (b) the extent to which each applicant has communicated its claims in relation to the agreement;
- (c) whether each applicant has provided a considered response to proposals made by the employer;
- (d) the extent to which bargaining for the agreement has progressed.

Employee groups have expressed opposition to the proposed changes. In its submission, the ACTU argued:

The practical effect of the proposed new subsection (1A) is not to be understated. For unions, it creates a sizeable burden to document every single interaction that occurs in bargaining so as to be in a position to leave open the option to pursue a protected action ballot at some future point in time. ... These burdens arise because section 443 is concerned not only with whether a union is genuinely trying to reach agreement, but whether it has been. ... unions will *always* face this burden, should they wish to leave the option of a protected action ballot open, even where they are confident or assured that an employer will not oppose such an application. This is because section 443 requires the FW Commission to reach a *positive state of satisfaction* as to whether the union ‘has been, and is, genuinely trying to reach agreement’. (sub. 167, p. 232)

The proposal appears likely to add to compliance burdens, and provide a number of new avenues through which industrial action is likely to be challenged on procedural grounds. The question is whether those burdens are offset by any gains. An increased focus on process is unlikely to improve the efficiency of the WR framework.

Some employers argued that a high compliance burden was justified due to the high costs that industrial action can impose on employers and third parties (Ai Group, sub. DR346). However, a large share of these costs are internalised by employees through lost wages. Further, this compliance burden would fall upon all parties attempting to undertake industrial action, not just those where the damage to others may be significant.

The Explanatory Memorandum to the Fair Work Amendment (Bargaining Processes) Bill (which contained the proposed amendment above) notes that the list of matters to be considered by the FWC are drawn from the principles used by the Full Bench of the then Fair Work Australia in *Total Marine Services Pty Ltd v Maritime Union of Australia*. However, as referenced by the ACTU (sub. 167) in its submission, this overlooks the broader views expressed by the Full Bench in its decision on the case in question:

In our view the concept of genuinely trying to reach an agreement involves a finding of fact applied by reference to the circumstances of the particular negotiations. ... it is not appropriate or possible to establish rigid rules for the required point of negotiations that must be reached. All the relevant circumstances must be assessed to establish whether the applicant has met the test or not. (*Total Marine Services Pty Ltd v Maritime Union of Australia* (2009) FWAFB 368)

While there are anecdotes, there is no evidence to suggest that there is widespread industrial action undertaken by employees who are not trying to reach agreement.

Requiring employees' claims to not be 'excessive'

Numerous employer groups have argued that prior to the FWC authorising protected industrial action, it should determine whether the bargaining claims of employees are 'reasonable', 'genuine' or are not 'excessive' (APPEA, sub. 209; Australian Shipowners Association, sub. 206; Chamber of Commerce and Industry of Western Australia (CCIWA), sub. 134; Manufacturing Australia, sub. 126; Chamber of Minerals and Energy of Western Australia, sub. 199; Toll, sub. DR312). Most of these participants also supported a proposed amendment to the FW Act that would require the FWC to reject an industrial action that had a significant adverse impact on workplace productivity.¹¹⁴ On face value, such requirements may seem reasonable. However, they involve considerable practical difficulties and have implications for the role of the FWC.

Given that enterprise bargaining is predicated on the notion that wages and conditions should be tailored to suit enterprises individually, defining what would constitute an 'excessive' claim is difficult, and endeavours to confine its possible scope may risk some unintended consequences. The Fair Work Amendment (Bargaining Processes) Bill proposed a benchmark based on conditions at the workplace and the industry in which the employer operated. However, such a benchmark would risk undermining the decentralised and enterprise oriented focus underpinning the WR framework. While employers and employees may currently choose to look to comparable enterprises to inform their bargaining claims, there is no mandatory requirement to do so.

An associated point is that any requirement for the FWC to indicate what is excessive implies that the industrial umpire would assume a quasi-arbitral role in disputes, though it may be poorly equipped to make those judgments without a thorough (and resource intensive) examination of the circumstances of the business. Consistent with the Productivity Commission's approach throughout this report, and the structure supported by all governments in recent decades, such an arbitral role should be avoided if possible.

Moreover, even were the FWC to attempt to make such judgments, a subjective term like 'excessive' means that different members of the FWC would reach quite different conclusions in different applications for protected action. In some cases, a member might set the bar quite high (as is the case in other areas of the FW Act, such as the termination of industrial action) and thus the amendments would have little effect on bargaining (except to raise complexity and uncertainty). Alternatively, another FWC member might set the bar low, and thus effectively place an industry-based ceiling on the bargaining claims of employees and restrict their access to industrial action. This would increase uncertainty for all parties.

¹¹⁴ Fair Work Amendment (Bargaining Processes) Bill 2014.

This is not to suggest that the WR system can never require the FWC to make potentially subjective judgments such as what is ‘reasonable’. Indeed, there are other sections of the FW Act that require parties to conduct themselves in a reasonable manner. However, evaluating the reasonableness of bargaining claim requires presupposing some level of acceptable wages and conditions before the negotiations are concluded. It also requires FWC arbitrators to assume a remarkably good knowledge of what is tactic and what is strategy in any set of circumstances. Game theorists win Nobel Prizes for this skill, and still find it hard to apply in practice.

Such presupposed outcomes risk becoming self-fulfilling prophecies. By placing ex-ante constraints on industrial action if employees’ bargaining claims are deemed to exceed a particular level, a lack of access to industrial action to press for a higher wage claim may mean that the final negotiated outcome will resemble the level chosen by the FWC.

Assessments of productivity involve some similar dilemmas, especially as claims for high wages would not generally decrease productivity. Indeed, to the extent that they prompted capital labour substitution or greater incentives for innovation in labour saving measures, both labour and multi-factor productivity might rise. Costs and productivity are quite different things. Employees and employers also have some aligned interests in encouraging firm level productivity to secure job security and higher wages.

Moreover, while most people can adduce examples of what they might see as excessive claims, the evidence on wage increases in recent EAs (chapter 20), does not suggest that this is widespread. And, where they occur, ‘excessive’ claims sometimes may be an attempt by employees to secure a bigger slice of the rents that occur in booming times in an industry (as occurred in the resources boom). That may be galling to employers, but it need not always be inefficient. Both sides want a better deal, but so long as investment is not curtailed, the exact bargaining outcome need not have adverse efficiency impacts. Indeed, where employees do push for seemingly ‘excessive’ claims during a boom period, employers should also recognize the temporary nature of any such pay rises, and equally push back and emphasise that corresponding reductions in wages must occur when economic conditions are less favourable.

That said, this does not mean that there should never be any concern about industrial action in support of excessive claims. Indeed, the ability to take different approaches to such claims, depending on the circumstances of the firm, is what public policy should be aiming to support. For example, the provisions to terminate disputes under Part 3-3, Division 6 of the FW Act reveal a desire to constrain unreasonable actions where they lead to damaging and intractable disputes that harm the bargaining parties or the public interest.

In considering the question of whether there should be ex-ante constraints, it is best to assess the fundamental reasons why employees would strike in support of what might seem to be unreasonable claims:

- First, there may simply be a large gap between the wage expectations of different parties. This could be expected in sectors where economic circumstances have changed

and where one party (be it employees or employers) seeks conditions that reflect the new environment, while the other attempts to preserve the status quo.

- Second, employers sometimes do not have the capacity to exert countervailing power to lower the payoffs from industrial action. This chapter recommends several changes that would provide greater countervailing powers to employers, without moving the power pendulum too much their favour. An effective bargaining arrangement must attempt always to strike some balance between the bargaining parties, while allowing hard bargaining by *either* party (an observation made in chapter 20).

Accordingly, the solution to any manifestly excessive claims is best achieved by lowering the incentives for such behaviour, not outlawing it through the intervention of an arbitrating regulator.

High income threshold for industrial action

Several employer groups, particularly in the resources sector, suggested that there should be a restriction on industrial action by employees earning above a certain income. Some have proposed the unfair dismissal high-income threshold, or some multiple thereof (AMMA, sub. 96; Chamber of Minerals and Energy of Western Australia, sub. 199; BHP Billiton, sub. 168; CCIWA, sub. DR323). This would likely preclude some types of employees from any industrial action (or at least during some parts of the business cycle), including many commercial airline pilots, remote workers in the mining industry, engineers on offshore gas platforms, and tug boat operators.

AMMA (sub. DR322) claimed that such a threshold is justified by the greater bargaining power held by high-income employees, arguing that income is the only objective approximation of bargaining power. It may also be argued that when they do engage in industrial action, high-income employees have greater capacity to endure prolonged strike action, as they would be less financially vulnerable than others, thus providing them with more leverage.

However, there are numerous arguments against any such restrictions:

- In the absence of industrial action, it is unclear what alternative mechanism would be available to these employees to press their claims when bargaining. Having a high income does not necessarily equate with high bargaining power, especially where the skill is highly job-specific or highly cyclical (for example, a coal miner).
- High wages can reflect reasonable compensation for the risks and nature of a job (for example, long hours, isolation, danger and extreme discomfort), rather than greater employee bargaining power. Placing a restriction on industrial action would risk providing inadequate compensation for such risks.
- It is unclear that, as a group, high-income employees generally have any stronger incentives to undertake unreasonable industrial action than others (except in circumstances in which their scarcity enables them to garner a greater share of any

rents obtained by their employer). Higher-income employees also face a greater opportunity cost from the income foregone by undertaking strike action (and may well have commitments tied to their income such that their deep pockets are illusory).

- The arguments that lead (reasonably) to a threshold on unfair dismissals involves quite different considerations to those applying to industrial action (chapter 17).
- If industrial action does give employees excessive bargaining power, this is likely to be manifested in the capacity to inflict significant economic harm. Suspension or termination of such action (discussed further below) would provide a more targeted check on excessive bargaining power than a blanket income threshold.

Overall, there are few compelling grounds for a restriction on industrial action by high-income employees.

Grounds for termination and arbitration of industrial disputes

Industrial action can be a useful means of balancing bargaining power and compelling parties to reach agreement. However, on some occasions, industrial action may lead to undesirable outcomes from a public policy perspective — for example, by causing harms to third parties, or inflicting excessive harm to one of the parties. Such circumstances may necessitate intervention by the FWC.

Many inquiry participants, particularly employers, have called for changes to the FWC's powers to suspend or terminate industrial action. Broadly, most have called for lower thresholds for economic harm or broader circumstances in which the FWC can terminate industrial action.

Where should the bar for 'significant harm' be set?

At present, industrial action can be suspended or terminated on the grounds that it is causing significant harm to bargaining participants (s. 423) or a third party (s. 426). While the FW Act does not provide an explicit definition of significant harm, the Explanatory Memorandum to the Fair Work Bill 2008 notes that significant would mean 'more serious nature than merely suffering of a loss, inconvenience or delay' (p. 271). The FW Act also provides a list of factors to be considered when deciding whether harm is significant, including the source, nature and degree of the harm suffered or likely to be suffered; the likelihood that the harm will continue to be caused; the capacity of the parties to bear the harm; the prospect of agreement being reached; and the objective of promoting and facilitating bargaining for the agreement.

Through its interpretations of the meaning of significant harm, the FWC has set a high bar for intervention. The *Woodside* decision in 2010 by the Full Bench of the FWC interpreted the meaning of 'significant' under s. 426 as being 'exceptional in its character or magnitude when viewed against the sort of harm that might ordinarily be expected to flow

from industrial action in a similar context.’¹¹⁵ On this basis, the FWC rejected an application by Woodside. This interpretation has also been subsequently adopted in other decisions relating to applications under s. 423.¹¹⁶

Applications under s. 423 and s. 426 are very rarely successful. Other than the Schweppes case (where both employees and the employer jointly applied for termination — see box 27.4), the FWC has not made any orders under s. 423 in the 30 applications that have been made since the FW Act was introduced. Similarly, not one of the 11 applications under s. 426 have been successful. This contrasts with applications to suspend or terminate under s. 424 (where an action threatens to endanger a person’s life, personal safety, health or welfare) which are much more commonly approved (as discussed further below).

A variety of stakeholders have argued the threshold for significant harm under s. 423 and s. 426 should be lowered or modified.¹¹⁷ Alternative approaches were proposed by participants, including:

- clarifying in legislation that ‘significant’ should attract its ordinary meaning (‘important or of consequence’) and that harm need not be exceptional to be regarded as significant (AHEIA, sub. DR297, National Farmers’ Federation (NFF), sub. DR302; Minter Ellison, sub. DR314; AMMA, sub. DR322; BHP Billiton, sub. DR362; MCA, sub. DR363)
- changing the threshold for intervention to harm that is unreasonable, or that has a serious adverse impact on the employer or other affected party (CCIWA, sub. 134; Master Builders Australia (MBA), sub. DR290)
- giving the FWC the power to terminate industrial action where the harm caused by the action ‘outweighs any legitimate purpose of the action’ (PwC, sub. DR318, p. 5).

While the FWC has certainly set a high bar, whether the bar has been set *too* high and change is warranted is debatable.

The FWC’s current interpretation of ‘significant’ appears to be unworkable in all but the most egregious of circumstances. Defining significant as being exceptional when compared with industrial action in a similar context ignores the important role that context can play in causing or magnifying the economic harms of industrial action (for example, if an enterprise operates in an industry where disruption is particularly costly). As noted by Minter Ellison:

¹¹⁵ *CFMEU v Woodside Burrup Pty Ltd and Kentz E & C Pty Ltd* (2010) FWA 6021.

¹¹⁶ *Prysmian Power Cables and Systems Australia Pty Ltd v NUW, CEPU, AMWU* (2010) FWA 9402.

¹¹⁷ Including Brendan McCarthy, sub. 43; CCIWA, sub. 134; ACTU, sub. 167; Australian Shipowners Association, sub. 206; APPEA, sub. 209; Minter Ellison, sub. 239; National Farmers Federation, sub. DR302; Toll, sub. DR312; AMMA, sub. DR322;

... in some industries an employer can lose tens of millions of dollars through industrial action. The mere fact that this would be an ‘expected’ consequence of industrial action in that industry does not mean that it is not significant. (sub. 239, p. 7)

Indeed, this was relevant in the *Woodside* case, where the FWC concluded that the potential losses from industrial action identified by Woodside (approximately \$3.5 million a day) were a function of the large size of the project, and thus were not significant when considered in the context of the project as a whole.

Some participants have argued that rather than being an illustration of an incorrect definition of significant harm, the *Woodside* case was instead an example of the FWC potentially misapplying that definition to the facts of the case (Stewart, McCrystal and Howe, sub. DR271). They suggested that the substantial harms to other parties, such as other contractors and their employees, arose from the unusually high level of interconnectivity and dependence in the project, and that these harms could have reasonably been interpreted as outside of the ordinary harms to be expected from industrial action, and thus within the FWC’s definition of significant harm.

There are good reasons for setting a relatively high threshold for significant economic harm to suspend or terminate industrial action.

- If industrial action could only be used where it would cause few harms to a bargaining participant, it would have a negligible effect on negotiations, and employees would have little incentive to undertake it. Doing so would lead to a loss of wages without corresponding pressure on employers to meet demands for wage increases. As noted by the Australian Education Union in its submission:

Industrial action always adversely affects the employer/s and employees involved and it always adversely affects in significant ways a host of ‘third parties’. This is its purpose: to create pressure to influence one side in a bargaining situation to make decisions they otherwise would not. (sub. 63, p. 15)

- Lowering the threshold for termination of disputes may also have the unintended effect of increasing the prevalence of industrial action. Termination triggers a determination by the FWC if agreement is not reached following a 21 day negotiating period. Accordingly, if a party believes that they would get a more favourable outcome from a determination by the FWC, they may undertake industrial action in the hope that it will be terminated. Indeed, under the former conciliation and arbitration system, ‘stoppages were often used to instigate proceedings in the conciliation and arbitration tribunals’ (Briggs 2006, p. 347). Thus lowering the threshold for termination carries the risk of returning the incentives for industrial action that existed under the previous system. It may offer some comfort to those employers that already experience industrial action under the current system, but in doing so cause harm to an entirely new group of employers. Ai Group also expressed similar concerns, arguing that it is important for a high bar to be set for termination and arbitration of disputes (sub. DR346, p. 56).

Nevertheless, it does appear that the *Woodside* decision set the bar too high when applying the test for significant harm. While the powers under ss. 423 and 426 should be used

sparingly, this should not extend so far as to effectively consign these powers to irrelevance. The question is whether any attempt to resolve or clarify this issue through black letter law would give the FWC greater scope to intervene in some intractable and highly damaging disputes, while avoiding unintended consequences and preserving the ability to use industrial action as a legitimate bargaining tool. Attempting to prescriptively define seemingly nebulous words such as ‘significant’ can be a vexing issue in public policy, and the FWC is placed in the unenviable position of having to interpret and apply such definitions.

Ultimately, the Productivity Commission sees merit in clarifying that the word ‘significant’ should be interpreted as having a plain meaning of ‘important or of consequence’. The FW Act already lists factors to be considered by the FWC when making an assessment of significance, and these factors should continue to be relevant. As described in the Explanatory Memorandum to the Fair Work Bill 2008, it should be made clear that intervention should require harm to be more serious than merely suffering of a loss, inconvenience or delay.

Regardless of the definition or threshold of significance chosen, there will inevitably be some exceptional cases that creep between any legislative distinctions of whether harms are significant or not. However, there are major dilemmas in attempting to tailor legislation to cater for all exceptions. Requiring the FWC to apply its judgment is still, on balance, the right answer. This will be particularly so with the Productivity Commission’s recommendations to improve FWC appointment qualifications and selection processes (chapter 3).

RECOMMENDATION 27.2

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).

Suspension or termination should not require both parties to be harmed

A peculiarity with s. 423 in its current form is that to suspend or terminate industrial action initiated by employees, the action must cause significant economic harm to *both* the employees and the employer. By contrast, to suspend or terminate a lockout by an employer requires that only the employees be significantly harmed.

The apparent effect of the current wording is that s. 423 is ineffective for dealing with employee industrial action that is causing significant harm to an employer. It would seem to be rare and counterintuitive for employees to choose to engage in industrial action that inflicts significant harm on themselves. Some stakeholders have also noted that some

forms of industrial action, such as work bans, can inflict substantial damage on an employer without employees suffering a substantial loss of wages. While this is not necessarily a reason for FWC intervention, it does mean that significant harms to both parties will rarely coincide (Minter Ellison, sub. 239).

In its current form, s. 423 may also encourage more drastic response actions by employers, such as a lockout, in order to cause sufficient harms to employees to justify termination. This was illustrated in the *Schweppes* case, where the employer locked its employees out, then applied for termination under s. 423 on the basis that its own lockout was harming the employees (box 27.4).

Given these shortcomings, s. 423(2) of the FW Act should be amended to require that *either* the employer *or* employees must be suffering significant economic harm in order for the FWC to suspend or terminate employee industrial action, similar to the current arrangements for employer response actions under s. 423(3).¹¹⁸ There also should be an explicit stipulation that a party cannot apply to have its own industrial action terminated — for example, on the basis of ‘self-harm’ — to limit the capacity for parties to initiate and terminate their own industrial action in pursuit of arbitration.

This proposal was opposed by some participants.¹¹⁹ Opponents generally argued that such a change would reduce the capacity for employees to take effective industrial action. However, as noted previously, the bar for ‘significant harm’ is set very high, meaning that most employee industrial action would likely be unaffected by such a change.

RECOMMENDATION 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.

¹¹⁸ This proposal was supported by MBA, sub. DR290; Australian Public Transport Industrial Association, sub. DR292; AHEIA, sub. DR297; NFF, sub. DR302; Toll, sub. DR312; AMMA, sub. DR322; Aged and Community Services Australia and Leading Age Services Australia, sub. DR328; ACCI, sub. DR330; BCA, sub. DR337; RCSA, sub. DR343; SAWIA and WFA, sub. DR352; MCA, sub. DR363.

¹¹⁹ Including the CPSU SPSF Group, sub. DR270; National Foundation for Australian Women, sub. DR288; QNU, sub. DR309; CPSU (PSU Group), sub. DR332; Queensland Government, sub. DR338.

Intervention is more common in disputes that threaten health or safety

The FWC must suspend or terminate proposed industrial action where it threatens to endanger the life, personal safety, health or welfare of the population or part of it, or cause significant harm to the Australian economy or an important part of it (s. 424). In contrast to ss. 423 and 426, the FWC appears to intervene more frequently in these cases, having made orders to suspend or terminate industrial action in more than half of applications brought under s. 424 since 2009.

One consequence of this relatively low bar is that employees in some sectors, particularly parts of the public sector, that are focused on delivering health services or in maintaining public safety (such as nurses, paramedics, police officers, firefighters, prison officers and child protection workers) can find it difficult to take industrial action, as:

... there is a strong prospect that practically any effective (as opposed to merely symbolic) industrial action taken by employees in the public health sector will be exposed to ready termination under s. 424(1)(c) of the FW Act. (ACTU, sub. 167, p. 237)

For public sector employees in particular, it means they cannot so easily countervail the Government's bargaining power (as discussed in chapter 24).

One of the reasons for the low bar under s. 424 is that the section requires that the FWC *must* act if it is satisfied that the industrial action would threaten to endanger the personal safety, health, welfare or life of a person, with no regard to the magnitude of the threat or risk. This contrasts with ss. 423 and 426, which require the FWC to be satisfied not only that harm is occurring, but also that it is 'significant'. This means that industrial action that may seem relatively benign may still face FWC intervention — the Australian Education Union (sub. 63) gave the example of teachers in the Northern Territory, who proposed to take industrial action by taking attendance rolls manually, rather than electronically, and not provide it to school administrators. The proposed action was found to threaten endangerment to personal health and safety or welfare, and was suspended by the FWC.

One proposed approach to address the perceived heavy handedness of the existing provisions would be to give the FWC greater discretion to allow industrial action to continue if the FWC is satisfied that the risks to health or safety from the action are acceptably low.¹²⁰ This could potentially reduce the number of cases where relatively harmless industrial action is terminated. However, it may lead to highly variable and subjective decisions — some FWC members may be reluctant to be responsible for allowing an ex post harmful action to have proceeded, leading to overly cautious decisions, while others may set a very high bar for intervention, as is the case with ss. 423 and 426.

¹²⁰ This proposal was supported by the Queensland Government (sub. DR338).

Many employer participants¹²¹ opposed granting the FWC such discretion. Criticisms of such an approach included that personal safety should always take primacy over the economic and bargaining interests of the parties, that the FWC was not well placed to make such precise assessments of the magnitude of the risks involved, and that it would be difficult to resolve questions of accountability if harm eventuated. Some employer groups also dismissed examples of potential misapplication of s. 424 raised by union participants as anomalous or isolated examples (Victorian Employers' Chamber of Commerce and Industry (VECCI), sub. DR339; Ai Group, sub. DR346) — although, perhaps unsurprisingly, many employers did not take a similar view when discussing individual examples relevant to ss. 423 and 426.

Alternatively, some participants proposed that s. 424 could be improved by removing the reference to harm to 'welfare' as grounds for termination. One group of academics argued that the reference, and recent interpretations¹²² by the FWC to extend welfare to include stress or anxiety, made the section 'impermissibly broad':

... it does not take any great stretch of the imagination to find other groups of individuals who may be at risk of stress and heightened anxiety across a range of social and other service sectors if their access to those services was interrupted by industrial action. This cannot constitute an appropriate bar for intervention in industrial action — which by its very nature causes stress and anxiety both to the participants themselves and any affected third parties. (Stewart, McCrystal and Howe, sub. DR271, p. 20)

The Community and Public Sector Union (CPSU) SPSF Group also noted the broadness of the welfare concept, particularly in the public sector context:

Child protection workers or prison officers quickly fall foul of the 'threats to the welfare of the population or part of it' which essentially denudes them of a right to strike which the Act is designed to confer. (sub. DR270, p. 21)

It is also worth noting that welfare is absent from the International Labour Organization's guidelines about when industrial action should be terminated:

To determine situations in which a strike could be prohibited, the criterion which has to be established is the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population. (ILO 2006, p. 119)

While the ILO guidelines should not be considered to be binding (chapter 30), they do provide some perspective on the peculiarity of the reference to welfare in s. 424. Overall, the Productivity Commission sees merit in removing this reference, noting that consideration of factors such as stress or anxiety would still remain relevant where they were substantial enough to endanger a person's life, personal safety or health.

¹²¹ Including MEA, sub. DR304; AHEIA, sub. DR297; ACCI, sub. DR330; VECCI, sub. DR339; Ai Group, sub. DR346; BHP Billiton, sub. DR362; CCIWA, sub. DR323.

¹²² For example, in *Monash University v National Tertiary Education Industry Union* (2013) FWC 5124

RECOMMENDATION 27.4

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.

Aborted strikes

Aborted strikes allow employees to impose costs on their employers while bearing little or no costs to themselves. This poses a problem for public policy. Industrial action should be supported by law where it is a necessary (if undesirable) step to settling a dispute. However, where industrial action imposes no cost on one of the parties, it will not have this desirable effect.

It may be argued that unions do not have an incentive to repeatedly undertake aborted strikes, as they would undermine the credibility of future threats of strike action — perhaps invoking the story of the ‘boy who cried wolf’. However, the employer bears the greatest risk if it ignores a notice of strike action under the assumption it will be aborted. Further, if employees are able to identify whether their employer has put in place a contingency plan, they can choose whether to proceed with strike action or not based on what will maximise damage to their employer. This asymmetry of information and risk can make aborted strikes an effective industrial tactic.

Given that strikes may be withdrawn for legitimate reasons, such as a sign of good faith or if a negotiated outcome is reached, it would be inadvisable to attempt a blanket prohibition on aborted strikes. Such a prohibition would eliminate any incentive for employers and employees to attempt to negotiate once a union has ‘crossed the Rubicon’ by providing notice of a strike. Indeed, as noted by the Queensland Council of Unions:

On the topic of aborted strikes, the QCU would be unsure of the remedy. It would be absurd to suggest that a tribunal order union members to undertake industrial action that had been threatened as part of a campaign. (sub. 73, p. 33)

The 2012 post-implementation review of the FW Act recognised the use of aborted strike actions as an industrial tactic, but ultimately concluded that sufficient remedies were available under good faith bargaining obligations:

... the FW Act already contains a mechanism for addressing this conduct under its good faith bargaining provisions. It is almost certainly open to an employer who is subjected to ‘aborted strikes’ to apply to the tribunal for an order under s. 230 restraining conduct involving the giving of notice by a bargaining party who does not pursue the industrial action that has been notified. Whether an order should be made will obviously depend on the facts and the reason why the industrial action wasn’t taken. We acknowledge that to date no bargaining order has been issued to stop or limit the taking of industrial action. However, the Full Bench in Boral

has provided a clear indication that this remedy is available. (McCallum, Moore and Edwards 2012, p. 184)

However, it is not clear that this avenue adequately addresses the problem. First, whether the good faith bargaining requirements *would* prohibit such conduct remains untested. Indeed, as the Panel has acknowledged, there are no examples of the requirements being used in this fashion. Second, such a response would require the employer to demonstrate that the union had already repeatedly engaged in aborted strikes. Accordingly, it would provide little deterrence of such behaviour or remedy for the employer until significant one-sided damage may have already occurred.

There were two proposals by participants for addressing the use of aborted strikes.

First, the Qantas Group (sub. 116) suggested that where employees unilaterally withdraw notice of an industrial action, and where the employer has already commenced a reasonable contingency plan in response (such as rescheduling services), the employer should be entitled to:

- dock the wages of employees covered by the relevant protected action ballot for the duration of the business's contingency response (which may be longer than the notified action where it has ramifications beyond the notified period), without this exposing the employer to employee response action
- stand down the employees covered by the relevant protected action ballot order because they cannot usefully be employed as a consequence of the contingency plan.

This proposal was also supported by numerous participants.¹²³ To illustrate how such a policy might operate, take the 7 October 2011 example provided by the Qantas Group (sub. 116). The TWU provided notice of a two hour strike for all airports, which was subsequently withdrawn following the cancellation of 17 flights and the rescheduling of 19 other flights. In this case, because the strike was withdrawn after Qantas implemented the contingency plan (the cancellation and rescheduling of flights), under the proposed policy, the airline would be able to stand down the relevant employees without pay for the periods when they otherwise would have been providing services to the cancelled or rescheduled flights.

Overall, the Productivity Commission sees merit in this remedy. It would reduce the impact of aborted strikes on employers, while maintaining the incentive for parties to continue negotiating and cancel impending strike actions where it is in the interests of both employees and employers to do so.

¹²³ Including AHEIA, sub. DR297; NFF, sub. DR302; MEA, sub. DR304; Allens, sub. DR310; AMMA, sub. DR322; CCIWA, sub. DR323; Aged and Community Services Australia and Leading Age Services Australia, sub. DR328; ACCI, sub. DR330; Ai Group, sub. DR346; SAWIA and WFA, sub. DR352; MCA, sub. DR363

Another proposal, put forward by BHP Billiton (sub. 168) and the Business Council of Australia (sub. 173) suggested giving the FWC the power to withhold protected action ballot orders for a specified period, for example 90 days, where the FWC is satisfied that a union has repeatedly and unreasonably notified and withdrawn strike action.¹²⁴ Such a proposal would deter parties from the strategic use of aborted strikes, while still allowing employees to withdraw strike action in good faith or upon reaching agreement with the employer. However, as noted by MEA (sub. DR304) such a power could be vulnerable to considerable subjectivity and uncertainty, as the FWC would have to make inferences about the intentions and tactics of bargaining participants. Further, it would represent a disproportionate ‘belts and braces’ response given the other remedy discussed above.

RECOMMENDATION 27.5

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.

Strike pay arrangements

As mentioned in section 27.2, the existing strike pay arrangements mean that employees can use brief work stoppages or partial work bans to impose substantial administrative costs on their employer, at a very small cost to themselves. Roughly one third of protected action ballots analysed by the Productivity Commission gave approval to strike actions lasting between zero and 30 minutes (figure 27.6), though the share of disputes in which these brief stoppages were actually undertaken may be much lower.

To address this issue, some employers recommended reintroducing a minimum four hour pay deduction for any protected industrial action taken by employees (Qube Ports, sub. 123; AHEIA, sub. DR297; MBA, sub. DR290; Toll, sub. DR312). This was previously the case under the WR framework from 2006 to 2008. However, this would be likely to discourage graduated, less disruptive forms of industrial action, as employees would have no incentive to undertake industrial action lasting less than four hours. It would also impose an inequitable barrier to industrial action, as employees who could not afford to sustain a loss of four hours of wages would effectively be precluded by regulation from undertaking industrial action of any duration. Accordingly, this report does not

¹²⁴ This proposal was also supported by AHEIA, sub. DR297; NFF, sub. DR302; Allens, sub. DR310; AMMA, sub. DR322; CCIWA, sub. DR323; Aged and Community Services Australia and Leading Age Services Australia, sub. DR328; ACCI, sub. DR330; Ai Group, sub. DR346; SAWIA and WFA, sub. DR352; MCA, sub. DR363

recommend the reinstatement of such a provision (though the four hour minimum deduction should continue to apply to *unlawful* industrial action).

Another proposal would be to designate that if protected industrial action lasts less than a designated short time period (for example, 15 minutes), then an employer would be permitted to choose between either deducting the full 15 minute period or simply paying the employees. This would allow an employer to avoid the payroll costs of withholding wages for short periods, and would reduce the incentives for short-duration strikes.

Some employers disagreed with this approach (MBA, sub. DR290; MEA, sub. DR304; ACCI, sub. DR330). Sometimes this reflected their principled opposition to any form of strike pay. Others suggested that the proposal could actually create incentives for more frequent brief stoppages. However, an employer facing this problem would simply choose to deduct wages (rather than paying them), which would discourage such conduct. Others raised the possibility that employers might be coerced to pay for brief periods under the threat of further strike action. However, as is currently the case, it should be explicitly unlawful for an employee or a union to ask an employer to pay for any period of industrial action.

Other participants were supportive of such a proposition (CPSU SPSF Group, sub. DR270; APSC, sub. DR299; NFF, sub. DR302; BCA, sub. DR337; Queensland Government, sub. DR338). For example, the Australian Public Service Commission (APSC) stated:

We support the Commission's [recommendation] to provide employers with greater discretion to make or not make deductions from wages for short work stoppages. In recent cases of short stoppages, for example ten minutes, APS employers reported a significantly greater cost associated with processing deductions than from the impact of the stoppage itself. (sub. DR299, p. 6)

A related issue is the deduction of pay for partial work bans. Some participants argued that the current requirements are:

... particularly onerous for employers where employees engage in a work ban that does not prevent the employees from performing their normal duties (or, if so, only to a limited extent) but where it is extremely difficult (or cost prohibitive) to calculate and administer the deduction. (Qantas Group, sub. 116, p. 11)

Other employers noted that the existing formula for pay deductions makes reference to the amount of time spent performing a particular duty, rather than the impact the loss of that duty may have on the employer (BHP Billiton, sub. DR362; MCA, sub. DR363). They suggested the employer should have the capacity to reduce pay to zero where the impact on the employer is profound. However, this is already the case under the existing rules — an employer can opt to refuse the partial performance of work by an employee and withhold payment in full.

Many employers supported a proposal that employers should have the discretion to deduct a minimum of 25 per cent of normal wages for any partial work ban that impacts on the performance of normal duties (Ai Group, sub. DR346; APSC, sub. DR299). Any deduction

above 25 per cent would continue to be proportionate to the impact of the partial work ban, assessed on an objective basis.

While this approach may help an employer avoid the administrative difficulties from calculating pay deductions, it may lead to similar (albeit smaller) undesirable effects as the minimum four hour pay deduction that existed previously in the WR framework (CPSU (PSU Group), sub. DR332). It could also impose a disproportionate penalty on employees for undertaking very minor actions, which the Queensland Council of Unions (sub. DR305) argued could further aggravate disputes. Further, the existing rules around strike pay allow employers to choose to pay employees at their full wage, while accepting the partial performance of work. This means employers can already avoid the costs or complexity of making a pay deduction if they wish. As such, the Productivity Commission does not recommend a change to the existing arrangements for deduction of wages for partial work bans.

RECOMMENDATION 27.6

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.

Employer response action

At present, protected industrial action by employers is limited to a lockout in response to protected industrial action by employees. This means employers must take an ‘all or nothing’ approach if they want to use countervailing pressure to reach a negotiated agreement. In some cases, employers may be forced to choose a dramatic and disproportionate response, even where the industrial action being undertaken by employees may appear to be relatively minor (Qube Ports, sub. 123).

One recent example in the manufacturing sector involved an employer locking out its employees in response to a ban on paperwork. The employer stated that the paperwork ban would have affected quality control processes, leaving it with no choice but to institute the lockout (ABC 2015). This led to the employees staging a ‘sit in’ in the factory’s lunchroom for more than four days, until the parties agreed to return to the negotiating table (Toscano 2015).

In addition, the loss of profit and possible reputational damage associated with a lockout may make it a prohibitively expensive action for some employers to take. This means that some employers may be forced to bear the cost of ongoing industrial action by employees, with no viable avenue to end the dispute, other than conceding to their employees bargaining claims.

One option to address these drawbacks would be to allow employers more graduated options in response to employee industrial action.

A threshold question is whether the existing legislation could already permit this. At present, a lockout is defined under s. 19(3) as when an employer ‘prevents the employees from performing work under their contracts of employment without terminating those contracts’. However, the exact boundary of this definition is yet to be clarified. As noted by Creighton and Stewart, the current definition of a lockout:

... would clearly cover the ‘classic’ situation of an employer locking its gates or doors and refusing to allow some or all of its employees to attend for work. But it is unclear whether it would extend to a situation where, for example, an employer reduces the working hours (and hence the pay) of a particular group. (2010, p. 773)

Accordingly, while it is possible that the existing legislation might allow more options than a standard lockout, this position is insufficiently clear for practical action by employers. This suggests that any graduated options would have to be clearly specified in the FW Act.

Some disagree with such an option.

One concern was that it might lead to escalation of some disputes as employees undertook industrial actions to counter an employer’s response. However, graduated responses would not be mandatory — it would be up to employers to judge whether they were inflammatory or otherwise in the circumstances they faced.

Others were concerned that in isolation, it would increase the bargaining power of employers (though this increase, and the relative balance of power between employer and employees, will vary between workplaces). As such, it may reduce the willingness of employees to take industrial action, knowing that the employer will be more likely to respond with action of their own. In its submission, the AWU has expressed opposition to expanding the responses available to employers, arguing that it would increase existing imbalances in bargaining power:

Employers by their very nature have all the cards stacked in their favour. It is for this very reason that unions came to be and legislation was put into place to protect workers from employers, who too often put profit making before the wellbeing and safety of their workers. ... The AWU does not therefore believe that employers need ‘a wider set of options in bargaining that mirror those available to employees’ ... (AWU, sub. 74, pp. 35–36)

An associated observation was that there is less need for employers to have a mechanism for compelling employees to reach a negotiated settlement as stalled negotiations already create incentives for employees to reach an agreement. This is because after expiry of an

enterprise agreement, employees will typically relinquish pay increases while negotiations are in progress.

However, it is not clear that employers always possess a strong advantage over employees with respect to industrial action. Indeed, some employers have argued in submissions that the existing industrial action provisions place employers at a disadvantage:

Presently employers are only able to react (by imposing a lockout) after a union commences protected industrial action while employees have the ability to engage in covert industrial action in the form of ‘go slows’ and the employer is usually powerless to respond. (Manufacturing Australia, sub. 126, p. 6).

The AWU’s concerns about excessive employer bargaining power may also be assuaged by maintaining the current restriction that limits employer industrial action to responses to employee industrial action. This would prevent employers using industrial action pre-emptively to exert pressure on employees early in the dispute. Further, because an employer’s response action would open the door for further employee action (for example, complete work stoppages) without notice, many employers may still be hesitant to undertake partial response action lightly. Finally, employer industrial action that was more graduated, but still caused sufficient harm to employees, health and safety, the economy or third parties, could be suspended or terminated by the FWC for various reasons under ss. 423, 424, 425 or 426.

The Productivity Commission supports allowing the use of graduated employer response actions. Such action would be protected industrial action, and thus would be accompanied by the usual immunity from civil liabilities. Qantas Group (sub. DR295) also suggested that such action should not be able to be a trigger an employee response action. However, this would create an asymmetry with employee industrial action, and is not recommended.

In the draft report, the Productivity Commission sought feedback on what forms of more graduated employer industrial action should be permitted. Forms of graduated employer industrial action proposed by participants included:

- reducing or varying employees’ hours of work (NFF, sub. DR302; MBA, sub. DR290; AHEIA, sub. DR297; CCIWA, sub. DR323)
- instituting limits or bans on overtime (NFF, sub. DR302; MBA, sub. DR290; CCIWA, sub. DR323)
- directing employees to only perform a particular subset of their normal work functions and adjusting their wages accordingly (NFF, sub. DR302; MEA, sub. DR304; AHEIA, sub. DR297).

All of these proposals have merit.

A final question is whether there should be any notice periods for employer actions. The Australian Services Union (sub. 128, sub. DR283) proposed that employer industrial action should be subject to a three-day notice period, similar to industrial action by employees.

The Productivity Commission did not accept this suggestion in its draft report, noting that unlike employees, employers are only permitted to undertake industrial action in response to employee industrial action, and that a notice period would undermine the capacity for employers to use lockouts in a defensive manner. As such, the Productivity Commission maintains its position that a notice period is not required for employer response actions.

RECOMMENDATION 27.7

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.

Remedies for unlawful industrial action

At present, the maximum monetary penalties for unlawful conduct relating to industrial action are \$10 800 (60 penalty units¹²⁵) for an individual, and \$54 000 (300 penalty units) for a corporation. These penalties pale in comparison to both the financial benefits that can be potentially gained by some parties from using (or threatening) unlawful industrial action, and the damages that may be suffered by parties that are the victims of industrial action. This imbalance between the potential gains from unlawful conduct and the existing penalties means that they are currently unlikely to provide effective deterrence.

Further, while parties harmed by unlawful industrial action can seek compensation through the courts, some employers have argued that this avenue is impractical:

Unlawful industrial action is capable of remedy only in common law courts where a tort has to be proved in order to secure damages. In practice, a damages claim is expensive and slow to

¹²⁵ The monetary value of a penalty unit (currently \$180) is set out in s. 4AA of the *Crimes Act 1914* (Cth).

mount and is invariably ‘traded away’ as part of a compromise to a deal. (APPEA, sub 209, p. 41).

Similar observations were made by the Productivity Commission during its previous inquiry into public infrastructure:

While affected parties can seek common law damages against a union (or other party), that process is slow, and fraught when there is a risk of industrial reprisal. (PC 2014c, p. 547)

This means that while civil litigation under common law may help some parties recover the costs of unlawful industrial action if they are willing to spend the time, money and effort to do so, it is unlikely to serve as a strong deterrent across the broader WR landscape.

There is a case for increasing the maximum penalties available under the FW Act for unlawful industrial action. This would allow the FWC and the federal courts the discretion to charge penalties for contraventions of the FW Act that are more commensurate with the losses resulting from unlawful behaviour. This proposal was supported by numerous participants,¹²⁶ with some suggesting that the appropriate increase would be three times the current maximum penalty (MBA, sub. DR290). The appropriate penalty in any individual case would be determined by the presiding judicial officer in accordance with the severity of the unlawful behaviour. A similar recommendation was made by the Productivity Commission with respect to penalties for unlawful industrial activity in the construction sector during the Productivity Commission’s inquiry into public infrastructure (PC 2014c).

The Productivity Commission cannot readily pinpoint the ‘right’ penalty level, but it must be orders of magnitude higher than current levels in order to provide the correct incentive. The penalty levels applying under the *Competition and Consumer Act 2010* (Cth) for anti-competitive practices and other harmful practices affecting businesses and consumers are many multiples of the penalties under the FW Act. False and misleading conduct, unconscionable conduct and failure to provide information under a substantiation notice all involve maximum penalties of \$1.1 million for corporations. The maximum penalty for a wide range of anti-competitive practices (such as misuse of market power, and cartel and exclusionary conduct) is \$10 million.

Any penalty level has to be chosen carefully because courts assess the seriousness of an unlawful act, and then if it is at the highest end, will tend to apply the maximum penalty rate stipulated under statute (*Markarian* (2005) HCA 25). The MBA’s proposal seems to pass a proportionality test.

¹²⁶ Including MBA, sub. DR290 and VECCI, sub. DR339.

RECOMMENDATION 27.8

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.

27.4 What are the likely impacts of these proposals?

As noted earlier in this chapter, the primary goal of the recommendations in this chapter is to provide parties with appropriately aligned incentives when undertaking industrial action. Ideally, this will lead to fewer industrial disputes because parties will reach mutually satisfactory agreements in the knowledge that industrial action can be taken. More specific likely impacts include:

- reducing the time and money spent on compliance issues (such as protected action ballots and strike pay) and legal disputes
- reducing the use of some disruptive industrial tactics, such as aborted strikes, which can come at a disproportionate cost to consumers and firms
- increasing the capacity for employers to use graduated response actions to encourage striking employees to return to negotiations
- the FWC being better empowered to enforce compliance with the industrial action provisions
- some productivity gains for the relevant businesses because of better capacity utilisation and reduced time spent engaged in unproductive strike activity, although it is important not to overstate these.

The incidence of these benefits will be concentrated in certain types of businesses, typically larger enterprises in sectors of the economy with a history of rivalrous conduct by unions and employers. For other parts of the economy, the gains are likely to be smaller because businesses and employees work typically together relatively harmoniously. Protected industrial action is also confined to enterprises where collective bargaining is ensuing — and many businesses and employees lie outside that bargaining framework.

A measured perspective on the gains

The benefits of reform will be significant, but it is improbable that the economywide productivity impacts will be large enough to be meaningfully enumerated against the background of all the other factors that drive productivity. However, some participants considered that the gains from reforms to the industrial action provisions of the FW Act

would be large. For example, AMMA argued that reductions in the ability to take industrial action would contribute in part to a 2–5 per cent increase in labour productivity in the resources sector. This was attributed to both a reduction in days lost to industrial action, and a ‘reduction in the ability of industrial action to contribute to excessive inflation in wages and conditions’ (AMMA, sub. 96, attach., p. 13).

The Productivity Commission has reservations about a projected productivity improvement of this magnitude. As with other sectors, the direct measured value of days lost to industrial action in the resources sector is likely to be small. Even in the coal mining industry, which has had the highest measured rate of disputation over the past five years, industrial disputes only reduced time worked by roughly one quarter of one working day per employee per year (figure 27.1). In its report into public infrastructure, the Productivity Commission reached similar observations about the construction industry:

To place some perspective on the apparent economic implications of industrial disputes, in 2012-13, they reduced time worked by employees in the construction industry by around 0.032 per cent or about 40 minutes per employee per year. This is a fraction of unscheduled absenteeism due to sickness each year. Taking account of idle capital on affected building sites, the estimated effect on economic output is around \$30 million in value added terms in 2012-13 in current prices, or around 0.025 per cent of gross value added in the construction industry. As the effects extend throughout the economy, the economywide GDP loss would be somewhat larger, and is estimated to be around \$40 million in that year ... Many of the apparent losses are internalised by the workers themselves, as workers are not paid wages during industrial disputes ... (PC 2014c, pp. 535–6)

Further, the notion that avoiding inflated wages and conditions (by restricting employee industrial action) would lead to labour productivity gains is flawed. As noted earlier in this chapter, labour costs and labour productivity are quite different things. Indeed, high wages can actually lift both labour and multi-factor productivity, by encouraging capital–labour substitution or innovation in labour saving measures. That being said, reducing labour costs through lower wages can lead to improvements in allocative efficiency, and increases in firm profits and the level of investment.

Some also considered that stronger measures against employee industrial action may improve productivity if employees shift from an adversarial to a cooperative relationship with management. However, cooperative workplace environments are unlikely to be manufactured by legislatively reducing the scope for protected industrial action. If the underlying causes of a dispute remain, restrictions on protected industrial action are likely to merely encourage more covert forms of action, such as shirking, which may have a more enduring adverse impact on productivity than temporary stoppages or work bans. This highlights a recurring theme in this report — that positive WR outcomes are ultimately the responsibility of firms and their employees, and cannot be obtained merely through attempts to regulate behaviour via legislation.

The bottom line: reform is worthwhile

While the gains may not be large enough to be visible at the macroeconomic level, this does not mean they are trivial. It can be expected that the recommendations in this chapter will reduce both conventional measures of industrial action (days lost), but more importantly, some of the more covert forms of action (such as aborted strikes). This will be beneficial for those businesses and sectors where such industrial action strategies have been effective in the past.

28 Right of entry

Key points

- Regrettably, relationships between some firms and unions have become so adverse that highly prescriptive regulation is used to regulate the rights of union officials to enter worksites. However, sufficient evidence has been forthcoming to show why this must often be the case, and cannot be left to negotiation or common sense.
- The provisions governing right of entry are mostly sound in this adversarial context, but at times can still be used for strategic or disruptive reasons by both sides.
- To limit disruptive conduct, there is a strong case for modifying the threshold for the Fair Work Commission to deal with disputes about the frequency of entry by employee representatives.
- Recent amendments to make lunch rooms the default location for discussions between unions and employees have, in some circumstances, caused disruption and disputes between employers and employee representatives.

28.1 Current arrangements

Part 3-4 of the *Fair Work Act 2009* (Cth) (FW Act) gives union officials conditional rights to enter workplaces during working hours. This has long been a right related to the accepted model for employees to organise collectively in Australia, and ideally would occupy no more than a few lines in any legislation. But in reality, it is accompanied by detailed prescriptive arrangements which usually would offer a natural opportunity for regulatory reform.

Union officials can enter a workplace (without an employer's consent) if they have a valid right of entry permit issued by the Fair Work Commission (FWC) and they are entitled to represent workers at the workplace. Permits, valid for three years, can only be issued to an official who the FWC is satisfied is a 'fit and proper person'. The FWC can revoke or suspend a permit on a range of grounds.

Permit holders can exercise their entry rights to:

- investigate alleged contraventions of the FW Act or a fair work instrument (for example, a modern award or enterprise agreement) (s. 481)
- hold discussions with employees during mealtimes and other breaks (s. 484 and s. 490)
- perform inspections under state and territory workplace health and safety laws (s. 494).

When entering a workplace, a permit holder must give written notice of at least 24 hours but no more than 14 days before the intended visit, unless the FWC agree otherwise. Where there is a suspected breach of the FW Act or a fair work instrument, a permit holder can:

- inspect any work, process or object that relates to the breach
- interview any person related to the suspected breach, if the person is:
 - entitled to be represented by the union and
 - willing to be interviewed
- meet with employees if the employees are:
 - entitled to be represented by the union and
 - willing to meet the union
- access records relating to the breach.

28.2 Right of entry can be a contentious issue

Right of entry is often not exercised for disruptive purposes. Indeed, regularly it is exercised in good faith where union officials want to investigate a genuine suspected breach of workplace laws or to speak with members or potential members at the workplace. However, on occasion right of entry issues can be used by unions to disrupt the efficient operation of a workplace (similar to industrial action), or by employers to hinder communication between representatives and employees.

Unlike industrial action, union entry to a workplace is not restricted to periods of enterprise bargaining. Right of entry can be exercised by an authorised union official at any point in the bargaining cycle, subject to many conditions. The rules around right of entry aim to balance the rights of employees to meet with representatives and the rights of employers to conduct their business operations without disruption.

Both employee representatives and employers have submitted during this inquiry that right of entry arrangements are sometimes abused by the other party. The Productivity Commission has also previously observed that right of entry may be used by either side to gain leverage during a bargaining dispute (PC 2014c, p. 516).

Employee representatives can impose significant burdens and costs on employers by exercising rights of entry very frequently, due to:

- the need to prepare and document the visit
- the need to escort the permit holder around the worksite, particularly where workplaces have high health and safety risks
- disruptions to the performance of work by employees.

The Minerals Council of Australia provided the following example of, in its view, ‘the skewed nature of the current regime’:

Between 2011 and 2013, union representatives made more than 550 ‘right of entry’ visits to BHP Billiton’s Worsley Alumina refinery work site to hold discussions with employees, resulting in work stopping and seriously reduced productivity. (sub. 129, p. 34)

Another employer group has estimated that the direct administrative costs of a right of entry visit — taking on average two hours to process and oversee — are \$86.45 an hour for tasks performed by the human resources manager (AMMA, sub. 96). They further estimated that the total costs of a union entry visit are \$200 an hour, with an average duration of four hours per visit. The employer has had 49 entries in the first two months of the year, costing an estimated \$39 200.

Conversely, one employer group noted that entry for discussions during work breaks does not cause the kinds of disruption that employers need protection from, and that unions can instead use safety inspections to flex bargaining muscle (Master Electricians Australia, sub. DR304).

The ACTU submits that excessive visits are sometimes the result of restrictive entry policies by the employer, rather than a union tactic to maximise disruption. According to the ACTU (sub. 167), this was the case in the Foster Wheeler Worley Parsons (Pluto) Joint Venture¹²⁷ — which some employer groups (AMMA, sub. 96; Business SA, sub. 174) put forward as an example of excessive union entries:

In *Pluto* FWA dealt with an entry dispute on a major construction site in a remote site in the North Western region of Western Australia. The site, valued at \$11b, consisted of over 3300 workers, an engineering, procurement and construction management contractor (FWW), twelve to fourteen major contractors and from 50 to 70 lower tier subcontractors.

Amongst other things the head contractor, FWW, insisted in its ‘entry protocol’ that unions meet only with the employees of one contractor at a time. In practice, this meant that even where the official visited this remote site every day of the week, the union could meet only 10 contractors’ employees in that week. (ACTU, sub. 167, p. 343)

Employers can also frustrate the ability of permitted employee representatives to exercise their entry rights in other ways. The ACTU (sub. 167, p. 343) provided numerous examples of this, including employers:

- refusing access to a representative after they had already covered long distances to get to a workplace
- refusing to allow an employee representative to return to a workplace, after exiting briefly to retrieve a pen from their car, without issuing a new entry notice and waiting a further 24 hours

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- claiming that representatives could only enter the site during business hours rather than working hours
 - demanding hard copies of entry notices issued in advance of attendance, rather than electronic copies
 - threatening removal, refusing entry, or refusing access to documentation during investigations of safety breaches, without explanation.

These examples highlight the balancing act that regulations must strike when dealing with entry rights. Many working relationships between union and employer do not require this level of regulation. But when relationships sour, and the extent of the problem registers nationally, intrusive black letter law inevitably follows. The pity is that neither party in a bad relationship can often see where this inevitably leads.

28.3 Areas of potential improvement

Frequency of entry

The FW Act already contains provisions aimed at preventing excessive entry by employee representatives. Section 505A empowers the FWC to deal with disputes about the frequency of entry to hold discussions. The FWC can deal with the dispute by any order it considers appropriate, including by suspending, revoking or imposing conditions on an official's entry permit.

However, the FW Act limits the circumstances in which the FWC can make orders. It can only make orders where it is satisfied that the frequency of entry by a permit holder requires an unreasonable diversion of the employer's¹²⁸ 'critical resources' (s. 505A(4)).

In practice, this has proved a high bar. Employers are required to demonstrate that each visit is a *critical* issue requiring an unreasonable diversion of their resources. This test overlooks the possibility that excessive entries may impose large, unwarranted costs on an employer without necessarily diverting 'critical resources'. Indeed, when considering excessive *frequency* of entries, it would seem more likely that it is the ongoing accrual of the incremental costs of each entry that would be most damaging to employers.

A more fundamental concern, from a policy perspective, is that s. 505A currently places a burden on the employer to prove that the costs of entry would be unreasonable and critical, with no consideration of the relative size of the benefits of entry to employees. Ideally, the

¹²⁸ For clarity, the Productivity Commission has decided to use 'employer's' in this context, though we note and support the use instead of 'occupiers's' in 505A(4) to cover a wider range of businesses who may suffer negative impacts by frequent visits (for example, a lead contractor who is not technically the relevant employer).

entry provisions should seek to balance these costs and benefits. At present, s. 505A effectively assumes that the value of the benefits to employees of entries by representatives is equal to just less than the cost of an ‘unreasonable diversion of the employer’s critical resources’. Where being used for tactical purposes, this is unlikely to be the case. In these circumstances, the costs of entry to a workplace should not have to be critical, before the merits of additional entry should be questioned.

In its submission, Linfox has recommended changes to s. 505A:

[Section 505A] is an unrealistic and irrelevant test. It ought not be about the application of the employer’s resources, but the effect of the excessive entry that is the relevant consideration and there ought be some onus on the permit holder to justify why excessive entry is warranted. ...

Section 505A should be amended so that the level of disruption required to be established by an occupier before the FWC makes orders regarding the frequency of entry to hold discussion is significantly lowered. The current requirement that the occupier must be subjected to an ‘unreasonable diversion of its critical resources’ before the FWC can intervene imposes an excessive imposition on an occupier’s productivity. (sub. 137, pp. 4–5)

The Fair Work Amendment Bill 2014 contained a proposal to repeal s. 505A(4), removing the requirement of an unnecessary diversion of critical resources. The Bill also included amendments s. 505A(6) — which requires the FWC to take into account fairness between the parties concerned — to include consideration of the combined impact on the employer’s operations of entries onto the premises by permit holders of organisations.

Although a small number of inquiry participants¹²⁹ have opposed changes to s. 505A, this proposal has been broadly supported by others,¹³⁰ including both employer and employee organisations. While supporting the proposal in principle, one participant also noted that it may be difficult to quantify the impact of entries on an employer’s operations (MBA, sub. DR290), while another noted that the proposal would be dependent on sensible application in practice by the FWC (MCA, sub. DR363).

In the Productivity Commission’s view, these proposed amendments are broadly sound. An even handed threshold of what constitutes excessive use of entry rights should take into account the benefits of entries for employees and the cumulative costs imposed by strategic use of entry rights by employee representatives. Any change to s. 505A should also take into account the reasons why repeated or costly entries are being made — for example, whether the employer is deliberately inflating the costs or frequency of entries by employee representatives (as claimed for the Pluto project discussed earlier).

¹²⁹ Government of South Australia, sub. DR281 and Queensland Government, sub. DR338.

¹³⁰ CPSU (SPSF Group), sub. DR270; MBA, sub. DR290; AHEIA, sub. DR297; NFF, sub. DR302; Toll, sub. DR312; CCIWA, sub. DR323; NRA, sub. DR327; BCA, sub. DR337; Ai Group, sub. DR346; SAWIA and WFA, sub. DR352; BHP Billiton, sub. DR362; and MCA, sub. DR363.

RECOMMENDATION 28.1

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.

Recruitment of members

Previously, under the WR framework from 1996 to 2008, union officials could only seek entry for discussions in workplaces where the union was bound by an award or enterprise agreement. Since the introduction of the FW Act in 2009 — with unions no longer being bound by particular awards — the right of a union to enter a workplace to hold discussions has instead been conditional on whether employees at a workplace are eligible to be members of the union in question.

Some have argued that the existing provisions have allowed unions to use entry rights primarily to undertake recruitment drives in workplaces where they currently have no members (Housing Industry Association, sub. 169; AMMA, sub. 96; Minerals Council of Australia, sub. 129; BHP Billiton, sub. 168; CCIWA, sub. 134). Numerous employers argued that unions should have no right to access workplaces where they have no members, and that an invitation from a member onsite should be required (ACCI, sub. DR330; HIA, sub. DR319; BHP Billiton, sub. DR362; MCA, sub. DR363 AMEC, sub. DR340).

The primary benefit from allowing entry by unions that do not have any members on site is that it may facilitate greater choice by employees about the party they wish to represent them. Of course, site entry is not the only way that a union could potentially gain access to potential members. For example, other methods could include by:

- telephone or email contact
- mail to employees' homes
- meetings at locations outside the firm.

However, unless potential members choose to proactively approach the union themselves, initial communication with these individuals could be difficult. The workplace provides a direct link to potential members. Moreover, the first two of these alternative recruitment

avenues do not allow for the ‘to and fro’ discussion that is usually required for people to be properly informed. The third avenue is feasible, but forcing unions to operate outside the premises appears unreasonable if there is scope for non-disruptive meetings in the workplace. The Productivity Commission is conscious that this is not a presumption that should be made.

The issue then is whether the conduct of employee representatives in the workplace is proportionate to their legitimate purpose and non-disruptive. Frequent visits might start to resemble spam mail. Equally, visits that are intended mainly to make employees aware of a union’s attractiveness to them can be abused if they become the vehicle for disruptive turf battles by competing unions — referred to as demarcation disputes. These disputes have the potential to damage workplace harmony, especially where their effects spill over to employees who may feel uncomfortable or intimidated by the presence of union officials, and employers, who are required to facilitate and accommodate the union’s visits. In its submission, Linfox has described a period where the National Union of Workers (NUW) made numerous entries to Linfox’s Truganina site in an attempt to recruit members:

In the period from August 2013 to October 2013, Linfox was provided with multiple entry notices under the FW Act from officials of the National Union of Workers (NUW) to enter the Truganina site under s. 484 of the FW Act. ... While the stated purpose for effecting entry was to hold discussions with employees eligible to join the NUW who wished to participate in those discussions, the real purpose of the officials was to recruit employees to join the NUW and to agitate for a separate enterprise agreement to cover just the Truganina site separate to the national agreement between Linfox and the TWU.

NUW permit holders exercised rights under s. 484 on an excessive number of occasions. They consistently insisted on entry to the lunchroom at the site, relying on the ‘default arrangements’ sanctioned by s. 492 of the FW Act. Having gained access to the lunch room the NUW officials engaged in insistent and unwanted approaches to employees to try to get them to join the NUW (in preference to the TWU which had traditionally represented them at the site). They also approached employees in the car park at night as they left the site at the end of their shift. Many employees felt intimidated and harassed by this conduct and Linfox management received numerous complaints — both written and verbal — directly from employees and through the TWU. (sub. 137, pp. 2–3)

Recommendation 28.1 above already provides one proposed avenue for employers to address potential abuse of entry rights by a union to the detriment of their operations. The question is whether there is a need for any further ex ante restrictions on unions entering workplaces where they have no members.

In the draft report, the Productivity Commission outlined a proposed restriction on entry by such unions to no more than twice every 90 days. This was an effort to indicate how a balance may be struck, giving a union some opportunity to communicate what they can offer to employees and to leave contact details and promotional material with them, while limiting the capacity for constant entries and confrontations. Having made initial contact, the unions concerned could use all the other available mediums to communicate with those employees who were interested in further contact (mail, telephone, email and so on).

While this proposal was supported by several employer participants,¹³¹ many employers offered only partial or qualified support. Some argued that visits should be limited to be even less frequent, for example two, three or six times a year (MCA, sub. DR363; MTO, sub. DR324; BHP Billiton, sub. DR362; Toll, sub. DR312).

Employee organisations suggested that this proposal would be problematic on a number of grounds, including that:

- such a rule could be unsuited to workplaces operating on a continuous roster or shift basis. The QNU (sub. DR309) noted that where employees work in three shifts every 24 hours, at least six visits in 90 days would be required to have the same outcome as two visits in a different workplace. Similar concerns may arise in workplaces with itinerant or temporary workforces (Centre for Employment and Labour Relations Law, sub. DR313; QCU, sub. DR305)
- a prescriptive cap on visits could be disproportionately low for workplaces with a large workforce — two occasions may provide plenty of time to consult with a smaller number of employees, but may be challenging in a workplace with hundreds or thousands of employees (Michael Clifford, QCU, trans. 610)
- basing union entry rights on whether the union has members onsite will lead to disputes between employers and unions about whether there are union members present (QCU, sub. DR305, trans. 610). While this can be resolved through member certification procedures by the FWC, this would also increase the regulatory burden on parties. It may also incentivise unlawful actions by some employers to discourage union membership in their workplaces.

The divergence of opinions on this issue reveals the challenge with applying an arbitrary rule to diverse circumstances. In one firm, a given number of visits may be considered excessive by employers, while in another workplace, the same number of visits could be manifestly inadequate for the size and nature of the workforce.

Some participants suggested that adequate protection against abuse would be better addressed through the capacity of the FWC to deal with disputes about the frequency of entry (ASU, sub. DR283; Centre for Employment and Labour Relations Law, sub. DR313). The Productivity Commission agrees with this view, and considers that the approach proposed above in recommendation 28.1 would more directly target occasions where right of entry has adversely affected the employer's operations.

To leave no doubt, the Productivity Commission envisages that the reform in recommendation 28.1 above would be drafted to provide an opportunity for relief in situations of apparently excessive entry, including where no members of the relevant union were employed by the firm.

¹³¹ Including AHEIA, sub. DR297; MBA, sub. DR290; NFF, sub. DR302; NRA, sub. DR327; LASA and ACS, sub. DR328; Ai Group, sub. DR346

Location of discussions with employees

Rules dictating the location of discussions between employees and union representatives are also a contentious issue. Employers have generally favoured arrangements that provide them with greater discretion to choose where discussions are held, while unions have tended to support rules that give them more expansive access to workplaces. The key mischiefs underpinning this issue are that employers may designate locations that hamper constructive interactions between unions and employees, while unions may use particular meeting locations to disrupt operations or workplace harmony.

Since recent amendments¹³² to s. 492 of the FW Act in 2013, discussions are now required to be held in meal break rooms if the employer and employee representatives cannot reach agreement on a different location. Prior to this, employee representatives were required to conduct discussions in a specified room or area of the premises in accordance with a ‘reasonable’ request by the employer. Such a request would be considered unreasonable, among other things, if the location was not fit for the purpose of holding discussions, or if the request was made with the intention of intimidating, discouraging or otherwise making it difficult for a person to attend a discussion (for example by requesting a location that is not easily accessible during mealtimes or other breaks).

Employers have generally been opposed to the recent changes.¹³³ AMMA argued that ‘a substantial amount of case law has been devoted to interpreting the meaning of the lunch room access provisions since they were introduced’ (sub. 96, p. 223). In some instances, this has led to disputes where union officials have allegedly insisted on holding discussions in disruptive, unsafe or costly locations, including crib rooms that were inside the cabin of a dragline excavator (BHP Billiton, sub. 168; Minerals Council of Australia, sub. 129), or in a restricted area where explosives were stored (AMMA, trans. p. 765).

This demonstrates the failing that often accompanies the use of black letter law in circumstances that are by their nature undefinable.

Aside from operational concerns, the effect on employees themselves should be considered. It has been suggested by some inquiry participants that some workers have felt inconvenienced or intimidated by the presence of union officials in meal rooms during their breaks (Mitolo Group, sub. 213; BHP, sub. 122; Rio Tinto, sub. 122; AMMA, sub. 96, sub. DR322; and CCIWA, sub. DR323).

Employee groups have argued that the recent amendments were necessary to prevent employers from designating locations that are inconvenient, uncomfortable or intimidating for workers (SDA, sub. 175 and TCFUA, sub. 214). Examples raised in submission included:

¹³² *Fair Work Amendment Act 2013* (Cth)

¹³³ Including ACCI, sub. DR330; MTO, sub. DR324; PwC, sub. DR318; AMMA, sub. DR322; CCIWA, sub. DR323; BCA, sub. DR337; Ai Group, sub. DR346

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- a senior member of management standing and eating his lunch in the corridor between the meals area and the room allocated for right of entry
 - discussions being held in a semi-enclosed area in the direct sun
 - employees and a union organiser being required to meet in the women's toilets area, with the union representative standing in the doorway to the toilet, female employees standing in the toilet area, and the male workers standing outside.

However, under the previous arrangements, these circumstances may well have been deemed unreasonable, not fit for purpose or intended to intimidate — though the ACTU (sub. 167) argued in its submission that establishing whether it was the intention of an employer to discourage or intimidate employees from attending is almost an impossible task.

The primary drawback of prescriptively enshrining a default location (that is, meal break rooms) in statute, as the current arrangements do, is that it will usually require sacrificing some degree of flexibility should a dispute about location arise. On many occasions, a meal or break room may be the most suitable location for discussions (especially given that discussions may only be held during breaks). However, in other circumstances, a different venue may be more suitable, but parties may nonetheless deliberately push the boundaries to create disputes and disruption, as in the dragline and explosives area examples above.

Rather than recommending a prescriptive default location, the 2012 review of the Fair Work Act also recommended that disputes over the location of discussions should be addressed through giving the FWC greater discretion to determine a reasonable location that balances the interests of employees, unions and employers (McCallum, Moore and Edwards 2012).

A recurring theme in this report has been that the FW Act should focus on the substance of a matter, rather than adherence to prescriptive requirements. The recent amendments appear to be contrary to this principle, and *prima facie* the Productivity Commission sees merit in a return to a more flexible, principles-based approach to regulating disputes about discussion locations.

However, the evidence put to this inquiry from both sides on this issue is driven by extremes. There was little discussion by participants of how these amendments may have affected the broader majority of workplaces. The Department of Employment should consider this closely in its post-implementation review of the *Fair Work Amendment Act 2013* (which includes the recent amendments to right of entry).

29 Migrant workers

Key points

- Migrant workers are more susceptible to substandard working conditions (such as being underpaid) than Australian citizens.
 - This reflects their sometimes limited English language skills, limited knowledge about their workplace rights and entitlements, and dependence on their employer for their visa. In some instances, migrant workers may willingly accept substandard conditions.
 - Migrants may be reluctant to report an exploitative employer because they fear either the Fair Work Ombudsman (FWO) or their employer will notify the Department of Immigration and Border Protection (DIBP) of work in breach of their visa.
- A mixed approach, combining more robust enforcement policies with improved information provision, appears the most effective way of reducing instances of exploitation.
 - The main regulators (the FWO and the DIBP) should improve information on their websites to be more accessible to migrants
 - The FWO should be given additional resources for its monitoring and enforcement activities
 - Penalties under the *Fair Work Act 2009 (Cth)* (FW Act) for keeping false or misleading documents should be increased to be more in line with those in the *Migration Act 1958 (Cth)* (Migration Act).
- The coverage under the FW Act of migrants that work in breach of the Migration Act has prompted confusion. The Australian Government should clarify in the FW Act that employment contracts for such workers are valid and the FW Act applies.
- Information sharing between regulators can also discourage migrants from reporting instances of exploitation. Subject to arrangements that ensure that this is lawful, the FWO should not share any information with the DIBP about a migrant who has only breached their employment-related visa conditions. To complement this, the DIBP should continue to consider a migrant's circumstances when deciding whether to cancel their visa.
- Regulators may struggle to recover workers' (including migrant workers') unpaid wages and entitlements from businesses that enter insolvency. These businesses may become insolvent because they face commercial difficulties or are looking to wind-up or restructure. However, some do so to avoid paying their liabilities.
 - In addition to provisions in the *Corporations Act 2001 (Cth)*, some provisions in the FW Act that are currently being tested in the courts may enable the FWO to pursue company controllers for compensation of workers (in addition to any penalties for breaching the FW Act). If the courts' judgments do not allow for this, the FW Act should be clarified to allow pursuit.
 - In some cases, finding the directors of insolvent companies can be difficult. A Director's Identification Number should be implemented to help with this.

Migrant workers have long been an important part of Australia's economy. However, evidence shows that some employers provide them with lower wages, reduced entitlements and fewer protections than required by the *Fair Work Act 2009* (Cth) (FW Act). This chapter examines the ways in which migrant workers interact with the national workplace relations (WR) system.

29.1 Number of migrant workers in Australia

Migrants — either permanently or temporarily living in Australia — account for a significant share of Australia's workforce. In the year to June 2015, Australia accepted around 190 000 permanent migrants through its Migration Programme, which comprises skilled workers and people reuniting with families, and around 13 750 refugees and migrants for other humanitarian reasons (DIBP 2015a).

Over the same period, Australia issued around 650 000 temporary migrant visas with some working rights (DIBP 2015a, 2015e).¹³⁴ The majority of these visas were issued to students and working holiday makers (on both 417 and 462 visa¹³⁵). There were 730 000 temporary migrants in Australia at June 2015 (table 29.1). Overseas students made up 51 per cent of temporary migrants, a quarter were temporary skilled workers on 457 visas, and about a fifth were people on a working holiday visa. A small proportion were overseas graduates remaining in Australia after completing their studies.

Employers use migrants on 457 visas to fill positions that require a certain amount of skill, and that cannot be filled by the local population (DIBP 2015d).¹³⁶ Of the 188 000 workers on 457 visas in Australia at June 2015 a bit more than half¹³⁷ were the primary visa applicants, while the remainder were applicants' family members (DIBP 2014b). The annual intake of workers on 457 visas has almost doubled over the past decade (figure 29.1).

¹³⁴ This figure includes working holiday (417 and 462) visa holders, students, temporary skilled visa holders (457s) and temporary graduates. This excludes New Zealand citizens. Number of temporary skilled visa holders for 2014-15 is an estimate based on data for the nine months to March 2015.

¹³⁵ The type of working holiday visa — either 417 or 462 — that an applicant is eligible for mainly depends on their home country. There are some differences between the two visas, with one being that 417 visa holders can apply to extend their visa for a second year (discussed below). 417 visas accounted for 95 per cent of working holiday visas issued in the year to June 2015 (DIBP 2015a).

¹³⁶ To issue a 457 visa, employers need to sponsor an overseas worker. Employers must gain approval from the Department of Immigration and Border Protection to become a sponsor. Workers on 457 visas can only work for their sponsor.

¹³⁷ Based on data as at March 2015 (DIBP 2015e).

Table 29.1 Temporary migrants able to work in Australia

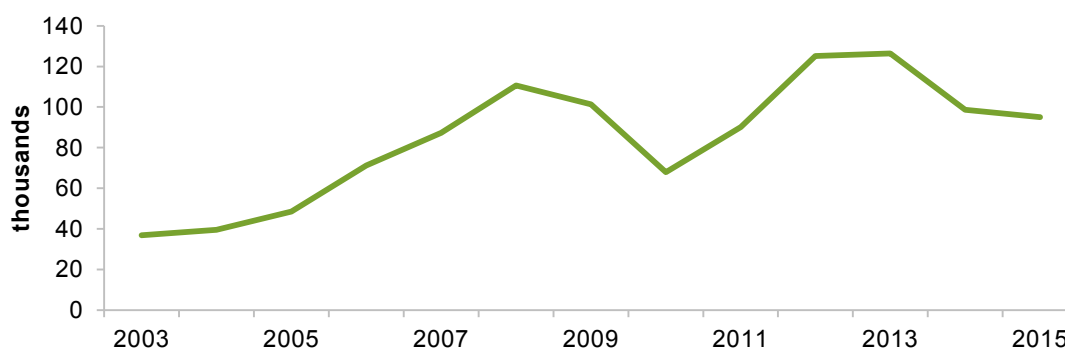
As at 30 June 2015

<i>Visa holder type</i>	<i>No.</i>	<i>Per cent of total</i>
Student visa	374 570	51.1
Temporary skilled (subclass 457) visa	188 000	25.7
Working holiday maker (subclass 417 and 462) visa	143 920	19.6
Temporary graduate (subclass 485) visa	26 260	3.6
Total	732 750	100.0

^a Data differ from ABS data (2014, *Characteristics of Recent Migrants, Australia, Nov 2013*, Cat. no. 6250, Canberra) which only include migrants living, or intending to live, in Australia for 12 months or more.

Source: Department of Immigration and Border Protection (2015f).

Figure 29.1 Annual intake of temporary skilled workers (on 457 visas)^a
Year to June



^a 2015 data point is annualised data for the nine months to March 2015.

Sources: Department of Immigration and Border Protection (2014b, 2015e), Department of Immigration and Citizenship (2013).

29.2 Exploitation of migrant workers

Migrant workers' employment rights are set out in the *Migration Act 1958* (Cth) (Migration Act) and the FW Act. The Migration Act regulates migration into Australia and details the different working visa types and their conditions. The Migration Act also requires employers to meet specific obligations, which include ensuring sponsored migrant workers are appropriately paid and perform duties relating to their approved occupation.

The FW Act covers *all* employees in Australia's national WR system, entitling migrant workers to the same working conditions as domestic workers, such as minimum wages and the National Employment Standards.

Some employers deliberately provide substandard conditions to their workers, such as below award wages in breach of the FW Act. (Some workers may also benefit from substandard conditions — this is discussed below.)

While all workers may face substandard working conditions, the information available, although limited, suggests that the risk is higher for migrant workers. Complaints from visa holders comprised more than 10 per cent of the 18 030 finalised complaints made to the Fair Work Ombudsman (FWO) in 2014-15, with complaints mainly from those on temporary visas, particularly working holiday visa holders and overseas students (FWO 2015b, pp. 39–40). This proportion is similar to that reported in 2013-14 (FWO 2014a, pp. 26–30). In addition, more detailed data for this 2013-14 suggest that the complaint rate for employed temporary migrants was around 0.7 per cent, which, while small, was more than three times the rate for other employees.¹³⁸ The true number may be higher, given that the characteristics of migrants make them less likely to complain about their employer than domestic workers (section 29.2).

Moreover, when compared with the proportion of complaints, the proportion of FWO's enforcement activities involving migrant workers is higher. In 2014-15, migrant workers were involved in 42 per cent of the FWO's civil penalty litigations, close to half of enforceable undertakings signed, and around one-third of compliance and infringement notices issued (FWO, sub. DR368, p. 2).

The FWO's audits of employers of 457 visa holders also suggest many on this visa type are vulnerable to exploitation. In 2014-15, the FWO assessed around 700 employers, which employed around 1600 visa holders.¹³⁹ The FWO referred nearly one third of the audited employers (relating to 20 per cent of the relevant visa holders) to the Department of Immigration and Border Protection (DIBP) (FWO 2015b, p. 40). Prima facie, the problems appear to be greater than suggested by complaint rates, but because of the FWO's targeted monitoring process, audited employers are more likely to not meet their obligations. In addition, the complaints arising from audits mainly related to underpayment of wages, and breaches of the requirement to assign the employee to the position specified in the visa which are breaches of the Migration Act, but not necessarily the FW Act.

¹³⁸ A breakdown of complaints data were provided by the FWO (pers. comm., 23 March 2015). The specific visa category was unknown for 30 per cent of visa holders making complaints in 2013-14. The estimate of the complaints rate assumes that the share of temporary visa holders where the visa type is unknown are equivalent to the share where the categories are known. The complaint rate is 0.5 per cent when complaints from visa holders with unknown categories are excluded. The employment data are based on ABS, 2014, *Characteristics of Recent Migrants*, Australia, Nov 2013, 2014, Cat. no. 6250, which estimated that there were around 340 000 employed temporary residents and around 11 million other employed people in Australia. This is the best available estimate of temporary migrant worker numbers. However, these data exclude migrants that are not living, or intending to live, in Australia for 12 months or more.

¹³⁹ To provide context to these numbers, there are more than 2 million workplaces in Australia, and within that around 35 000 that sponsor 457 visa holders (ABS 2015c; Azarias et al. 2014).

Survey evidence suggests that many international students are being significantly underpaid (Clibborn, sub. DR353). 60 per cent of surveyed international students that worked¹⁴⁰ reported being paid below the National Minimum Wage of \$17.29 per hour. Almost one third were paid \$12 per hour or less, and some were paid \$8 per hour.

Government inquiries and initiatives currently addressing migrant worker exploitation also point to an ongoing problem:

- In August 2014, the FWO announced an inquiry in this area, which looks at the wages and conditions of 417 visa holders and whether they are being exploited by employers (FWO 2014c)
- The Senate Education and Employment References Committee is addressing this issue in its inquiry into the Australia's temporary work visa program (which is due to report in February 2016) (Parliament of Australia 2015b)
- The Victorian and South Australian Governments are each considering aspects of worker exploitation in respective inquiries into the labour hire industry (Parliament of South Australia 2015; Victorian Department of Economic Development, Jobs, Transport and Resources 2015)
- In June 2015, the Australian Government established Taskforce Cadena, which is a multi-agency operation whose foundation members include the DIBP, the FWO, and Australian Customs and Border Protection Services. They target fraud, illegal work and the exploitation of migrant workers (FWO 2015a, p. 32)
- A Ministerial Working Group was also established in October 2015 to consider 'policy options to protect vulnerable foreign workers in Australia' (Cash 2015).

The vulnerabilities of migrant workers

Several characteristics of the employment circumstances of migrant workers, and the information available to them, can leave them more vulnerable to exploitation. In many instances, migrant employees are unaware of their workplace rights and entitlements, the way in which they are enforced, and that they can report any instances of exploitation (box 21.1). This may be because they have poor English language skills and limited support networks, which make it difficult to obtain information. (Where Australian citizens and permanent residents share these characteristics, they are typically also at threat of underpayment.)

¹⁴⁰ 1 433 international students responded to the survey, and 19 per cent of respondents worked at the time of the survey (Clibborn, sub. DR353).

Box 29.1 Factors contributing to migrant workers' vulnerability to exploitation

Several submitters to the inquiry outlined factors that make migrant employees particularly vulnerable to exploitation by employers. Submitters mentioned migrants' limited English language skills and lack of support as key factors. The Salvation Army wrote:

Many clients were tempted to and sometimes accepted [substandard conditions] due to barriers they faced in obtaining legitimate work and affordable housing. These barriers include limited English, lack of transferrable skills, and social isolation. (sub. 190, p. 7)

The Federation of Ethnic Communities' Councils of Australia also commented:

Factors which contribute to [migrants'] vulnerability and lack of bargaining power include lack of familiarity with a new culture and customs and lack of English language proficiency. (sub. 69, p. 1)

Moreover, the Western Community Legal Centre (formerly the Footscray Community Legal Centre) also noted that some migrants' language skills in their native tongue may not be strong:

So when people first come to Australia, perhaps straight from a refugee camp, they don't speak any English, they're learning how to use a public transport system, get their kids in school. Perhaps they don't speak – unable to read and write in their own language. A translated flyer on a website is completely inaccessible. (trans. p. 743)

Employers may take advantage of some migrant workers' poor understanding of their workplace entitlements, which can be compounded if entitlements and systems are different from those in workers' countries of origin. On this matter, the Federation of Ethnic Communities' Councils of Australia said:

Newly arrived workers often do not have an understanding of their entitlements under the Australian workplace relations scheme including the National Minimum Wage or National Employment Standards. These workers are also not aware of enforcement mechanisms that exist including the services provided by the Fair Work Ombudsman. (sub. 69, pp. 2–3)

Australian Council of Trade Unions mentioned:

[U]nscrupulous employers know that these workers' knowledge of their workplace rights is often limited and their bargaining position is weakened by their visa status. (sub. 167, p. 58)

Western Community Legal Centre also commented:

People of refugee background may have past experiences and cultural understandings of legal systems and authority figures, which deter them from seeking advice or enforcing their rights. (sub. 143, p. 7)

Some submitters also suggested that migrant workers may be reluctant to challenge their employer for fear of losing their sponsorship, or losing their income as they may be in debt or financially supporting their family in their country or origin. Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia said that:

Migrants may go into significant debt to pay these fees, which renders them more willing to accept substandard conditions in order to earn money ... Employers can hold the offer, genuine or not, of eventual sponsorship for [permanent] residency in return for migrants' compliance with substandard or exploitative working conditions. (sub. 227, p. 4)

The Federation of Ethnic Communities' Councils of Australia also noted:

Migrant and refugee workers often bear the heavy responsibility of providing financial support for family in their country of origin. (sub. 69, p. 1)

However, even when migrant workers are aware of their rights, other factors can discourage them from reporting exploitation by their employer.

- Many migrant workers depend on their employer for their visa, and may fear losing their visa if they report them. This can be the case for 457 visa holders and working holiday makers on 417 visas, which account for around half of temporary migrant workers. 457 visa holders require an employer to sponsor them, and are only able to work for one sponsor at a time.¹⁴¹ 417 visa holders must have an employer sign-off on their three months of specified regional work for the DIBP to approve their second year of stay in Australia. In both cases, an employer can retaliate against a migrant who has reported them by effectively curtailing the period of their visa.
- An employer may threaten to report a migrant who has breached their visa conditions to DIBP. These migrants, who may have been complicit (discussed subsequently) or coerced into their breach, can face significant penalties under the Migration Act, including deportation. These penalties may deter a migrant from reporting their exploitative employer if they outweigh the benefits (see section 29.4 for further discussion of migrants who work in breach of the Migration Act).
- Migrants may also face, or perceive, difficulties finding work, which can make them reluctant to report their employer where it might result in them losing their job. For instance, despite being underpaid, a migrant may choose to remain with their employer as they can struggle to find a new job for the remainder of their time in Australia.
- Many instances of exploitation occur within migrant communities. In these cases, an unwillingness to report may be driven by cultural pressures, or by a need to subsequently coexist in the same community as the employer.

There are also instances where migrants have been found to willingly accept wages below the legislated minimums. This may occur when minimum wages in Australia are significantly higher than those paid in the migrants' home countries, or their home country does not have a regulated minimum wage. It can also occur where migrants perceive themselves to be less qualified relative to other workers, either through deficiencies in their communication or skill levels. As a result, they may seek to make themselves more appealing by offering their labour at a discount to the prevailing wage. In these circumstances, the underpaid workers and their employers both benefit from the payment of lower wages.

It is important to eliminate underpayment, irrespective of whether the workers are accepting of the arrangement or not. Underpayment can put employers and employees who adhere to the law at a competitive disadvantage. Where such arrangements are allowed to flourish, employees acting lawfully find their wages undercut, and face pressure to do likewise or receive fewer employment opportunities. Moreover, employers acting lawfully find that their costs of production are higher than those of their (underpaying) competitors.

¹⁴¹ If a 457 visa holder stops working for their sponsor, they must either find another sponsor, apply for a different visa or leave Australia within 90 days.

So while the imperative to eliminate the underpayment of migrant workers generally rests on the desire to ensure they are treated like the broader workforce and are remunerated accordingly, instances where they are complicit (or accepting of an underpayment) are of equal concern.

Where feasible, combining confidentialised data from enforcement activities of the FWO and DIBP, together with additional data where needed from the Australian Taxation Office and Australian Securities and Investments Commission (ASIC), may shed further light on the circumstances where the risks of underpayment are greatest (for example, through collection of data on the relevant industries, characteristics of migrants, size of business, location, and the form and extent of underpayment). In turn, this would facilitate more targeted enforcement. Information from industry and community groups may also provide information about risks.

29.3 Protecting migrant workers' workplace rights and conditions

Targeted, proportional and effective policies are required to reduce the exploitation of migrant workers. Employers' incentives to exploit migrants workers will be reduced by policies that make exploitative practices more detectable, less easy to initiate and more costly when discovered.

Because of the various factors contributing to migrants' vulnerabilities, no single policy will be able to effectively reduce exploitation. Rather, a suite of policies that target different aspects of migrant exploitation and are implemented in concert are likely to be more effective, particularly given that the policies may complement each other. The solutions proposed in this section and the next have been designed with this in mind.

Outside of the solutions presented, the Productivity Commission notes that general cultural change, particularly by employers, can also help minimise the risks of exploitation. In this regard, several developments are noteworthy. In its media releases, the FWO 'names and shames' employers found to have underpaid their workforce. Several employers have also voluntarily entered 'compliance partnerships' with the FWO (FWO 2015j). These employers form an agreement with the FWO to ensure that they are compliant with workplace conditions. The agreements create a public signal about the employers' compliance with workplace laws. Broader initiatives like these, in concert with the policies outlined in this section, will also reduce exploitation.

More information for migrant workers on their rights and entitlements

Increasing the amount and quality of information available to migrant workers on their workplace rights and entitlements should be part of a broader strategy to reduce the prevalence of exploitation. Not only are informed migrant workers less likely to accept

substandard working conditions when these are offered, but they are also more likely to alert regulators once an employer begins to act exploitatively. Since the FWO mainly discovers instances of exploitation through complaints from workers, informing migrants can also increase the effectiveness of the regulator.¹⁴²

Existing information resources

The DIBP and the FWO already produce a number of documents that outline the rights and obligations of migrant workers, and both have taken recent steps to improve this information.

In particular, the DIBP provides useful information about working conditions in Australia in its Visa Grant Notice for working holiday makers and 457 visa holders (DIBP, pers. comm., 22 October 2015), which is sent to migrants to notify them that their visa has been approved. The notice, which incorporates feedback from the FWO, includes:

- details of the existence of a national minimum wage in Australia (but not its level) and that pay and conditions are available in awards and enterprise agreements
- information about the FWO, its website and contact details
- links to information available on the FWO's website in different languages
- some details on 'what is not okay at work' such as being bullied or harassed.

In addition, the Notice encourages migrants to keep a diary of their days and hours worked and copies of their payslips. Both pieces of information are useful for regulators when pursuing exploitative employers.

As the workplace regulator, the FWO has detailed information on its website about employees' workplace rights and conditions, and, as noted, some of this is tailored for migrant workers. For example, this includes several online videos available in different languages outlining workplace rights and conditions. While this is useful, migrant workers with limited English language skills might find it hard to find the relevant material.

The FWO also produces the Fair Work Information Statement (FWIS), which, employers are required to give to each employee as soon as practicable after the employee starts work.

Nonetheless, the information currently provided by both agencies could be improved.

Material on the DIBP's website is less specific to migrant workers' employment rights. At the time of writing, some webpages contained general information about Australia's

¹⁴² The FWO has a risk-based approach to uncovering exploitation. However, given the large number of migrant workers in Australia (at least 730 000 at June 2015), and that the regulator is unaware of the identity of the employing businesses (apart from 457 visa holders), it is highly unlikely that the FWO can discover most instances of exploitation through monitoring alone. As a result, complaints from migrants are necessary for the FWO to significantly reduce the prevalence of exploitation.

workplace laws with links to the FWO, and the FWO's tools to calculate pay, but other live webpages contained information that could be updated to provide further information to visa holders. For example, more specific information on workplace laws, as presented in the Visa Grant Notice, would be beneficial.

The FWIS offers specific information on workers' rights and conditions, but it also has weaknesses in relation to migrant workers. While it enumerates the minimum workplace entitlements specified in the National Employment Standards, making it easier for those with limited English skills to use, it contains no information about minimum wage levels. Moreover, because it is only provided upon employment, it can easily be withheld by an employer seeking to keep its workers ignorant of their rights.

Both regulators should make their websites more accessible for migrants. In particular, available resources should be better utilised and linked. In addition, the regulators should also explore other ways of delivering information. The FWO has undertaken some work in this regard, such as its advertisements at regional airports targeting potential fruit and vegetable pickers. Regulators could also consider using visuals instead of words to explain workplace rights and conditions.¹⁴³

A greater role for technology?

More technological approaches provide further opportunities for improvement. An example is the FWO's social media campaigns aiming to alert international students about their rights, which has allowed more tailored information to be shared (FWO 2015o).

One additional option could be to encourage migrants to register their details with the FWO, such as through an expanded version of its current *My Account* function. This could allow the FWO to deliver information via email and, with enhanced functionality, SMS (much in the same way that the Department of Foreign Affairs and Trade delivers travel alerts). The greater the amount of information gathered at registration would also allow the regulator to target its messaging — for example, the FWO could send migrants working in the horticulture industry details of their minimum wages in the award (or if matching workers with an appropriate award is difficult, then simply that the national adult minimum wage is \$17.29 per hour). This would also remind migrants about the regulator's role, which may facilitate future interactions.

Another idea canvassed in the Productivity Commission's inquiry draft report *Migrant Intake into Australia* (2015d), is the development of a mobile phone app that contains information on workplace rights and entitlements. An app of this type could offer several layers of information, presenting both general information (like the minimum wage and National Employment Standards) and, at the user's request, more specific information if

¹⁴³ The Western Community Legal Centre noted that pictures can be easier for migrants to understand than text (trans., p. 743).

required. The app could also contain links, thereby offering a direct conduit to the regulator.

The role of community groups and outreach in providing information

Community groups and outreach programs also play a role in informing migrant workers about their rights and entitlements, as well as the recourse they have to the FWO. Some evidence suggests that where they are active in susceptible communities, the work of these organisations helps reduce instances of exploitation (Booth 2009). This is aided by the credibility these organisations have within the community, their sensitivity to established cultural or community attitudes and their separation from government. The Western Community Legal Centre (formerly the Footscray Community Legal Centre — FCLC) noted the following about its clients of refugee background:

FCLC observed that clients commonly misunderstood the confidential nature of legal advice, and that some clients expressed fear of retribution in both seeking legal assistance and in enforcing their rights. Clients fear extended not only to engaging with an employer but with engaging with government agencies including the Fair Work Ombudsman. Many of FCLC's refugee clients access services via trusted caseworkers or friends. (sub. 143, p. 7)

Community organisations often have a broader remit than just ensuring compliance with employment law. For instance, apart from providing legal advice, the Western Community Legal Centre also runs a legal education program for vulnerable workers, which includes information sessions to community members about their workplace rights, and training programs to assist people to distribute legal education within their community (sub. DR329). In this way, these organisations also can likely direct migrant workers to alternative employment opportunities or government support programs. In some instances, the presence of alternatives can impact a worker's willingness to report an instance of exploitation.

The Federation of Ethnic Communities' Council of Australia suggested extending the involvement of community organisations. It advocated 'linking workers in with community organisations when they arrive in Australia. That's a way not only to get information to workers but also providing them a support network and people to go to if they find themselves in a position where they need assistance' (trans., p. 360).

The Productivity Commission agrees that earlier involvement of community organisations with working migrants could empower them to recognise and report exploitative relationships. The DIBP could encourage such links as part of the information provided to migrants upon visa approval.

RECOMMENDATION 29.1

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.

Improved monitoring and enforcement

In addition to the 'softer' approaches discussed above, enhanced monitoring and enforcement is required.

The sheer number of employment relationships across the national WR system means the FWO typically has to rely on self-reporting and a risk-based approach to monitoring in order to monitor compliance with the FW Act. (For further details on monitoring see chapter 3.) Self-reporting occurs when workers submit inquiries, reports and complaints to the regulator, while the risk-based approach to monitoring involves targeting businesses and industries that are more likely to offend. This applies not only to migrants, but for all vulnerable workers. The FWO also shares information with other government agencies, including the DIBP and the Australian Taxation Office. Improvements in these arrangements are discussed later.

There is a strong argument for increasing the FWO's enforcement resources, a viewpoint shared by many participants in this inquiry.¹⁴⁴ Greater resourcing would allow the FWO to increase its monitoring and enforcement activities, as well as to explore alternatives that may improve its practices. Such enforcement could extend beyond migrant workers to any other employee groups where the risk of underpayment was high (as recommended by the Kingsford Legal Centre, sub. DR278). Moreover, as discussed in chapter 3, the resourcing should take into account the decline in the relevance of unions as parties that monitor working conditions and entitlements. Where any increase in resourcing increases the probability of detection, it reduces the profitability of exploitation, and strengthens the disincentives to act unlawfully.

¹⁴⁴ For instance, the Business Council of Australia (sub. DR337), United Voice (sub. DR354), Stewart, McCrystal, and Howe (sub. DR271) and Synod of Victoria and Tasmania, Uniting Church in Australia (sub. DR333) all supported this recommendation.

RECOMMENDATION 29.2

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.

Potential complicating matters

One of the challenges associated with regulating compliance with the FW Act is that the regulator may struggle to collect sufficient evidence to mount a case against an exploitative employer. This might arise, for example, because a migrant leaves Australia during the period of an investigation or court hearing following the expiry or termination of their visa (Federation of Ethnic Communities' Councils of Australia and the Salvation Army (sub. DR268) and Synod of Victoria and Tasmania, Uniting Church in Australia (sub. DR333)). Submitters proposed a new 'Civil Justice Stay Visa' to allow migrants to stay in Australia for the duration of any investigations. Although the Productivity Commission has not explored this in detail, the need for a new visa is not immediately clear. The FWO can organise a bridging visa for migrants in these situations, and has also brought migrant workers back on tourist visas to provide evidence.

Another issue is that exploitative employers sometimes try to conceal their actions by doctoring documents (such as payslips in the recent 7-Eleven case¹⁴⁵) to create the illusion of compliance with the FW Act and visa requirements, or by destroying correspondence and records to inhibit the FWO's capacity to prove underpayment.

The FW Act prohibits such actions. Reg. 3.44 of the Fair Work Regulations 2009 (Cth) provides that all documents that are required to be kept under the Act (or the Regulations) are not false or misleading.¹⁴⁶ However, the penalties for a breach of this regulation, at up to \$3600 for an individual and \$18 000 for a corporation, are not large, particularly when compared with employers' potential benefit from underpaying workers. Other Acts allow for higher penalties for serious breaches of similar provisions. For example, under the Migration Act, individuals who provide false documents, or false or misleading information, relating to a visa application or a non-citizen entering Australia (s. 234) can be fined up to \$180 000 and/or imprisoned for 10 years. While these Migration Act penalties are for individuals, applying a similar upper limit to the fines on corporations under Reg. 3.44 would more effectively deter serious breaches. As with existing

¹⁴⁵ Ferguson and Toft (2015) reported that several 7-Eleven franchises masked underpaying migrants by misreporting pay and hours in workers' payslips.

¹⁴⁶ Also, s. 712 of the FW Act provides the FWO with powers to require people to produce records or documents, while s 713 specifies that a person is not excused from providing documents on the grounds of self-incrimination.

arrangements under the FW Act, a lower maximum penalty should continue to apply for individuals when compared with that which applies to corporations.

RECOMMENDATION 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).

Unlike ASIC and the ACCC, the FWO cannot compel a person to provide testimony.¹⁴⁷ The FWO has noted such powers may be useful:

If I could compel people to speak with my inspectors on the record – with the appropriate protections in place, of course, because we need to balance those protections and this is an impingement on someone’s liberties – it would make a difference. (James 2015b, pp. 124–125)

The Government should consider giving the FWO greater powers to compel a party to provide information. More generally, information and advice provided to migrants should strongly encourage them to record details of their pay and hours worked, as is in the Visa Grant Notice. This can be useful evidence in court (James 2015a, p. 69).

Vulnerable workers (including migrant workers) can also be exploited even when they receive the correct pay and entitlements. Some employers have found ways to extract rents that do not involve explicit underpayment. For instance, even though they receive the correct wage, employees may be persuaded to enter into secondary contracts for food, transport, accommodation or other services at prices that effectively transfer money to the employer. A recent high profile case of this nature involved labour hire companies contracted by the poultry processing company Baiada.¹⁴⁸ Workers for the labour hire companies advised the FWO that ‘they were informed by their recruiters that they would not get work unless they rented accommodation from their contractor’ (FWO 2015a, p. 13).

The FW Act protects against this. Section 325 prohibits an employer from directly or indirectly requiring an employee to spend any of their pay unless the circumstances are

¹⁴⁷ ASIC has this power under s. 19 of the *Australian Securities and Investments Commission Act 2001* (Cth) and ACCC has this power under s. 155 of *Competition and Consumer Act 2010* (Cth).

¹⁴⁸ Another prominent recent example of exploitation involved a labour hire company contracted by Australia Post (Baker and McKenzie 2015). The company underpaid migrant workers recruited through an affiliated education provider, which helped migrants obtain a student visa, but reportedly did not offer education. Outside of underpayment, many of the issues in this case fall outside the remit of the FW Act. However, other laws address this, as migration fraud is regulated by the DIBP under the *Migration Act 1958* (Cth) and registered training organisations are regulated by the Australian Skills Quality Authority (and some state providers) under the *National Vocational Education and Training Regulator Act 2011* (Cth).

reasonable. Moreover, s. 50 in Sch. 2 of the *Competition and Consumer Act 2010* (Cth) also prohibits a party harassing and coercing another into paying for goods or services. However, migrant workers are unlikely to be aware of such provisions. As discussed above, the Productivity Commission notes that providing migrant workers with practical, easy to understand information and a link to a support network at the beginning of their stay in Australia will empower them, and will go part of the way to addressing these concerns.

Adjustments to visa conditions

Even where a migrant worker knows their rights and entitlements and understands they can ask the FWO to rectify their situation, they may still be reluctant to report exploitation. This principally reflects the position of power held by the employer (especially where the employer is directly able to influence a migrant worker's visa status), and concerns by the migrant about the outcomes from working in breach of their visa conditions.

As highlighted earlier, 457 visa holders and working holiday makers on 417 visas are particularly affected by the role of the employer, but recent changes to conditions on these visas have weakened the scope for an employer to coerce employees:

- As part of the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (Cth), 457 visa holders are now allowed 90 days to remain in Australia once their sponsorship with an employer ends. This was increased from 28 days. The change should reduce 457 visa holders' barriers to reporting an exploitative employer by providing additional time to find another sponsor.
- From 31 August 2015, 417 visa holders are obliged to provide payslips to the DIBP for their three months of regional work when applying to stay on in Australia for a second year (DIBP 2015b). This solution appears beneficial for visa holders who are unaware of their entitlements and that they are being underpaid. Employers that underpay workers are unlikely to report a worker's actual pay and hours worked in a payslip that is being sent to the DIBP which may check a workers' conditions are in line with workplace laws. In such cases, the difference between an underpaid worker's actual pay and that reported in their payslip will alert workers of a problem.

29.4 Migrants working in breach of the Migration Act

At least 50 000, and possibly in excess of 100 000, migrants are estimated to be working in Australia in breach of the Migration Act (Howells 2011). These migrants either do not hold a valid visa to be in Australia, have overstayed the term of their visa, or are breaching a visa condition by working. Examples include people working on a visitor visa, or overseas students who work more than 40 hours in a fortnight. Migrants may be complicit in the breach of their visa conditions, but others may have done so unknowingly, or may have been coerced by their employer.

All migrants in breach of their visa conditions, regardless of their complicity, run the risk of having their visa cancelled; and in many cases, fear of cancellation can outweigh any perceived benefit from reporting an exploitative employer to the FWO. Measures to shift this balance — such as making clear the FW Act applies to migrants that breach their visa conditions, or by limiting the information shared between the FWO and DIBP about these migrants — should motivate more migrants to report their employer, and reduce instances of exploitation.

Clarifying the coverage of the FW Act

There is confusion and inaccurate information about whether the FW Act applies to migrant workers working in breach of their visa conditions.

Neither the Migration Act nor the FW Act specify whether or not the FW Act applies to migrants under these circumstances, and different ruling bodies have demonstrated different interpretations. For instance, the Fair Work Commission's decision in *Smallwood vs Ergo Ltd*¹⁴⁹ suggests that the FW Act may not cover migrants that work in breach of their visa conditions. (This decision drew on a case heard by the Queensland Court of Appeal.)¹⁵⁰ In this particular instance, the FWC ruled that a 457 visa holder did not have a valid employment contract when working with an employer other than her sponsor. The decision suggests employment contracts for migrants in breach of their visa are void and unenforceable (Berg 2015).

Several submitters to this inquiry also held this impression (Clibborn, sub. 26, Salvation Army, sub. 190). However, others disagreed.

... [o]ther decisions in this area have adopted a different approach, reasoning that it is not necessarily contrary to public policy, nor to the intent of the relevant legislative scheme, to deny an 'illegal' worker any employment entitlements: see Creighton and Stewart 2010: 177-8. The High Court has repeatedly stressed, most recently in *Gnych v Polish Club Ltd* [2015] HCA 23, that whether a statutory prohibition should be construed as denying all effect to a particular contract must depend on a careful consideration of the legislative regime. (Stewart et al., sub DR271, p. 23)

For its part, the FWO's current practice is to enforce the FW Act for migrants that work in breach of their visa conditions. It noted, in its response to the Draft Report, that:

... it is critical that the Government makes clear to workers, employers and their advisers that the FWO can and does enforce Fair Work laws with respect to all workers, including migrant workers, irrespective of their visa conditions. (sub. DR368, p. 3)

In several instances, the FWO has been able to recover underpayments for migrants that have worked in breach of their visa conditions. For instance, in *Fair Work Ombudsman v*

149 *Smallwood vs Ergo Ltd* [2014] FWC 964

150 *Australian Meat Holdings Pty Ltd v Kazi* [2004] QCA 147

Bosen Pty Ltd & Anor,¹⁵¹ the Federal Circuit Court ordered the employer to make back-payments to workers on student visas who had worked hours in excess of those permitted by their visa.

Given the confusion about the coverage of the FW Act, it would be useful to clarify in the FW Act that a migrant's employment contract is valid despite working in breach of the Migration Act. This would provide migrants (and agents acting on their behalf) with greater certainty about their workplace rights. It would encourage migrant workers to report exploitation, and increase the effective penalty for exploitative employers.

RECOMMENDATION 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.

Improving the avenues for migrant workers to approach the FWO

While coverage under the FW Act, and thus recourse to back-pay, will motivate some exploited migrants to approach the FWO, the threat of penalties under the Migration Act may deter others.

In some cases, migrants may not report an exploitative employer because they fear that the FWO will refer their details to the DIBP. This is in spite of the fact that, in practice, the FWO does not actively check a worker's visa status when fielding complaints and running investigations, and does not necessarily share this information with other Agencies (FWO, pers. comm. 24 November 2015). The FWO has noted:

One of the things my inspectors do when they are investigating Fair Work matters is they make it really clear that we are not interested in their visa status. We do not require them to tell us if they are on a visa. (James 2015a, p. 72)

However, many migrant workers are unlikely to understand the distinction between these government agencies — a distinction that is blurred by the fact that FWO Inspectors' are designated as Migration Inspectors under the Migration Act for the purpose of ensuring that 457 visa holders' nominated salaries are being paid and that they are performing the jobs approved in their visa.

Migrants may also fear that employers will report their visa breach to the DIBP notwithstanding that employers can face significant risks if they do so.¹⁵² However,

¹⁵¹ *Fair Work Ombudsman v Bosen Pty Ltd & Anor* [2011] VMC 21

¹⁵² Individual employers can face fines of up to \$51 000, and corporations can face fines of up to \$255 000, for each of these migrants that they employ (DIBP 2015c).

migrants may not understand the costs that employers face, so may still view an employer's threat as credible. This is further complicated if regulators are unable to effectively penalise employers under the Migration Act, or if employers have other non-financial motivations, such as the desire to retaliate.

There are several ways to address the reluctance of migrant workers to report breaches. These include removing the limits on information sharing between the FWO and DIBP about migrants breaching the Migration Act, and reduced penalties on migrants for less severe breaches of the Migration Act.

One-way information sharing between FWO and DIBP

One approach is a one-way information sharing arrangement between the FWO and the DIBP. Under this policy and subject to arrangements that ensure that this is lawful, the FWO *would not* share any information with the DIBP about a case (including any details about the employer) when a migrant has only breached their employment-related visa conditions. Conversely, the DIBP *would* share details with the FWO of any migrant that they suspect has been underpaid, regardless of the status of their visa, and would also provide information about any business with suspect employment arrangements. This arrangement could give migrant workers more confidence to approach the FWO.¹⁵³ Moreover, the FWO can still alert the DIBP about migrants found to be in breach for other non-employment matters, such as for serious breaches of the Migration Act (for example, for people trafficking).

RECOMMENDATION 29.5

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.

The FWO and DIBP should also re-consider FWO Inspectors' role as Migration Inspectors. That role helps uphold the migration program's objectives by ensuring temporary skilled migrants (on 457 visas) work in industries where skills are genuinely needed and are not used by employers to undercut domestic workers' wages. However, as noted above, it can also discourage migrants on 457 visas from approaching the FWO and, more broadly, can confuse other migrants about the FWO's relationship with the DIBP.

¹⁵³ The reassurance this provides also depends on how well migrant workers recognise and trust the separation of the agencies.

Discretionary penalties for breaches of the Migration Act

Regardless of the above measures, migrants may still be reluctant to report breaches of their workplace rights if they fear deportation or other penalties. In practice, the DIBP applies discretion when cancelling a migrant's visa, and can decide against cancellation if there is evidence that the worker has been coerced into a breach of their visa conditions. Under the DIBP's process, a delegate assesses a migrant's circumstances when a migrant is suspected of breaching their visa. A delegate is able to cancel the visa of a migrant found to have breached their visa conditions. However, delegates also consider mitigating factors, such as whether a migrant was coerced into their breach, and can decide against cancelling a migrant's visa based on these factors.

There have been some recent high profile examples of the exercise of such discretion. The DIBP has provided assurances to international students who were underpaid by certain 7-Eleven franchises:

... we have been indicating to those students who have come forward to assist the Fair Work Ombudsman with their inquiries that – so long as they comply with their visa conditions prospectively – if they are assisting FWO with their inquiries there will be no action taken against them from a visa cancellation point of view. (Manthorpe 2015, p. 134)

The exercise of such discretion may reduce the barriers to reporting by migrant workers.

Can these policies have unintended consequences?

By reducing their consequences, the above measures may encourage more breaches of the Migration Act, but this risk is likely to be small. Those contemplating breaching their visa would be aware that, if caught (and unable to persuade the DIBP of coercion by their employer — an allegation the employer is likely to defend vigorously in order to avoid penalties under the Migration Act), they would still face substantial penalties. Moreover, the benefits associated with reducing exploitative practices are likely to offset any increase in the number of migrants that work in breach of the Migration Act.

In addition, several participants have proposed an amnesty for migrants from facing migration-related penalties if they report an exploitative employer to the FWO (Kingsford Legal Centre, sub. DR278; Western Community Legal Centre sub. DR329). The Productivity Commission has not considered in detail the impact of an amnesty.

29.5 The effect of insolvency on migrant workers

Around 10 000 companies entered insolvency in 2013-14 (ASIC 2014), but only a few of these appear to involve businesses looking to avoid paying their obligations. The majority were a result of financial difficulties, or companies looking to wind-up or restructure their business. Importantly, regardless of the reason for insolvency, any worker — both

Australian citizens and migrants — can lose their job, and be owed unpaid wages and entitlements.

Nevertheless, some businesses strategically exit to avoid claims and regulatory action. With few assets under their company structure and sometimes limited details available about company controllers, regulators often find it difficult to recover workers' unpaid wages and penalise unscrupulous directors.¹⁵⁴ While insolvent labour hire businesses appear to be a prominent source of lost migrant workers' entitlements (box 29.2), the problem is by no means isolated to them.

There are several avenues for addressing the problems posed by insolvency.

Protecting employees entitlements

Employees have some protections if their employer enters insolvency. Under insolvency law in Australia, employees are priority creditors in the event of a business being wound up. This means that they are paid ahead of other unsecured creditors (but after secured creditors and the costs of external administration have been paid).

Most employees who lose their job because their employer has entered bankruptcy or gone into liquidation, and whose entitlements cannot be recovered by other measures, may instead be able to obtain help through the tax-payer funded Fair Entitlements Guarantee (FEG). The scheme provides assistance for up to 13 weeks of unpaid wages, annual leave, long service leave, payment in lieu of notice (to a maximum of 5 weeks) and redundancy pay (to a maximum of 4 weeks per full year of service) (Department of Employment 2015a). In 2013-14, government expenditures on FEG amounted to around \$200 million (ANAO 2015, p. 14). However, apart from New Zealanders living and working in Australia, temporary migrants are ineligible for FEG (Department of Employment 2014b).

¹⁵⁴ This is only an issue for pursuing incorporated entities. Owners of sole traders or partnerships are legally responsible for any of their businesses' liabilities.

Box 29.2 **Labour hire businesses are a particular concern**

Labour hire companies figure prominently in cases of migrant exploitation, particularly in industries such as horticulture and food processing. Most labour hire companies operate legitimately, sourcing workers for employers and paying workers their correct wages and entitlements. They can benefit businesses, particularly those that need workers at short notice or struggle to find workers.

Despite this, some labour hire companies have been found to be underpaying migrant workers (and providing them with exploitative living conditions). As noted, a prominent example is labour hire companies contracted by Baiada. The FWO's inquiry into Baiada's labour procurement arrangements found:¹⁵⁵

... exploitation of a labour pool that is comprised predominantly of overseas workers in Australia on 417 working holiday visas, involving: significant underpayments; extremely long hours of work; high rents for overcrowded and unsafe worker accommodation; discrimination and misclassification of employees as contractors. (2015a, p. 3)

The Productivity Commission has not explored in detail solutions specific to the labour hire industry. However, the Productivity Commission reiterates its earlier argument that cultural change by employers and the industry can help reduce exploitation conducted by labour hire companies. Examples could be an industry code of conduct and encouraging employers and the supply chain to engage their workers about wages and entitlements, and to remind contractors of their obligations under workplace laws. An example in relation to this is the South Australian Wine Industry Association's work. It noted at public hearings:

[W]e do have regular engagement with our winery members to ensure that they are aware of the obligations and also to encourage labour hire operators ... to attend workshops and also training sessions to understand the obligations that they have ... (trans., p. 438)

Pursuing a company's controllers

In addition to mechanisms that aid the recovery of entitlements, there are also laws intended to deter behaviour by the controllers of a company which may adversely affect creditors (including employees).

Current statutory mechanisms hold directors to account for some unpaid liabilities. Amendments to the *Taxation Administration Act 1953* (Cth) in 2012, for example, made directors personally liable for a company's unpaid superannuation guarantee amounts and, in some instances, for unremitted Pay As You Go withholding obligations. It also ensured directors could not avoid any penalties for unpaid superannuation or unremitted Pay As You Go withholding, if unpaid or unreported for over three months, by placing their company into receivership or liquidation.

¹⁵⁵ In October 2015, Baiada agreed to a proactive compliance partnership with the FWO to repay underpayments by its contractors and to ensure compliance with workplace laws (FWO 2015e).

Moreover, there are several provisions under the *Corporations Act 2001* (Cth) aimed at preventing the principals of a company from taking actions that *cause* a loss of employee entitlements. These include provisions that specify the duties of a director¹⁵⁶ (s. 180-184) and prohibit a person from entering into a transaction that thwarts the recovery of, or reduces the amount of, sums available to repay entitlements (s. 596AB).

However, there are some question around the efficacy of these provisions.

While actions under s. 180-184 are relatively common (although not only in relation to the recovery of employee entitlements), actions under s. 596AB are not. This may be because ASIC, having determined that the matter falls within its regulatory responsibility, finds little merit in pursuing the matter or considers the use of alternative regulatory tools to be more effective.¹⁵⁷ While a number of factors contribute to this decision, some have argued that the high onus of proof, or the need to demonstrate that the principal *intended* to inhibit the recovery of entitlements limits the effectiveness of these provisions (Anderson 2013). Similarly, the extent to which harm or loss is mitigated by the FEG may also dampen any imperative to act.

The role of employment law?

Provisions in the FW Act also hold directors to account for contraventions of workplace laws when a business has entered insolvency. Under s. 550, a director of the company *involved* in a contravention of the FW Act is also liable as an accessory. As a result, a court can impose a penalty on a director shown to be involved and/or order that they rectify any underpayments to employees.

To be *involved* a director must be found to have:

- aided, abetted, counselled or procured the contravention
- induced the contravention, whether by threats or promises or otherwise; or
- been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- conspired with others to effect the contravention.

In a submission to this inquiry, the FWO cited examples of where it had used s. 550 to secure penalties against directors involved in a contravention. The FWO stated: ‘It is common practice for the FWO to seek to have penalties against Directors paid to employees who have been underpaid instead of the Commonwealth, where there is no or little prospect of recovery from the corporate employer’ (sub. DR368, p. 5).

¹⁵⁶ Some of a director’s duties include acting in good faith, and not acting recklessly, dishonestly, or to gain advantage for themselves or others.

¹⁵⁷ The framework for assessing what regulatory tools it will bring to bear on a matter (if any) is detailed in ASIC’s approach to enforcement (ASIC 2013).

The FWO appears to have adopted the practice of directing *penalties* to employees rather than seeking to recover underpayments; however, penalties often do not cover the entire amount underpaid.¹⁵⁸ The FWO commented ‘there are relatively few decided cases that have considered the Court’s discretion to make compensation orders against accessories in these circumstances’ (sub. DR368, p. 6). Despite this, Stewart notes:

... [s]ection 550 can be used not just to impose penalties on accessories, but to require them to compensate anyone who suffers a loss from the contravention: see eg *Scotto v Scala Bros* (2014)¹⁵⁹. Even though the Explanatory Memorandum for the FW Act suggests otherwise, and the FWO has a practice of not seeking such orders, the legislation seems clear on its face. (2015, p. 197)

The FWO ‘has recently commenced proceedings that seek orders against Directors who are alleged to be liable as accessories, to rectify alleged underpayments in the event they are not recoverable from the corporate entity, in addition to seeking a penalty’ (sub. DR368, p. 6).¹⁶⁰ This would enable workers to receive their minimum entitlements in spite of the corporate employer ceasing to exist.

In the unlikely event that the Federal Circuit Court determines it does not have jurisdiction to require a director involved in a contravention to rectify underpayments, the Australian Government should amend the FW Act to ensure this is possible.

Barriers to identifying controllers

While legal provisions enable regulators to pursue company directors and controllers for employees’ unpaid wages, regulators can face barriers when doing so in practice. In particular, regulators can face difficulties identifying and locating directors to prosecute.

This issue of locating and prosecuting directors is a particular problem for illegal phoenixing, in which previous controllers start another similar company. The FWO has noted that this practice ‘presents a serious challenge to the FWO’s ability to enforce Australian workplace laws’ (sub. DR368, p. 4).

Phoenixing itself is not illegal, and can involve situations where companies legitimately rebirth their operations to save their business. But this practice can also be used for improper purposes, in particular to quarantine assets away from liabilities. The obstacles to doing this, as they relate to the subsequent identification and prosecution of principal

¹⁵⁸ In one example, the FWO noted the penalty paid by the Haider Enterprises was less than a third of the wages owed to a 7-Eleven worker (James 2015a, p. 2).

¹⁵⁹ *Scotto v Scala Bros Pty Ltd & Anor* [2014] FCCA 2374.

¹⁶⁰ These matters are *FWO v Nobrace & Anor*, filed on 31 August 2015 in the Federal Circuit Court, and *FWO v Step Ahead Security Services (ACN 149 618 397) & Anor*, filed on 14 September 2015 in the Federal Circuit Court.

controllers, are relatively limited at present. For example, the Productivity Commission in its draft inquiry report *Business Set-up, Transfer and Closure* noted in this regard:

While s. 117 of the [Corporations] Act requires that the application for registration of a company includes the name and address of the directors, little is done to verify this information. As one participant put it during the Commission's consultations 'it is easier to become a company director than it is to rent a movie'. (2015a, p. 382)

Reform options

As noted earlier, larger penalties for employers that provide misinformation to the FWO, along with encouraging migrant workers to keep records of their pay and hours worked, can help the FWO's enforcement activities. So too would the Productivity Commission's draft recommendation in *Business Set-up, Transfer and Closure* requiring company directors to hold a Director's Identification Number (DIN) (PC 2015a). If implemented, the recommendation would require directors to apply for the DIN as part of their first directorship. They would provide the ASIC with proof of identity similar to that given when opening bank accounts. While the introduction of a DIN system would create some administrative costs for directors, and additional costs around implementation, such costs are likely to be outweighed by the benefits arising from improved tracking of directors. Regulators would be more able to effectively pursue prosecutions for unpaid wages. Ideally, the DIN would be required in addition to a directors' existing reporting requirements, and information relating to the history of a DIN would be publicly available through ASIC.

Making this information public would also assist interested parties (such as community legal groups advising migrants) by making them aware of exploitative directors who have simply moved companies, or phoenixed their previous one.

30 International obligations

Key points

- The International Labour Organization's International Labour Standards are intended to be a benchmark for countries' labour laws, and mainly consist of international conventions.
 - Australia is not obliged to ratify a convention and usually only does so when it aligns with existing domestic laws.
 - Australia's current approach is reasonable as it assesses the national interest of ratification, taking into account the costs of adjusting domestic laws and any benefits to Australia from raising standards in other countries.
- Some of Australia's preferential trade agreements contain labour provisions requiring it to uphold core labour standards, such as eliminating forced and child labour.
 - Australia's domestic laws are in line with these labour standards, and the legal system effectively enforces them.
 - When deciding whether to include labour provisions in a preferential trade agreement, the Government should carefully assess whether they are of net benefit.

Australia's commitment to international standards can influence the national workplace relations (WR) system. In particular, some argue that Australia should align labour laws with the International Labour Organization's (ILO's) International Labour Standards¹⁶¹, and adjust labour laws following trade negotiations. Both are discussed below.

30.1 International Labour Standards

While labour laws generally vary from country to country, the ILO¹⁶² provides a common reference point through its International Labour Standards. Several participants considered

¹⁶¹ The Centre for Employment and Labour Relations Law noted that Australia also has 'obligations to respect workers' rights arising from general human rights treaties' (sub. DR313, pg. 30). For example, the United Nations' *International Covenant on Economic, Social and Cultural Rights*, 1966, which Australia has ratified, contains provisions on workers' right to strike. The Productivity Commission notes that while the specifics around ratification can vary, the discussion in section 30.1 generally applies to the impact of labour provisions in these treaties on Australia's labour laws.

¹⁶² The International Labour Organization (ILO) is a specialised United Nations agency that focuses on labour issues, aiming to improve employment opportunities, outcomes and conditions (ILO 2015a). The ILO operates a 'tripartite' system, where governments, and worker and employer groups from member countries are involved in developing and adopting labour standards.

these standards as a benchmark for labour laws, with the Australian Council of Trade Unions noting:

International Labour Standards can, if properly enforced be a useful method of lifting the minimum standards of employment for workers both domestically and abroad. (sub. 167, p. 22)

The Australian Institute of Employment Rights (AIER) also said:

It is from within the tradition of seeking social justice, and by that avoiding the devastation that injustice wreaks, that the AIER submits the ILO [standards] remain important benchmarks for assessing the workplace relations system. (sub. 140, p. 8)

The standards consist of international treaties (conventions) and recommendations that are non-binding guidelines, and can assist countries when drafting and implementing their labour laws (ILO 2015c). As at November 2015, the Australian Government had ratified 58 of the 189 conventions, roughly in line with Australia's peers (figure 30.1) (ILO 2015d).

Australia is not obliged to ratify a convention, nor does ratification automatically incorporate a convention into Australia's domestic laws (DFAT 2015b).^{163, 164} This differs from other countries, such as the United States, which are more legally bound by ratified conventions (and which partly explains the United States' low level of ratification).¹⁶⁵

While the standards are, in many cases, useful points of comparison for domestic WR laws, the development of a convention or a recommendation by the ILO does not necessarily mean that it is in Australia's best interests to automatically comply. Australia has a framework for ratifying international treaties which allows it to make an informed decision on whether to ratify a convention (box 30.1). Ultimately, this rests on whether the benefits of any change exceed the costs.

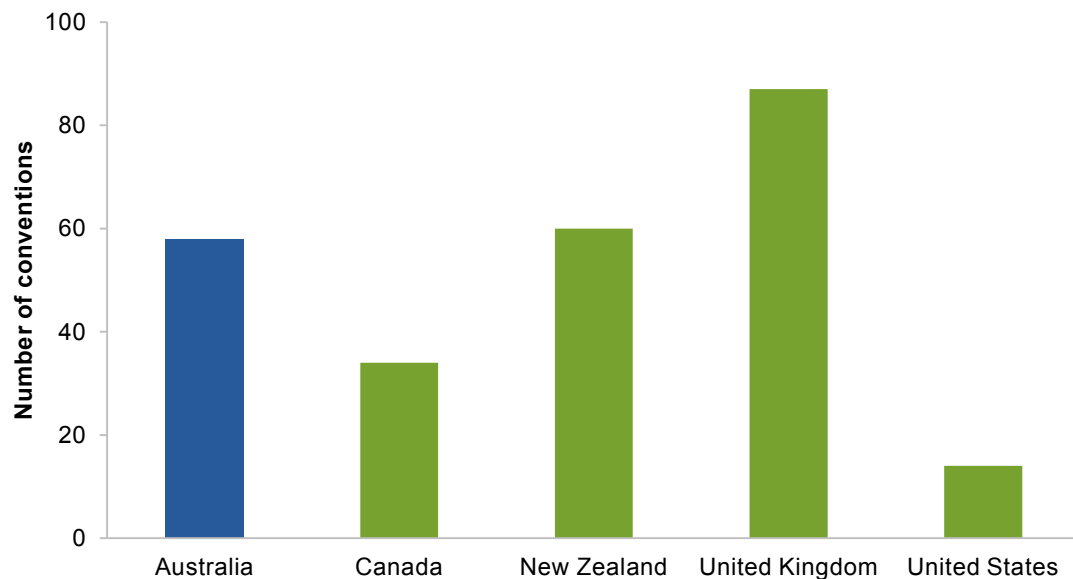
¹⁶³ Australia, like all other member countries of the ILO, are effectively signatories to all ILO conventions. As a signatory, the Australian Government expresses its willingness to examine the treaty. Ratification is a commitment to implement the convention domestically, such as by incorporating it into laws or court decisions. Formally, it occurs when Australia communicates its commitment to the ILO Director-General.

¹⁶⁴ The ILO can request Australia to amend its laws if it does not incorporate a ratified convention into its domestic laws, or otherwise breaches a ratified convention. However, the ILO has limited power to implement more punitive measures. The ILO may also examine Australia's reasons for not ratifying conventions.

¹⁶⁵ Unlike in Australia where a ratified convention needs to be implemented into domestic legislation for it to bind, ratified conventions in the United States are binding in their own right.

In most cases, Australia ratifies conventions when they are consistent with existing domestic laws (DFAT 2015b).¹⁶⁶ Because laws do not need to change, the costs of ratifying these conventions are low and ratification itself could be described as largely symbolic, reinforcing a commitment to certain labour standards.

Figure 30.1 **Number of ILO conventions ratified by country^a**



^a As at November 2015. Includes all conventions that have been ratified including denounced conventions and those currently not in force.

Source: International Labour Organization (2015d).

There may be benefits from symbolic ratifications. For instance, the Walk Free Foundation and the Salvation Army commented:

... ratification of [the *Domestic Workers Convention, 189*] would have important symbolism in the Asia Pacific region, home to some 21.5 million domestic workers. Ratification would allow Australia to step forward as a regional leader within South East Asia, and serve as an example of best practice as efforts are made to strengthen national responses to abuse of domestic workers within the ASEAN region (sub. 156, p. 2).

¹⁶⁶ The Australian Government may also ratify a convention in order to override states' and territories WR laws, which it can do under the external affairs power in the Constitution (Stewart 2013). For example, the Government ratified the *Termination of Employment Convention* in 1993 without formal agreement from the states and territories. Once ratified, the Convention applied to *all* Australian employers irrespective of whether they were previously a national system employer or not. The Government has other means of overriding states' and territories' laws apart from the external affairs power, such as through the corporations power in the Constitution.

Box 30.1 **Australia's Framework for Ratifying International Treaties**

The Australian Government decides whether to ratify an international treaty (including a convention). In theory it can do so without consulting Parliament. For some urgent issues, this can substantially accelerate the process of ratification, but, more generally, doing so reduces public scrutiny of a treaty and the decision to ratify it.

In practice, however, the Government rarely ratifies a treaty without Parliamentary consideration. There are several processes that allow this:

- Treaties proposed for ratification are tabled for review in both Houses of Parliament and are accompanied with a National Interest Assessment produced by the relevant Department. The Assessment outlines the treaty's benefits and costs, the obligations arising from it, and the implementation process. When a treaty is tabled, Senators and Members of Parliament can raise and discuss their concerns.
- The Joint Standing Committee on Treaties (JSCOT) also reviews each tabled treaty. The JSCOT includes Members of Parliament and Senators from the Government, Opposition, and minor parties, and operates for the term of the Government. It invites submissions and conducts public hearings to inform their decision and usually reports within 15-20 sitting days of the treaty being tabled. The JSCOT presents their assessment of the proposed treaty in a report to the Parliament, including a recommendation on whether the Government should ratify it. The Government usually responds to the Committee's recommendations.

In addition to these processes, ratified international treaties are only binding if domestic laws and practices reflect the treaty conditions. In most cases, legislation needs to be passed for this to occur. This allows for Parliament to further scrutinise the domestic effects of an international treaty. More generally, Australia's practice is to ratify a treaty only once domestic laws are aligned with it.

Australia's processes are similar to some other countries. The Governments of New Zealand and Canada can also ratify treaties without consulting Parliament, but common practice in both countries is to table them in Parliament before ratification. The United Kingdom had a similar procedure until 2010 when it passed legislation requiring treaties to be tabled, and specifying that a treaty could not be ratified if either House resolved that it should not be. In the United States, international treaties need to be passed through the Senate with a two-thirds majority.

In 2015, the Senate Standing Committee on Foreign Affairs, Defence and Trade examined Australia's treaty-making process. One of its recommendations was that Parliamentarians and the JSCOT be granted access to draft treaty text during negotiations. At the time of publication of this report, the Government had not responded to the Committee's recommendations.

Sources: Department of Foreign Affairs and Trade (2015b), Parliament of Australia (2015a).

More generally, there is a broad body of research that considers when it may or may not be in a nation's interests to export its own labour standards (Nankivell 2002).

Domestic laws are often *not* aligned with international conventions. This is because either the convention targets a concern yet to be fully addressed by lawmakers, or it prescribes standards at odds with community norms. In either event, the Government faces a choice between meeting the proposed international standard or maintaining the status quo.

While the merits of some standards are clear (such as eliminating child prostitution), for others the difference between the benefits and costs of any change is not so obvious. Assessments of the relative merits of a standard can vary from nation to nation, depending on what each nation considers appropriate. This means that a global consensus may be unachievable for some standards, with standards adopted by some countries, but not others. A good example of the dilemmas is the longstanding question of whether Australia should ratify the ILO's *Minimum Age Convention*, 1973 (box 30.2).

Box 30.2 **Minimum Age Convention**

The Australian Government has not ratified the *Minimum Age Convention*, 1973, which prescribes a minimum working age of 15 and permits light work for children aged at least 13 (with some exceptions for developing countries). The Convention is one of the ILO's eight 'fundamental' conventions that focus on workers' rights and conditions. 167 of the ILO's member countries have ratified the Convention, and countries that have not include the United States, New Zealand and Canada.

There is no universal minimum working age in Australia. For example, New South Wales does not have a set minimum employment age, while Queensland's minimum working age is 15 with some exceptions (FWO 2015q). However, current labour laws generally adhere to the Convention's principles by ensuring children do not forego school for work and are not forced to work in inappropriate workplaces (Creighton 1996). There are now national consistent laws on the minimum school age and leaving age, and policies in all jurisdictions to retain students at school until year 12. Safe work practices are principally covered by OH&S laws.

Advocates suggest that ratifying this convention will better protect children against unsafe work practices, as well as improve Australia's international credibility on labour issues, particularly when addressing labour rights issues in the Asia Pacific region (ACTU 2013b; DEEWR 2013; The University of Adelaide 2013). To ensure Australia's laws meet the principles of the convention, advocates propose listing exemptions upon ratification with the ILO to cover all situations where children are legally allowed to work in Australia but do so in breach of the convention. By listing exemptions, advocates suggest that Australia's domestic laws would not need to change in order for the convention to be ratified.

Critics argue that the exemptions are unlikely to cover all situations where children work, and Australia may breach the convention leading to compliance costs (ACCI 2013b). Compliance costs could arise from adjusting different states' laws to be more in line with the convention, and preventing some families and children from earning, despite it being of apparent benefit (such as paper runs for pocket money, and working on the family farm and in family businesses). The Australian Bureau of Statistics found 175 100 children aged under 15 worked in 2005-06 (ABS 2006).

In 2013, the Australian Government proposed ratifying the convention, tabling it in Parliament which initiated an inquiry by the Joint Standing Committee on Treaties examining the convention (Parliament of Australia 2015a). However, with the change in Government, the inquiry lapsed before the JSCOT could report and the Government could make a final decision on ratification.

30.2 Preferential trade agreements

Of Australia's nine active trade agreements (commonly referred to as free trade agreements or FTAs), those with the United States, Chile and Korea specify labour provisions (table 30.1).¹⁶⁷ Each of these require both countries to uphold the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998)* which, among other things, stipulates the elimination of forced and child labour. The US and Korean agreements also require that each country ensures any repeated labour law breaches do not affect bilateral trade.

Table 30.1 Australia's trade agreements^a

<i>Status</i>	<i>Agreement</i>
Active	ASEAN-Australia-New Zealand FTA Australia-Chile FTA Australia-New Zealand Closer Economic Relations Australia-United States FTA Japan-Australia Economic Partnership Agreement Korea-Australia FTA Malaysia-Australia FTA Singapore-Australia FTA Thailand-Australia FTA
Signed ^b	China-Australia FTA
Negotiations concluded	Trans-Pacific Partnership Agreement
Under negotiation	Australia-Gulf Cooperation Council FTA Australia-India Comprehensive Agreement Environmental Goods Negotiations Indonesia-Australia Comprehensive Economic Partnership Agreement Pacific Agreement on Closer Economic Relations (PACER) Plus Regional Comprehensive Economic Partnership Trade in Services Agreement

^a Information is as at October 2015. ^b Signature means both Australia and China have agreed to begin domestic processes to make the agreement active (see box 30.1 for details of Australia's process).

Source: Department of Foreign Affairs and Trade (2015a).

¹⁶⁷ Some of Australia's trade agreements also include concessions on visa requirements for migrants from these countries working in Australia, such as the removal of labour market testing for some visa applicants. However, while these concessions may affect the labour market, they do not affect the functioning of the WR system, with all migrant workers being entitled to the same rights as Australian citizens under the Fair Work Act.

These provisions have little impact on Australia's WR Framework. Australia's domestic laws are in line with the principles of the ILO Declaration, with Australia ratifying seven of the eight conventions that underpin it, while Australia's laws uphold the principles of the eighth (see box 30.2 on the Minimum Age Convention). In addition, Australia's legal system effectively handles and resolves labour law breaches, which means that other countries are unlikely to be concerned with Australia's enforcement of laws.

In the rare case that Australia does breach a labour provision, only the agreement with the United States allows for dispute settlement measures. These include the establishment of a panel to resolve the issue when informal discussions fail. In cases when a breach cannot be rectified, Australia can be asked to pay a fine; and although Australia's domestic laws do not enforce payment of the fine, non-payment can have adverse implications for trade and other aspects of Australia's relationship with the United States.

Should Australia include labour provisions in its bilateral and regional trade agreements?

Some participants in the inquiry are concerned that the absence of labour provisions in Australia's agreements do little to reduce poverty and may weaken workplace conditions (Maritime Union of Australia, sub. 121).

Deciding whether to include labour provisions requires considering their impact on counterparty countries and Australia, which may be at odds with each other. Adherence to core labour standards can lead to economic and social benefits, but the net effects may not always be positive (PC 2010a). Some may be benign, but of little effect:

- As Australia's domestic laws uphold the core labour standards and will be in line with the proposed provision (as is the case with the provisions included in some of its recent agreements), most proposed labour provisions will not impose any costs on Australia, but will equivalently not produce any obvious domestic benefits
- Countries' compliance with labour standards through trade agreements may sometimes have little prospect of affecting the wellbeing of the other countries' workforce, particularly in developing countries where a large share of workers are in the informal or domestic sectors. Moreover, measures such as technical or financial assistance are more likely to be effective in enhancing living standards with fewer adverse effects.

However, some proposed provisions may require Australia to adjust its WR laws. The Government should examine these provisions on a case-by-case basis, assessing a provision's impact against the broader benefits from the trade agreement and the views of the Australian community. In some cases, the adjustments may be in line with the community's view and may not be costly, but in others, the community may oppose the provision, which could be burdensome or weaken Australia's workplace laws. In these latter cases, Australia and its counterparties need to carefully assess whether the inclusion of such provisions provide net benefit.

31 Interactions between competition policy and the workplace relations framework

Key points

- The workplace relations system is largely exempted from Australian competition law.
 - But some provisions still apply, including in relation to secondary boycotts, anticompetitive contracts or understandings in the supply or purchase of goods and services, and resale price maintenance.
- There is a strong policy rationale that the regulation of labour markets should continue to be separated from the regulation of other markets for goods and services.
 - Competition policy and the workplace relations system have both complementary and competing objectives that must be balanced.
 - There are ethical and social factors that separate the labour market from more conventional markets.
 - Collective action, which is generally limited by competition policy, is a core principle of the workplace relations system.
- Concerns about anticompetitive behaviour in employment matters appear to be mostly capable of being addressed through the workplace relations system itself, rather than through an expansion of competition policy.
 - While using competition law to regulate the workplace relations system would create more regulatory consistency between labour and goods markets, such consistency would not justify the associated transactions costs, uncertainty and complexity.
 - However, there is a case for incorporating principles of competition and efficiency into aspects of the workplace relations system.
- Secondary boycotts are a problematic area at the interface of the two legal systems.
 - Concerns about misuse of secondary boycotts appear to lie primarily in the construction industry. Fair Work Building and Construction, as the industry regulator, should be given the jurisdiction to obtain evidence, while leaving the Australian Competition and Consumer Commission to determine if action is then warranted.

While the *Fair Work Act 2009* (Cth) (FW Act) and its two main institutions are the centrepiece of Australia's workplace relations (WR) system, Australian competition policy — enshrined in the *Competition and Consumer Act 2010* (Cth) (CCA) and administered by the Australian Competition and Consumer Commission (ACCC) — represents a complementary (and potentially competing) limb of that system. Various commentators

have described WR policy and competition policy as ‘neither married nor divorced’ (Anderson 2003, p. 2) or as ‘Siamese twins, unhappily separated at birth’ (Litwinski 2001, p. 50).

This chapter is about the regulatory interactions between competition policy and the WR system in Australia — it does not directly address any alleged or proven illegal anticompetitive outcomes. The chapter first describes the nature and extent of the current interactions between the WR system and competition policy. Second, it discusses the similarities and differences between these laws, and whether there are any grounds for widening the capacity of competition policy to address anticompetitive behaviour in the labour market. Finally, it explores possible improvements to existing competition policy settings that currently influence the WR system.

31.1 How does competition policy currently interact with the WR system?

The WR system is largely exempted from competition law

The role of competition policy in Australia’s WR system is limited. Section 51(2)(a) of the CCA generally excludes matters relating to the negotiation and determination of terms and conditions of employment from the restrictive trade practices provisions of the Act. This means that the ACCC cannot take action against anticompetitive conduct by employees and their representatives (or by industry associations) relating to wage claims or other employee benefits. The practical outcome is that WR is largely excised from competition law.

WR law permits some degree of anticompetitive conduct by unions and employer associations, and offsets it by constraining the exploitation of market power (for example, employers must still comply with the National Employment Standards, and only some forms of industrial action are lawful).

But competition law still applies to some employment related activities

While s. 51(2)(a) broadly exempts WR matters from prohibitions on anticompetitive practices, some sections of the CCA — namely ss. 45D, 45DA, 45DB, 45E, 45EA and 48 — apply. These sections relate to prohibitions on secondary boycotts; anticompetitive contracts, arrangements or understandings in the supply or purchase of goods and services; and resale price maintenance. Of these prohibitions, the two that interact most with the WR system — and attract some debate — are the provisions relating to secondary boycotts and anticompetitive arrangements.

Secondary boycotts

Section 45D of the CCA contains provisions prohibiting secondary boycotts. In the WR context, secondary boycotts occur when two or more people (such as union officials and/or employees) hinder or prevent a third party from: supplying goods or services to a business; acquiring goods or services from a business; or engaging in interstate or overseas trade or commerce, where the target business is not the employer of those people imposing the boycott (NCC 1999). This can be contrasted with primary boycotts (commonly known as strikes), which are a refusal by a group of employees to perform work for the employer that they are in a dispute with. Strikes are not prohibited by the CCA and they are expressly authorised in some circumstances, under the FW Act (chapter 27).

Secondary boycotts target third parties that are not directly involved in the dispute. By involving third parties, the harmful effects of a dispute are magnified across the community, to serve the interests of a single party. They also have the capacity to entrench the market power of larger players, as larger firms or unions will generally have greater capacity to exert pressure on third parties. As noted recently by the Competition Policy Review, ‘secondary boycotts are harmful to trading freedom and therefore harmful to competition’ (Harper et al. 2015, p. 387).

The provisions in the CCA prohibiting secondary boycotts are complex, involving many tests. Among other factors, the prohibition only applies where the main purpose of the action is not related to remuneration or the working conditions of the employees (s. 45DD). Thus a secondary boycott would be permissible under the CCA if its purpose was to increase wages of employees working for the employer (even if the action led to major costs for suppliers and customers). However, such actions might remain subject to penalties under the FW Act and the common law — for example, depending on whether protected industrial action has been authorised — so s. 45DD may only cut off one option for legal action against secondary boycotts.

Anticompetitive contracts in the supply or purchase of goods and services

Sections 45E and 45EA of the CCA prohibit a person from making, or giving effect to, a contract, arrangement or understanding with a group of employees that contains a provision that has the purpose of preventing or hindering the person from supplying (or acquiring) or continuing to supply (or acquire) goods or services to (or from) a second person that the first person has been accustomed, or is under an obligation, to supply (or acquire), or doing so subject to conditions. Some employer groups have expressed concern about recent court decisions¹⁶⁸ that have determined that enterprise agreements fall outside the scope of these provisions, allowing terms restricting the hiring of services such as

¹⁶⁸ For example, *Australian Industry Group v Fair Work Australia* (2012) FCAFC 108 (*ADJ Contracting*).

independent contractors to be included in enterprise agreements. This is addressed in chapters 20 and 25.

31.2 Competition policy and the WR system have commonalities and divergences

Market power is a major concern of both systems

Competition policy and the WR system have some features in common and others that are quite divergent. Both give an emphasis to the power of parties to influence the terms of any contracts they form with each other. However, the expression of these concerns sometimes differs.

Competition policy is primarily aimed at protecting and promoting effective competition between participants within markets. The CCA's stated objective is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provisions for consumer protection' (s. 2). This involves: prohibiting anticompetitive conduct, such as price fixing between market players or the abuse of market power by a dominant player, while at the same time permitting conduct that is pro-competitive (or more efficient) even at the cost of market disruption; and providing firms and consumers with clear, simple and predictable regulations (Harper et al. 2015; World Bank and OECD 1999).

An important feature of competition policy, and more specifically the CCA, is that it is not intended or designed to protect individual competitors. In fact, the rigorous competitive processes supported by Part IV of the CCA may well result in businesses downsizing or leaving a market. As the ACCC states:

Competition law must strike a balance between, on the one hand, preventing business activities that undermine the competitive process, and on the other not inhibiting healthy rivalrous behaviour that is part of the ordinary cut and thrust of robust competition. (ACCC 2014b, p. 8)

The WR system is also concerned with market power, but the predominant goal is to address the unequal bargaining power between an employee and their employer, rather than between two businesses, or a business and consumers. The concern is that unequal labour market bargaining power can lead to the undesirable suppression of wages and conditions, a tolerance of poor workplace health and safety arrangements, and contract insecurity. Many facets of the WR system are intended to address the various dimensions of this bargaining imbalance — such as safety net provisions, employee protections and arrangements that provide countervailing power, such as collective bargaining and the scope for lawful industrial action.

In principle, it might be possible to conceive of a competition policy approach to workplace relations based on authorisation of collective bargaining and regulated price

setting. This is examined below. The degree to which this is overwhelmed by the practical regulatory structures and social objectives of the WR system is an important consideration.

The thresholds for action to address market power vary

Competition policy tolerates some market power provided it is not entrenched, substantial or based on the creation of cartels. Indeed, the merciless goal of enterprises to gain market share at the expense of competitors through better business strategies, higher product quality and innovation are regarded as positive features of competition. Regulations do not discourage high prices for new goods, and indeed in some cases are facilitated by patents and other intellectual property protections. The CCA generally does not use regulatory means to facilitate countervailing power to offset the efforts of one business to gain an advantage over a rival (as the WR system does).¹⁶⁹ In this context, the bar for regulatory action against the exertion of market power in goods markets is high in competition (and complementary) policies. Notably, s. 46 of the CCA requires that regulatory action should only be taken if the firm has a ‘substantial degree of market power’.

Unlike competition policy, in labour markets there is a lower level of tolerance by the community of moderate and perhaps less enduring market power by businesses, and the overarching competitive drive by a business to lower its total wages bill is not an excuse for exploitation. Associated with this is a different judgment about the likelihood of unequal bargaining power. The presumption of the CCA is that it is rare (or rare enough in any material sense), whereas the presumption in the FW Act is that, if unregulated, it would be common. Understandably, the two sets of laws adopt different processes depending on the risks of some outcomes, both of which may not otherwise serve the public interest well.

The mechanisms to address market power are different

In the WR system, the main strategies for achieving more balanced bargaining power are:

- regulated minimum conditions
- empowering employees, through their representatives (primarily unions), to exercise countervailing power against an employer that holds bargaining power (with a set of rules about how such negotiations must proceed and with limits on what can be negotiated away). The regulator itself does not largely (now) act as the mediating party or determine the outcome of the negotiations.

¹⁶⁹ There is one notable exception, in that the CCA permits small businesses to collectively bargain with a supplier or customer. The ACCC has permitted small business group bargaining in areas as diverse as dairy farming, vegetable growing, hotels and concrete carting (ACCC 2012, p. 16). However, permission must occur through the authorisation or notification process, and is therefore not automatic. In addition, an important test is that collective bargaining must result in a public benefit (for example, through more efficient bargaining) or otherwise lead to lower prices or greater variety.

The CCA principally leaves businesses to make their decisions as they feel fit, with the regulator acting on an ‘exceptions’ basis. In limited areas only, there are prescriptive rules about the day to day interactions of businesses with other businesses or consumers, or the prices they may charge (telecommunications being an example). The bulk of monitoring and enforcement is undertaken by the ACCC which steps in to address situations where a party has misused its market power or otherwise engaged in actions that breach the CCA.

As noted above, there is one limited area where competition law permits businesses to act collectively in their dealings with other businesses, but this is highly restricted. The CCA allows micro businesses and professions a circumscribed right to collectively bargain with a supplier or customer. For example, this allowed general practitioners to engage in intra-practice price setting and collective bargaining with state and territory governments in relation to the provision of certain services. However, the capacity for collective action is not a blanket provision that permits such conduct generally. As an illustration, the ACCC sought undertakings that a group of doctors negotiating with a regional hospital not seek common prices where this was accompanied by the threat of collectively withdrawing services if that price was rejected (ACCC 2011b, p. 24). In this instance, collective action was seen as anticompetitive.

Moreover, authorisation of collective bargaining under competition law in the limited circumstances it occurs is quite different from that in the FW Act.

- Parties that collectively bargain under the CCA have to *prove* that such bargaining is in the public interest. The CCA only allows collective bargaining where the parties are authorised or notified by the ACCC. The decisive test is that the collective arrangements must result in a public benefit (for example, through more efficient bargaining) or otherwise lead to lower prices or greater variety (ACCC 2011a, 2011b; King 2013). It is therefore still subject to a fundamentally economic test. The presumption therefore in the CCA is that collective action between parties (‘cartels’) should generally be prohibited, even if that means overlooking the inequalities in bargaining power that can often arise between firms.
- In the FW Act, the onus of proof is reversed. Enterprise bargaining is an objective of the Act and the Fair Work Commission is expected to allow bargaining to proceed unless certain circumstances prevail (chapter 20). The FW Act recognises that *unfettered* collective bargaining could be anticompetitive, but the way in which this is addressed is through proactive regulatory measures that attempt to preclude it, rather than through ex-post penalties if it occurs as under the CCA. For example, there are legal remedies against parties that try to coerce people to join unions (‘adverse action’); union membership is voluntary and there can be multiple employee bargaining representatives; industrial disputes must follow certain rules; and there is competition from other non-regulated sources of labour (such as independent contractors, though, as discussed further below, this is an area where the Productivity Commission recommends pro-competitive strengthening to reduce constraints in the competitive forces posed).

The labour market exemption in the CCA seeks to reconcile the conflict between the use of collective action to address the likelihood of unequal bargaining power between an employee and employer, and competition policy, where the presumption is that collective action is more likely to be anticompetitive.

The concerns of the WR system go beyond efficiency

Competition law, as noted earlier, is not for the most part interested in individual competitors, their welfare or the minimum standard of their reward. It is acceptable to society that they may go broke. The same is not true of labour. The FW Act has a wide set of objectives — some of them non-economic, and, depending on the circumstances, parts of the objective can take precedent over other parts (chapter 1).

As discussed in chapter 1 (and above), there is a human dimension to labour that means that the market for labour does not always operate in the same way as markets for goods and services. The outcomes of labour markets (unlike those of most goods and service markets) are not just about economic performance; they also involve ethical and social considerations. For example, while competition policy generally emphasises the importance of firms entering and exiting markets, there can be significant personal and social costs associated with workers losing their jobs. Competition policy is mostly unconcerned about distributional issues.

Similar observations were also made by numerous inquiry participants (Australian Council of Trade Unions (ACTU), sub. 167; Australian Institute of Employment Rights, sub. 140; Andrew Stewart and others, sub. 118; Shop, Distributive and Allied Employees' Association (SDA), sub. 175). As noted in the Productivity Commission's Review of National Competition Policy Reforms, labour market outcomes also have 'a significant impact on equality of opportunity, the stability of family relationships and social cohesion more generally' (PC 2005b, p. 354).

Some inquiry participants also suggested that the exemption from competition policy is not unique to employees, arguing that while employer firms themselves comprise a collective of capital in the form of shareholders, such collective behaviour is also overlooked by competition policy (ACTU, sub. 167; David Peetz, sub. 133; SDA, sub. 175).

Treating labour differently is not unique to Australia

The separation of WR matters from competition law is not unique to Australia. Similar exemptions are in place in the United States, the United Kingdom, Canada and New Zealand.

In the United States the *Sherman Antitrust Act 1890* regulates concerted employer activity in the labour market only where the activity restrains the product market. While the Sherman Act was 'intended to promote only product market competition ... the courts had

permitted the Act be used as a weapon against unions and it was this perversion of congressional intent that required legislative correction' (Jerry and Knebel 2014, p. 194).

The *Clayton Act 1914*, was designed to withdraw the power of the United States Federal Courts to regulate labour through antitrust laws. Section 6 of the Clayton Act states that:

... the labour of a human being is not a commodity or article of commerce ... nothing contained in the antitrust laws should be construed to forbid the existence and operation of labour ... organizations, instituted for the purposes of mutual help ... or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 prohibits federal courts from enjoining certain specified acts 'involving or growing out of a dispute concerning terms and conditions of employment' and contains a clause making such acts lawful, notwithstanding any other legislation (Altman 1982).

Canada's *Competition Act 1985* also exempts labour union activities. Section 4(1) of the Act states that 'Nothing in this Act applies in respect of (a) combinations or activities of workmen or employees for their own reasonable protection as such workmen or employees'. It also exempts employer associations for collective bargaining purposes (s. 4(1)(c)).

Likewise, New Zealand's *Commerce Act 1986* exempts employment contracts: agreements relating to employees' wages, salaries or working conditions (s. 44(1)(f)).

A number of reviews into Australian competition policy have concluded that the existing exemption is warranted because labour markets are only partly comparable with other markets (Harper et al. 2015; Hilmer, Rayner and Taperell 1993; NCC 1999). For example, when the National Competition Council (NCC) reviewed the exemption for labour arrangements under s. 51(2), it concluded that the benefits (to the community as a whole) of the restriction on competition outweighed the costs, including that:

Section 51(2)(a) ... allows practices to occur which are permitted under labour laws but in breach of Part IV of the [Trade Practices Act]. This supports a public policy, observed both nationally and internationally, that labour markets are generally treated differently to markets for goods and services. This policy is reflected in the mechanisms and institutions in place ... international agreements relating to labour that recognise collective bargaining and the exemption of employment matters from competition laws in comparable countries. (NCC 1999, p. 41)

This inquiry has found no strong argument against the general exemption in submissions or in other sources. Specific exemptions are, however, another matter.

31.3 Competition policy cannot subsume the WR system

In summary, notwithstanding some of their congruent goals, there are strong reasons for separating (many aspects of) the WR system and competition policy. Repealing s. 51(2) of the CCA would represent a dramatic shift in Australia's WR system and would underplay some of the important differences between the systems. This inquiry finds, as the NCC did in 1999, that the social policy grounds for retaining a separate WR regime are clear.

In practical terms, the sheer volume of employment agreements and arrangements that would otherwise need to be authorised or notified if s. 51(2) of the CCA was repealed would suggest significant transaction and compliance costs (Andrew Stewart and others, sub. 118).¹⁷⁰ Removing the exemption would also create some uncertainty around the application of Part IV to employment arrangements. Authorisation from the ACCC would only be obtained if the agreement or arrangement could be shown to be in the public interest — some inquiry participants have argued that this public interest test is 'ill-suited to a labour relations framework in which collusive conduct plays a central role' (Andrew Stewart and others, sub. 118, p. 21).

As noted by Anderson, the repeal of s. 51(2) would affect employer organisations as much as unions (both would be subjected to the general prohibitions on collective organisation).

The complete removal of the exclusion in 51(2)(a) may prevent what is wholly justified and indeed necessary — the capacity of employers to meet together and determine policy, strategy and representation over employment matters that have impacts across industry and across employers or that are imposed by governments, parliaments, unions or industrial tribunals across industry or across employers. And the same applies to unions. (Anderson 2003)

Both employee and employer organisations, expressed opposition to such a repeal on various grounds (Australian Mines and Metals Association (AMMA), sub. 96; Australian Education Union (AEU), sub. 63; SDA, sub. 175). While removing the exemption would mean regulatory consistency across product and labour markets, using the CCA would appear to be a 'blunt' instrument for addressing concerns about anticompetitive behaviour given the distinctive features of the labour market (as discussed above).

Further, while the authorisation and notification processes in the CCA allow for the determination of whether a group should be *allowed* to bargain collectively, it provides little insight into *how* the parties should bargain. Thus (again on practical grounds) using

¹⁷⁰ Currently the CCA does not empower the ACCC to grant block exemptions. The Competition Policy Review (Harper et al. 2015) recommended that exemption powers based on the block exemption framework in the United Kingdom and European Union should be introduced to the CCA to supplement the authorisation and notification frameworks (largely in respect of non-employment matters). In principle, a block exemption process might reduce the transaction costs of dealing with large numbers of employees, but this would not overcome the need to have a thorough public benefit test, nor address some of the other deficits of the CCA in dealing with employment matters.

the CCA to regulate WR would either lead to a loss of these procedural rules, or require such rules to be enshrined within the CCA, leading to greater complexity. It would also lose some of the ‘on the ground’ information that informs negotiations under the FW Act. In essence, the FW Act empowers another agent (typically a union) to address bargaining imbalances and that is also close to the specific employer and worker. This can produce efficient outcomes at lower costs, and can take account of the specific context of the business and its employees. The risks of overreach by this agent are then controlled through a host of regulations.

While the Productivity Commission considers that the reach of competition laws should not be further expanded into the employment space, there is a case for increasing the prominence of competition policy *principles* in the framework of the WR system itself. Exclusion from competition laws should not preclude WR regulation being informed by principles of competition and efficiency — especially as this would also improve the consistency of regulations across labour and product markets, while still remaining separate. This notion was also supported by some inquiry participants (Australian Petroleum Production and Exploration Association, sub. 209; Minerals Council of Australia, sub. 129).

Indeed, as outlined in chapter 1, one focus of this inquiry is to identify reforms to the WR system that appropriately balance principles such as competition and efficiency with the other goals of the WR system. A standalone WR framework that holistically accommodates these competing goals is preferable to a chimeric approach that attempts to shoehorn provisions from the CCA into WR issues.

31.4 Are there gaps in the WR system that allow anticompetitive conduct

While there is a strong case for regulating labour markets differently from other markets for goods and services, what continues to be questioned is the appropriate balance between the two broad regulatory systems. In particular, some claim that the anticompetitive detriment of particular arrangements may sometimes outweigh the labour law policy objectives. For example, while noting the differences between product markets and labour markets, a former Chair of the Productivity Commission questioned whether the lack of scrutiny around particular restrictions on competition in the labour market was justified:

Industrial relations regulation has generally been regarded as falling outside the purview of competition policy altogether and, secondary boycotts aside, union activities are largely exempt from the anticompetitive conduct provisions of the Competition and Consumer Act. The basis for this has been that labour markets are more complex than product markets and involve a significant human dimension. And these points are correct. But are they good reasons for foregoing scrutiny of whether the benefits of particular restrictions on competition and other regulatory measures in the labour market exceed the costs and, where they do, whether they are the best way of achieving those benefits? (Banks 2012, p. 8)

Anderson also argues that the industrial relations exclusion should not be misused by allowing anticompetitive provisions in agreements:

It should not be the case that an industrial exclusion for the legitimate policy purpose of allowing for an orderly system of minimum standards and collective bargaining to exist, should be misused by allowing the inclusion in agreements (particularly unregistered agreements) anticompetitive provision that undermine the public interest, or economic efficiency or even the interests of parties affected by the agreement. (Anderson 2003)

In cases where one party is able to exert substantial market power, the use of an employment arrangement could raise concerns about unreasonable constraints on competition and costs to the community. Some of the costs to the community of such behaviour could include: higher prices for consumers in the short term caused by the higher labour costs of a non-competitive labour market; fewer people employed because of higher labour costs; and lower economic growth (NCC 1999, p. 61).

The ACCC reported to the Harper Competition Policy Review that on certain occasions it investigates allegations of anticompetitive conduct involving employee organisations, usually relating to interactions between such organisations and other businesses. For example, the ACCC recently investigated allegations of anticompetitive conduct involving Toll and the Transport Workers Union. However, the ACCC noted that in many cases ‘a threshold consideration is whether or not the conduct at issue falls within the ‘employment exemption’ of Part IV’ (ACCC 2014c, p. 5).

The specific concerns and which Act should address them

Numerous stakeholders expressed concern to the Competition Policy Review about the use of terms in enterprise agreements to limit the capacity of employers to hire independent contractors (Ai Group 2014c; AMMA 2014; MBA 2014). They argue that such terms conflict with the intended purpose of ss. 45E and 45EA, and constitute an anticompetitive restriction on business to business activity. Similarly, Ai Group (2014c) previously advocated that s. 51(2)(a) should be modified to exclude industrywide pattern agreements from the exemption.

The Competition Policy Review (Harper et al. 2015) noted these concerns and agreed that the conflict between the CCA and the WR system should be resolved. The Review recommended that ss. 45E and 45EA be amended so that they expressly include awards and enterprise agreements (except to the extent they deal with the remuneration, conditions of employment, hours of work or working conditions of employees). This would extend the reach of competition policy into the WR system, and would prohibit restrictive terms on independent contractors in enterprise agreements by subjecting them to the CCA.

As outlined in chapter 25, this inquiry prefers to resolve concerns related to independent contractors directly via s. 194 of the FW Act, which sets out unlawful terms that cannot be included in an enterprise agreement. Broader alterations, such as those proposed via amendment to the CCA, would raise the prospect of unintended consequences.

The WR framework constrains the use of coercive pattern bargaining by prohibiting the use of protected industrial action in support of pattern agreements (chapter 20). However, the Productivity Commission has also noted that the use of pattern bargaining can be a strong indicator of excessive market power, and thus may be a relevant factor for the ACCC when considering the competitive circumstances of an industry in relation to other competition policy issues, such as mergers or secondary boycotts.

The difficulties in finding the right legislative framework for alleviating anticompetitive conduct in WR are further illustrated by the swinging statutory pendulum for consideration of secondary boycotts. Secondary boycotts first found a home in the *Trade Practices Act 1974* (Cth) in 1977, only to be evicted into WR legislation in 1993, and then re-housed in competition law in 1996, where it has stayed ever since.

The presumption in favour of adapting the FW Act rather than resorting to a broader role for generic competition law is that any change is likely to involve substantial compliance problems, legislative complexity and uncertainty, and regulatory challenges. A broad exemption for employment matters from competition policy provides clarity for parties about the legal framework that applies to them. Selectively reinserting competition policy into employment matters through specific exclusions from the exemption could reduce clarity and undermine the abilities of these separate policy frameworks to achieve their own objectives. Further, such a shift would require the ACCC to actively involve itself in regulating the WR system — this is likely to create a confusing and duplicative regulatory environment. Some inquiry participants also questioned whether the ACCC possesses the expertise or capacity to fulfil a role in regulating labour markets (Andrew Stewart and others, sub. 118; SDA, sub. 175).

Secondary boycotts

Secondary boycotts are an apparent exception to the general rule of locating core employment issues in the FW Act. The provisions dealing with these matters are at least conceptually well placed in the CCA, given that they involve third parties external to the employee–employer relationship. Secondary boycotts can involve non-WR matters, such as interactions between multiple firms, or between firms and consumers.

Some stakeholders criticised the existing secondary boycott provisions as they apply to WR matters, on the grounds that they do not currently provide adequate exemptions for secondary boycotts and sympathy strikes by unions (ACTU, sub. 167; AEU, sub. 63). These stakeholders argue that Australia, as a signatory to International Labour Organization (ILO) conventions, should feel obliged to observe existing conventions recognising the rights of trade unions to be able to engage in secondary and sympathetic industrial activity.

Being a signatory to ILO conventions is not, on its own, a sufficient justification for changes to laws prohibiting secondary boycotts. Such conventions are not legally binding unless Parliament chooses to enact domestic laws to bring them into effect (chapter 30),

thus any inconsistencies do not present problems from a legal perspective, and there is little evidence that organised labour is unable to find alternative ways to express its support for causes wider than the workplace relationship.

In contrast, there are strong perceptions in sections of the business community, particularly in the construction sector, that there is inadequate enforcement of secondary boycott provisions. Recent high profile cases have further shaped these perceptions (box 31.1). Various submissions to the Competition Policy Review have raised questions about the appropriate reach and enforcement of the secondary boycott provisions of the CCA and the degree to which even applicants and respondents understand their application (ACTU 2014; AMMA 2014; Lloyd 2014; MBA 2014). For example, Lloyd (2014) claims that the secondary boycott provisions are ‘essentially ineffectual’ due to inadequate enforcement.

The ACCC has commented that while there was a view in the business community that there were a large number of complaints regarding secondary boycotts, in reality the ACCC received very few complaints in this area. While some have alleged that the ACCC does not take enforcement action in response to the complaints they receive, the ACCC responded that they will enforce such complaints where there is sufficient evidence. The Chair of the ACCC, has stated ‘when we go and talk to people and they do not want to provide us with that evidence, there is very little we can do’ (Sims 2014, p. 24).

Box 31.1 Disputes between the CFMEU, Grocon and Boral

Business’ perceptions of the secondary boycott provisions of the CCA have been formed against the background of the widely reported dispute between the Construction, Forestry, Mining and Energy Union (CFMEU) and Grocon, which resulted in the CFMEU preventing Boral Concrete from entering construction sites in the Melbourne CBD.

In response, Boral sought legal action against the union and injunctions were issued by the court to halt the secondary boycott. However, Boral has also told the Royal Commission into Trade Union Governance and Corruption that the injunction has had no effect and the company is unable to secure work in the Melbourne CBD.

The ACCC has commenced proceedings in the Federal Court against the CFMEU, alleging that the union has engaged in secondary boycott conduct against Boral.

Sources: Kane (2014); ACCC (2014a).

It appears that there are barriers to the enforcement of the current law in some cases, but its location in the CCA seems to be the lesser of these. The status quo may be problematic in several respects. For example:

- the imputation is that there may be cases of genuine secondary boycotts that are not disclosed because people fear the consequences for their businesses.
- the FW Act specifies matters that are unlawful in enterprise agreements. A union would not be able to take protected action in respect of unlawful terms, nor could an

agreement with such terms be registered by the Fair Work Commission. Yet secondary boycotts might be able to circumvent this restriction in some circumstances.

- action under the secondary boycott provisions is seen as cumbersome and difficult to carry through successfully.

As McClelland has observed:

Section 45D of the CCA is a significant coercive weapon in the area of industrial disputation. However, it would be overly simplistic for those who would seek to rely on s 45D to assume that it will achieve a direct hit in all cases. While s 45D will inevitably receive attention during intense industrial campaigns, the reality is that the proceedings are extremely complex and require careful preparation. (McClelland 2014, p. 51)

Concerns about secondary boycotts may be addressed through practical remedies to encourage effective enforcement. The recent Competition Policy Review found that there was no sufficient case to change the relevant provisions, but recommended more vigorous enforcement (Harper et al. 2015).

The issue for the ACCC appears to be obtaining sufficient evidence to effectively prosecute secondary boycotts. The complaints received about secondary boycotts appear to centre largely on the construction industry. If this is indicative of a localised (even if serious) problem, the solution may not lie in a change across the full gamut of WR or competition law. It is possible that the powers of Fair Work Building and Construction (FWBC) to compel witnesses to provide evidence could be applied, by giving FWBC shared jurisdiction with the ACCC to investigate secondary boycotts within the construction industry. Having obtained evidence, the ACCC would then be able to take action. A similar approach was also recommended in submissions to the Royal Commission into Trade Union Governance and Corruption (Boral 2014; HIA 2014; MBA 2014), and was supported by several inquiry participants.¹⁷¹

An advantage of this approach is that parties or activities that are potentially in breach of the secondary boycott prohibitions can also be the subject of other concurrent investigations by FWBC into potential breaches of WR laws (ACCC 2014c). It would leave intact the general responsibility of dealing with secondary boycotts via the appropriate mechanism, but address the core issue — obtaining evidence — via another mechanism.

¹⁷¹ Including Master Builders Australia, sub. DR290; Master Electricians Australia, sub. DR304; HIA, sub. DR319; AMMA, sub. DR322; ACCI, sub. DR330; MCA, sub. DR363.

RECOMMENDATION 31.1

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.

32 Compliance costs

Key points

- Compliance costs of interest to this inquiry go beyond those costs that might reasonably be required to meet the objectives of the workplace relations system — that is, the focus is on the wasteful incremental costs rather than total compliance costs.
- Complexity is a major source of compliance costs in the regulatory framework. Most parties find the system complex.
- Unnecessary compliance costs tend to manifest as increased leadership and management time to comply with obligations or the added expense of seeking external advice. As a result, compliance costs can displace more productive activities and efficient bargaining.
- Small businesses and unions are less able to bear this compliance burden.
- Two previous regulatory analyses suggested that regulatory costs under the *Fair Work Act 2009* (Cth) were expected to be transitional in nature, but concerns persist. Businesses have provided data and anecdotes to this effect, but data also suggest that the compliance burden is decreasing. Despite this overall perception, the available data are not informative of the incremental costs to businesses.
- The excess compliance burden on unions appears mainly to have been transitional in nature, but some ongoing concerns remain.
- The effectiveness of regulators in overseeing how the workplace relations system is implemented is critical to minimise compliance costs. The Fair Work Ombudsman and Fair Work Commission are proactive in seeking to manage their caseload.
- The Australian Government has introduced the Regulator Performance Framework from 1 July 2015 as part of its commitment to reduce the cost of unnecessary or inefficient regulation imposed on individuals, businesses and community organisations. The Productivity Commission considers that the new Framework and recommendations proposed in this inquiry, effectively implemented, are likely to reduce compliance costs towards efficient levels.

For most businesses, employment costs are their largest single expense. As well as the direct costs of employing staff (such as wages and on costs), the costs to comply with employment laws and other parts of the workplace relations (WR) system are necessarily a part of doing business and to provide adequate protections for employees. However, where workplace regulations are poorly designed or implemented, these compliance costs can outweigh the benefits to compliance (such as reducing adverse outcomes for employees or the risk of penalties to employers). In such cases, this leads to the needless imposition of a compliance burden beyond that required to meet a policy objective.

Unions too can be victims of compliance burdens. Membership dues may be a declining revenue source in some cases, with falling membership overall, and the diversion of staff to handle compliance burdens will reduce a union's ability to service its members. Moreover, as more active users of parts of the regulatory apparatus, they have a familiarity with the system's strengths and weaknesses.

This chapter surveys the evidence on the compliance impacts of the current system. The compliance impacts of recommendations on specific areas of the WR system and the costs of regulatory distortions are considered in other parts of the report. Data used in this chapter include the 2015 survey data provided by the Chamber of Commerce and Industry Queensland (CCIQ).¹⁷² The chapter also draws on past surveys by the CCIQ, the Australian Chamber of Commerce and Industry (ACCI) and the Australian Human Resources Institute (AHRI).

Section 32.1 provides a brief overview of regulatory compliance costs. Sections 32.2 and 32.3 examine whether and to what extent there are ongoing, unnecessary compliance costs for businesses and unions, and section 32.4 suggests how ongoing compliance burdens may be managed.

32.1 Sources of compliance costs

Compliance costs are incurred by businesses or other parties to undertake actions that are necessary to comply with their regulatory requirements (OECD 2014c).

Not all compliance costs are inefficient. Some costs are reasonably required to meet the objectives of the *Fair Work Act 2009* (Cth) (FW Act). The compliance costs of interest to this inquiry are any wasteful incremental costs. For example, a regulatory process may involve unnecessary steps for a business that tie up staff and other resources without any offsetting benefit to the business or its employees. For a union, this might be the time spent by union officials dealing with procedural requirements to fill out applications or other paperwork, or appear before the Fair Work Commission (FWC) when they could be undertaking other tasks for their members (such as consultations and bargaining).

The following, which draws on the OECD's guide to assessing regulatory costs, indicates where compliance costs can arise.

¹⁷² The CCIQ surveyed around 1000 small, medium and large businesses in February and March 2015 on a range of workplace relations issues, including indicators of the compliance burden on businesses. Findings from the survey data are also presented in its submission to the inquiry (sub. 150).

Administrative burdens

These are the costs of complying with information obligations set out in government regulations, such as obligations to provide information and data to the public sector or third parties. The information does not actually have to be provided to incur a cost — administrative burdens include the costs involved in having information available for inspection or supply on request.

For businesses, unnecessary costs can arise from redundant regulations, variations between regulations in definitions and reporting requirements, and overlapping regulatory requirements (Regulation Taskforce 2006). For unions, these costs could include the time taken to record or document employer union interactions during bargaining in order to demonstrate compliance with the good faith bargaining requirements.

Transitional costs

These are the costs from learning to operate under a new regulatory regime, such as developing compliance strategies and allocating responsibilities for compliance-related tasks. These were examined in two regulatory analyses of the FW Act (discussed below).

Substantive compliance costs

These are the costs of generally dealing with regulation and affect both businesses and unions. They include:

- direct labour costs — the cost of wages paid and non-wage labour costs
- overhead costs — rent, office equipment, utilities and other inputs
- equipment costs — where purchased to comply with regulation (for example, software)
- external services costs — where specific technical expertise is required.

To the extent that compliance activity is unnecessary, these costs will be higher than they need to be.

Assessing compliance costs

A full assessment of compliance costs would involve collecting relevant data, developing a base case for comparison (without the unnecessary compliance costs), and estimating the incremental compliance costs. However, the available data are limited and tend to relate to the costs of compliance, without taking into account the offsetting benefits.

The CCIQ data discussed later, assess the performance of the Fair Work Ombudsman (FWO) and FWC which play a critical role in minimising compliance costs, particularly

for small businesses. Regulators can add to compliance costs through ineffective communication, unnecessarily extensive reporting requirements, excessive numbers of inspections or audits (relative to compliance risk) and excessive prescriptiveness and rigidity in enforcement (PC 2013d). (On the other hand, less is not always better. In some areas, there is a need for more enforcement — as for migrant workers — even if this is unwelcome for some businesses.)

32.2 Compliance costs were expected to be transitional in nature

Two previous analyses have considered the compliance costs imposed by the FW Act on businesses and trade unions compared with the system it replaced (WorkChoices). These reviews found that there were transitional costs of compliance for businesses and unions under the FW Act, but also that compliance costs should not raise any ongoing concerns.

A regulatory analysis was included in the explanatory memorandum to the Fair Work Bill 2008. The findings on compliance costs included that:

- while there would be a moderate increase in compliance costs associated with the national employment standards (NES), these would not impede the competitiveness and viability of businesses
- the new bargaining system was expected to generate some transitional costs but would ultimately provide net benefits
- removing the 100 employee exemption for unfair dismissal laws would significantly affect businesses under this threshold, but the Fair Dismissal Code was expected to minimise the burden for genuinely small businesses (though in fact, the Productivity Commission rejects that view)
- changes to the industrial action provisions were clear and reduced unnecessary regulatory impacts
- any regulatory burden placed on employees and employers by the creation of the new FWC should be minimal.

As the FW Act was exempted from regulatory review at the decision making stage on the grounds of exceptional circumstances, the then Department of Education, Employment and Workplace Relations conducted a post-implementation review in 2012 to meet best practice regulation requirements.

The post-implementation review examined compliance costs in the context of transitioning to the new WR system. The review found there were compliance costs associated with transitioning to the new system but that the costs would reduce over time and they were justifiable, bearing in mind the objects of the FW Act and the longer-term benefits.

32.3 Are compliance costs an ongoing concern?

The compliance burden on business

Data from the CCIQ 2015 survey of Queensland businesses suggest that the compliance costs associated with the FW Act are not as ‘transitional’ as the earlier analyses suggested would be the case. In contrast with the earlier analyses, the 2015 CCIQ survey results show compliance costs remain a significant concern for businesses (table 32.1). However, there is conflicting evidence about the compliance burden over time (see discussion on complexity below) and relative to other issues. While businesses perceive that the red tape and compliance cost burden has increased under the FW Act and modern awards (table 32.1), some survey data suggest that concerns about these costs are marginal compared with concerns about other costs of employment — particularly wage and penalty rates and the burden imposed by unfair dismissals (table 32.2).

Some participants disputed the proposition that the regulatory burden under the FW Act had fallen over time, although tended to focus on the overall, rather than the unnecessary, costs of compliance.

Based on its national survey of chief executive officers in 2014, the Australian Industry Group (Ai Group) nominated industrial relations, employment, workcover and occupational health and safety as placing the largest regulatory burden (relative to other regulation such as taxation and the environment) on all businesses regardless of size, and by sector, manufacturing, service, construction and mining businesses (sub. DR346).

Ai Group reported that the survey showed a strong rise in between 2013 and 2014 in survey respondents that nominated flexibility in industrial relations as an impediment to growth (sub. DR346). The survey report noted that the increased concern in the manufacturing sector, for example, could reflect businesses’ experience in attempting to streamline their operations during challenging domestic conditions (Ai Group 2014b).

Table 32.1 Key indicators of the compliance burden on Queensland businesses

<i>Indicator</i>	<i>Business view ^a</i>
Impact of the FW Act and modern awards on red tape	Increased
Impact of the FW Act and modern awards on the overall cost of compliance with the Fair Work Act	Increased
The extent to which complexity of the WR system is a cause for concern	Moderate concern

^a Mean response to the survey questions. Responses have not been weighted by industry or business size.
Source: Productivity Commission estimates based on CCIQ data from its 2015 survey of Queensland businesses.

Table 32.2 The greatest workplace relations issues nominated by Queensland businesses

<i>Issue</i>	<i>Responses (per cent) ^a</i>
Wages	17
Penalty rates/overtime	15
Unfair dismissals/dismissals	15
Leave	5
Awards	4
Complexity and compliance	3
Red tape	1

^a Percentage of all survey respondents who nominated a top workplace relations issue for their businesses (approximately 57 per cent of all respondents answered this question). The table does not include all responses below 4 per cent.

Source: Productivity Commission estimates based on CCIQ data from its 2015 survey of Queensland businesses.

Reflecting regulatory burdens, particular to the mining sector, the Minerals Council of Australia (sub. DR363) reported that respondents to a survey of its members found industrial relations was second to approval processes and ‘green tape’ as requiring government policy attention. The main concerns were delays in reaching agreements, restrictions on flexible work arrangements and the lack of productivity offsets in agreements.

Concerns about the lack of ‘flexibility’ in working arrangements could reflect the view of some participants that there should be a return to individual statutory agreements, such as Australian Workplace Agreements (discussed further in chapter 23).

The Australian Mines and Metals Association (AMMA) said that its members are:

... spending an increased amount on specialist advice as a direct function of complexity added to the system through the 2009 changes in particular (noting that our system had been vastly complex by international standards for more than a century before this re-regulation). (AMMA, sub. DR322, p. 218)

AMMA proposed examining some of the paperwork requirements in the WR system, such as the Fair Work Information Statement and Notice of Representation rights, as well as the paperwork required to make agreements (DR322). However, this would need to take into account the offsetting benefits (such as transparency and employee education, in the case of the Fair Work Information Statement). The agreement making process is discussed further in chapter 20.

The Launceston Chamber of Commerce said that it continued to receive feedback from its members that compliance costs remained a concern. Maree Tetlow, the Chamber’s Executive Officer pointed to need for improved communication to address the compliance burden:

... it's hard to actually quantify what the burden is, but I think there is a sense with the award structure and everything else that it is complex ... how does business maintain their contemporary and current understanding of the workplace framework and ensure that they are doing the right thing? If there is some way of the communication, whether it is through the chambers of commerce or whether it's through other business mechanisms, I would encourage that it is considered for better communication. (trans., p. 124)

Complexity

Complexity is a significant contributor to the compliance burden on businesses and arises from:

- technicality (the need for specialist knowledge)
- density (the number of rules)
- differentiation (the different instruments or decision making systems)
- uncertainty (Stewart et al., sub. 118)

It also arises from inconsistency between parts of the WR system. For example, the FWO has pointed to inconsistencies between awards and other mandated conditions (Dunckley 2014). This increases the opacity of employment standards for small businesses in particular — and means that in complying with the award, employers could find themselves in breach of the FW Act.

Participants in this inquiry have also identified inconsistencies in the FWC's appeals process:

When matters do go to the FWC, there should be consistent decision making and interpretation. Unfortunately, this is currently lacking at both an individual commissioner and Full Bench level in some cases. (Australian Mines and Metals Association, sub. 96, p. 375)

The sheer number of decision making rules or instruments in the WR system increases the time businesses need to take from their day-to-day business operations to meet their compliance obligations (particularly where these rules are not easily navigable) and can manifest as an increase in management time:

- to interpret and determine the meaning and requirements of the statutory framework (South Australian Wine Industry Association and the Winemakers' Federation of Australia, sub. 215)
- to keep records and manage employment contracts. An AHRI survey in 2011 found that to comply with the FW Act, 63 per cent of respondents reported an increase in record keeping while 65 per cent reported it took more time to formulate employment contracts (AHRI 2012).

On the other hand, HR Business Direction (sub. 91) did not consider that the legislation was of itself necessarily difficult to comply with, but knowing what to comply with, and

how, were issues. For example, businesses may not be aware of the coverage of awards, but once they are, compliance is relatively easy.

Complexity also increases the need for businesses to seek specialist advice, which can be costly and time consuming. According to AHRI, 77 per cent of human resources professionals surveyed perceived an increase in the need to seek legal advice in order to comply with the FW Act (AHRI 2012).

In addition to seeking advice from the FWO and FWC, employers seek assistance from employer groups and specialists (such as employment lawyers) to manage compliance obligations. However, seeking advice from multiple sources can have unintended consequences, as one small business in the services industry found when it received three different and conflicting answers from the FWO small business helpline, a private lawyer and an industry association (Geelong Chamber of Commerce, sub. 177).

Survey data provide conflicting evidence on whether complexity is perceived as decreasing over time (which would be expected as businesses become more familiar with their regulatory obligations and/or introduce systems to manage these), or increasing.

ACCI's national red tape survey found that the proportion of businesses responding to the survey that reported that the WR regulations were extremely complex or very complex had increased between 2014 and 2015, and that complexity centred around employing workers, wages and conditions of employment and unfair dismissal (figure 32.1).

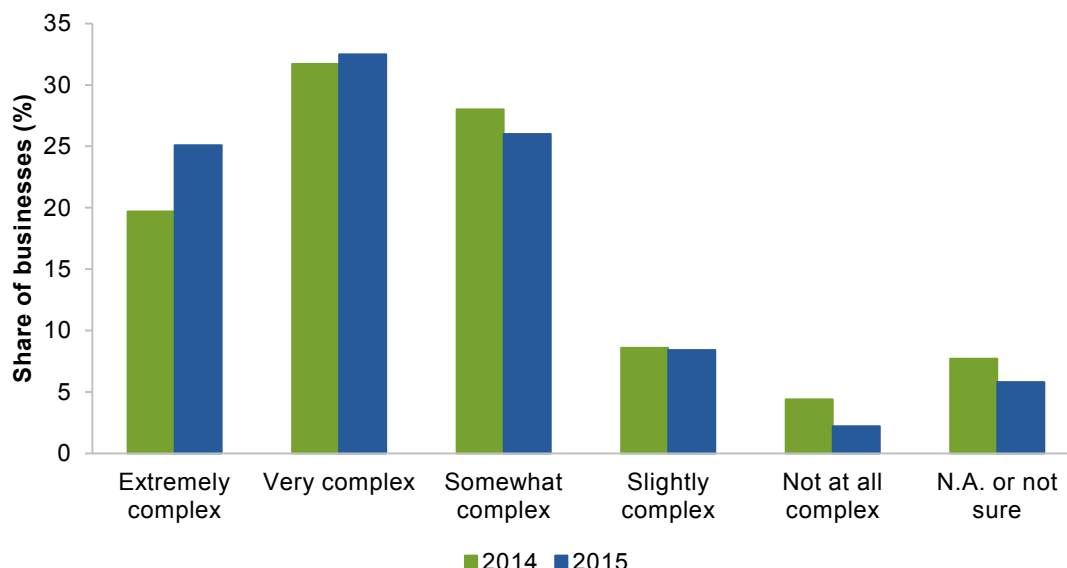
By contrast, the findings from CCIQ surveys are consistent with the expectation that perceptions of complexity would decrease over time. The percentage of surveyed Queensland businesses who reported that the complexity of WR matters was a major or critical concern fell by 13 percentage points between the 2012 and 2015 CCIQ surveys (from 66 per cent to 53 per cent of businesses) (figure 32.2). This was part of a broader decline evident in the degree of concern about a range of WR issues (which would be expected as businesses familiarised themselves with the new system).

Awards

Awards specifically were raised by participants as imposing compliance burdens (see also the discussion in chapter 8). The FWO has provided considerable assistance to businesses through its education activities and its information line to manage the transition to modern awards (of which a prominent feature has been the shift in penalty rates to a new award) by employers that previously understood the specifics in their smaller, more targeted award. CCIQ survey data show that the degree of concern among Queensland businesses about award compliance has fallen since 2012 (figure 32.2).

Nonetheless, participants reported that award compliance continues to frustrate employer groups and businesses.

Figure 32.1 Complexity in workplace relations regulations
Percentage of businesses responding to ACCI red tape surveys



Sources: ACCI (2014, 2015).

The Chamber of Commerce and Industry of Western Australia reported that 29 per cent of calls to its Employee Relations Advice Centre were queries about award provisions (sub. 134). Callers sought assistance to interpret the award, in particular an employee's entitlement to wages when they are required to work overtime or perform shift work.

These issues frequently require employers to consider the application of multiple clauses which are not only difficult for small business to interpret but also frequently baffle experienced IR and HR practitioners. (Chamber of Commerce and Industry of Western Australia, sub. 134, p. 31)

PricewaterhouseCoopers (PwC) proposed that small business should be a focus of award reform such as through small business schedules to awards and simplification (sub. DR318).

The Office of the Australian Small Business Commissioner (sub. DR366) singled out the complexity of modern awards as a major impediment to employing more staff, and recommended reducing the number of awards, positions and classifications. Master Builders Australia (sub. DR290) recommended that the FWC commission a study on the compliance costs of modern awards by sector.

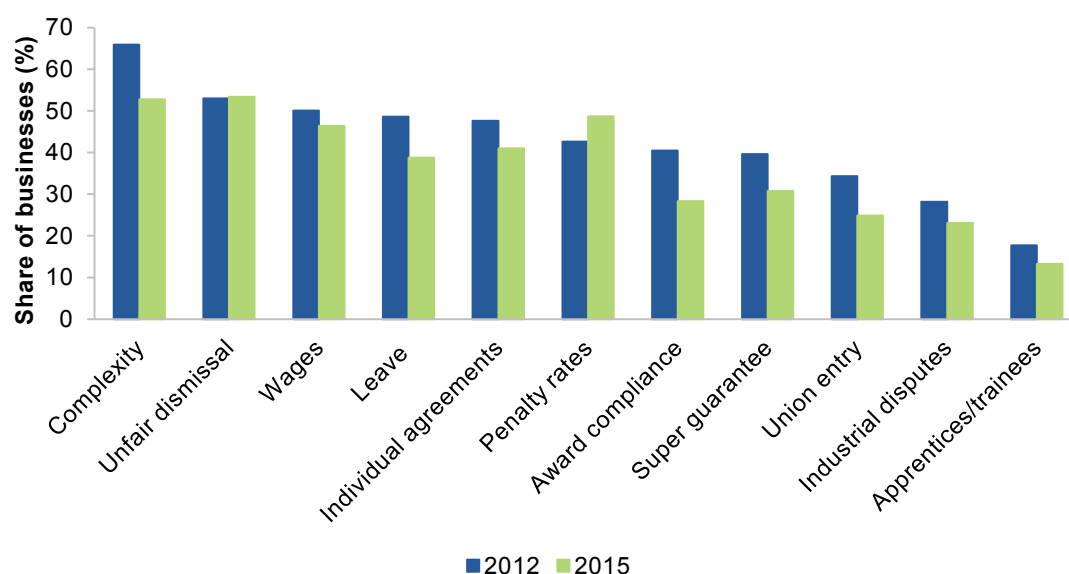
Small differences between award provisions and changes to those provisions were also a source of annoyance:

The descriptions on award rates are not specific enough between the levels and the hourly rates do not vary very much ... The descriptions for the levels change by stealth, you think you were

paying someone at the correct level for their duties, then check 18 months later and find it is not enough. (Launceston Chamber of Commerce, sub. 124, p. 9)

This has adverse effects for employees where they do not receive the correct entitlements.

Figure 32.2 Proportion of Queensland businesses reporting major or critical concerns with different aspects of the workplace relations system in 2012 and 2015



Sources: CCIQ (2012), Productivity Commission estimates based on CCIQ 2015 survey data.

Unfair dismissals

A number of participants (the Office of the Australian Small Business Commissioner, CCIQ, South Australian Wine Industry Association and Winemakers' Federation of Australia, Sydney Symphony Orchestra and the Australian Hotels Association and Accommodation Association of Australia) criticised the cost of complying with unfair dismissal laws. The Sydney Symphony Orchestra said that:

Each and every claim of this type [unfair dismissal cases and severance packages] means at least 2 of our Senior Executive Team are required to redirect their time and energies away from their necessary work to spend significant work time in dealing with a dispute or a claim and this does come at the detriment of their other work. This is an enormous cost to a medium size business such as ours. (sub. 100, p. 10)

A Gold Coast business operator in the hospitality sector also commented that:

As a small business owner, I have been reluctant to take on new employees for fear of unfair dismissals. In the past, employees have sought settlement money as a first resort to discourage

the matter going to the Fair Work Commission. Even in instances where the employee was on the facts, objectively in the wrong, I have paid over \$12,000 just to be able to get on with running my business. (CCIQ, sub. 150, p. 8)

The CCIQ surveys suggest that the degree of concern with unfair dismissals has not diminished since 2012 (figure 32.2), and remains one of the greatest concerns for Queensland businesses (table 32.2).

Unfair dismissal is discussed further in chapter 17.

Small and medium sized businesses

Small and medium sized businesses are more likely to experience the excess burden of compliance — as they have fewer resources to manage their regulatory obligations.

... [T]he vast majority of small business operators are not lawyers or industrial experts and so the complexity of the system magnifies the potential for error and misinterpretation. (ACCI, sub. 161, p. 44)

For a large employer with a sophisticated payroll system and dedicated payroll expertise the effort involved in interpreting awards or agreements to determine the applicable rates of pay, including penalties, loadings, overtime and allowances may be relatively small. However, for a family operated small winery business carrying out the relevant wages calculations may involve considerable effort, time and resources. (South Australian Wine Industry Association and the Winemakers' Federation of Australia, sub. 215, p. 15)

Most small business owners do not have the resources to fully understand their compliance obligations nor do they fully understand how to interpret issues relating to workplace relations. (Geelong Chamber of Commerce, sub. 177, p. 3)

The Office of the Australian Small Business Commissioner (sub. DR366) said that small businesses were particularly vulnerable to the adverse impacts of compliance costs, as they were responsible not only for day-to-day business operations, but accounts, payroll, superannuation, registration and workplace relations. This was compounded by factors such as:

- regulator processes and behaviours and lack of small business understanding
- the centralised approach to collective bargaining in the FW Act
- small business uncertainty as to where to get advice
- constant changes to the system.

The Office (sub. DR366) said that these factors meant there was a cumulative compliance burden across the three tiers of government, which raised both risk (where small businesses found it cheaper to comply by applying a 'rule of thumb' and 'hoping for luck') and stifled business growth (where businesses chose not to expand to avoid an increase in their regulatory burden).

The special needs of small and medium sized businesses are acknowledged in the objects of the FW Act (s. 3). Despite this, several participants raised concerns about the impact of the FW Act on small businesses, suggesting a need for increased support to ensure they could understand and comply with the laws.

Compliance costs affect more than a small business's bottom line:

... the costs to small businesses are often non-financial in that it can cause stress and related ill health, and also affect the personal life of the small business people, which can have just as much of an impact on their ability to carry on business. (National Tourism Alliance, sub. 39, p. 2)

The Australian Road Transport Industrial Organisation (sub. 103) suggested structuring compliance obligations to reduce the burden on small organisations, similar to the Australian Charities and Not for Profits Commission, which has a sliding scale of accounting and auditing standards based on turnover.

PwC (sub DR318) suggested a 'one-stop shop' for all workplace issues affecting small businesses to simplify access to advice and support and encourage a coherent approach by regulatory agencies (including the FWO and FWC).

Around 80 per cent of respondents to the 2015 CCIQ survey (sub. 222) perceived that the FW Act, despite its intentions, is unfriendly to small and medium sized businesses.

The compliance burden on unions

In its submission, the Australian Council of Trade Unions (ACTU) reported that drivers of compliance costs have been mainly transitional in nature (sub. 167), which is consistent with the findings of previous analyses of the FW Act (discussed above).

Award modernisation and the subsequent award reviews imposed a substantial cost on unions (as well as employers). The ACTU (sub. 167) stated that peak bodies bore the weight of these proceedings, in part due to the increase in 'test cases' while the new system bedded down. Moreover, the stakes of each 'test case' were higher under the current system than under previous systems given each award covers a larger proportion of the workforce (ACTU, sub. 167). Costs to unions, including staff time, administration and professional services (legal representation and research), and the cost for individual unions to participate in the modern award review process ranged from \$22 000 to almost \$900 000 (ACTU, pers. comm. 18 June 2015). The 2013-14 federal budget provided \$4 million over two years to employee and employer groups to assist them to participate in the award modernisation process. These grants were terminated after one year.

Ongoing costs to unions arise from prescriptive requirements for protected action ballots (chapter 27), right of entry permit renewal and reporting requirements under the *Fair Work (Registered Organisations) Act 2009* (Cth) (RO Act) (ACTU, sub. 167).

The ACTU (sub. 167, p. 2) says that unions are prepared to bear the compliance burdens under the RO Act given ‘the clear and balanced objectives of transparency and democracy’.

Administering and applying for right of entry permits has increased union compliance costs, including the need to provide education and testing facilities to enable officials to satisfy requirements of the FW Act (ACTU, sub. 167).

Duplication of process under enterprise bargaining also imposes costs on unions. The Queensland Council of Unions suggested industry-level bargaining and site-level agreements to reduce duplication (Queensland Council of Unions, sub. 73). However, this would be a radical departure from the current WR system, and hardly justified on the basis of compliance costs.

The role of regulators in addressing compliance costs

Regulators have a significant impact on the compliance costs of businesses, unions and individuals through education, compliance and adjudication activities.

Employees need transparent and easy accessible information to understand their rights and responsibilities. Poorly designed websites or congestion can increase the cost of seeking advice and diminish the benefits of accessing information. (The benefits of transparency to employers as well as employees are discussed in chapter 23 in relation to the proposed enterprise contract.)

In addition to the FWO and FWC, the WR system is regulated by Fair Work Building and Construction (FWBC), which is responsible for workplace relations in the building and construction industry.

Participant comments (and survey data) focused on the performance of the FWO and FWC. Participant views on the FWBC related mainly to its role (for example, Master Builders Australia sub. DR290, Master Electricians Australia sub DR304) rather than its performance, although Ports Australia (sub. 249) noted its efforts should reduce costs and delays in infrastructure development.

The CCIQ survey indicates that on average around 42 per cent of surveyed businesses had engaged with the FWC on various issues and around 40 per cent of surveyed businesses had engaged with the FWO. More businesses were satisfied than unsatisfied with the FWC and FWO (table 32.3) (except for the FWC’s handling of unfair dismissal claims).

Table 32.3 Satisfaction with regulators — ratio of satisfied to dissatisfied respondents

<i>Satisfaction with the Fair Work Commission</i>	<i>Satisfaction ratio^a</i>
Approving agreements and facilitating collective bargaining	2.1
Dealing with industrial action	1.4
Dealing with workplace disputes	1.2
Dealing with unfair dismissal claims	0.9
<i>Satisfaction with the Fair Work Ombudsman</i>	
<i>Advice received</i>	1.4

^a The ratio of businesses responding that they were either 'satisfied' or 'very satisfied' to those businesses responding that they were 'dissatisfied' or 'very dissatisfied'.

Source: Productivity Commission estimates based on CCIQ data from its 2015 survey of Queensland businesses.

Participants considered that there was an ongoing need to ensure regulators are sensitive to the particular needs of small businesses. Monash Business School considered clear communication and a user-friendly WR framework can lower transactions costs for small businesses (Australian Consortium for Research on Work and Employment, Monash Business School, sub. 181).

The Office of the Australian Small Business Commissioner (sub. 119) commended the efforts of the FWO and FWC, but was also one of the participants that identified ongoing concerns about the compliance burden for small businesses. The Office gave substantial weight to education in assisting small businesses:

... the easy approach for a regulator is to concentrate effort on enforcement, rather than educating businesses to comply. However, the majority of businesses want to comply with the laws that regulate their industry ... small business is more responsive to a facilitative approach to regulation, one that is underpinned by understanding and education. (sub. DR366, p. 6)

The Office highlighted the FWO's approach in this regard, indicating that the FWO identified and implemented opportunities to reduce the burden on small businesses, such as online training courses and engaged with industry and businesses to improve service and communication (sub. DR366).

Both the FWO and FWC already carry a large caseload.

In 2014-15, the FWO responded to around 469 800 enquiries (resolving 99 per cent at first contact), received more than 13.3 million visits to its website with more than 2.2 million visits to its pay tool. It also assisted with over 25 000 workplace disputes. It issued 348 infringement notices to employers that breached record keeping or payslip obligations and 118 compliance notices to recover unpaid wages. The FWO also entered into 42 enforceable undertakings and initiated 50 civil penalty litigations (FWO 2015b)

In 2014-15, the FWC's website was visited around 3.8 million times and the FWC received around 208 000 phone queries. The FWC also received more than 34 000 applications. This led to around 20 000 hearings and conferences resulting in more than 12 000 decisions and orders published (FWC 2015c).

Both regulators are proactive in seeking to reduce the burden of compliance with the FW Act through education and attempting to resolve queries and disputes in a timely fashion. For example:

- the FWO is seeking to reduce the complexity associated with the implementation of modern awards through a range of measures such as incorporating feedback from businesses and workers in reviews and publishing guidance on awards and pay tables
- in April 2015, the FWO issued its Compliance and Enforcement Policy to provide practical advice and assistance to businesses so that they find it easy to access, understand and apply (FWO 2015f). The policy focuses on promoting a culture of compliance and early intervention to resolve issues at the workplace level
- in 2012, the FWC moved to address longstanding concerns by commencing its Future Directions initiative to set out a range of activities to improve its performance and quality of service. These include increasing resources available online (such as benchbooks and practice notes), introducing timeliness benchmarks for decisions, increasing accountability by establishing user groups, and developing an engagement strategy with industry. The Law Council of Australia (sub. 247) noted that benchbooks, which offer clear, plain language guidance on issues including unfair dismissal, have been widely praised as providing detailed practical assistance to unrepresented parties and practitioners.

32.4 Addressing unnecessary compliance costs

Submissions to this inquiry indicate that parts of the WR system continue to frustrate and impose compliance burdens, although the data are not as informative about the extent to which these burdens are not necessary to achieve the objectives of the WR system. However, what is clear is that businesses (particularly small businesses) continue to regard effective engagement with the FWO and FWC as crucial to managing compliance costs.

To address concerns about the WR system, the reforms proposed in this inquiry are expected to reduce unnecessary compliance impacts, including in those areas identified as being of specific concern in this chapter.

In relation to awards (chapter 8), the proposed new approach to award assessments would:

- improve the accessibility and ease of use of awards
- improve the transparency around the effects of changes to award wages and conditions
- reduce the resources required by interested parties to participate in award assessments.

Other proposals would:

- change unfair dismissal arrangements (chapter 17)
- change enterprise bargaining arrangements to reduce costs and rigidities (chapter 20)
- lower the costs of industrial disputes by reducing scope for gaming the system (chapter 27)
- address FWC governance issues to improve quality of decision making (chapter 3)
- reduce the complexity and coverage of transfer of business provisions in the Act (chapter 26)
- provide greater consistency in penalty rates between like industries (chapter 15).

In relation to the performance of the FWO and FWC, the Australian Government introduced the Regulator Performance Framework in 2014, as part of its commitment to reduce the cost of unnecessary or inefficient regulation imposed on individuals, businesses and community organisations by regulators.

The Framework, which commenced on 1 July 2015, requires regulators to examine their operations and the effects of administering regulation. Regulators will self-assess annually and receive performance reviews from an external body. The Ministerial Advisory Council in the employment portfolio is the default body for external validation of reviews of regulators in the WR system.

The framework will assess regulators against the following outcome based key performance indicators:

- regulators do not unnecessarily impede the efficient operation of regulated entities
- communication with regulated entities is clear, targeted and effective
- actions undertaken by regulators are proportionate to the regulatory risk being managed
- compliance and monitoring approaches are streamlined and co ordinated
- regulators are open and transparent in their dealings with regulated entities
- regulators actively contribute to the continuous improvement of regulatory frameworks (Department of the Prime Minister and Cabinet 2015, p. 1).

The Regulator Performance Framework does not apply to the FWC's tribunal function, as courts or administrative tribunals are not subject to the Framework.

The FWO and FWC have published key performance indicators on their respective websites and in their annual reports, and the performance metrics (such as data, summaries of processes or case studies) that will be used to assess their performance.

The Productivity Commission understands that the FWO's assessment will be published as part of its annual report, with the first report a benchmark for future assessments against

the key indicators. The FWC will provide a report against its measures on its website at the end of the first reporting period (30 June 2016).

The Productivity Commission considers that the Framework, which will provide ongoing assessment of the effectiveness of regulators against key performance indicators, provides a holistic and measurable way of reducing the compliance burden in the WR system.

To the extent that the issues raised in the inquiry are not already being examined as part of this process, the Framework provides an opportunity to better address the compliance burdens on business, particularly small businesses.

The Productivity Commission considers that the recommendations proposed in this inquiry are likely to reduce compliance costs towards efficient levels, and that the new processes in place from 1 July 2015 under the Regulator Performance Framework are likely to be sufficient to manage ongoing regulatory burdens in the WR system if implemented effectively.

33 Impacts

Key points

- The Productivity Commission has identified aspects of the system that are in need of repair or improvement.
- The impacts of the recommendations in previous chapters can be assessed according to changes in:
 - employment protection
 - minimum wages and conditions
 - bargaining regimes
 - the ease of making agreements.
- Changes to these elements of the workplace relations (WR) system can affect unemployment, productivity and wages through a number of channels.
- However, the empirical literature examining the aggregate impacts of changes to the WR system contains mixed results and often lacks consensus.
- This is not surprising because the notion that WR reform alone will transform aggregate productivity is misplaced.
 - Changes to the WR system resemble incremental innovations at the firm level, in that they form a component of a portfolio of microeconomic policies across many areas, and it is this portfolio that has wider economic effects.
 - These effects are expected to be observable at the individual enterprise and sometimes industrywide level. However, they would be hard to identify at the economywide level because aggregate outcomes reflect a number of influences. This is a feature of many policy reforms.
- Nevertheless, the recommendations in this report are very likely to have positive effects on employment and productivity, and reduce compliance costs, especially in some industries.
- The recommendations will increase the functions of both the Fair Work Commission and Fair Work Ombudsman and, when combined with the establishment of the Workplace Standards Commission, will have a small immediate fiscal cost to government. These are a worthwhile investment in the fiscal benefits of greater employment and productivity.

Earlier chapters in this report contain recommendations to improve aspects of Australia's Workplace Relations (WR) system, and consider some of the impacts of their implementation. The effect of the recommendations could be pervasive as 71 per cent of employees are regulated by the *Fair Work Act 2009* (Cth) (FW Act). State Governments may also take account of the recommendations for the parts of the system still under their control.

The goal of this chapter is to synthesise, and in some cases extend, this analysis, set against the broad international and Australian empirical evidence on the impacts of workplace reform.

While the emphasis is on the consequences for unemployment, productivity, growth, wage dispersion and inequality, the WR system has social and ethical dimensions that, though less easily scrutinised and measured, are also important (unfair dismissal being an example). These have been acknowledged in the relevant chapters, and the Productivity Commission's policy changes have generally attempted to preserve the social and normative purposes of workplace regulations (such as avoiding unfair treatment of employees), while improving the employment and efficiency outcomes.

Impacts on specific aspects of the workplace relations system

This inquiry has scrutinised Australia's WR system by examining its key parts, and the different emphases of the report reflect to a large extent the areas where the Productivity Commission has identified the need for change. The structure of the report, however, does not necessarily reflect the breakdown of a WR system into those parts most commonly assessed in the economic and industrial relations literature. This chapter therefore departs from the structure of the rest of the report and instead examines the impacts of the recommendations on:

- employment protection
- minimum wages and conditions
- bargaining regimes
- ease of making agreements.

In addition, the reform of the principal regulators, the Fair Work Ombudsman (FWO) and the Fair Work Commission (FWC) will improve their operations, and together with the introduction of a new organisation, the Workplace Standards Commission (WSC), this will support the effective implementation of the other recommendations of this inquiry.

Some broader effects

As well as impacts in specific areas, increased flexibility in the WR system should improve the economy's capacity to respond to shocks. Some studies have identified the employment impacts of different WR systems by assessing how well countries have responded to shocks.

- Bertola, Blau and Kahn (2001) found mixed evidence of the direct effects on employment of the rigid wage setting institutions and interventionist benefit systems that typically occur in Europe. However, the laissez faire approach in the United States

contributed to reducing the impact on employment of macroeconomic shocks due to flexibility in real wages and relative wages.

- Nickell et al. (2001) suggested that 55 per cent of the change in unemployment in Europe between the 1960s and 1990s was explained by changes to institutions (of which 39 per cent can be attributed to changes in welfare benefits, 26 per cent to increases in labour taxes, 19 per cent to changes to union variables and 16 per cent to changes to employment protection laws). They attribute much of the rest of the increase in unemployment to the deep recession that Europe experienced in the latter part of the period studied (Nickell et al. 2001, p. 18).

Accepted and evolving societal norms about how people should interact with each other in the workplace can also affect productivity. These norms can have a sizeable effect and can work as a conduit, or in opposition to, the regulations in the framework.

- Some literature suggests that wage rigidities are not only the result of rules in a WR system, but also a result of ‘deeply rooted social customs’ (Agell 1999, p. F143). Several studies find that employers are unwilling to cut wages because they fear that the cuts will affect morale and effort negatively. Akerlof’s (1982) model of gift exchange suggests employers will be willing to pay more to encourage greater effort. Other studies find that fairness and reciprocal kindness have a strong effect on the actions of both employees and employers, and that this effect can be strong enough to prevent the labour market from clearing even in the absence of legal constraints on wages (Agell 1999).
- Research from the United Kingdom concludes that:
... businesses which reported good employment relations and high trust relationships in 2004 were less likely in 2011 to report themselves weakened by economic downturns ... [and that] ... around a quarter of the UK’s productivity gap with the US is down to poor workplace management ... which covers everything from job design to communication channels and management skills. (Acas 2015, p. 5)

The aggregate effects of any productivity improvements at the sectoral level ripple throughout the economy (so-called ‘general equilibrium effects’), so that the aggregate effects are larger than the initial shocks (PC 2011b). Projections which extend the Productivity Commission’s reporting on the impacts of COAG reforms (PC 2012) illustrate that small sustained differences in labour productivity growth (arising mainly from differences in multifactor productivity growth) can make for large cumulative differences in future prosperity (PC 2013c).

The relationship between Australia’s WR system and productivity is discussed further in appendix G.

33.1 Impacts of changes to employment protection

Employment protection includes measures such as dismissal protection, limitations on the use of fixed-term or temporary work contracts, the regulation of working hours, minimum wages, mandatory leave entitlements, and rights to representation. Researchers utilise differences that exist in one or more of these elements, either between countries, within countries across time, or when regulation differentiates between types of firms, to assess the effects of employment protection on unemployment, productivity and economic growth. The results of the research are mixed.

Effects of employment protection on unemployment

Employment protections have a sound basis in preventing the unfair treatment of employees, but can also affect employment. While the overall impacts on employment are an empirical matter, there are several avenues through which unduly restrictive employment protections may have employment effects.

- To the extent that employment protection raises labour costs for a business (for example, through more costly hiring practices or greater costs associated with layoffs and dismissals), and there is no scope to reduce wages, output will fall. This would then be accompanied by reductions in the employment of both labour and capital, at least in the short run. As is normally the case when labour costs rise relative to capital, there is also likely to be substitution away from labour towards capital, and possibly substitution between types of labour (for example by increasing the number of casual employees and decreasing the number of full time, ongoing employees). The level of unemployment would be expected to increase.
- High costs of dismissal may prompt firms to choose their employees more carefully, and make them reluctant to employ workers that present dismissal risks for the employer, especially where there are strict wage floors in place. These workers tend to be more vulnerable, such as people with a sporadic history of work and those with lower skills.
- An increase in the costs of dismissals could lead firms to lay off fewer employees than they would when demand for their product falls. Similarly, when demand increases, firms will take into account the likelihood of having to pay redundancy pay when making hiring decisions and might choose to hire fewer workers due to the risk of future costs (Skedinger 2010). This could result in smaller employment fluctuations within a business cycle.
- Less turnover of employees increases unemployment duration (as there are fewer vacancies over time), which can result in greater income loss to those who spend time unemployed and possibly greater stigmatization of, and skill atrophy for, the unemployed. The resulting reduced job search effectiveness and greater unemployment duration also tend to reduce the extent to which any given unemployment rate

moderates wage pressures (Gregg, Machin and Fernandez-Salgado 2014; Layard, Nickell and Jackman 2005).

- Less turnover also constrains the efficient reallocation of labour from declining sectors to expanding sectors, and restricts the ability of emerging industries to dynamically adjust their workforce in response to shifts in more volatile demand.
- Where temporary employees (primarily contractors) do not receive similar protections, the provision of strict employee protections for employees may distort the mix of labour market arrangements towards contractors (Scarpetta 2014).

Researchers have used empirical analyses to try to identify and measure the importance of these various avenues for employment effects.

An additional challenge is the existence of several measures of employment protection, which means that the particular choice between these can make a large difference to empirical results (box 33.1). For instance, the literature generally shows that strict employment protection can adversely affect employment. The Organisation for Economic Co-operation and Development (OECD) data (which are the primary basis for the findings of the literature) place Australia at the lower end of restrictiveness, which corresponds well with Australia's relatively lower unemployment rate. By contrast, World Economic Forum data (which draw heavily on the perceptions of chief executive officers) place Australia at the higher end of restrictiveness, which infers that Australia's regulatory regime has adverse effects on employment. However these data appear to have some shortcomings (box 33.1).

Cross country studies give varied results (Scarpetta 2014; Skedinger 2010). Lazear's (1990) early multivariate cross country analysis — which concluded that while the evidence is mixed, generous severance pay did help explain higher rates of unemployment in France and Portugal — prompted further cross country assessments. Of 15 cross-country studies examined by Addison and Teixeira (2001), none reported a positive correlation between employment protection and employment. However they also found very little evidence of a negative effect on the employment of prime age males. There is also evidence of a positive relationship between employment protection and self-employment. Other studies find no negative effects of employment protection on employment (Addison and Grosso 1996; Pissarides 2001), or even a positive relationship (Cazes, Khatiwada and Malo 2012). Modelling from the International Labour Organization (ILO) suggests that the relationship is hump shaped. Very low levels of employment protection are associated with higher levels of unemployment that decrease with increased employment protection up to a tipping point of 2.6 on the OECD's employment protection legislation index (which ranges from 0 to 6). Two thirds of OECD countries have an employment protection legislation index of less than 2.6, including Australia (Cazes, Khatiwada and Malo 2012).

Box 33.1 Comparative measures of employment protection in Australia

A number of organisations publish international cross-country comparisons of the relative level of employment protections. These include the OECD, the World Bank, the International Organisation of Employers and the World Economic Forum. Reports of this kind tend to rely on composite indexes, which assign scales to the various elements within a country's employment laws, and then compare the aggregated totals that result.

The OECD's indicators on the strictness of Employment Protection Legislation are the most commonly used of such measures. These are made up of four sub indicators on, respectively: the regulation of individual dismissal of workers with regular contracts; additional restrictions for collective dismissal; the regulation of standard fixed-term contracts; and the regulation of temporary work agency employment. In 2013, the OECD updated its collection methodology, which had previously relied heavily on questionnaire responses from member governments, to also include a detailed analysis by the OECD itself of legislation, collective bargaining agreements and case law.

Other measures, such as those used by the World Economic Forum in its annual Global Competitiveness Report, tend to rely more heavily on surveys of businesses within the various countries reported on.

As discussed in chapter 17, different index constructions and, most importantly, different methodologies, can affect the reliability and comparability of such measures. In regard to unfair dismissal laws, for example, the OECD measure ranks Australia at the less restrictive end of the scale, while results from the Global Competitiveness Report suggest Australia is more restrictive in relative terms. Aleksynska and Cazes (2014) have detailed shortcomings and limitations in the latter.

Sources: OECD (2013b), World Economic Forum (2014).

The mixed results of the cross-country studies are perhaps not surprising since they rely on indexes of employment protection, which might hide some of the more subtle differences between different protections in different countries. Further, as theory highlights, the effects that the studies are seeking to measure in each country are possibly the net effects of different types of employment protection; some of which increase employment, while others decrease it.

Country-level studies do not suffer from comparability issues and can benefit from using more disaggregated data. For example, studies that examine the effects of different employment protection treatment for firms of different sizes have found that stricter employment protection reduces the flow of workers into and out of employment, but the overall impact on employment is mixed (Cazes, Khatiwada and Malo 2012; Kugler and Pica 2005).

Effects of employment protection legislation on productivity

Theory and empirical analysis of the relationship between employment protection and labour productivity also produce mixed results. Research highlights several channels through which employment protection can affect productivity.

- OECD research concludes that stringent employment protection for regular contracts is estimated to have large, negative and statistically significant effects on worker reallocation (OECD 2010), and that ‘there is quite a lot of evidence that gross job reallocation and productivity growth are positively correlated’ (OECD 2010, p. 173)
 - Several single-country studies show jobs tend to be reallocated from firms with lower labour productivity to those with higher labour productivity. Multi-country studies have confirmed this result, and find the result is stronger for effects on multifactor productivity.
 - Productivity-enhancing labour reallocation can be improved by reducing barriers to product market competition and encouraging entrepreneurship, as around one third of job creation and destruction are the result of firms entering and exiting markets (OECD 2010).
 - International empirical analysis using micro data supports the finding that higher dismissal costs and shorter trial periods reduce hiring, dismissal and total worker flows. However, some studies find no effect, including one that examined the effects of the change in unfair dismissal laws in Australia in 2009 (chapter 17). The author suggests the lack of any significant effects could be due to the levels of employment protection in Australia which are some of the lowest in the OECD even after the reform (Venn 2010).
- Greater labour reallocation is not, in and of itself, conducive to greater productivity if it is the result of an overreliance on temporary contracts — which become relatively more attractive when dismissal costs for ongoing contracts are high (Scarpetta 2014):
 - Temporary workers are less likely to participate in job-related training, more likely to have a work-related accident, and provide less effort when the likelihood of their contract being converted into an ongoing position is low (OECD 2010).
- Workers are encouraged to cooperate with management to incorporate new innovations into the production process if they are more certain of their ongoing employment.
- Employment protection increases the cost of turnover, prompting employers to provide further education and training to their existing employees rather than use turnovers to adjust the mix of skills they use in production (Addison and Teixeira 2001).
- A unique quasi-experiment in Portugal suggested that employees who are not safeguarded by unfair dismissal laws tend to work harder (Martins 2009).

The OECD (2010, p. 187) cautiously concludes that ‘for countries close to the OECD average, reforms relaxing provisions for individual and collective dismissals would increase productivity growth’, and that lighter restrictions on dismissals is the main

channel through which employment protection affects productivity. Given that employment protection in Australia is, however, comparatively low, it is not necessarily the case that reducing it further would have any positive effect.

Impacts of Productivity Commission recommendations on employment protection

In this inquiry, the Productivity Commission has examined aspects of employment protection in detail, including unfair dismissal laws, general protections, anti-bullying laws, employee rights to representation, restrictions on alternative forms of employment (such as labour hire and contracting) and mandatory leave provisions (such as public holidays). Minimum wages and conditions are considered separately below. The Productivity Commission recommends several changes to these elements of the WR system, which would have varying impacts:

- Ensuring that unfair dismissal cases focus on the substance of the reason for dismissal rather than on whether procedure was followed (chapter 17) and changing fee arrangements for lodgment and arbitration of unfair dismissal matters would have the effect of reducing the number of dismissal cases before the FWC that are deemed to be ‘unfair’ as a result of employers failing to precisely follow dismissal procedures in cases where there is otherwise good reason for dismissal.
 - This would most likely reduce the number of unfair dismissal cases that come before the FWC, but would not reduce the protection to employees, except for those who should otherwise have been dismissed with cause.
- Tightening the terms on which a spurious general protections claim can be made, introducing a disincentive to pursue dismissal claims that the FWC has advised should not proceed, and clarifying the intent and interpretation of aspects of the protections in this area (chapter 18), would have the effect of removing ambiguities for employees and employers about the scope of the protections, and the likely interpretation of important elements such as workplace rights.
 - This should reduce confusion about the types of conduct that are likely to constitute adverse action and remove the possibility of long-running discovery processes in cases. These changes would refocus the protections and remove a greater number of cases launched with trivial and vexatious intent.
- Improving the ability of the FWC to deal with abuse of right of entry (chapter 28) would have the effect of reducing the costs imposed on some businesses by unions that make excessive entries into a workplace.
- Changing the way the FW Act treats public holidays and leave entitlements in the National Employment Standards (chapter 16) would offer flexibility in the workplace and constrain the ability of the states and territories to declare new public holidays without consideration of their impacts on prices, output and employment.

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- This would allow employees to take leave at times that more closely match their preferences. The change could also provide some relief for employers from the increased costs associated with the expansion of public holidays.
 - Making terms that restrict the use of alternative forms of employment unlawful (chapter 25) — such as independent contracting, casual work and labour hire — would prohibit employee organisations from exercising control over the hiring decisions of a business.
 - This should raise productivity and allocative efficiency, as businesses would be able to use the mix of employment types that best suits their business. The effects would be redistributive. Workers who prefer these forms of employment would benefit, as there would be fewer barriers to their employment, but this could come at a potential cost to permanent employees.
 - Strengthening the test against misrepresenting an employment relationship (current or proposed) as an independent contracting arrangement should ensure that where an employment relationship exists, employers must provide employees with their rightful conditions under the FW Act.
 - Increasing the ability of the FWO to undertake additional audits and investigations to identify employers that underpay workers (chapter 29), clarifying and publicising the rights of migrant workers under the FW Act, and increasing the penalties for exploitative employers would have the effect of deterring unscrupulous employers from taking advantage of migrant workers.

These recommended changes do not significantly shift employment protection in Australia and effectively make no change to the level of protection in the FW Act. However, they do seek to improve how well the provisions in the FW Act are applied, adhered to and, where necessary, enforced. For some parties, these changes could have a large effect.

- the changes to unfair dismissal, general protections and rights of entry would affect the case load of the FWC
- some workplaces that have incurred costs from unions that have abused their right of entry would be protected from similar costs in the future
- some permanent employees might experience reduced job security if contractors or labour hire could undertake the same job for less.

In aggregate, these changes would not change Australia's positive ranking in the OECD's employment protection legislation index because they do not significantly change the protections currently enjoyed by employees. Nor would these changes be likely to prompt many firms to re-think their production processes, factor and skills mixes, or future recruitment decisions, because the employment protection related costs incurred by the majority of firms would not be considerably affected. The gains are likely to be most significant for re-structuring businesses, which in turn, are an important source of dynamic productivity in an economy.

Overall, the recommendations are likely to modestly reduce administration and compliance costs, generate some productivity improvements across industries and, in some cases, strengthen protections for vulnerable employees.

33.2 Impacts of changes to awards, minimum wages and conditions

Australia has a complex set of minimum wages and conditions contained in the National Employment Standards, the minimum wage order and awards. Several chapters in this inquiry examine these minimum conditions and include detailed assessments of the likely effects of them on unemployment and productivity.

Effects of minimum wages and conditions on unemployment

The theoretical and empirical literature on the effects of minimum wages and conditions on employment is extensive (chapters 4, 5 and 14 and appendix C). In general, the literature suggests that small increases in labour costs do not have marked effects on observed employment levels (in part, because regulators attempt to calibrate the regulations to avoid such effects). However, marked increases would reduce employment (through headcounts of employees and/or hours worked). This can prolong unemployment spells, with the detrimental effects this has on the wellbeing of people, particularly the more vulnerable.

Effects of minimum wages and conditions on productivity

The main channel through which minimum wages and conditions affect productivity is through incentives for employees to undertake further education and training. However, as summarised in chapters 4 and 5, contradictory effects are discussed in the literature:

- Increases in minimum wages and conditions can increase employees' demand for education and skills if they recognise that they need to increase their productivity to match the increased wages. Similarly, those outside the labour market have a greater incentive to seek work at the higher wage, and to the extent that education or skills are required for minimum wage jobs, undertake the necessary training first.
- Increases in the minimum wage can reduce the incentive for job seekers to undertake further education and training because the minimum wage provides a reasonable income and there is consequently less need to up-skill to obtain jobs above the minimum wage.

Minimum wages and conditions can also affect productivity if they influence how much effort employees put in while at work. If employees feel they are being paid a fair wage, it is less likely that they will shirk on the job.

Effects of minimum wages and conditions on consumers

Minimum wages and conditions can redistribute income from employers to employees. The relevant chapters in this report have discussed these effects in detail. Employees (who are also consumers) use this income in different ways to employers (or producers). As a result, a change in minimum wages and conditions can also affect production decisions and consumption and investment patterns, including the demand for consumption goods and services for minimum wage workers.

Increases in award wages have also affected inflation at times and so have had an effect on consumption patterns more broadly. Today, increases in award wages are much less likely to be a key driver of changes to inflation due to low levels of award reliance.

Impact of Productivity Commission recommendations on awards, minimum wages and conditions

As part of this inquiry, the Productivity Commission has made several recommendations to re-formulate the way minimum wages and conditions are set in the WR framework, including to:

- use a more formal risk-based approach when seeking to meet the employment goals of the minimum wage objective in the FW Act
- use a targeted and evidence-based approach to assess award wages and conditions to:
 - identify those award wages and conditions that could be having a negative impact on employment, and consider adjustments to them over time
 - identify those award wages and conditions that have the effect of redistributing income from employers to employees, without causing a reduction in employment, and consider whether there is room to increase them
- reduce Sunday penalty rates in several consumer-oriented services industries (such as hospitality and retailing) with the effect of:
 - increasing employment on Sundays (as well as increasing the hours of work for existing employees and improving customer convenience). This effect may be significant because the wage change would be considerable for some awards. However, the net employment effects will be less than the gross employment effects on Sundays because of shifts in employment from other days and other industries
 - decreasing the income of those employees who consistently work on Sundays.

Many of these changes are underpinned by significant institutional change, and in particular a change to the expertise, evidence and methodologies used to set awards, and wage setting more generally. The Productivity Commission also recommends significant changes to the modern awards objective, including to ensure the needs of the unemployed and consumers are explicitly considered in award reviews.

In aggregate, the impact of these recommendations is likely to increase hours worked by existing employees and reduce unemployment, but the effect would be modest at the national level.

Recommendations that affect minimum wages and conditions, including penalty rates, would have impacts that differ between industries. The changes would depend on factors such as the magnitude of the changes imposed, the levels of award reliance, the labour intensity of the industry and any effects of growing demand on the size of the industry.

33.3 Impacts of changes to bargaining regimes

Bargaining over employment conditions is a central tenet of most WR systems. In some countries, bargaining occurs at the national or industry level, while in others, it occurs within enterprises and at the individual level. In Australia, bargaining occurs at the enterprise and individual levels, and for those who are award reliant, wages and conditions are set nationally. The extent to which bargaining is centralised and coordinated, and the matters subject to bargaining, can affect the outcomes employees receive and the labour costs that firms face. Consequently, the economic and industrial relations literature examines the impacts of bargaining regimes on wage outcomes, unemployment and productivity. Bargaining regimes can also have significant costs to firms (and their representatives) and to unions – these impacts are discussed further in section 33.4 below.

Effects of bargaining regimes on unemployment

Theoretical literature that examines the effects of bargaining regimes on employment suggests that, in systems with highly decentralised bargaining, employers will have relatively greater bargaining power than employees, and will make employment and wage decisions in accordance with their profit maximising objective.

Conversely, in highly centralised bargaining systems, coordinated union action will ensure that employees receive better wages and conditions (as a result of the increased bargaining power that results from union-led collective negotiations), but coordinated action would normally avoid wage settings so high as to materially threaten the viability of businesses and the jobs of union members (Arpaia and Mourre 2012).

Calmfors and Driffill ignited debate about the shape of the relationship between the centralisation of bargaining and macroeconomic outcomes, suggesting that systems of bargaining in the middle of these two extremes are likely to have the worst outcomes (Calmfors 1993) — for example, each union might have enough bargaining power to push the wages for their members higher, but not enough members to need to worry about the economic consequences of raising wages more broadly. More recently, the debate has focused on the degree of coordination rather than the level of bargaining.

... [T]he evidence suggests that if bargaining is highly co-ordinated, this will completely offset the adverse effects of unionism on employment. Co-ordination refers to mechanisms whereby the aggregate employment implications of wage determination are taken into account when wage bargains are struck. This may be achieved if wage bargaining is highly centralised, as in Austria, or if there are institutions, such as employers' federations, which can assist bargainers to act in concert even when bargaining itself ostensibly occurs at the level of the firm or industry. (Nickell et al. 2001, p. 8)

Addison and Teixeira (2001), among others, find evidence that coordinated collective bargaining can have positive results on employment that offset the negative impacts of employment protection. Other studies have found that collective bargaining has no impact on employment in OECD countries (Cazes, Khatiwada and Malo 2012).

Effects of bargaining regimes on productivity

There are several channels through which bargaining regimes can affect productivity. When bargaining occurs at a decentralised level (such as the individual or firm levels), firms adapt to new technologies by changing the composition of their workforce to bring in people with the required training and skills.

When bargaining occurs at a centralised level (such as the industry or national level) and where wages are consequently compressed, firms cannot attract the skills they require by offering higher wages, so they train their own workers (Scarpetta and Tressel 2004). When the costs of hiring and firing are high, there is an added incentive to adopt a 'competence accumulation' strategy based on firm sponsored training (Scarpetta and Tressel 2004).

The characteristics of production also affect how bargaining and employment protection affect the adoption of new technology. In those industries that rely more on cumulative technological progress, it is more likely that up-skilling existing staff is an efficient way to incorporate new technologies (Scarpetta and Tressel 2004). Conversely, industries that rely on frequently changing the types of physical and human capital used to respond to technological progress would be hindered by rigid, compressed wages and high hiring and firing costs.

International empirical evidence finds that countries with centralised bargaining regimes and stringent employment protection (such as Germany and Austria) have a comparative advantage in industries characterised by cumulative technological progress (which is more easily absorbed through training of existing staff) than countries with decentralised bargaining systems and low employment protection (such as the United States, United Kingdom and New Zealand) (Scarpetta and Tressel 2004).

In the Australian context, bargaining is decentralised. Awards provide a floor for wages and do not stop firms from offering above award wages and conditions to attract highly skilled workers, and the WR framework does not impose high costs of hiring and firing by international standards (box 33.1). As such, Australian firms looking to innovate and

respond to changing market demands are not hindered from offering higher wages to attract workers with the right skills when they need them most, or from downsizing when demand for their products shrinks. Undoubtedly, however, this relies on there being Australian workers with the skills and training required to ensure firms can adapt. Consequently education and skill development is a crucial part of any strategy to promote improvements in productivity.

Has shifting to enterprise bargaining in Australia improved productivity?

Borland's (2012) view is that the shift to enterprise bargaining in the 1990s was the reform that has had the biggest consequence for Australia's macroeconomic performance. However, attempting to isolate the effects of enterprise bargaining on productivity is a difficult task. A macro-data analysis (looking at economywide productivity trends), or a micro-data analysis, can be adopted. Loundes, Tseng and Wooden (2003) provide a good overview of the different ways to do this, and the studies that have attempted it. Their main conclusion is not the absence of a clear cut finding, but how poorly developed the literature is in Australia.¹⁷³

Very few studies have attempted to quantify linkages between objective measures of business performance and measures of changes in bargaining structure. Further, those that have attempted this exercise have invariably found that their data are not well suited to the task (Loundes, Tseng and Wooden 2003).

Regarding micro-data analyses, Loundes, Tseng and Wooden (2003) suggest that enterprise and workplace level research generally falls into one of four main categories:

- case studies that document the experience with enterprise bargaining at specific workplaces and/or firms
- attempts to draw inferences about the implications for workplace productivity from analyses of the content of agreements
- surveys to collect data from managers about their perceptions of the effectiveness of agreements
- analyses of workplace or enterprise level data to identify any independent associations between the presence of enterprise agreements and various productivity related measures.

While there is a consensus that enterprise bargaining has improved productivity, many academics claim that research has been unable to establish a clear causal relationship. Loundes, Tseng and Wooden (2003, p. 257) recommended that:

¹⁷³ Quiggin (2001a) describes some of the difficulties of accurately measuring productivity improvements, including attributing increases in output to productivity improvement rather than to unmeasured increases in inputs (such as from increased intensity of worker effort, or increased (but unmeasured) hours from workers skipping breaks, or by replacing continuous shifts with split shifts).

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- the preoccupation with what is written in formal agreements needs to be abandoned as it is not obvious that this has any direct relationship with productivity outcomes
 - case study research should move away from single-firm studies and look for clusters of firms that are similar, but nevertheless structure their arrangements with employees differently
 - new data sets are needed that link records-based data on output to tailored surveys designed to provide measures of the various elements that define bargaining structure
 - wherever possible, case study methods and quantitative methods should be used in tandem as complements to each other.

Farmakis-Gamboni et al.'s (2014) review of the literature on enterprise bargaining and enterprise agreements (rather than on particular clauses within enterprise agreements) found ambiguous results on the relationship between bargaining and productivity. The literature also highlighted the difficulty in finding a causal relationship in this area (Hancock et al. 2007).

A wide range of workplace-level drivers of productivity are identified in the literature, including increasing employee skill levels, introducing new machinery or making changes to firm-level organisation, management practices and work arrangements. Regarding enterprise bargaining and productivity in particular, the literature and analysis of Australian data in this area do not provide a clear conclusion, suggesting workplace level case studies may provide further insights.

The Productivity Commission's inquiry into public infrastructure included a detailed review of studies and empirical evidence on aggregate productivity and stated that:

... it is hard to isolate numerically the effects of workplace arrangements, including industrial relations, from all the other factors shaping workplace productivity, especially given small and inadequate datasets and statistical noise. (PC 2014c, p. 543)

Similarly, Peetz and Preston reported that:

British evidence ... suggested little difference in most performance indicators between workplaces that maintained and those that abandoned collective bargaining in favour of individualised approaches. Where there were differences, workplaces that had abandoned collective bargaining had weaker improvements in productivity. Does individual contracting offer an assumed 'efficiency wage' benefit, in that employers pay a premium in the belief that they will reap benefits from having a non-unionised workforce? Or does individualisation increase dispersion because workers with less skill and bargaining power lose out because of widening power gaps under individualisation? (Peetz and Preston 2009, p. 446)

Enterprise bargaining, income inequality and low-paid workers

Peetz and Preston (2009) point to various studies that show that centralised wage systems, unions and collective bargaining are generally associated with more compressed wage

structures. There is broad consensus in the international literature to support this conjecture (Cazes, Khatiwada and Malo 2012). Peetz and Preston (2009) also point to OECD evidence showing increased wages dispersion in recent years and, consistent with theory, it is particularly present in countries pursuing more flexible wage setting arrangements such as Australia. Other aspects of the Australian wage structure show related characteristics, including a persistent gender pay gap for full-time employees (between 15 per cent and 19 per cent for the past two decades) (Workplace Gender Equality Agency 2015b).

The FW Act's low paid bargaining stream is, from an international perspective, a novel aspect of Australia's WR system. It is one of the few instances in which multi-employer agreement making is allowed under the FW Act but its main effect is likely to be a somewhat greater incidence of enterprise bargaining.

Will the Fair Work Act help bargain away low pay? Potentially employees, particularly low paid women, have a new avenue to use to access increases in their terms of employment via a unique form of collective bargaining. But this case has certainly not paved the way for the industry based grand bargain envisaged by some observers and feared by many employers. The current evidence seems to suggest that the low paid stream will not be a mechanism that, on its own and in its current form, will erase low pay sector. It will just mean a bit more enterprise based bargaining. But I think that is what it was meant to do. (Cooper 2011)

Effects of individual-level bargaining

There is little evidence to shed light on the employment impacts of individual arrangements. The requirement for a no-disadvantage test (NDT) in individual flexibility arrangements (IFAs) will limit the extent to which there are any wage effects, and accordingly also limit employment changes.

Peetz (2005) examines whether there is evidence of productivity gains from the introduction of Australian Workplace Agreements (AWAs) as part of Work Choices and concludes that there is no evidence that they increased productivity. Hancock et al. (2007) explain that is might be partly due to the fact that few AWAs included provisions for training and development.

Impacts of Productivity Commission recommendations on bargaining regimes

The Productivity Commission has recommended several changes to the way that enterprises and employees bargain in Australia. Most of these, however, seek to improve the agreement-making process, rather than to shift the level at which bargaining occurs (these are discussed in the next section). Several recommendations could, however, prompt the movement of a larger share of previously award-reliant workers (for whom wages and conditions are set centrally) to enterprise-based arrangements, or individual arrangements.

Reducing the costs associated with the transfer of business provisions (chapter 26) would lessen the rigidities in the enterprise bargaining process and encourage the movement of capital and labour to more productive businesses. If the new employer has a higher rate of labour and capital productivity than the old employer, this should result in a productivity gain. While the recommendations might also result in reduced employment terms and conditions for some employees, it will also address the unintended adverse effects of the current transfer of business arrangements on the job prospects of employees from re-structuring businesses.

The enterprise contract (chapter 23) gives employers a greater capacity to more flexibly run their businesses by allowing variations in award terms. These parallel the kind of tradeoffs that already occur in many enterprise agreements, but that are less readily available to smaller businesses, which often find enterprise agreements difficult to form.

The enterprise contract would not replace any existing enterprise agreement, nor prevent businesses from moving from enterprise contracts to such agreements. As such, they have not been designed to shift either the centrality or coordination of bargaining in Australia. Nevertheless, at the firm level, an enterprise contract could provide more opportunities for more efficient and innovative ways to work as a business unit, with associated productivity gains.

Enterprise contracts would be subject to a strong suite of protections that ensured employees were no worse off compared with the award.

The suggested changes to IFAs in chapter 22 are proposed to make them more attractive to employees and employers, and as such, would be expected to increase their uptake and provide net benefits by encouraging flexibility in the workplace. These changes are not expected to materially increase the uptake of IFAs, which are used by only a small proportion of employees, but for those who would benefit from added flexibility in their working conditions, the recommendations would have a positive effect. However, aggregate impacts from these changes would be very small.

33.4 Impacts of making it easier to form agreements

Recommendations intended to reduce compliance costs by reducing procedural complexity and the regulatory burden associated with WR in Australia relate to employment protections, minimum wages and conditions, bargaining regimes (all discussed above), and the ease with which enterprise agreements and IFAs can be made.

There is an extensive literature that deals with the impacts of compliance costs generally, but much less that examines the impacts of compliance costs of WR systems. Chapter 32 discusses compliance costs of the current WR system.

As part of this inquiry, the Productivity Commission recommends several changes to procedure and regulations, with the objectives of making it easier to form enterprise

agreements and to lower the costs imposed on all parties during the agreement making process. These include to:

- reduce the ability and incentive of unions to organise and threaten strike action that is unlawful, likely to cause significant harm, or likely to impose high costs on an employer but immaterial costs on employees (chapter 27)
- increase the ability of employers to impose a graduated response to industrial action, and reduce the costs that employers face when dealing with such action (chapter 27).

These recommendations are not intended to undermine the bargaining power that industrial action gives to unions and their members, but rather to ensure such action does not impose unnecessarily high costs on business. This may somewhat reduce the potency of industrial action for some unions, but only those unions for whom industrial action currently confers disproportionate power. At an aggregate level, the observed effect on disputation will likely be small, but at the individual firm level there may be substantial reductions in costs to firms and consumers from disruptions caused by industrial action.

Other recommendations to change procedures and regulations of enterprise agreement making include extending the life of greenfields agreements to reduce the uncertainties and costs that businesses otherwise face if they are forced to renegotiate partway through a project. The Productivity Commission has also recommended a menu of arrangements to make it easier to make greenfields agreements including last offer arbitration by the FWC, and a 12-month employer greenfields arrangement. These changes are likely to produce small efficiency and investment gains in getting projects started faster, at lower cost, and with lower risk of project disruptions.

The Productivity Commission also recommends replacing the better off overall test (BOOT) with an NDT. The NDT will increase flexibility and reduce uncertainty during the enterprise bargaining process when compared with the BOOT. The change is not intended to make employees worse off. Indeed, reducing delays in agreement approvals can lead to employees gaining faster access to the benefits of a new agreement, such as pay rises.

Awards also attract criticism, especially from small business, for being overly complex (chapter 7). The Productivity Commission recommends that, where specific sources of poor practice have been identified, awards be revised to be shorter, less complex, and in plain English.

These recommendations are intended to reduce compliance costs to businesses, and make it quicker and easier to make agreements generally.

33.5 Fiscal impacts

The Productivity Commission's recommendations would involve some modest direct costs for government, but which would be likely to be more than balanced by longer-term indirect fiscal savings.

Several recommendations change the roles and the functioning of the principal WR institutions, and introduce a new agency, the WSC.

The Fair Work Ombudsman (FWO) would increase its education, monitoring and compliance activity, including that required to support the introduction of the enterprise contract (chapter 23) and the NDT (chapters 20 and 22), and to address the exploitation of migrant workers (chapter 29). The FWO would also support the FWC to undertake evidence-based assessment of awards (chapter 8).

In addition to increasing its reporting on the general protections (chapters 3 and 18), the FWC would apply the NDT and administer the enterprise contract. It would also have a greater role in the making of greenfields agreements (chapter 21) and in right of entry (chapter 28).

On the expenditure side, these additional functions would require an increase in funding, although to the extent that the functions of the WSC are already performed by the FWC this would reduce the cost to government. The effect of a number of recommended changes (such as those to unfair dismissal, the general protections, and the move to a NDT) would reduce the burden on regulators and would also reduce their costs.

It is easy to neglect the revenue benefits of many small but widely spread efficiency gains. Nevertheless, the indirect fiscal benefits — while hard to enumerate — are likely to be more significant than the immediate modest requirements for some expenditure to strengthen the institutional arrangements:

- A more productive and efficient economy is a prime source of growth and is accompanied by greater tax revenues (from taxes on higher personal incomes, profits and consumer expenditure).
- Improved employment outcomes associated with award and minimum wage reforms should decrease transfer payments.

34 Implementation

Key points

- Implementing the Productivity Commission's recommendations should be relatively simple, indeed some can be adopted quickly although most require legislative amendments.
- The priority is to reform the institutional framework and specifically to:
 - improve the quality of decision-making for matters involving minimum wages and modern awards through the creation of a Workplace Standards Commission (WSC)
 - reform the process for appointing members to the Fair Work Commission (and to the new WSC) to reduce inconsistencies in decisions and to increase public confidence in the institution.
- These changes, like the change in the 1990s in the way monetary policy is set in Australia, require the breaking of customary bad habits. Such a break will be hard — and self-interested parties will suggest that it is not the main game but it would be one of the biggest microeconomic reforms in Australia of the past 15 years because it would strengthen the quality of key economic decision-making in Australia.
- The Australian Government will need to consult closely with affected parties on the fine detail of legislative changes to ensure that they are effective and lasting.
- The Government can also be a catalyst for change in respect of other recommendations. Its submissions to annual wage reviews and award reviews are a vehicle to make clear the need for reform in the FWC's processes for minimum wage and award determination along the lines recommended in this report.
 - The alternative path of Parliament directly setting minimum wages and conditions (including penalty rates) as suggested by some has considerable downsides.

This report provides a blueprint to improve Australia's national workplace relations system. The recommended reforms have been developed as a package so their adoption in full would realise the maximum benefit.

Some of the report's recommendations can be implemented immediately by the Fair Work Commission (FWC) or by administrative decision, but most require legislative change. The Productivity Commission recognises that the speedy passage of amendment bills through the Parliament in an area of public policy as partisan as workplace relations is not assured. Nevertheless, in this chapter the Productivity Commission has set out a potential implementation schedule, with work assumed to commence in early 2016 (table 34.1). The chapter also canvasses some approaches to help fine-tune implementation of the recommendations.

Along with the relative importance of different reforms, key considerations in devising the implementation timetable have been to start as soon as possible those changes whose effect will take some years to be felt, and to provide employers, employees and the regulators reasonable time to prepare for those changes whose effect will be immediate. Consideration has also been given to the desirability of allowing processes currently underway, such as the four yearly review of modern awards, to run their course with minimum disruption.

After implementation, the Australian Government should assess the effectiveness of all regulatory changes made in response to this report, to inform decisions about the need for any further reform.

34.1 Priorities for reform

The performance of the institutions

Improving the performance of the institutions responsible for setting and adjusting regulated wages and award conditions must be a priority. As noted in chapters 3 and 8, these are matters with wide economic significance and the reforms should deliver considerable benefits to the community.

The primary recommendation in this area is, on balance, to split the FWC's functions in two. The FWC would maintain responsibility for the adjudication of individual and collective disputes and the approval of enterprise agreements, right of entry permits, and protected industrial action ballots. A new institution — the Workplace Standards Commission (WSC) — would take over responsibility for those decisions with economywide impacts, such as annual wage reviews and modern award reviews.

Presently the FWC adopts an overly legalistic approach to these reviews, relying almost entirely on the evidence presented to it by partisan bodies and drawing heavily on precedent. It is expected that the new WSC would adopt a more investigatory and analytical approach, as is appropriate for the determination of matters affecting a far larger segment of the community than traditionally represented before the FWC. The WSC should rely primarily on independent and expert research.

The Productivity Commission has conducted some of the sort of research and analysis that will be required, for example in respect of penalty rates for Sunday work in the retail and hospitality industries (chapters 10 to 15). This analysis provides one example of the approach the WSC should take when considering variations to the national minimum wage or to awards.

The Australian Government should act quickly to establish the WSC with the functions outlined in chapter 3. The Parliament will need to pass legislation to enable this. The Australian Government should consult state and territory governments, the President of the FWC and other stakeholders about the details of the legislation and a timeframe for implementation. Alongside this, the Australian Government should determine a budget for the WSC that would enable it to perform and/or commission more research and analysis than the FWC's research arm is currently able to undertake.

Once established, the WSC should, among other things:

- use a broad analytical framework to systematically consider the risks of variations in economic circumstances on employment and the living standards of low paid employees when considering adjustments to the national minimum wage and award minimum wages (recommendation 4.1)
- use robust economic analysis to set modern award issues for assessment, prioritised on the basis of likely high yielding gains and to consult widely with the community on reform options (recommendation 8.1).

If change to the FWC's structure is delayed, or not pursued, the FWC should itself adopt the approach recommended above, and in chapters 3 and 8, for the performance of the relevant functions. Indeed, the Productivity Commission would encourage the FWC to adopt the approach as far as possible in the remainder of the current four yearly review of modern awards and the 2015–2016 annual wage review. The FWC is also well placed to implement the following recommendations during the current four yearly review:

- incorporating terms that permit an employer and an individual employee to agree to substitute a public holiday for an alternative day into all modern awards (recommendation 16.1)
- setting 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, restaurants and café industries, with one year's delay before commencement of the changes (recommendation 15.1).

The Productivity Commission recognises that the proposed approach represents a significant shift in the FWC's decision-making processes that may not be eagerly embraced by some FWC members and possibly some participants in future reviews. To ensure the new approach is implemented and used with consistency, the FWC President will need to encourage and steer individual members, and the organisation as a whole, through this period of change. Of course, the FWC (and subsequently the WSC) should also ensure that all those affected by minimum wages and award decisions are provided with clear notice (via release of research, for example) of the new approach to be adopted in these reviews, and the new role for participants.

Over time, as the WSC (and the FWC in the first instance) settles into the new approach, the body could also be expected to provide more public commentary over the future of

minimum wages and conditions, much in the way the Reserve Bank of Australia comments on relevant aspects of monetary policy and economic policy more broadly.

Why should the institutions retain responsibility for setting minimum wages and award conditions?

Some participants have suggested that legislated requirements would be an alternative approach to issues such as penalty rates, award reform or even minimum wage setting. While there are grounds for using the National Employment Standards for some universally applicable standards, there are two major pitfalls in using legislation to prescribe highly controversial aspects of awards. First, it would suffer from a pendulum effect, with successive governments of different political views amending the legislation, creating compliance costs, confusion and transitional costs for employers and employees. Second, the FWC can take into account the differences in the circumstances of different industries in its wage determination functions, and if the Productivity Commission's recommended governance arrangements are instituted, will do so dispassionately and with expertise.

The expert appointment panel

As noted in chapter 3, reforms to appointment processes to the FWC would reduce inconsistencies in its members' decisions.

To minimise opportunities for inconsistency, the Productivity Commission recommends a new appointment process for membership of the FWC. It should involve all jurisdictions, be transparent, and ensure appointments are based on merit. The Australian, state and territory governments should create an expert appointments panel to develop a merit-based shortlist of suitable candidates. The Australian Minister for Employment would then choose individuals from the shortlist for appointment to the FWC for a maximum ten years or until the individual attains the age of 70. Both the panel and the Minister should be satisfied the candidate/s would be widely seen as having an unbiased and credible framework for reaching conclusions and determinations. The expert appointment panel should also be called on to make nominations for appointment to the WSC.

A number of FWC members have retired or resigned in recent years and have not been replaced. The Productivity Commission encourages the Australian Government to establish the expert appointment panel and to adopt the appointment process outlined above before filling any current vacancies or any vacancies due to arise in the near future.

As a matter of priority, the Australian Minister for Employment should, in consultation with relevant state and territory ministers, appoint suitable individuals to the expert appointment panel. Once established, the panel should immediately seek nominations for appointment to the FWC from interested individuals and seek information from the President of the FWC about its current membership needs. Until the recommended changes

to the FWC membership eligibility criteria commence, the panel should give preference to candidates who meet the existing eligibility criteria in the *Fair Work Act 2009* (Cth) (FW Act) and have experience in economics or social science.

Over time, this new appointment process should, together with the other reforms recommended in this report, help to enhance confidence in the independence and performance of the FWC.

Some commentators have suggested that the politics of institutional change in this area is too hard, and that the issues at the heart of workplace relations are ones that separate the political identities of the two main parties. In this rationalisation, it is simply unavoidable that each new government, faced with the appointment choices of former governments, attempts to restore balance in the FWC by making 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 bodies. Many 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 shift in thinking. It would represent one of the bigger microeconomic reforms to date this century.

34.2 Considerations for implementation

As noted above, implementing the majority of the report's recommendations requires the passage of legislation through the Parliament. Passage through Parliament is likely to benefit from careful legislative drafting and engagement with interested parties as well as broad and accurate public understanding of the reforms.

The development of the legislation should not be rushed, so it is vital that the drafting process starts as soon as possible to ensure the required changes can commence without unreasonable delay. As noted above and throughout this report, some changes warrant a longer lead time before commencement than others. In particular, the ability to make an enterprise contract should not arise until six months after the legislation commences to give the Fair Work Ombudsman (FWO) sufficient time to undertake an information campaign.

During the development phase, the Australian Government should consult widely, including with state and territory governments, major employer and employee representatives, social welfare groups, and with the existing Fair Work institutions. The Productivity Commission understands that, as part of this process, the Government would be likely to consult with members of the National Workplace Relations Consultative Council about proposed reforms, and its subcommittee, the Committee on Industrial

Legislation on draft legislation. However, given membership of these groups is limited to the traditional workplace relations parties (unions and employer representatives), the Government should not limit its consultation to them. Rather, it should also engage with social welfare and consumer groups and government and non-government economic agencies to seek feedback on the details of proposed reforms. This broader approach would be effective in canvassing the views of a far wider cohort of stakeholders than has occurred in some past instances. In general, consultation should be limited to implementation details rather than canvassing the need for reform and options for reform — matters comprehensively addressed in this report.

Recommendations that can be readily implemented

A minority of the Productivity Commission's recommendations can be implemented administratively without the need for legislation. Some of these are directed to the Australian Government, and others are directed to the FWC and/or the WSC.

Among those proposals that the Government can implement relatively quickly are:

- a view on the processes to be adopted by the FWC and subsequently the WSC during annual wage review and award reviews
- requiring the FWC to publish more detailed information about conciliation outcomes and processes (recommendation 3.6)
- requesting the Productivity Commission undertake a comprehensive review into Australia's apprenticeship and traineeship arrangements (recommendation 5.2)
- requiring the FWC to report more detailed information about general protections matters and providing additional resourcing to the FWC to improve its data collection and reporting processes in this area (recommendation 18.4)
- improving the information available on the Department of Immigration and Border Protection (DIBP) and the FWO websites about migrant workers' workplace rights and conditions, and exploring other ways of providing migrants with this information in languages and format that are accessible to them (recommendation 29.1)
- providing the FWO with additional resources to identify, investigate and carry out enforcement activities against employers for underpaying workers, particularly migrant workers (recommendation 29.2)
- changing arrangements for the sharing of information between the DIBP and the FWO about migrants suspected of working in breach of their employment-related visa conditions (recommendation 29.5).

Table 34.71 Implementation schedule

<i>Date</i>	<i>Action</i>
Late 2015	<i>The Australian Government should publish this report.</i>
Early-mid 2016	<p><i>The Australian Government should:</i></p> <ul style="list-style-type: none"> • Consult widely, including with employer and employee representatives, social welfare groups, the FWC and the FWO, and state and territory governments, on the details of the legislative amendments. • Start drafting legislation. • In consultation with the state and territory governments, appoint individuals to the expert appointments panel. • Implement recommendation 5.2 by requesting the Productivity Commission undertake a review of Australia's apprenticeship and traineeship arrangement. • Implement recommendation 29.1 by directing the DIBP and the FWO to improve the information available on their websites about migrant workers' workplace rights and conditions, and exploring other ways of providing migrants with this information, in languages and formats that are accessible to them. • Implement recommendation 29.5 by directing the FWO not to share any information with the DIBP about a migrant who has only breached their employment-related visa conditions and directing the DIBP to share any information with the FWO about the suspected underpayment of a migrant worker. • Make changes to the Fair Work Regulations 2009 (Cth), including to: <ul style="list-style-type: none"> • require the FWC to publish more detailed information about conciliation outcomes and processes (recommendation 3.6) • revise the application fee for unfair dismissal matters (recommendation 17.1) • require the FWC to report more information about general protections matters (recommendation 18.4). <p><i>The FWC should:</i></p> <ul style="list-style-type: none"> • Implement recommendation 3.8 by ensuring 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. • As much as possible, adopt the approach set out in chapter 8 and recommendation 8.1 for the remainder of the four yearly review of modern awards. • Implement recommendation 15.1 by setting Sunday penalty rates in certain awards for certain workers at the higher of 125 per cent and the existing Saturday award rate (and allow one year's notice from the decision until the changes commence). • Implement recommendation 16.1 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. • Commission (internally or externally) more research that will assist the FWC/WSC determine whether and to what extent to vary minimum wages and award conditions.
Budget 2016	<p><i>The Australian Government should:</i></p> <ul style="list-style-type: none"> • Make provision for the establishment of a WSC. • Ensure the FWO is adequately resourced to identify, investigate and carry out enforcement activities against employers for underpaying workers, particularly migrant workers (recommendation 29.2) • Ensure the FWC is adequately funded to improve its data collection and reported on general protections matters (recommendation 18.4). <p>Provide additional resourcing to the FWC and the FWO for the performance of functions associated with the creation, assessment and enforcement on enterprise contracts (recommendation 23.2).</p>

(continued next page)

Table 34.72 (continued)

<i>Date</i>	<i>Action</i>
Budget 2016	<p><i>The Australian Government should:</i></p> <ul style="list-style-type: none"> • Make provision for the establishment of a WSC. • Ensure the FWO is adequately resourced to identify, investigate and carry out enforcement activities against employers for underpaying workers, particularly migrant workers (recommendation 29.2) • Ensure the FWC is adequately funded to improve its data collection and reported on general protections matters (recommendation 18.4). • Provide additional resourcing to the FWC and the FWO for the performance of functions associated with the creation, assessment and enforcement on enterprise contracts (recommendation 23.2).
Annual Wage Review 2016	<p><i>The FWC should:</i></p> <ul style="list-style-type: none"> • Adopt recommendation 4.1 and broaden its analytical framework to systematically consider the risks of variations in economic circumstances on employment and the living standards of low paid employees.
Mid 2016	<p><i>The Australian Government should:</i></p> <ul style="list-style-type: none"> • Introduce Bills to the Parliament to give effect to the recommendations in this report.
Mid-late 2016	<p><i>The Australian Government should:</i></p> <ul style="list-style-type: none"> • Implement part of recommendation 3.6 by commissioning a review of the FWC's conciliation processes. <p><i>The expert appointment panel should:</i></p> <ul style="list-style-type: none"> • Nominate suitable candidates to the Australian Government for appointment to the FWC/WSC.
Following passage of the legislation through the Parliament	<p><i>The Australian Government should:</i></p> <ul style="list-style-type: none"> • Establish the WSC. <p><i>The FWC should:</i></p> <ul style="list-style-type: none"> • Assist with the transition of some of its functions to the new WSC. • Implement recommendation 23.2 by creating a lodgment and approval system for enterprise contracts. <p><i>The FWO should:</i></p> <ul style="list-style-type: none"> • Implement recommendation 22.2 by providing detailed guidance to employers and employees on the no-disadvantage test (NDT) as it applies to individual flexibility arrangements (IFAs), and examining the desirability of upgrading its website to provide a platform to assist parties assess whether an IFA satisfies the NDT. • Implement recommendation 22.3 by developing an information package on IFAs and distributing it to employers (although if there is a significant lag between release of this report and the commencement of changes to the IFA framework, the FWO should consider distributing information on IFAs ahead of the changes commencing). • Implement recommendation 23.2 by conducting education and awareness raising about enterprise contracts.

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Table 34.73 (continued)

<i>Date</i>	<i>Action</i>
Early 2017	<p><i>The WSC should:</i></p> <ul style="list-style-type: none"> • Commission (internally or externally) research that will assist the WSC determine whether and to what extent to vary minimum wages and award conditions. • Issue a statement regarding the new approach being adopted for the 2017 annual wage review. <p><i>The Australian Government should:</i></p> <ul style="list-style-type: none"> • Commission an external review of the FWC's <i>New Approaches</i> activity (recommendation 3.7).
Annual Wage Review 2017	<p><i>The WSC should:</i></p> <ul style="list-style-type: none"> • Adopt recommendation 4.1 and use an analytical framework to systematically consider the risks of variations in economic circumstances on employment and the living standards of low paid employees.
Mid-late 2017	<p><i>The WSC should:</i></p> <ul style="list-style-type: none"> • Issue a statement regarding the new approach being adopted for reviews of modern awards, including a list of the initial issues the WSC will seek to address. <p><i>The Australian Government should:</i></p> <ul style="list-style-type: none"> • Monitor and evaluate the impact of the transfer of business provisions (recommendation 26.6).
18 months after the legislative changes commence	<p><i>The Australian Government should:</i></p> <ul style="list-style-type: none"> • [If there is continuing growth in the number of general protections claims] further review the operation of the general protections (recommendation 18.5).

34.3 Promoting reform in the national interest

While the Productivity Commission considers that the above implementation schedule is achievable, it recognises that the passage of amendment bills through the Parliament, in an area of public policy as partisan and often contentious as workplace relations, is not assured.

Consequently, for Australia to reap the benefits available, it will be important for the Australian Government to effectively communicate the need for the reforms. Stakeholders on all sides should represent the reforms accurately and engage in public debate constructively, with the broader national interest as the ultimate concern.

An important perspective in this regard is that legislated workplace rights and responsibilities can have ramifications for prices, productivity and employment, and the wellbeing of people and entities far beyond the people directly affected. Thus, for example, not every instrument that confers greater rights on an employee (or on a group of employees, or on unions) will benefit workers as a whole, let alone Australia as a whole. Indeed, higher wages or stronger workplace protections for some workers can, in some circumstances, come at the cost of higher prices and/or less employment for other workers or would-be workers. The equivalent point applies to workplace rights for businesses. The

Productivity Commission has given weight to the interests of *all* Australians, including consumers and the unemployed, and the workers and employers that are indirectly affected by particular workplace relations provisions and decisions, as well as those directly affected, in arriving at its package of recommendations.

Another important perspective is that no workplace relations system can ever be ‘perfect’ and that legislation, even when well designed, can only achieve so much. For example, the law alone cannot guarantee harmonious and productive workplaces, which ultimately depend on the attitudes and behaviours of management and staff. Likewise, job security is ultimately dependent on the economic viability of firms and the performance of the economy; it cannot be legislated for. Nor is it possible through legislation (or, indeed, through any means) to ensure that all individual ‘injustices’, whether to employers or employees, are eliminated or compensated.

The Productivity Commission is not recommending radical change, as the transitional costs of doing so would be high and the need is not evident. Implementation of the changes recommended throughout this report will provide a more balanced workplace relations framework that should serve Australians well, both inside and outside the system, for many years to come. But the recommended changes will not solve all workplace problems, with relationships and judgment amongst employers and unions and employees and regulators all heavily intertwined. As with the Productivity Commission’s approach in this report, future evaluations of this type should be based strongly on evidence available at the time.

A Conduct of the inquiry

This appendix describes how the Productivity Commission publicly and privately consulted with stakeholders throughout the course of the inquiry.

A.1 Public consultation

Public participation was invited following the receipt of the terms of reference for this inquiry on 19 December 2014 in the form of both formal public submissions and informal anonymous comments. The Commission released a suite of issues papers on 22 January 2015 to assist participants in preparing submissions to the inquiry.

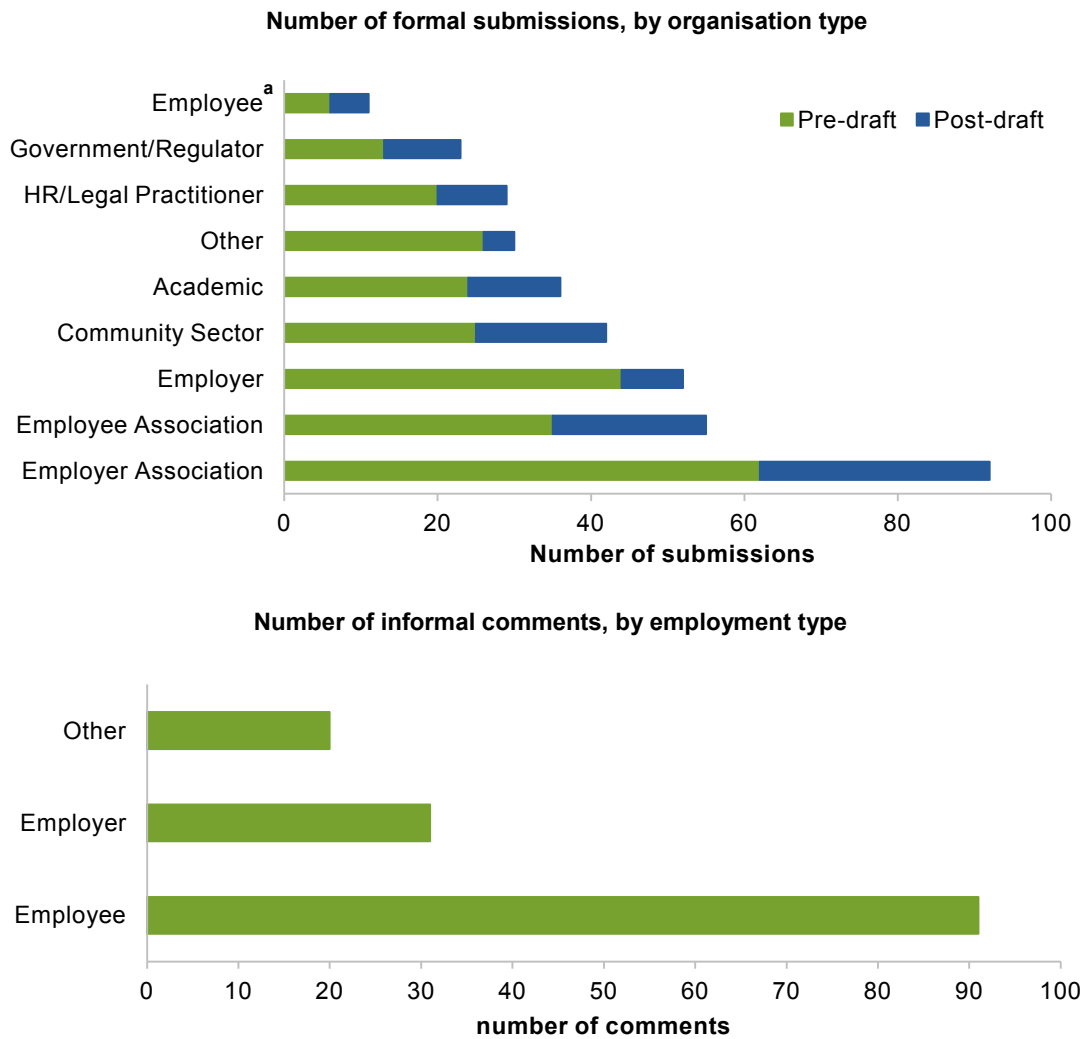
Informal comments and formal public submissions were received from a broad range of individuals and organisations (figure A.1). Prior to the publication of the inquiry draft report on 4 August 2015, 91 informal comments and 255 submissions were accepted. Following the release of the draft report an additional 51 informal comments and 117 submissions were accepted.

The names and numbers of each submission are listed in table A.1 below. DR before a number denotes that the submission was lodged subsequent to the release of the draft report.

The Commission also consulted with participants via public hearings, held in 8 locations throughout September 2015 (figure A.2). Details of the dates, locations and names of the 67 participants at these hearings are listed in table A.2 below.

Anonymised copies of informal comments, full copies of public submissions and transcripts from all public hearings will remain available for download from the pc.gov.au website associated with this report.

Figure A.1 **Accepted submissions and informal comments**



^a Pre-draft submission 188 has been recorded as one submission in this figure, but comprises of 447 individually lodged employee submissions submitted via an online template.

Figure A.2 **Participants in public hearings, by organisation type**

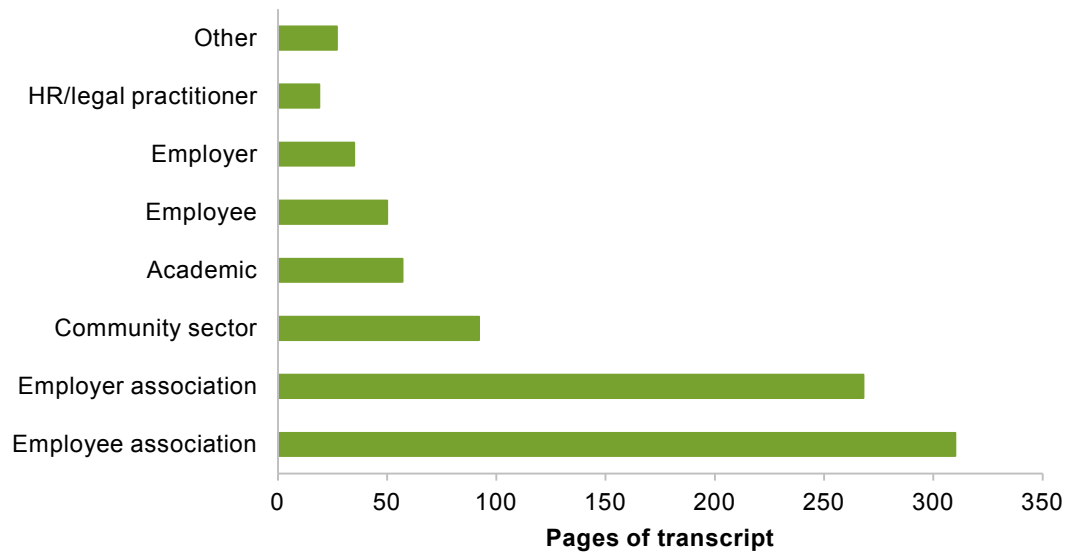


Table A.1 Formal submissions received^{a,b}

<i>Submitter</i>	<i>Organisational type</i>	<i>Submission number/s</i>
Accommodation Association of Australia	Employer Association	DR308
Air Conditioning and Mechanical Contractors Association of Australia	Employer Association	85
ALDI Stores	Employer	146
Allens	HR/Legal Practitioner	DR310
Alugia, Jean	Other	55
Anglicare Australia	Community Sector	108
Arif, Arisha	Academic	DR347
Asciano Ltd	Employer	138
Association of Mining and Exploration Companies	Employer Association	182, DR340
Ausgrid, Endeavour Energy, Essential Energy (Networks NSW)	Employer	98
Australasian Railway Association	Employer Association	155
Australian Association of Progressive Repairers	Employer Association	77
Australian Breastfeeding Association	Community Sector	DR334
Australian Bureau of Statistics	Government/Regulator	166
Australian Catholic Council for Employment Relations	Community Sector	232, 254, DR335
Australian Catholic University	Employer	DR284
Australian Chamber of Commerce and Industry	Employer Association	161, DR330
Australian Consortium for Research on Work and Employment	Academic	181
Australian Council of Social Service	Community Sector	165
Australian Council of Trade Unions	Employee Association	167, DR355
Australian Dairy Farmers	Employer Association	56
Australian Dismissal Services	Employee Association	44
Australian Education Union	Employee Association	63, DR348
Australian Federation of Employers and Industries	Employer Association	219
Australian Food and Grocery Council	Employer Association	DR279
Australian Higher Education Industrial Association	Employer Association	102, DR297
Australian Hotels and Accommodation Associations of Australia	Employer Association	164
Australian Hotels Association	Employer Association	DR303
Australian Human Resources Institute	Employer Association	46
Australian Human Rights Commission	Government/Regulator	110
Australian Industry Group	Employer Association	172, DR346
Australian Industry Group, Australian Chamber of Commerce and Industry, Business Council of Australia and Australian Mines and Metals Association	Employer Association	DR370

^a In-confidence submissions have been omitted. ^b DR denotes submissions received after the publication of the inquiry draft report.

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Table A.1 (continued)

<i>Submitter</i>	<i>Organisational type</i>	<i>Submission number/s</i>
Australian Institute of Employment Rights	Employee Association	140
Australian Institute of Marine and Power Engineers	Employee Association	68
Australian Law Students' Association	Employee Association	DR291
Australian Licensed Aircraft Engineers Association	Employee Association	183
Australian Logistics Council	Employer Association	52
Australian Meat Industry Council	Employer Association	236
Australian Mines and Metals Association	Employer Association	96, DR322
Australian National Retailers Association	Employer Association	216
Australian Newsagents Federation	Employer Association	218, DR301
Australian Nursing and Midwifery Federation	Employee Association	132
Australian Petroleum Production and Exploration Association	Employer Association	209
Australian Psychological Society	Other	205
Australian Public Service Commissioner	Government/Regulator	170, DR299
Australian Public Transport Industrial Association	Employer Association	210, DR292
Australian Retailers Association	Employer Association	217
Australian Risk Policy Institute	Other	DR260
Australian Road Transport Industrial Organisation	Employer Association	103
Australian Services Union	Employee Association	128, DR283
Australian Shipowners Association	Employer Association	206
Australian Small Business Commissioner	Government/Regulator	119, DR366
Australian Sugar Milling Council	Employer Association	226
Australian Workers' Union, The	Employee Association	74, DR315
Baldassar L, Caspersz D and Fozdah F	Academic	189
Bergwald, Andrew	Employer	1
BHP Billiton	Employer	168, DR362
BlueScope	Employer	58, DR369
Bowley, Trevor John	Employee	148, DR367
Bray M, Macneil J, Stewart A and Oxenbridge S	Academic	DR272
Bray, J Rob	Academic	32, DR261
Brickworks Ltd	Employer	207
Buchanan, John	Academic	131
Building Service Contractors Association of Australia	Employer Association	220
Bushell, James	Other	12
Business Council of Australia	Employer Association	173, DR337
Business SA	Employer Association	174, DR360
Busselton Chamber of Commerce and Industry	Employer Association	65
Byford, Martin	Academic	59
Caponecchia, Carlo	Academic	72

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Table A.1 (continued)

<i>Submitter</i>	<i>Organisational type</i>	<i>Submission number/s</i>
Carers Australia	Community Sector	82
Catholic Commission for Employment Relations	Community Sector	99, DR289
CB&I Constructors	Employer	238
Cement Industry Federation	Employer Association	204
Centre for Employment and Labour Relations Law	Academic	DR313
Chamber of Commerce and Industry of Western Australia	Employer Association	134, DR323
Chamber of Commerce and Industry Queensland	Employer Association	150, DR311
Chamber of Minerals and Energy of Western Australia	Employer Association	199, DR349
Choong, Kien	Academic	11, 36
Civil Contractors Federation	Employer Association	62
Clare Dewan and Associates	Employer	42
Clibbon, Stephen	Academic	26, DR353
Clubs Australia Industrial	Employer Association	60
Clubs Queensland	Employer Association	88
Coinvest	Community Sector	202
Communist Party of Australia	Other	105, DR282
Community and Public Sector Union (PSU Group)	Employee Association	160, DR332
Community and Public Sector Union (SPSF Group)	Employee Association	90, DR270
Contact Centres Australia	Employer	240
Council of Small Business of Australia	Employer Association	115
Craig Joy Consulting	Employee Association	49
Creighton B, Denvir C, Johnstone R and McCrystal S	Academic	DR273
Creighton B, McCrystal S and Johnstone R	Academic	48
Cully, Marietta	Employee	237
Department of Employment	Government/Regulator	158
Dixon J, Corr L, Strazdins L, Carey G, Burgess J, Banwell C, Venn D, Bittman M, Woodward D and Sargent G	Academic	57
East Coast Apprenticeships	Employer	27
eChenn	Other	208
Eco Door, The	Employer	152
economic Security4Women	Community Sector	250
Electrical Trades Union	Employee Association	DR300
Ellem, Bradon	Academic	45
Employment Law Centre of Western Australia	HR/Legal Practitioner	89, DR350
Ethnic Communities' Council of Victoria	Employee Association	75
Everson's Food Processors	Employer	54

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Table A.1 (continued)

<i>Submitter</i>	<i>Organisational type</i>	<i>Submission number/s</i>
Extron Design Services Pty Ltd	Employer	18
Fair Work Ombudsman	Government/Regulator	228, DR368
Fairweather, Ray	Other	24
Family Business Australia	Employer Association	10
Favre, Remy	Employer	20
Federation of Ethnic Communities Councils Australia	Community Sector	69
Federation of Ethnic Communities Councils of Australia and The Salvation Army	Community Sector	DR268, DR341
Finance Sector Union	Employee Association	243, DR294
Finger, Steven and Michelle	Employer	142
Footscray Community Legal Centre	Community Sector	143
Forsyth, Anthony	Academic	251
Frappell, Graeme	Other	15
Freebairn, John	Academic	13
Freyens, Ben	Academic	149, DR287
G&T Security	Employer	50
Garnett, Clarissa	Employer	DR262
Geelong Chamber of Commerce	Employer Association	177
Giuretis, Terri	Employee	DR256
Glencore	Employer	185
Government of South Australia	Government/Regulator	114, DR281
Government of Victoria	Government/Regulator	DR274
Government of Western Australia	Government/Regulator	229, DR286
Graham, Duncan	Other	117
Griffiths, David	Other	35
Guzzardi, Vito	Employee	DR298
Hair and Beauty Australia	Employer Association	47
Hancock, Keith	Academic	233
Hardware Federation of Australia	Employer Association	DR316
Health Employment Relations Medical Imaging Employment Relations Group	Employer	81
Health Services Union	Employee Association	203
Hemlof, Loris	Other	3
Hicks, David	Other	17
Hicks, Ronald	Academic	40
Hopgood Ganim	HR/Legal Practitioner	225
Housing Industry Association	Employer Association	169, DR319
HR Business Direction	HR/Legal Practitioner	91
Individuals	Employee	188
Information Technology Contract and Recruitment Association	Employer Association	193
Innovative Research Universities	Employer Association	196

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Table A.1 (continued)

<i>Submitter</i>	<i>Organisational type</i>	<i>Submission number/s</i>
Institute of Public Accountants	Employer Association	180
Institute of Public Affairs	Other	64
Interns Australia	Employee Association	66, DR326
Job Watch	Community Sector	84, DR285
Jobs Australia	Community Sector	221
Jones, Robert	Other	4
Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia	Community Sector	DR333
Justice Connect	Community Sector	127, DR356
JW Shannon Engineers	Employer	37, 67, DR267
K&L Gates	HR/Legal Practitioner	151
Kelly, Sarah	Other	83
Kingsford Legal Centre	Community Sector	87, DR278
Koci, Stephen	Other	34
Laan, Rene	Other	107
Launceston Chamber of Commerce	Employer Association	124
Law Council of Australia	HR/Legal Practitioner	247, DR344
Law Institute of Victoria	HR/Legal Practitioner	195
Law Society of New South Wales, The	HR/Legal Practitioner	184, DR293
Law Society of South Australia, The	HR/Legal Practitioner	211
Leading Age Services Australia and Aged & Community Services	Employer Association	DR328
Legal Aid NSW	Community Sector	197, DR364
Legislative Council Select Committee (Tasmania)	Government/Regulator	DR258
Linfox Australia	Employer	137
Linney Strategies	HR/Legal Practitioner	113
Local Government NSW	Employer	222
Lukman, Jonathan	Employer	76
MacIver, Lyn	Other	111
Magellan Projects Pty Ltd	Employer	187
Major Events Consulting Australia Pty Ltd	Employer	38
Mannkal Economic Education Foundation	Other	92
Manufacturing Australia	Employer Association	126
Manufacturing Industries Group Apprenticeship Scheme	Employee Association	30
Mapleson, John	Other	21
Maritime Union of Australia	Employee Association	121
Master Builders Australia	Employer Association	157, DR290
Master Electricians Australia	Employer Association	245, DR304
Master Grocers Australia / Liquor Retailers Australia	Employer Association	246
McCarthy, Brendan	Employee	43

(continued next page)

Table A.1 (continued)

<i>Submitter</i>	<i>Organisational type</i>	<i>Submission number/s</i>
McDonald Murholme	HR/Legal Practitioner	194
McDonald, Rachel	Community Sector	DR331
McDonald, Tom	Employee Association	33
McGrath-Champ, Susan	Employee	22
McPherson, Graham	Other	101
Minerals Council of Australia	Employer Association	129, DR363
Minter Ellison	HR/Legal Practitioner	94, 239, 252, DR314
Mitolo Group	HR/Legal Practitioner	213
Motor Trades Organisations, The	Employer Association	DR324
Mount Gambier Chamber of Commerce	Employer Association	147
National Disability Services	Employer	136, DR325
National Electrical and Communications Association	Employer Association	159
National Farmers' Federation	Employer Association	223, DR302
National Foundation for Australian Women	Community Sector	154, DR288
National Retail Association	Employer Association	144, DR327
National Road Transport Association	Employer Association	186
National Tourism Alliance	Employer Association	39
National Union of Workers	Employee Association	125
National Working Women's Centres	Community Sector	242, DR345
Norris Park IGA	Employer	23
North Rivers Community Legal Centre	Community Sector	191
Norton Rose Fulbright	HR/Legal Practitioner	61
NSW Young Lawyers	HR/Legal Practitioner	198
O'Brien, Frank	Other	6
Office of the Commissioner for Public Employment	Government/Regulator	178
Office of the Merit Protection Commissioner	Government/Regulator	109
Origin Energy	Employer	141
Orr, Graeme	Academic	DR264
Patmore, Glenn	Academic	192
Paul Murphy & Associates Lawyers	Employee Association	14
Paws a While Boarding Kennels	Employer	71
Peabody Energy	Employer	241
Peetz, David	Academic	133
Per Capita	Other	235
Philanthropy Australia	Community Sector	80
Police Federation of Australia	Employee Association	106, DR320
Ports Australia	Employer Association	249
Price, Simon	Other	93
PricewaterhouseCoopers	HR/Legal Practitioner	DR318
Prime Minister's Community Business Partnership	Government/Regulator	DR277

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Table A.1 (continued)

<i>Submitter</i>	<i>Organisational type</i>	<i>Submission number/s</i>
Printing Industries Association of Australia	Employer Association	139
Professionals Australia	Employee Association	212, DR317
Qantas	Employer	116, DR295
Qube Ports Pty Ltd	Employer	123
Queensland Association of Independent Legal Services Inc	HR/Legal Practitioner	7
Queensland Council of Unions	Employee Association	73, DR305
Queensland Government	Government/Regulator	120, DR338
Queensland Nurses Union	Employee Association	86, DR309
Quiggin, John	Academic	DR266
Rail, Tram and Bus Union	Employee Association	231
Recruitment and Consulting Services Association	Employer Association	248, DR343
Restaurant and Catering Australia	Employer Association	97, DR359
Rio Tinto	Employer	122
Rogers, Neil	Other	9
Ross J, Iain	Government/Regulator	171, DR357
Sadler, Giles	Other	DR257
Salvation Army, The	Community Sector	190
Scott, Jane	Employee	DR259
Scully, Amanda	HR/Legal Practitioner	DR269, DR373
Seymour Timber and Hardware	Employer	53
Shockwaves Hair Design	Employer	41
Shop, Distributive and Allied Employees' Association	Employee Association	175, DR306
Shopping Centre Council of Australia	Employer Association	153, 255, DR342
Smith, Mark	Academic	DR296
Sonja Holland Sole Trader	Employer	25
South Australian Wine Industry Association and the Winemakers' Federation of Australia	Employer Association	215, DR352
St Vincent de Paul Society National Council	Community Sector	78, DR280
Steers, Andrew	Other	5
Stewart A, Gahan P, McCrystal S and Chapman A	Academic	118
Stewart A, McCrystal S and Howe J	Academic	DR271
Strategic Human Resources	HR/Legal Practitioner	104
Sydney Symphony Orchestra	Employer	100
TAB Agents Association (SA Branch)	Employer	230
Terri Butler MP and Andrew Giles MP	Other	DR336
Textile Clothing and Footwear Union of Australia	Employee Association	214, DR365
Teys Australia	Employer	95, DR307
Teys Australia and NH Foods	Employer	179
Toga Group	Employer	19

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Table A.1 (continued)

<i>Submitter</i>	<i>Organisational type</i>	<i>Submission number/s</i>
Toll Holdings Pty Ltd	Employer	DR312
Tourism and Transport Forum	Employer Association	DR358
Transport Workers' Union	Employee Association	145
Ultimacy	Employee Association	16
Underhill, Elsa	Academic	DR321
Unions NSW	Employee Association	DR361
Unions Tasmania	Employee Association	244
UnionsWA	Employee Association	112, DR351
United Voice	Employee Association	224, DR354
Uniting Church in Australia	Community Sector	227
University of New South Wales Policy Society	Academic	135
VACC, MTA-NSW and MTA-SA	Employer Association	201
Versatile Group	Employer	31
Victoria Legal Aid	Community Sector	200, DR276
Victorian Employers' Chamber of Commerce and Industry	Employer Association	79, DR339
Victorian Government	Government/Regulator	176
Vintage Reds of the Canberra Region	Employee Association	163
Walk Free Foundation and Salvation Army	Community Sector	156
Walk Industrial Services Pty Ltd	Employee Association	51
Watkins, Sam	Employee	8
Watts, Seth	Other	162
Western Community Legal Centre	Community Sector	DR329, DR372
Whittenbury, Holly	Employee	DR263
Wilson, Peter	HR/Legal Practitioner	70
Woldring, Klaas	Academic	2
Women's Legal Services NSW	Community Sector	234
Woolston, Loretta	Employee	DR371
Work + Family Policy Roundtable and Women and Work Research Group	Academic	130, DR275
Worksite Resolutions	HR/Legal Practitioner	28, DR265
Young, Stephen	Academic	29
In confidence		253

Table A.2 Public hearings

<i>Individual or organisation</i>	<i>Transcript page numbers</i>
Bendigo — 4 September 2015	
Victorian Employers Chamber of Commerce and Industry	1–23
Bendigo Business Council	23–28
Australian Nursing and Midwifery Foundation (Victorian Branch)	29–57
Ambulance Employees Australia of Victoria	58–66
Bendigo Manufacturing Group	66–76
Young Professionals Network	76–81
National Union of Workers	81–91
Peter Watkinson	92–94
Gareth Mills	94–97
Hobart — 7 September 2015	
Tasmania's Own Redline Coaches	98–111
Launceston Chamber of Commerce	111–128
Unions Tasmania	129–146
United Voice Tasmania	147–157
Tasmanian Small Business Council	157–161
Australian Manufacturing Workers Union	162–164
Melbourne — 8 September 2015	
Shop, Distributive and Allied Employees' Association	166–187
Australian Industry Group	188–209
Australian Consortium for Research on Employment and Work	209–223
The Essential Points	224–229
Victorian Automobile Chamber of Commerce	229–252
Australian Services Union	252–267
Textile, Clothing and Footwear Union of Australia	267–286
Mary O'Connor	286–291
Canberra — 11 September 2015	
Master Builders Australia	292–310
Civil Contractors Federation	310–318
Business Council of Australia	319–345
Community and Public Sector Union	345–358
Federation of Ethnic Communities' Council of Australia, and Salvation Army Freedom Partnership to End Modern Slavery	358–367
Australian Council of Trade Unions	368–391
J Rob Bray	391–403
Joseph Mitchell	403–405

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Table A.2 (continued)

<i>Individual or organisation</i>	<i>Transcript page numbers</i>
Adelaide — 15 September 2015	
Working Women's Centre SA Inc	407–422
South Australian Wine Industry Association	422–442
Andrew Stewart	443–465
Sydney — 17 September 2015	
K&L Gates	467–481
Economic Security4Women	481–486
Restaurant and Catering Australia	486–499
Klaas Woldring	500–509
Kingsford Legal Centre, and Marrickville Legal Centre	510–525
United Voice	525–541
Australian Chamber of Commerce and Industry	541–566
Unions New South Wales	566–579
Catholic Commission for Employment Relations	579–591
Australian Catholic Commission for Employment Relations	591–601
Ipswich — 21 September 2015	
Queensland Council of Unions	602–624
Teys Australia	624–636
Chamber of Commerce and Industry Queensland	636–653
National Retail Association	653–663
Queensland Nurses Union	663–681
Loretta Woolston	681–688
Communist Party of Australia	689–700
Alan Byers	700–702
Steve Franklin	702–704
Wayne Porritt, Karen Moran, Samarah Wilson and Sheila Hunter	704–720
Australian Breastfeeding Association	720–729

(continued next page)

Table A.2 (continued)

<i>Individual or organisation</i>	<i>Transcript page numbers</i>
Melbourne — 23 September 2015	
Western Community Legal Centre	730–747
Australian Mines and Metals Association	747–766
Kerry Deturt	766–771
Community and Public Sector Union	771–790
Unions WA	790–808
Australian Higher Education Industrial Association	809–820
Professionals Australia	820–830
Chamber of Commerce and Industry of Western Australia	830–850
Australian Nursing and Midwifery Federation	851–863
Brendan McCarthy	863–876
Duncan Graham	876–882
Seth Watts	882–885

A.2 Private consultation

In addition to inviting public consultation, the Productivity Commission consulted formally and informally with key stakeholders. These consultations comprised of technical workshops (refer table A.3), industry roundtables (refer table A.4) and informal meetings (refer table A.5).

Table A.3 Technical workshops

<i>Workshop Topic</i>	<i>Participants</i>
CGE Modelling Preliminary Reference Case Workshop Tuesday 23 June 2015 Productivity Commission Canberra Office	Australian Bureau of Statistics Centre of Policy Studies Department of Employment Department of the Prime Minister and Cabinet Melbourne Institute of Applied Economic and Social Research The Treasury (Cth)
Preliminary Workplace Relations CGE Modelling Workshop Wednesday 24 June 2015 Productivity Commission Canberra Office	Australian Bureau of Statistics Department of Employment Department of the Prime Minister and Cabinet Reserve Bank of Australia The Treasury (Cth)
Preliminary Workplace Relations CGE Modelling Results Workshop Wednesday 28 October 2015 Productivity Commission Canberra Office	Australian Bureau of Statistics Department of Employment Melbourne Institute of Applied Economic and Social Research The Treasury (Cth)

Table A.4 Industry roundtables

	<i>Organisation</i>
Unions Roundtable	Australian Council of Trade Unions (ACTU)
Monday 23 March 2015	Australian Education Union (AEU)
Productivity Commission Melbourne Office	Australian Manufacturing Workers' Union (AMWU)
	Australian Nursing and Midwifery Federation (ANMF)
	Australian Services Union (ASU)
	Australian Workers Union, The (AWU)
	Community and Public Sector Union (CPSU)
	Construction, Forestry, Mining and Energy Union (CFMEU)
	Health Services Union (HSU)
	Maritime Union of Australia (MUA)
	National Tertiary Education Union (NTEU)
	Professionals Australia
	Shop, Distributive and Allied Employees' Association (SDA)
Minerals Council of Australia Roundtable	BHP Billiton
Tuesday 24 March 2015	Downer EDI Mining
Minerals Council of Australia Melbourne Office	Glencore
	Minerals Council of Australia (MCA)
	MMG
	Newcrest Mining
	Peabody Energy
	Rio Tinto
	Wesfarmers Resources
Business Council of Australia Workplace Relations Expert Advisory Group	Brickworks
Transfer of Business Roundtable	Business Council of Australia
Tuesday 29 September 2015	Lend Lease
Video/teleconference	Medibank Private
	Programmed
	Qantas
	Suncorp
	Transfield Services

Table A.5 Private consultations

Organisation or individual

Advisory, Conciliation and Arbitration Service (UK)
Amendola, Steven
Anderson, Helen
Ashurst
Australian Newsagents Federation
Australian Chamber of Commerce and Industry
Australian Council of Social Service
Australian Council of Trade Unions
Australian Hotels Association
Australian Human Resources Institute
Australian Industry Group
Australian Mines and Metals Association
Australian Retailers Association
Australian Small Business Commissioner
Belchamber, Geoff
BHP Billiton
Bluescope Steel
Boral
Borland, Jeff
Buchanan, John
Business Council of Australia
Catholic Commission for Employment Relations
Centre for Employment and Labour Relations Law
Chamber of Commerce and Industry Queensland
Clibborn, Stephen
Cochlear
Community and Public Sector Union SPSF Group
Council of Small Business Australia
Department of Education (Cth)
Department of Employment (Cth)
Department of Immigration and Border Protection
Department of the Prime Minister and Cabinet
Employment Research Australia
Evesson, Justine
Fair Work Commission
Fair Work Ombudsman
Forsyth, Anthony
Freyens, Benoit
Giudice, Geoff
Independent Contractors Australia
Isaac, Joe
Joint Commonwealth Tasmanian Economic Council
K&L Gates

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Table A.5 (continued)

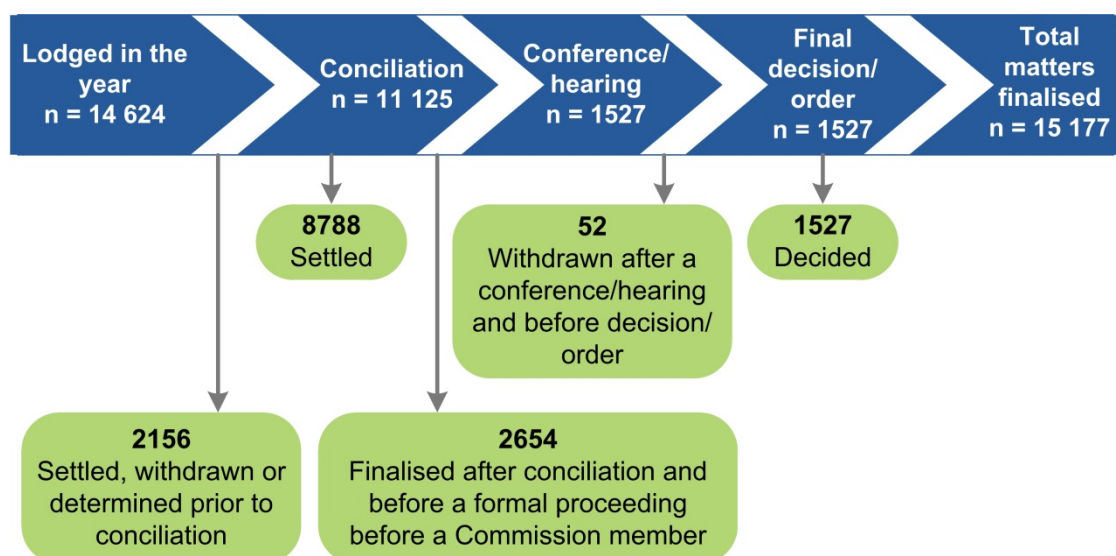
Organisation or individual

Master Builders Australia
McCrystal, Shae
Melbourne University
Minerals Council of Australia
Ministry for Business, Innovation and Employment (NZ)
National Union of Workers
Oxenbridge, Sarah
Power, Charles
Qantas
Reserve Bank of Australia
Shell
Stewart, Andrew
Tasmanian Small Business Council
Telstra
Teys Australia
Toll Holdings
Treasury, The (Cth)
United Voice
Venn, Danielle
Victorian Employers' Chamber of Commerce and Industry
Western Australian Industrial Relations Commission
Whiteford, Peter
Wooden, Mark
Workplace Lawyers

B Unfair dismissal data

Figure B.1 **Flow chart of unfair dismissal cases by manner of finalisation**

Cases finalised in 2014-15^a



^a Totals do not match due to some matters not being finalised in the year.

Data source: FWC (2015c), Appendix G.

Table B.1 Incidence of recent dismissal claims (from AIRC/FWC annual reports)

Cases	Lodged (total)	Lodged under general protection provisions (s. 365)	Dismissed (procedure or jurisdiction)	(WCh)	(FW)	Finalised (WCh)	(FW)	Conciliated (finalised at or prior to conciliation)	%	Finalised pre- arbitration (without requiring tribunal/ decision)	Substa- tively arbitrated	(WCh)	(FW)	% of lodgm ents	
2000-01	8109		223 ave. for period 1997– 2006			7809		6096	78	1422	291			3.7	
2001-02	8658					8658		6719	78	1648	291			3.4	
2002-03	7121					7326		5876	80	1209	241			3.3	
2003-04	7044					7125		5763	81	1139	223			3.1	
2004-05	6707					6841		5654	83	985	202			3.0	
2005-06	5758					6006		4739	79	1143	124			2.1	
2006-07	5173		357			5531		4508	82	922	101			1.8	
2007-08	6067		531			6281		5282	84	930	69			1.1	
2008-09	7994		598			6980		5972	86	913	95			1.4	
2009-10	11 116 ^a	1188	350	241	109	11 569	2200	10 545	8897	77	780	142	55	87	1.2
2010-11	12 840 ^a	1871	201	5	186	12 398	97	12 301	9948	80	1922	316			2.5
2011-12	14 027	2162	226			14 063		11 410	81	2059	325			2.3	
2012-13	14 818	2429	258			13 945		11 143	80	2093	402			2.7	
2013-14	14 796	2879	374			14 648		10 932	75	2475	826			5.6	
2014-15	14 624	3382	890			15 177		11 125	73	2654	637			4.3	

^a Values reported for lodgments from 2009-10 to 2010-11 in this table include unfair dismissal applications lodged under s. 394 of the FW Act (FW), and s. 643 of the Workplace Relations Act (WCh). This differs from F&O (2013a) but is consistent with the FWC's reporting requirements (see O'Neill 2012a). Because of the addition of lodgments from several avenues, totals may differ from those shown in subsequent tables.

Sources: Updated from Freyens and Oslington (2013) using data from O'Neill (2012a), Fair Work Australia (2012a), FWC (2013, 2014b, 2015c).

Table B.2 Number and outcomes of arbitrated cases (from AIRC/FWA annual reports)

<i>Arbitrated Cases</i>	<i>Substantive Arbitration: Total^a</i>	<i>FWA Compensation: Total</i>		<i>FWA Reinstatement: Total</i>		<i>FWA Dismissed on merit: Total</i>		<i>FWA</i>	<i>Plaintiff success rate in cases substantively arbitrated: Total^b</i>	<i>FWA</i>
2000-01	291		96		42		142		47	
2001-02	291		96		47		148		49	
2002-03	241		81		24		136		44	
2003-04	223		84		22		117		48	
2004-05	202		69		18		115		43	
2005-06	124		52		17		55		56	
2006-07	101		35		8		58		43	
2007-08	69		17		18		34		51	
2008-09	95		22		14		59		38	
2009-10	142	87	51	35	22	15	67	35	51	57
2010-11	316	316	122	122	25	25	165	216	47	40
2011-12	325	325	85	85	17	17	215	215	31	31
2012-13	402	402	112	112	20	20	256	256	33	33
2013-14	826	826	150	150	34	34	175	175	22	22
2014-15	637	637	141	141	27	27	161	161	26	26

^a Totals refer to claims under all workplace relations systems. The FWA column includes only claims made under the FWA. The number of FWA cases is not explicitly stated for 2012-13. However, in 2011-12, all substantively arbitrated cases related to s. 394 of the FWA. Therefore the assumption is made that this is also the case in 2012-13. ^b The plaintiff success rate is the sum of compensation and reinstatement outcomes divided by the total number of cases arbitrated.

Sources: Updated from Freyens and Oslington (2013) using data from O'Neill (2012a), Fair Work Australia (2012a), FWC (2013, 2014b, 2015c).

Table B.3 Average timeframes of Fair Work Australia to process s. 394 applications

	1 July 2010-30 June 2011	1 July 2011-30 June 2012
Average number of days taken from lodgment to initial allocation	1	1
Average number of days taken from lodgments to dispatch of notice of listing	9	9
Average days taken from lodgment to finalised conciliation ^a	29	29
Average days taken from lodgment to arbitration listing (conference or hearing)	140	152
Average days taken from lodgment to judgment ^b by Fair Work Australia member	175	171
Average days ^c taken from lodgments to finalisation	49	49

^a Includes any subsequent conciliation listings (for example, where matter is adjourned). ^b Judgment relates to a final decision or order (ie. 'jurisdictional objection upheld', application dismissed or application granted). ^c Finalisation relates to a matter that has had a final result recorded and includes conciliations, arbitrations and matters withdrawn and is based on all matters finalised.

Source: O'Neill (2012a).

Table B.4 Conciliation settlements

	2010-11		2011-12		2013-14	
	Number	% of monetary settlements	Number	% of monetary settlements	Number	% of monetary settlements
Settlements involving money	5641	100	6629	100	6607	100
\$0-\$999	587	10	630	10	460	7
\$1000-\$1999	970	17	1120	17	1010	15
\$2000-\$3999	1559	28	1784	27	1786	27
\$4000-\$5999	993	18	1167	18	1275	19
\$6000-\$7999	542	10	661	10	741	11
\$8000-\$9999	285	5	376	6	406	6
\$10000-\$14999	426	8	503	8	556	8
\$15000-\$19999	138	2	184	3	172	3
\$20000-\$29999	95	2	142	2	141	2
\$30000-\$39999	24	0	43	1	43	1
\$40000-max	16	0	12	0	14	0
>maximum	6	0	7	0	3	0
Non-monetary	2097		2435		2313	
Total	7712		9039		8920	

Source: O'Neill (2012a), Fair Work Australia (2012a), FWC (2013, 2014b).

Table B.5 Arbitration payments

	2010-11			2011-12			2012-13			2013-14		
	Total	Share of total		Total	Share of total		Total	Share of total		Total	Share of total	
Application granted: compensation	118			81			104			140		
\$0–\$999	1	1%		4	5%		8	7%		7	5%	
\$1000–\$1999	2	2%	31%	11	14%	36%	12	11%	34%	9	6.4%	26%
\$2000–\$3999	33	28%		14	17%		15	13%		20	14.3%	
\$4000–\$5999	17	14%	25%	12	15%	26%	13	12%	20%	18	13%	21%
\$6000–\$7999	12	10%		9	11%		8	7%		12	8.6%	
\$8000–\$9999	6	5%		5	6%		8	7%		17	12.1%	25%
\$10000–\$14999	13	11%	16%	6	7%	14%	14	13%	21%	18	12.8%	
\$15000–\$19999	16	14%		7	9%		7	6%		8	5.7%	
\$20000–\$29999	12	10%		5	6%		8	7%		13	9.3%	
\$30000–\$39999	4	3%	29%	4	5%	25%	8	7%	25%	8	5.7%	28%
\$40000–maximum	2	2%		4	5%		3	3%		10	7.2%	

Sources: O'Neill (2012a), Fair Work Australia (2012a), FWC (2013, 2014b).

C Australian empirical studies of wage employment effects

This appendix reviews the Australian empirical literature on the effects of wages on aggregate employment to gauge the possible overall employment responses to changes in wages (whether they be changes to minimum wages, award wages or general wages). The aggregate responses assessed subsume a vast array of responses by individual firms, their employees and potential employees. These responses are conditioned by many firm specific and local characteristics that make it difficult to ascertain the extent to which the findings of these studies apply to labour markets in aggregate, and are the subject of an extensive literature which is not the focus of this appendix.

The appendix has the following structure:

- section C.1 outlines some of the theoretical, data and technical issues that need to be confronted to help assess the relationship between wages and aggregate employment
- section C.2 summarises the key findings of the Australian empirical studies of the effects of changes in wages on aggregate employment
- section C.3 discusses the studies' methodologies and findings in more detail
- section C.4 reviews how the empirical findings have been interpreted in general equilibrium modelling.

C.1 Issues in assessing the employment effects of wage changes

Theoretical considerations

Wages can have a variety of effects. Wage rates affect the relative cost of labour compared with the cost of other inputs such as capital. Variations in wage rates relative to other wages affect the cost of one group of workers relative to another, thereby influencing the mix of different types of workers that employers demand. Wage changes may therefore influence the number of people employed, the nature of their employment (such as full-time versus part-time or ongoing versus contract) and the hours that they work.

Wage changes may also have wider employment and income impacts than just for those who are directly affected by the wage change. For example, a change in the minimum wage may affect the demand for workers who are not on the minimum wage (box C.1).

The impacts of a change in wage may take time to occur. For example, broader responses to a change in award wages may include adjustments in the investment behaviour of firms and changes in the relative competitiveness of firms. Consumer behaviour may also be indirectly affected that occurs in response to changes in household disposable income. Such changes can take time to flow through the economy.

These various considerations are relevant for undertaking and interpreting empirical estimates of the responsiveness of employment to changes in wage rates. To aid comparability across studies, the empirical literature usually presents the employment effects of wage changes in terms of ‘employment elasticities’. Under this approach, *minimum wage elasticities* are used to denote the percentage change in employment implied by a 1 per cent change in the *minimum* wage, while *average-wage elasticities* are used to denote the employment effects of a 1 per cent change in the *average* wage, that is, the broad level of wages that applies across the economy. The sign of the elasticity indicates whether the employment response is positively or negatively related to the wage change being examined (either the nominal or real wage depending on the study). Thus, for example, a minimum-wage elasticity of -1 would indicate that employment of minimum-wage workers *decreases* by 1 per cent in response to a 1 per cent increase in the minimum wage, while an elasticity of +1 indicates that employment of minimum-wage workers *increases* by 1 per cent.

In turn, minimum wage elasticities fall into three broad groups:

- the impact of minimum wage changes on the employment of minimum wage workers (termed the ‘own-price elasticity of employment’)
- the impact of minimum wage changes on the employment of above minimum wage workers (termed the ‘cross-price elasticity of employment’)
- the impact of minimum wage changes on total employment (covering both minimum wage and above minimum wage workers) (termed the ‘total elasticity of employment’).

Data issues

There is no one measure of ‘minimum-wage’ employment in Australia, in large part due to the interaction between the national minimum wage, the entry-level minimum wage that applies in each award and the interlinkage with award rates of pay more generally. Moreover, there are no comprehensive statistical data on the way employee remuneration is determined in Australia (chapter 2). As a result, the studies reviewed adopt different measures of ‘minimum-wage’ employment or instead use proxies for minimum-wage employment considered to be appropriate.

Box C.1

Stylised economywide employment effects arising from changes in the wages of certain groups of workers in the labour market

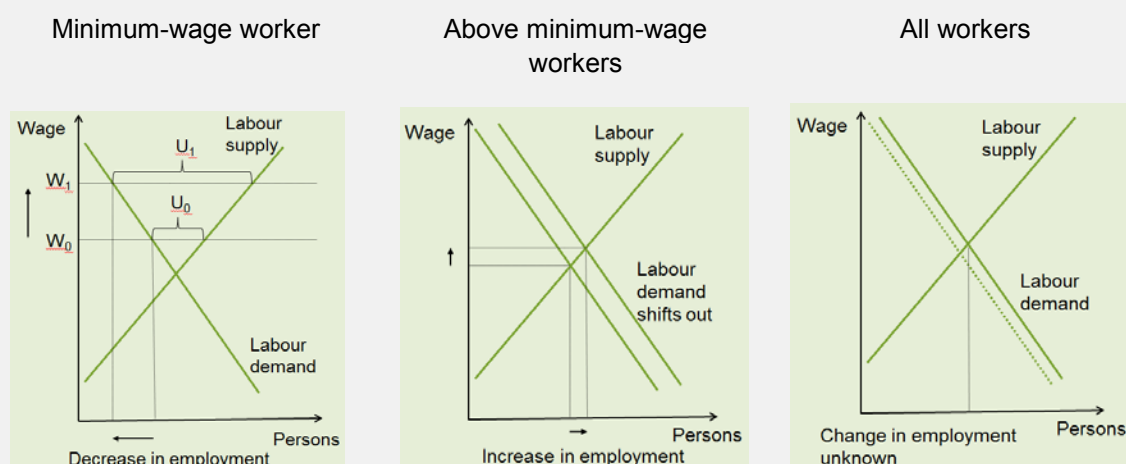
Estimating the responsiveness of employment to wage changes is complicated by numerous complexities in the way labour markets operate in the real world (such as the presence of search and transaction costs, information asymmetries, firm-specific characteristics and lagged responses). In turn these affect the nature and timing of responses of employees (which affects the supply of labour) and employers (which affects the demand for labour). While relevant to all assessments, these complexities are more an issue for firm-level studies than for studies of aggregate or economywide labour markets.

This box presents a stylised partial equilibrium framework for conceptualising how specified changes in the wages of one group of workers (in this case, those on minimum wages) may impact on aggregate employment (as opposed to firm-level employment). The nature of these impacts is important in understanding what each of the studies reviewed in this appendix seeks to do and to better understand the nature and relevance of their findings.

The framework adopts the simplifying assumptions that the minimum wage is paid to a proportion of workers and is binding (that is, it is set above the wage that would otherwise prevail), that there is a pool of ('involuntarily') unemployed workers, and that labour markets are free to adjust to changes in relative wage rates. In this partial framework, a rise in the minimum wage, from W_0 to W_1 , would be expected to lead to a fall in the employment of minimum-wage workers (the treatment group for this example) and an increase in unemployment from U_0 to U_1 (figure below, left panel), all other things remaining equal. This corresponds to a negative 'own-price elasticity' of employment for the minimum wage workers in aggregate.

Firms, in aggregate, may respond to the rise in the minimum wage relative to other wages by substituting towards workers who are not on the specified wage (figure below, middle panel). This substitution effect, in aggregate, gives rise to a positive 'cross-price elasticity' of above minimum wage workers with respect to the minimum wage rise.

Stylised representation of the employment effects of a hypothetical rise in the minimum wage



(Continued next page)

Box C.1 (continued)

The net effect on total employed persons depends on two potentially opposing effects (figure above, right panel). The net effect of an increase in the minimum wage rate on workers subject to the minimum wage relative to the wage rate of other workers would be negative if the decrease in minimum-wage employment in persons is not offset by an increase in employment in persons of workers that are not on the minimum wage. The magnitude of any net effect on total employment may be negligible if the change in minimum wages is small or if those workers affected by the specified change constitute a small share of the overall labour market.

In this stylised representation, if the prevailing wage is below the market clearing wage, employment of minimum wage workers would rise with an increase in the wage rate. The impact of a wage change on overall employment of the treatment group would then depend on the relationship between the prevailing wage and the 'equilibrium' or competitive market-clearing wage.

In practice, estimating the responsiveness of employment to wage changes is not straightforward, as employees and employers move along their labour supply and labour demand curves, and both the demand and supply curves for labour shift over time (both of which affect observed employment outcomes). Estimating the responsiveness of employment to wage changes also involves an assessment of the relationship between the designated wage rate (the minimum wage in this case), the wage rate actually paid to workers and the wage rate that would apply in the absence of the specified wage. The effects of other non-wage factors on the observed employment outcomes also need to be taken into account where relevant (such as the effect of changes in output, profitability, productivity and the regulatory environment).

It is also important to understand the level of the analysis in each study. The employment impacts may be on the economy as a whole, on a particular industry or sector, or on groups or individuals. Surveys and analysis of unit-record datasets — datasets containing records on the labour-market responses of individuals — often use sample weights to draw inferences on the implications for the wider population, the accuracy of which depend on how well the sample represents the wider population. Higher-level analysis is more likely to factor in indirect impacts of any wage change, but it may also be more difficult to isolate the impact of wages as opposed to other factors that determine the observed employment outcomes.

Technical issues

The empirical literature uses quantitative techniques, usually econometric, to seek to ascertain whether changes in wage rates are statistically related to changes in employment (typically expressed in terms of persons employed or total hours worked) (box C.2).

Given the generally small changes in minimum wages in Australia (chapter 4), estimating the overall response of employment is not straightforward. The studies typically use data on observed employment outcomes, which are a consequence of the demand for labour by employers and the supply of labour by workers, including a range of factors such as changes in output, the general business environment, firm-level profitability, productivity

and the regulatory environment. In addition, the impact of any wage change on an individual firm or group of firms need not be the same as the impact on the overall labour market, which takes into account the responses of all firms and all people looking for work (the supply of labour).

The studies reviewed seek to establish the *aggregate* effect of wage changes on employment in one of two ways:

- by comparing the impact on affected workers (termed the treatment group) relative to non-affected workers (termed the control group) using cross-sectional or panel data techniques
- by ascertaining the effect on total employment, or that of the subgroup being examined for minimum-wage studies, over time (often termed time-series analysis).

Box C.2 Techniques used in the Australian empirical literature to assess the effects of wage changes on the aggregate employment

The Australian empirical literature uses a range of methodologies to assess the effects of minimum wage changes on employment, while average wage studies typically use a single technique (error correction models). The various techniques used are described below.

Ordinary least squares regressions (OLS) use regression analysis to ascertain if employment growth is statistically related to the growth in wages and aggregate demand (usually expressed in terms of real GDP) over time. Aggregate demand is included to account for the effect of changes in output on employment. Some studies also include a time trend to pick up the effects of technological change. There are many weaknesses with the use of OLS regressions in this context, including the need to control for other factors affecting employment growth and the potential for spurious results if there are underlying trends in the wages and employment time series being used.

Generalised least squares regressions (GLS) correct for the presence of correlation over time in employment and wages. This approach is suited to large sample sizes, but can be less reliable than OLS for small samples.

Error correction models are an extension of OLS regressions that ascertain the impact of changes in wages (usually general wage changes) on aggregate employment over time. A strength of this approach is that it enables the speed at which employment (the dependent variable) returns to equilibrium after a change in wages (one of the independent or explanatory variables) to be assessed. Error correction models can be used to estimate both short-term and long-term effects of one time series on another and can overcome the spurious results that may arise from the use of OLS where trends exist in the wages and employment data being used. A potential weakness of error correction models is that they generally do not control for the influence of other factors that may affect the dependent variable, such as changes in the institutional arrangements that govern the operation of the labour market.

(Continued next page)

Box C.2 (continued)

Difference-in-differences regression analysis estimates the effect of minimum wage changes on one group affected by that policy (termed the treatment group) compared with the measured effect on another otherwise 'identical' group (termed the 'control' group). Instead of controlling for the various factors that influence employment, as would normally be done in regression analysis, it is assumed that the employment growth in the treatment group would have been the same as in the control group, but for the difference in the policy being examined. A challenge for difference-in-differences analysis is to find a control group that is sufficiently comparable to the treatment group so that any observed differences between the groups only reflect the effect of the minimum wage changes on the treatment group.

Regression discontinuity analysis is a related technique that measures the change in employment immediately before and after a change in the minimum wage. The situation before is used as the 'control' and the situation immediately after is considered to be affected by the change. Any difference is regarded as the effect of the change. It assumes that the change in wage is not anticipated and factored into employment decisions before it occurs and that any change in employment only reflects the effects of the minimum wage.

Structural break analysis involves a statistical test to see if there is a change in the characteristics of the employment data when the minimum wage is adjusted. If such a change does occur, this may suggest that the minimum wage has affected employment.

A *multinomial logit model* uses regression techniques to estimate the probability of alternative labour market outcomes (such as staying in employment, gaining employment, becoming unemployed or exiting the labour market) based on the characteristics of individuals in cross sectional unit or panel data (a time series of cross sectional data over time).

Surveys have also been used to estimate the effect of wage changes on employment by asking employers to indicate how their employment decisions were affected by an actual wage change or how their employment decisions might be affected by a hypothetical policy change. The usefulness of this technique depends on, among other things: the size of the sample used; how well the sample represents the underlying population of interest, and whether there are biases present in the questions and/or responses.

Some studies, such as those using difference-in-differences techniques, may seek to combine aspects of both approaches. The minimum wage studies reviewed in this appendix use both approaches — cross sectional and time series — whereas the studies into the employment effects of average wages typically use time-series analysis.

The choice of benchmark used in measuring the effect of any wage change (termed the 'counterfactual') is an important aspect of empirical studies and affects how the results should be interpreted and what other factors should be controlled for. Some studies use estimates of what would have happened in the absence of the wage change being examined as their counterfactual. This becomes the basis for estimating the effect of the wage change. Other studies use the state of the world before the wage change being examined as their counterfactual. Yet other studies use a control group as a counterfactual on the basis that they are deemed to have the same (or sufficiently similar) characteristics as the treatment group (and, hence, that the key difference between the two groups should arise from the change in wages affecting the treatment group).

Whichever approach is used, it is important that the studies control for the impact of other factors that may affect the measure of employment being used in order to avoid spurious conclusions being drawn about the impacts of wage changes. The choice of other factors can be controlled for directly in some techniques by including other variables in the relationships being estimated or indirectly through statistical techniques such as ‘fixed’ or ‘random’ effects models, or by differencing. This is particularly important in time-series studies, as changes in the level and composition of employment are also driven by a myriad of factors over time, including:

- employer and employee characteristics that are persistent during the sample and which influence behaviour in a manner material to the study of the responsiveness of employment to wage changes (often referred to as fixed effects)
- changes in market conditions, skill levels, technology and organisational change that affect the demand for labour
- demographic and other factors that affect the supply of labour
- the broader institutional and economic environment that governs the operation of labour markets (such as employment standards).

Most empirical studies assess the ‘initial’ impacts of minimum-wage changes (typically those occurring within one year), as they do not control for longer-term factors that may affect the level of employment. Some studies attempt to ascertain impacts beyond one year by controlling for some of these longer-term factors influencing employment, such as ongoing economic growth or changes in relative competitiveness arising from non-labour market factors (for example, terms of trade effects). This is usually achieved in Australian studies through the use of error correction models (box C.2).

C.2 Summary of the Australian effects of wage changes

Overview of the studies reviewed

The Commission has identified eight Australian empirical studies that, since 1999, assess the effect of changes in the *minimum wage* on employment, and a further nine that look at the broader impact of changes in *average wages*. Each of these studies is reviewed in section C.3.

The minimum wage studies identified comprise a mix of:

- published articles in refereed academic journals (Junankar, Waite and Belchamber 2000; Lee and Suardi 2011; Leigh 2003, 2004a, 2004b; Mangan and Johnston 1999)
- published articles in periodicals that do not appear to have been refereed (Lewis 2005)

-
- research papers submitted to, or published by, government agencies, such as the Fair Work Commission (and its predecessor organisations) or the then Department of Employment and Workplace Relations, that do not appear to have been externally refereed (Harding and Harding 2004; Lewis 2006)
 - conference papers that do not appear to have been externally refereed (Olssen 2011; Plowman 2007).

Reflecting in part the different publication and refereeing requirements, the quality and thoroughness of the studies reviewed here may vary.

This appendix also includes studies that look more broadly at the impact of general wage changes on total employment (covering wage changes applying to both minimum-wage and above minimum-wage workers). All but one have been peer reviewed.

The average wage studies identified comprise a mix of:

- published articles in a journal that have been refereed (Dixon, Freebairn and Lim 2005; Lewis and MacDonald 2002)
- research papers published by government agencies that have been peer refereed — the Fair Work Commission (Yuen and Mowbray 2009), Productivity Commission (Daly et al. 1998), the Reserve Bank of Australia (Debelle and Vickery 1998; Dungey and Pitchford 1998) or the Australian Treasury (Downes and Bernie 1999; Hutchings and Kouparitsas 2012)
- a discussion paper that does not appear to have been externally reviewed (Karanassou and Sala 2008).

A lack of suitable Australian data restricts the analysis that can occur

One conclusion that emerges from the studies reviewed is that there are a dearth of Australian data for identifying and assessing the impact of minimum wages on *minimum-wage* workers. Plowman (2007) notes that:

... the capacity to undertake statistical analysis in Australia [on the effect of minimum wage adjustments] is more limited as there is not the same richness of data. In the USA, it is possible to obtain a range of data on those who are employed at hourly rates at, or below, the federal minimum. These include such matters as industry of employment, marital status, age, gender, educational attainment, usual hours worked per week, region/state, ethnicity, major occupation, and full-time or part-time status. (p. 12)

In an attempt to overcome this, some Australian studies seek to draw inferences from:

- industries considered to be more likely to be affected by minimum wage adjustments (Junankar, Waite and Belchamber 2000; Plowman 2007)
- in one case, a group of two industries relative to the rest of the economy (Lewis 2005).

Even where data are available, there seem to be inconsistencies across studies in how they use what appears to be otherwise comparable data items (table C.1).

Table C.1 Minimum wage reported for Western Australia
\$ per week

<i>Wage applying at:</i>	<i>Plowman (2007)</i>	<i>National wage case (excluding metal workers) ^b</i>	<i>National wage case (including metal workers) ^b</i>	<i>Federal minimum wage</i>	<i>Western Australia's statutory minimum wage (Leigh 2003)</i>
June 1996	270 ^a	260.30	349.4	n/a	317.1
June 1997	370 ^a	n/a	n/a	359.40	332.0
...	
June 2006	484.40			484.40	

^a Estimate based on Plowman (2007, fig. 3). ^b Prior to the introduction of the Federal Minimum Wage in April 1997, the national minimum wage for metal workers differed from that of other workers.

Sources: Bray (2013b); Leigh (2003); Plowman (2007).

The employment effects of changes in minimum wages

While the quality of the Australian empirical studies on the employment effects of changes in minimum wages vary, they are generally less robust and rigorous than the average wage studies. Of the minimum wage studies, Leigh reports more rigorous testing than most. Further, there is also relatively less consensus across the minimum wage studies in terms of their findings than for the average wage studies. This is understandable given the relatively small number of Australian workers on minimum wages, the relatively modest changes in minimum wages relative to average wages and the limited number of natural wage experiments that can be analysed.

Of the eight minimum wage studies reviewed, the five earliest studies found employment to be negatively related to changes in the minimum wage (table C.2)¹⁷⁴. Of these, three reported a statistically significant relationship (Junankar, Waite and Belchamber 2000; Leigh 2003, 2004a; Mangan and Johnston 1999).¹⁷⁵

¹⁷⁴ A negative effect indicates that a rise/fall in the minimum wage leads to a fall/rise in employment.

¹⁷⁵ Statistical significance is generally used in the literature as one indicator of how robust a finding may be. The statistical significance of results is the statistical probability of incorrectly concluding that there is an impact when in fact there is no impact. A 1 per cent level indicates this probability is only 1 per cent, and is the converse of saying there is a 99 per cent probability that there is an impact. This is the highest level of statistical significance usually reported. A 5 per cent level is less statistically significant than the 1 per cent level. A 10 per cent level is usually the lowest level that is reported in the literature.

Table C.2 Australian estimates of the elasticity of employment with respect to minimum wage changes

<i>Study</i>	<i>Broad type of technique used</i>	<i>Elasticity measure</i>	<i>One-year or less</i>	<i>More than one-year</i>
Employment specified in terms of persons				
Mangan and Johnston (1999)	Econometric	Youth employment wrt the ratio of the youth award wage to adult average weekly earnings	-0.05** to -0.31 (1 year)	
Junankar, Waite and Belchamber (2000)	Econometric	Youth employment wrt the ratio of the youth minimum wage to adult average weekly earnings	-3.1** a (1 quarter, manufacturing)	-2.6** a (time scale n/a, retail)
Leigh (2003, 2004a)	Econometric	Total employment wrt the nominal minimum wage	-0.29*** (3 months)	
Harding and Harding (2004)	Sample based	Total employment wrt the nominal minimum wage	-0.05 (1 year)	
		Total employment wrt the real minimum wage		-0.25 (5 years)
Lewis (2005, 2006)	Statistical	Minimum-wage employment wrt the nominal minimum wage		-0.55 (10 years)
		Minimum-wage employment wrt the real minimum wage		-0.72 (10 years)
Plowman (2007)	Econometric	Total employment wrt the nominal minimum wage	Reports 'little effect' b	
Lee and Suardi (2011)	Econometric	Youth employment wrt the nominal minimum wage	No evidence of any effect	
Employment specified in terms of hours worked				
Olssen (2011)	Econometric	Youth employment wrt the nominal minimum wage	No evidence of any effect	

wrt: with respect to. Statistical significance: ***: one per cent; **: 5 per cent. **a** The authors concluded that there was little evidence of an effect because out of the thirty-eight equations they estimated, the only statistically significant estimates were the two reported in this table. **b** The author reports a statistically significant effect but does not report the magnitude. The sign of the effect can be inferred as positive from the test statistic which he reported.

While not calculating the standard errors needed to test for statistical significance, two additional studies also found a negative relationship between minimum-wage changes and employment (Harding and Harding 2004; Lewis 2006). In contrast, Plowman (2007) found a statistically significant positive relationship between the minimum wage and youth employment.¹⁷⁶ The two most recent studies — Lee and Suardi (2011) and

¹⁷⁶ While Plowman did not report the magnitude of the employment effect, the sign of the effect can be inferred from the test statistic which he did report (2007, p. 18).

Olssen (2011)— did not find a statistically significant relationship. The different findings on statistical significance may reflect changes that have occurred since 1999, including for example, changes to the workplace relations framework.

With respect to the *minimum* wage, the Australian studies find elasticities of:

- *total* employment range from -0.05 to -0.29 for up to one year (based on two studies) and -0.25 after five years (based on one study)
- *award-wage* employment of -0.55 for nominal wages and -0.72 for real wages after 10 years (based on one study)
- *youth-wage* employment range from -0.05 to -3.1 for up to one year (based on two studies) and -2.6 after more than one year (based on one study) (table C.2).

Some of these elasticities appear high and outside of a range that may be expected based on other results. For example, one study (Junankar, Waite and Belchamber 2000) undertook a series of thirty-eight regressions and only in two cases did they find a statistically significant impact. In those two cases, they found that a 1 per cent reduction in the ratio of the minimum wage to the adult wage may increase youth employment by between 2 and 3 per cent. They noted that their sample size was small (2000, p. 180) which would make it more difficult to discern statistically significant effects, and they concluded that they had not found evidence of an effect.

Notwithstanding possible concerns with individual studies, when viewed collectively these employment elasticities suggest that:

- minimum wage changes in Australia, if anything, tend to have a small and negative effect on the total employment (that is, taking into account the impact on both minimum wage and above minimum wage workers)
- the impacts may be stronger for certain subsections of the labour market, particularly younger workers (Leigh found statistically significant effects for females aged 15 to 24 and males aged 15 to 34. Mangan and Johnston found statistically significant effects for young people in Queensland and in Australia, but of a smaller magnitude than those reported by Leigh)
- there is some evidence to suggest that minimum wage changes may indirectly impact on other subsections of the labour market — the statistical significance of Leigh's finding that minimum wage changes have a positive impact on female workers aged 45 to 54 suggests that they may be substitutes for minimum wage workers
- the impact tends to increase (to be higher in an absolute sense) when the estimation is undertaken over longer time periods, which is consistent with employers having greater scope and ability to expand or contract operations over time and for employees to move between employment opportunities and in and out of employment.

The employment effects of changes in average wages

The findings of Australian empirical studies on the employment effects of changes in average wages are generally more robust than the minimum wage studies. Access to better data and wage changes that affect the broader workforce enable the average wage studies to employ more uniform methodologies, control for additional variables and undertake more rigorous statistical testing.

A key finding that emerges from these studies is that the level of real output is the main driver of employment over time, rather than wages per se. Estimates of the elasticity of employment in Australia with respect to real output lie in the range of +1.0 to +1.3. That is, a 1 per cent rise in real output is found to lead to between a 1 to 1.3 per cent increase in aggregate employment.

Another key finding is that average wage changes have a negative and statistically significant effect on employment, which rises as more time passes after a wage change. Error correction model estimates of the total elasticity of employment with respect to the average real wage range from:

- -0.2 to -0.5 after one quarter
- -0.3 to -0.5 after one year (or -0.4 to -0.7 if employment is measured in hours worked).

Error correction model estimates of an employment elasticity are based on the assumption that output is unaffected by the change in wage. As output adjusts, the employment effects are likely to increase further.

Studies that include second-round employment impacts of output and/or capital are DeBelle and Vickery (1998), Lewis and MacDonald (2002), and Downes and Bernie (1999). These studies give estimates of the total elasticity of employment with respect to the average real wage ranging from -0.8 to -4.8.

The *average-wage* studies raise four additional issues that may assist in understanding the *minimum-wage* effects on employment, but, because of data limitations, are not generally explored in the Australian minimum-wage literature.

First, the literature indicates that the employment impact of a change in wages is greater on employment specified in terms of hours worked than in terms of persons employed. Two studies considered the employment effect in terms of both hours worked and the number of employees (Downes and Bernie 1999; Lewis and MacDonald 2002). Both found the real, long-run wage elasticity to be larger when employment is defined in terms of hours worked than when it is defined in terms of the number of employees.

Second, the studies indicate that second-round employment effects in response to a change in the average wage, are material. Studies that include second-round employment impacts of output and/or capital are DeBelle and Vickery (1998), Lewis and MacDonald (2002), and Downes and Bernie (1999). The estimates in these studies are higher than those

estimated in most studies in which second-round effects on output are not factored in, for example the error correction model approach (table C.3).

Third, there is some evidence that the speed of adjustment to a wage change varies depending on other broader economic factors. Dixon, Freebairn and Lim (2005) found that the speed of adjustment varies over the business cycle, with the speed of adjustment being higher during a recession than during the rest of the business cycle. They estimate that employment adjusts within one year during a recession, but employment would otherwise take three years to adjust. They contend that there is greater adjustment pressure from employers during a recession and more willingness on the part of workers to accept the adjustment.

Table C.3 Australian estimates of the elasticity of employment with respect to average wage changes

<i>Study</i>	<i>Broad type of technique used</i>	<i>Elasticity measure</i>	<i>One-year or less</i>	<i>More than one-year</i>
<i>Employment specified in terms of persons employed</i>				
Daly et al. (1998)	Labour share equation	Youth employment wrt average youth wage	-2 to -5 ^a (1 year)	
Dunsey and Pitchford (1998)	Error correction model	Total employment wrt the real average wage		-0.4*** (time scale n/a)
Downes and Bernie (1999)	Macroeconometric including error correction model	Total employment wrt the real average wage	-1	-4.8 (10 years)
Lewis and MacDonald (2002)	Based on error correction model	Total employment wrt the real average wage		-0.8*** (1 to 1.5 years)
Dixon, Freebairn and Lim (2005)	Error correction model	Total employment wrt the real average wage	-0.11*** (1 quarter)	-0.32*** (3 to 4 years)
Karanassou and Sala (2008)	Error correction model	Total employment wrt the real average wage		-0.50**
Yuen and Mowbray (2009)	Error correction model	Total employment wrt the real average wage	-0.2 (1 quarter)	-0.5*** (1.5 to 2 years)
Hutchings and Kouparitsas (2012)	Error correction model	Total employment wrt the real average wage	-0.14 (1 quarter)	-0.4*** (7 to 8 years)
<i>Employment specified in terms of hours worked</i>				
Debelle and Vickery (1998)	Macroeconometric including error correction model	Total hours worked wrt the real average wage		-1.1
Lewis and MacDonald (2002)	Based on error correction model	Total hours worked wrt the real average wage		-0.9*** (time scale n/a)

wrt: with respect to. Statistical significance: ***: 1 per cent; **: five per cent. ^a Range of elasticity estimates reported by authors for industries that employ a high proportion of youth. Statistical significance varied from not statistically significant at the 10 per cent level in some industries, to statistical significant at the 1 per cent level in other industries.

Fourth, the employment response to wages is concentrated in the private sector. Downes and Bernie (1999) analyse the employment response of the Australian labour market both

including and excluding government employment. They find the elasticity of private employment to be around a third larger than the elasticity of total employment.

C.3 Empirical studies of the impact of wage changes

This section reviews each of the sixteen Australian empirical studies identified that estimate the effects of wage changes on employment.

For each study, the review focuses on:

- how the study was undertaken
- the techniques and data sources used
- what other factors, if any, were controlled for
- whether the findings are robust, including whether results were statistically significant at either the 1, 5 or 10 per cent level
- the sign of the effect found on employment to indicate the estimated direction of the relationship (positive or negative)
- the employment elasticity if it is reported, or the elasticity implied if not, to indicate the magnitude of the effect
- the type of publication and the extent of any external refereeing or peer review.

Where relevant, the review also includes assessments of the studies in the literature.

Studies of the employment effects of changes in minimum wages

The Commission has found eight empirical studies of the employment impacts of minimum wages in Australia since 1999. These studies are summarised in table C.4.

Table C.4 Australian empirical studies of the employment effects of minimum-wage changes

<i>Study [Coverage]</i>	<i>Minimum wage event and time period of analysis</i>	<i>Method of analysis</i>	<i>Description of data</i>	<i>Estimate of elasticity with respect to the minimum wage</i>	<i>Statistical significance of results</i>
Mangan and Johnston (1999) [Australia and Queensland]	Method 1: Variation over time in Queensland youth award wage relative to adult average weekly earnings for non-managerial occupations from 1980 to 1994 Method 2: Minimum wage change in 1996 ^a	Method 1: Generalised least squares regression of both full-time and part-time employment to population ratio of youth on the ratio of the youth award wage relative to the adult average weekly earnings, gross state product and a time trend Method 2: Multinomial logit model of probability of a young person's labour market status (full-time, part-time, unemployed or not in the labour force)	Method 1: ABS annual Queensland data Method 2: unit record census data for Queensland and Australia ^a	Method 1: -0.08 (full-time, real, 1 year) and -0.19 (part-time, real, 1 year) Method 2: -0.07 to -0.28 (Queensland, real, 1 year) and -0.05 to -0.31 (Australia, real, 1 year)	Method 1: no results were significant at the 5 per cent level Method 2: four out of six elasticity estimates were statistically significant at the 5 per cent level
Junankar, Waite and Belchamber (2000) [Australia]	Variation over time in youth minimum wage relative to adult average weekly earnings from 1987 to 1997	Error correction model in which youth hours of employment depends on the youth minimum wage relative to the adult average weekly earnings and output. Estimated for retail trade and manufacturing; full-time and part-time; male and female and ages 16, 17, 18, 19 and 20.	Seasonally unadjusted quarterly data: output by industry from ABS, youth wages and adult average weekly earnings from unspecified source ^b	-3.1 (real, 1 quarter, manufacturing) -2.05 (real, over 1 year, retail) ^c	Reported impacts were significant at 5 per cent level. The other elasticity estimates were not statistically significant and were not reported.
Leigh (2003, 2004a) [Western Australia]	Six increases in the Western Australian minimum wage from 1994 to 2001	Difference-in-differences analysis of the employment to population ratio in Western Australia relative to the rest of Australia. Estimates employment elasticities for Western Australia	ABS employment and population data for Western Australian and the rest of Australia	-0.29 (nominal, 3 month)	Impacts significant at 1 per cent level for youth and for males aged 25-34. Impacts significant at 10 per cent level for females aged 45-54 .
Harding and Harding (2004) [Australia]	1. The 2003 national safety net adjustment; 2. hypothetical freeze in national safety net for five years.	Survey of 1800 small and medium-sized businesses in October/November 2003. Estimates employment elasticities for the Australian small and medium-sized business sector ^d	Businesses surveyed stratified to be representative of the Australian small and medium-sized business sector	-0.05 (nominal, 1 year) -0.25 (real, 5 year)	Sampling errors not provided ^e

(Continued next page)

Table C.4 (continued)

<i>Study [Coverage]</i>	<i>Minimum wage event and time period of analysis</i>	<i>Method of analysis</i>	<i>Description of data</i>	<i>Estimate of elasticity with respect to the minimum wage</i>	<i>Statistical significance of results</i>
Lewis (2005, 2006) [Australia]	Changes in wages in two national industries compared with the whole economy between 1994 and 2004	Comparison of wage and employment growth in two industries — Accommodation, cafes and restaurants; and Health and community services (collectively denoted as the ‘minimum wage sector’) — with that of the total economy	Wage and employment growth for these two industries and for the total economy. Source not stated	-0.55 (nominal, 10 year) -0.72 (real, 10 year)	Standard errors not provided
Plowman (2007) [Western Australia]	Minimum wage changes affecting Western Australia between 1990 and 2006	OLS regression of employment on the minimum wage and state final demand. Analysis for: total WA labour force; two age groups (15–19 and 20–24 year olds); and three sub-sectors (Retail trade; Accommodation, cafes and restaurants; and Personal and other services)	ABS data for Western Australia	Reported that the effect on employment is ‘small’	Impact significant at 1 per cent level for total employment. (The sign of the test statistic implies the direction of change is positive.)
Wheatley (2009) [Australia]	Changes in the Federal minimum wage relative to average wages between 2001 and 2008	Error correction model in which the ratio of national employment of high-skilled occupations to low-skilled occupations depends on the Federal minimum wage, GDP and a trend term	ABS national employment by occupation, GDP, and wages	n/a ^f	Impact on employment relativities significant at the 1 per cent level
Lee and Suardi (2011) [Victoria, Northern Territory, ACT]	Introduction of the Federal minimum wage in April 1997 and changes in Federal minimum wage from 1997 to 2007	Statistical test for structural breaks in the youth employment to population ratio for each state over time	ABS Labour Force Survey time series data from 1992:Q1 to 2008:Q1	No evidence of any effect on employment	Impacts not significant at the 10 per cent level
Olssen (2011) [Australia]	Effect of award minimum wage increases for youths at each birthday	Regression discontinuity approach to measure the change in hours and wages that occurs upon the birthdays of young people	HILDA, wave 8	No evidence of any effect on hours worked	Impacts on employment not significant at the 10 per cent

^a Year of census data was not reported but personal communications with the principal author indicates it was 1996. ^b Source of wage data was not reported and the data appendix could not be obtained from the authors. ^c No other results were reported for this regression. ^d Small-sized businesses are defined as those with between one and twenty full-time employees. Medium-sized businesses are defined as those with between 20 and 200 full-time employees. ^e Low reported response rate, but its stated that the estimates are unbiased because the low response rate was not related to the inclusion in the survey of the questions related to the safety net. ^f Estimated substitution between low and high-skilled labour in response to the minimum wage instead of employment elasticity with respect to the minimum wage.

Mangan and Johnston

In a refereed journal article, Mangan and Johnston (1999) considered the sensitivity of youth employment to changes in youth award minimum wages in Queensland and in Australia. They used two approaches — a generalised least squares (GLS) regression on Queensland data; and a multinomial logit model on unit record census data for both Queensland and Australia.

The results generally show a small negative relationship between the youth wage and employment (both part-time and full-time). The results for Queensland from the GLS estimation were not statistically different from zero (table C.5). Nine out of the twelve elasticity estimates from the logit model for Queensland and Australia were statistically significant, at least at the 5 per cent level.

The results indicate that full-time employment of youth in Australia is less responsive to changes in the minimum youth wage than part-time employment, at least for youth aged 15 to 17 years. In contrast, the results indicate that full-time employment of youth in Queensland is more responsive than part-time employment. The authors attribute this difference to the different industrial structure in Queensland and to the greater importance of part-time and other forms of non-standard employment in Queensland relative to Australia.

The logit modelling for Queensland otherwise indicates that full-time male employment is more responsive to youth award wages than full-time female employment. However, for part-time employment, the female employment elasticity is not statistically different from zero.

Table C.5 Estimates of youth employment elasticities with respect to the youth award wage in Mangan and Johnston

	<i>Data period</i>	<i>Gender</i>	<i>Full-time</i>	<i>Part-time</i>
Queensland				
GLS (ages 15-19)	1980-1994	All	-0.08	-0.19
Logit (ages 15-19)	1996	All	-0.27★★	-0.12
	1996	Female	-0.15★★	-1.76
	1996	Male	-0.55★★	-0.22★★
Logit (ages 15-17)	1996	All	-0.28★★	-0.07★★
Australia				
Logit (ages 15-19)	1996	All	-0.17★★	-0.31
Logit (ages 15-17)	1996	All	-0.05★★	-0.21★★

Statistical significance: ★★: 5 per cent.

Source: Mangan and Johnston (1999, p. 423,426).

The authors identify limitations in their work. In particular, there is the risk of self-reporting error in census data which could lead to misclassifying the labour market state of young people. The authors found evidence that around 30 per cent of labour market states were not correctly predicted by their logit model.

Junankar, Waite and Belchamber

In a published book, Junankar, Waite and Belchamber (2000) assessed the effects of minimum wages on youth employment using an error correction model approach. Their aim was to identify a statistically significant relationship in two of the industries that account for a high proportion of minimum wage employment — Manufacturing and Retail trade. They report finding little to no effect of minimum wages on youth employment.

The authors estimate the employment–wage relationship for 38 different categories of employment, disaggregated by industry, gender, age (16, 17, 18, 19 and 20 year olds) and the basis of employment (full-time and part-time).

In their preferred error correction model, youth employment in hours was regressed on the ratio of the youth minimum wage to adult average weekly earnings and on output. Youth employment is expressed in terms of total youth employment rather than just those employed on the minimum wage. The authors only report results for this model if they are statistically significant and results are only statistically significant for two categories of employment. The results that they reported are presented in table C.6. It is relevant in this context that the authors indicate that their sample size is small which would make it difficult to discern a statistically significant effect (Junankar, Waite and Belchamber 2000, p. 180).

Table C.6 Estimates of youth employment elasticities with respect to the youth minimum wage in Junankar, Waite and Belchamber 1987 to 1997

<i>Industry</i>	<i>Aggregation</i>	<i>Elasticity</i>	<i>t-value</i>
Manufacturing	Full-time, male, 18 year olds	-3.1 (real, 1 quarter) ★★	-2.17
Retail trade	Full-time, female, 19 year old	-2.05 (real, longer-run but exact time scale not reported) ★★	-2.58

Statistical significance: ★★: 5 per cent.

Source: Junankar, Waite and Belchamber (2000, p. 184).

Junankar, Waite and Belchamber also estimated an alternative equation in which the youth minimum wage was expressed as a ratio of the adult minimum wage. However, as the authors point out, there is a close relationship between youth and adult minimum wages. Youth award minimum wages typically begin at 50 per cent of the adult minimum wage

for people aged younger than 15, and increase by about 10 percentage points each year until the age of 21 (Olssen 2011, p. 2). It may be then that any variation in the ratio of the youth minimum wage to the adult minimum wage reflects changes in the pattern of occupations within the relevant industries. Only one elasticity estimate was found to be statistically significant in this alternative equation, that of part-time males aged 18 who were employed in the manufacturing industry.

Leigh

In a refereed journal article, Leigh (2003) used a difference-in-differences approach to examine the effects of a series of six minimum wage changes in Western Australia from August 1994 to March 2001, one of the few natural minimum wage experiments in Australia. (The analysis was updated by Leigh (2004a) to address technical errors in the original paper.)¹⁷⁷

In a subsequent refereed journal article, Leigh (2004b) responded to methodological concerns raised by Watson (2004) about the earlier papers and to test the sensitivity and robustness of the updated results to alternative assumptions.

The six changes in the Western Australian statutory minimum wages examined occurred out of step with changes to the federal minimum wage and Western Australian payroll taxes, and before other states introduced a statutory minimum wage (table C.7). Leigh excluded the 1997 change in the Western Australian minimum wage from his analysis, as the wage increased by a trivial amount (less than one per cent). There was no increase in the Western Australian statutory minimum wage in 1999.

Leigh (2004a) examined the impact of the minimum wage rises in Western Australia by comparing the employment impacts in Western Australia (the treatment group) before and after each rise with the changes in employment in the rest of Australia (the control group), on the basis that the principal source of employment differences between the two groups arose from the changes in Western Australian minimum wages.

For the treatment and control groups, these changes were specified in terms of the three month period before and after each minimum wage change. This resulted in 247 difference-in-differences estimates spanning seven month periods between 1981 and 2002.

Each model estimated expressed the difference in the change in the seasonally adjusted, full-time equivalent, employment to population ratio in Western Australia compared with the rest of Australia as a function of the percentage change in the nominal Western Australian minimum wage, which was zero in each month other than the months in which the six wage changes being examined occurred (table C.7).

¹⁷⁷ The original Leigh (2003) paper inadvertently used employment to labour force ratios rather than the stated, and more theoretically appropriate, employment to population ratios. This was pointed out by Junankar (2004, p. 66) and rectified in Leigh (2004a).

Table C.7 Western Australian and Federal adult minimum wage changes examined by Leigh, 1994 to 2002^a

	<i>Federal minimum wage set by AIRC</i>	<i>Federal minimum wage incorporated into state awards by WAIRC</i>	<i>Western Australian statutory minimum wage</i>	<i>Included in analysis?</i>
1994	b	b	29/8/94	Yes
1995	b	b	29/9/95	Yes
1996	b	b	29/10/96	Yes
1997	22/4/97	14/11/97	10/11/97	No
1998	29/4/98	12/6/98	7/12/98	Yes
1999	29/4/99	1/8/99	No change	No
2000	1/5/00	1/8/00	1/3/00	Yes
2001	2/5/01	1/8/01	22/3/01	Yes
2002	9/5/02	1/8/02	8/4/02 and 1/8/02	No

AIRC: Australian Industrial Relations Commission. WAIRC: Western Australian Industrial Relations Commission. **a** Persons aged over 21. **b** No single minimum wage applied across all low-wage industries.

Source: Based on Leigh (2003, p. 364).

The elasticities of total employment with respect to the change in Western Australia's minimum wage were derived from the coefficient estimated on the minimum wage term by dividing by the average of the Western Australian employment-to-population ratio over the period 1994 to 2001. The resulting employment elasticity from the pooled sample of -0.29 is statistically significant at the 1 per cent significance level (Leigh 2004a, p. 104).

As well as undertaking an aggregate analysis, employment elasticities were also estimated for various age and gender cohorts (table C.8). The reported elasticities were only statistically significant for:

- males and females aged 15 to 24 (at the 1 per cent significance level for males and at the 5 per cent significance level for females)
- males aged 25 to 34 (at the 1 per cent significance level)
- females aged 45 to 54 (at the 10 per cent significance level).

The minimum wage elasticity of -1.0 for people aged 15 to 24 is more than three times larger than that for the overall labour market. To some degree, this reflects the higher minimum wage reliance of youth. In contrast, the elasticity for males aged 25 to 34 was estimated to be -0.24, just below the estimate for the overall labour market. The elasticity for females aged 45 to 54 was +0.22.¹⁷⁸

¹⁷⁸ This positive result may indicate that females aged 45 to 54 substitute for minimum wage workers (and, hence, would be expected to have a positive cross-price elasticity).

Table C.8 Employment elasticities by age-gender sub-groups in Leigh

<i>Age group</i>	<i>15 to 24</i>	<i>25 to 34</i>	<i>35 to 44</i>	<i>45 to 54</i>
Persons				
Elasticity	-1.009★★★	-0.141	-0.032	-0.069
Standard error	(0.344)	(0.087)	(0.108)	(0.150)
Females				
Elasticity	-1.426★★	0.033	-0.253	+0.217★
Standard error	(0.708)	(0.298)	(0.318)	(0.131)
Males				
Elasticity	-0.681★★★	-0.238★★★	+0.079	-0.236
Standard error	(0.232)	(0.083)	(0.0119)	(0.198)

Statistical significance: ★★★: 1 per cent; ★★: 5 per cent; and ★: 10 per cent. ^a Dependent variable is all seven-month difference-in-differences estimates between Western Australia and the rest of Australia between February 1981 and February 2002.

Source: Leigh (2004a, p. 105).

While it is arguably the most rigorous and comprehensive of the Australian minimum wage studies, the Leigh study has proven to be contentious.

Watson (2004) and Junankar (2004) raised a number of methodological concerns about the Leigh study (2003, 2004a) that may reflect on the validity and robustness of the results presented. A key concern was whether the rest of Australia's labour market was a suitable control group for minimum wage changes in Western Australia (including whether the employment trends were similar in the treatment and control groups). Other concerns raised covered whether:

- it was meaningful to use data on aggregate employment ('macrodata') rather than data on the employment of individuals ('microdata')
- the three-month period before and after the minimum wage examined over which the employment effects were assessed was suitable
- the potential for employment effects may have influenced the magnitude of changes in the minimum wages that occurred (giving rise to potential endogeneity)
- changes in the Western Australian minimum wage can be distinguished from the 'noise' of month-to-month changes in ABS employment data.

Watson (2004, p. 166) concluded that:

... close scrutiny of Leigh's article shows that it is fundamentally flawed. Despite Leigh's efforts, it remains the case that we simply do not know a great deal about the employment impact of Australia's system of minimum wages.

Leigh responded to each of these concerns in a further paper, where he also undertook additional testing of the robustness and sensitivity of his estimates (Leigh 2004b). Based

on that analysis, Leigh stood by his original findings and dismissed the potential concerns. Leigh concluded:

Careful reanalysis of the Western Australian minimum wage experiment demonstrates that this critique [that of Watson] is not well founded. Further checks show that the results are robust to a number of alternative specifications, in addition to those presented in the original article. (p. 173)

Leigh also stated:

Since Watson never provides evidence that the estimated elasticity of labour demand in my study is biased towards the finding that raising the minimum wage costs jobs, one could accept his critique in its entirety, and still be left unable to explain why my estimate of the elasticity of labour demand is negative and statistically different from zero at the 1 per cent level. (p. 173)

In his response, Leigh did not publish the results of his parallel paths assumption testing which would provide the evidence required to ascertain whether the rest of Australia was a suitable control group for Western Australia. Without recourse to the original data and without further analysis, and in the absence of evidence to the contrary, it is difficult to assess the validity of these competing claims and counterclaims and their implication, if any, for Leigh's findings.

In a later review of the international literature on minimum wage studies, Neumark and Wascher (2006) argued:

The elasticities that Leigh reports for aggregate employment of young individuals are quite large relative to those found for other industrialized countries, especially given his estimate that only about 4 per cent of workers were affected by these changes in the minimum wage. Unfortunately, he does not offer a potential explanation for the size of his estimates, and in the absence of such an explanation, the magnitudes of these estimates, at least, might be regarded sceptically. (p. 90)

However, given the analysis undertaken by Leigh was at a time when the minimum wage coverage was higher than it is today, and given that there are significant differences in labour markets and institutional arrangements across state economies, it is not possible to resolve the issue about whether the implied employment elasticity in Leigh of -0.29 is excessive or not.

Harding and Harding

In a report to the Department of Employment, Harding and Harding (2004) used a survey of 1800 small and medium sized businesses to estimate the employment elasticities with respect to changes in Federal minimum award wages.

The businesses surveyed were drawn from the Australian Bureau of Statistics Business Register. The survey sample was stratified to take into account known characteristics of the population of small and medium-sized businesses in Australia. To maintain an accurate

representation of the population based on industry, region and business size, any non-respondent business was replaced by another with the same characteristics.

Businesses were asked:

- how their employment decisions were affected by the 2003 national safety net adjustment
- how their employment decisions would be affected if there were a hypothetical freeze in the nominal safety net over a future period of five years.¹⁷⁹

The businesses surveyed were asked to report on the total change in employment. As a result, the employment elasticities reported include workers who earn above the minimum wage.

Answers to question one were used to estimate ‘short-run’ elasticities of employment with respect to minimum award wages (proxied by the safety net adjustment). The key ‘short-run’ elasticities derived were:

- -0.2 for minimum award wage workers
- -0.05 for all workers in the survey (table C.9).

Table C.9 Implied employment elasticities with respect to the real minimum award wage rate in Harding and Harding^a

	<i>Minimum-award wage workers</i>		<i>All workers</i>	
	Short run ^{b,c}	Medium to longer-run ^d	Short run ^{b,c}	Medium to longer-run ^d
Full-time employees	-0.24	-1.14	-0.04	-0.20
Part-time employees	-0.33	-0.89	-0.16	-0.41
Casual employees	-0.08	-0.67	-0.03	-0.27
Total employees	-0.19	-0.90	-0.05	-0.25

^a Based on a survey of 1800 small and medium-sized businesses. ^b Taken by the authors to be a period of three months. ^c Derived by dividing the reported percentage changes in employment in the short run by the percentage change in award wages. ^d Taken by the authors to be a period of five years.

Source: Harding and Harding (2004).

The positive employment responses to the hypothetical freeze in the nominal safety net, derived from the answers to question two, were converted to ‘medium-to-long run’ employment elasticities (over five years) of:

¹⁷⁹ Businesses were also asked to indicate the importance of selected factors for wage setting. Answers were used to assess the empirical evidence in support of alternative theories of labour markets, a topic not covered in this appendix.

-
- -0.9 for *minimum-award wage* workers
 - -0.25 for *all* workers (table C.9).

Both ‘medium-to-long run’ elasticities are over four times larger than the implied short run elasticities. However, these are real wage elasticities, which will be higher than nominal wage elasticities to the extent of inflation.

These long-run elasticities are based on the assumption in the study that the annual inflation rate of 2.5 per cent over the twelve months that preceded the survey would apply over the five year period, such that the hypothetical change in the nominal safety net over five years is equivalent to a 13 per cent decline in the real value of the minimum award wage rates.

The study does not provide standard errors or confidence intervals, as ‘until ... further work is undertaken the calculation of standard errors could be interpreted as misleading readers regarding the precision of the estimates presented in this report’ (Harding and Harding 2004, p. 116).

While considering the response rate to the survey of between 20 and 22 per cent as low, the authors emphasised that:

- non-response was independent of the inclusion of the questions regarding the safety net and would not have biased the survey responses
- the use of design-based estimation methodology ensured that non-responses did not bias the survey (Harding and Harding 2004, pp. 109–110).

Lee and Suardi (2011) questioned the validity of the short-run elasticities given that only 37 businesses reported an adverse effect in response to the 2003 safety net adjustment, and that such a small number may not be a sufficient basis for economywide estimates.

It is unclear to what extent other factors other than the safety net changes affect the employment responses stated and how the stated survey responses to the hypothetical wage freeze would have translated into actual employment outcomes for the firms concerned if the wage freeze had eventuated. Moreover, Harding and Harding is a firm-level survey and, notwithstanding the use of sample weights to aggregate the results, it is unclear as to how applicable their findings are to the economy as a whole.

Lewis

In a published periodical that does not appear to have been refereed, Lewis (2005) compared the employment and wage growth in the rest of the economy with the accommodation, café and restaurants and health and community services industries (referred to collectively as the ‘minimum-wage sector’). The minimum-wage sector in this paper comprises two of three industries characterised by the ACTU as ‘award wage reliant industries’ in a submission to the Australian Fair Pay Commission.

The employment elasticities reported were derived by dividing the percentage point difference in the employment growth rates for the minimum wage sector and the rest of the economy by the corresponding percentage point difference in wages growth.

The study found a *minimum-wage* elasticity of employment with respect to:

- the *real* minimum wage of -0.72
- the *nominal* minimum wage of -0.55 (table C.10).

Table C.10 Implied elasticity of minimum wage employment with respect to the minimum wage in Lewis
1994-2004

	<i>Units</i>	<i>Nominal wages</i>	<i>Real wages</i>	<i>Employment</i>
Minimum wage sector ^a	Per cent	40.2	7.7	29.9
Total all sectors	Per cent	53.9	18.2	22.4
Difference	Percentage points	-13.7	-10.5	7.5
Implied elasticity ^b		-0.55	-0.72	

^a Accommodation, café and restaurants and Health and community services. ^b Implied elasticity of minimum-wage employment with respect to the minimum wage.

Source: Lewis (2005, p. 19).

Lewis (2006) reported the results of the 2005 study in an Australian Fair Pay Commission research paper.

The study did not undertake any rigorous statistical analysis of the significance of the results, did not control for the influence of other factors that may have affected these two ‘minimum wage’ sectors and did not detail the data sources used.

Plowman

In a conference paper that has not been refereed, Plowman (2007) undertook a series of ordinary least squares (OLS) regressions to examine the impact of the minimum wage on young workers (those aged 15 to 19 years and 20 to 24 years). The study considered youth employment because it was considered that young, unskilled workers were the most adversely affected by minimum wage changes. The objective was to assess the effect of changes in the minimum wage applying in Western Australia between 1990 and 2006 on full-time employment, part-time employment, total employment and on the share of part-time employment:

- for the Western Australian workforce

-
- for three industries considered to be most affected by minimum wage adjustments (where ‘award only’ employees predominate) — Personnel and other services, Retail trade, and Accommodation, cafes and restaurants.

Plowman regressed the growth in employment and participation rates for the two target age groups (the dependent variables) on an estimate of the prevailing minimum wage and State Final Demand (the independent variables).

Despite not reporting the actual employment effects, the paper reported that the minimum wage had:

- ‘little effect’ on overall employment¹⁸⁰
- no statistically significant effect on youth employment (table C.11).

At the industry level, the paper found that the impact of minimum wage changes on employment was sometimes statistically significant, with mostly positive relationships (table C.11).

- The relationship between employment and the minimum wage was statistically significant for part-time employment, total employment and the proportion of employees working part-time, but not for full-time employment, and this suggested to the author that ‘if there are employment effects arising from minimum wage increases, those effects relate to part-time employment’ (p. 18).
- Minimum wage changes had statistically significant impacts on part-time employment in the Personnel and other services (negative impact) and in Retail trade (positive impact), but not in Accommodation, cafes and restaurants.
- The only statistically significant impact on full-time employment at the industry level was for Retail trade (positive impact at a 5 per cent).

The results were interpreted to indicate that state final demand is the primary determinant of all types of employment in Western Australia (full-time, part-time and total), both in aggregate and for each of the industries examined.

Wheatley

In a report commissioned by the Australian Fair Pay Commission, Wheatley (2009) considered the impact of minimum-wage changes on the substitution between low-skilled workers (representing minimum-wage workers) and high-skilled workers. While not estimating an employment elasticity, the analysis is useful for understanding the strength of substitution by employers away from minimum wage workers in response to changes in the minimum wage.

¹⁸⁰ The sign of the test statistic reported indicates the employment elasticity with respect to the minimum wage was positive.

Table C.11 Effect of minimum wage on employment in the Western Australian labour market in Plowman

	<i>Employment effect</i>
Aged 15–19	nss
Aged 20–24	nss
<i>Personnel and other services</i>	
Full-time	nss
Part-time	-ve ^a ★★
Total	nss
<i>Retail trade</i>	
Full-time	nss
Part-time	+0.21★★★
Total	+0.26★★
<i>Accommodation, cafes and restaurants</i>	
Full-time	+0.01★★★
Part-time	nss ^b
Total	0.0★★
<i>Western Australian labour force</i>	+ve ^a ★★★
Full-time	nss
Part-time	+ve ^a ★★★
Total	+ve ^a ★★★

nss: not statistically significant. Statistical significance: ★★★1 per cent; ★★5 per cent. ^a The sign is indicated by the test statistic, but the employment effect was not reported. ^b The impact on the proportion of part-time employees in this sector's employment found to be statistically significant and negative at the 1 per cent level.

Source: Plowman (2007, pp. 17–18).

Wheatley observed that, in a growing economy, there had been a shift towards high-skilled employment and away from low-skilled employment. Two main theoretical explanations for this shift postulated that:

- international trade had reduced the demand for low-skilled workers in developed countries because of the competition from imports from developing countries
- there had been skill-biased technological change favouring high-skilled workers over low-skilled workers.

Given that the shift towards high-skilled workers was across a range of industries in Australia, both traded and non-traded, the study concluded that it was more probable that technological change was the most important factor driving the change in relative employment of high-skilled labour.

The study went on to estimate an error correction model in which changes in the ratio of employment of high-skilled occupations and employment of low-skilled occupations

depended on the Federal minimum wage, the level of economic activity (as indicated by GDP) and a trend decline to represent technological change favouring skilled employment.

The trend term was found to be statistically significant at the 1 per cent level and was attributed to skill-biased technological change. Changes in minimum wages were also found to have a statistically significant effect (at 1 or 10 per cent significance levels depending on the choice of skill level) on employment, with a 1 per cent increase in the minimum wage relative to average ordinary-time earnings reducing low-skilled employment relative to high-skilled employment by 1.4 to 1.6 per cent (table C.12).

Table C.12 Effect of minimum wage ‘bite’ on the change in the gap between low skilled employment and high skilled employment in Wheatley ^a

	<i>Impact on low–skilled employment relative to high–skilled employment</i>	<i>Standard error</i>
Low-skilled occupations represented by skill levels 4 and 5	–1.411★	0.514
Low-skilled occupations represented by skill level 5	–1.681★★★	0.913

Statistical significance: ★★★1 per cent; and ★10 per cent. ^a Average ratio of minimum wage to full-time adult average weekly ordinary-time earnings over past four quarters.

Source: Wheatley (2009, p. 57).

Wheatley pointed out that the study does not indicate the effect of minimum wages on the total employment of unskilled workers, noting that employment grew for all skill levels over the period analysed.

Lee and Suardi

In a refereed journal article, Lee and Suardi (2011) used time-series data to test for the presence of (unknown) structural breaks in the employment-to-population ratio following the introduction of the Federal minimum wage in 1997, and subsequent changes (covering 11 federal minimum wage changes in total).

The analysis focused on the impact on full-time equivalent and part-time employment for teenagers aged 15 to 19 in Victoria, the Northern Territory and the Australian Capital Territory between 1997 and 2007. The study focused on teenage outcomes because this sub-group of the population was considered to be that most likely to be affected by minimum wage changes. The three states were chosen as they were the ‘only ... states that had all employees under federal industrial jurisdiction and subject to a binding federal minimum wage’ (p. S378).

The model used for each state expressed the aggregate employment-to-population ratio for each age group (the dependent variable) as a function of the following independent variables:

- the real minimum wage
- the real adult average wage
- the unemployment rate for males aged 25 to 54 (as a proxy for overall labour demand and business cycle effects)
- the population of teenagers aged 15 to 19 as a proportion of the total work force (as a proxy for labour supply).

All of the variables were expressed as natural logarithms with quarterly data used from 1992:Q1 to 2008:Q1 and sourced from the ABS *Labour Force Survey*.

The approach used statistical tests to determine if the timing of changes in minimum wages coincided with any statistically significant discontinuities in the data series of the dependent variable (to test for structural breaks). The study did not find any evidence of statistically significant structural breaks. Further, the coefficient on the minimum wage variable was not significant in any of the models estimated (table C.13). The authors concluded that this implied ‘that changes in minimum wages appear to have had no negative employment effects’ (p. S397). The authors offer the explanation that minimum wage increases over the period of analysis had been moderate and predictable.

Table C.13 Structural break test statistics following the introduction of the Federal minimum wage in 1997

Chow test statistic

	<i>Victoria</i>	<i>Northern Territory</i>	<i>Australian Capital Territory</i>
Full-time	7.9 ^a	7.6 ^a	6.2 ^a
Part-time	11.9 ^a	3.3 ^a	9.4 ^a

^a not statistically significant.

Source: Lee and Suardi (2011, pp. 24–26).

Olssen

In a conference paper that has not been refereed, Olssen (2011) used youth award rates (minimum wages) in Australia to investigate the effect of minimum wages on actual wages and youth employment over the period 2001 to 2008.

The study used regression discontinuity analysis to assess the short-term impact of age-based wage increases of young people on their hours of employment around their birthday. Under the awards, youth minimum wages were typically discounted in proportion

to adult minimum wages based on the age of the youth. The discount started at 50 per cent for 16 year olds and went up by ten percentage points each birthday until the full adult rate was reached at 21 years of age.

The study used data sourced from wave 8 of the Household, Income and Labour Dynamics in Australia (HILDA) survey. Youth in the data are divided into similar sized treatment groups and control groups.

This stratification is predicated on the basis that the measure being examined only affects the treatment group (Olssen 2011, p. 14), including that employers do not factor in the change in entitlement in advance of the birthdays of their employees (Olssen 2011, pp. 9–10).

However, the study noted that employers tended to increase the wages of their 19 and 20 year old employees in advance of their birthdays (pp. 22, 30), which may indicate that this assumption did not hold. If the assumption did not hold, the approach used may not pick up such effects, thereby biasing the results downwards or rendering the approach inappropriate (Olssen 2011, pp. 10, 22).

Notwithstanding this, the study found that the ten percentage point wage rise that occurred on a young person's birthday led to an increase in actual wages of about six per cent. The study found no statistically significant impact of the wage increase on the hours of employment (table C.14).

Table C.14 Estimates of the impact of award minimum wage increases on employment hours in Olssen

	<i>Model 1</i>	<i>Model 2</i>	<i>Model 3</i>	<i>Model 4</i>
19 year olds				
Employment impact	0.6517	1.8218	0.5960	1.5773
Standard error	0.8421	1.6855	1.1385	1.9790
20 year olds				
Employment impact	0.2612	-1.3040	0.0752	-2.0963
Standard error	0.8786	1.7833	1.1801	1.9717
21 year olds				
Employment impact	-0.6105	-1.4288	0.6868	-0.6156
Standard error	0.8870	1.8289	1.2800	2.0316

Statistical significance: ★★★: 1 per cent; ★★: 5 per cent; and ★: 10 per cent.

Source: Olssen (2011, p. 33).

Studies of the employment effects of changes in average wages

Nine empirical studies of the employment effects of average wages in Australia since 1999 have been identified. These studies are summarised in table C.3. Five of these studies use an error correction model to estimate the relationship between employment and wages (Dixon, Freebairn and Lim 2005; Dungey and Pitchford 1998; Hutchings and Kouparitsas 2012; Karanassou and Sala 2008; Yuen and Mowbray 2009). A further three studies incorporate an error correction model into a broader framework to estimate a more general employment elasticity (Debelle and Vickery 1998; Downes and Bernie 1999; Lewis and MacDonald 2002). The ninth study uses a labour share equation (Daly et al. 1998).

Error Correction Model approach

The eight Australian empirical studies that have estimated the relationship between average wages and employment using a single equation error correction model are listed in table C.15. In these models, the relationship between wages and employment estimated is the elasticity of substitution between labour and capital (box C.3).

In each of the error correction model studies, employment is expressed as dependent on real wages, output and a time trend representing labour-augmenting technical change. Dixon, Freebairn and Lim (2005) also include standard hours as an additional independent variable, in order to control for changes in the standard hours of work.

These studies use national macroeconomic quarterly data, with the exception of Karanassou and Sala (2008) who use national macroeconomic annual data. Four studies limit their analysis to the non-farm sector, five do not. All but one use employment data that combines the public sector and the private sector. The exception is that of Downes and Bernie (1999) who also consider private sector employment separately. In doing so, they find that the elasticity of private employment to be around -0.8, compared with -0.6 for total employment.

While most studies measure employment in terms of persons employed, Debelle and Vickery (1998) measure employment in terms of hours worked. Lewis and MacDonald (2002) estimate the same equation for both employment measured in persons and employment measured in hours worked.

Most studies estimate real wage effects after one quarter and after employment has adjusted back to a longer-run equilibrium. The speed of adjustment back to a longer-run equilibrium is reported in the last column of table C.15 and represents the rate of adjustment in each quarter. The reported rate at which employment returns to its longer-run equilibrium varies from 15 per cent each quarter in the most recent study, Hutchings and Kouparitsas (2012) to 54 per cent each quarter in Debelle and Vickery (1999).

Most studies estimate the labour-capital substitution elasticity which is an employment elasticity that does not allow for second-round employment effects such as through the expansion of capital and output. Three studies estimate a general employment elasticity by allowing for an expansion effect (Debelle and Vickery 1998; Downes and Bernie 1999; Lewis and MacDonald 2002).

Lewis and MacDonald (2002) apply the approach of Hamermesh (1993, pp. 24–27) to derive a general form of the employment elasticity (box C.3). In doing so they use their own error correction model estimate of the labour-capital substitution parameter, σ . They also use their error correction model estimate of the longer-run output elasticity as a proxy for the product demand elasticity, η . They estimate that the general employment elasticity lies marginally above the substitution elasticity between labour and capital estimated in the error correction model literature (table C.16).

Box C.3 **The elasticity of substitution between labour and capital**

The employment equation in the error correction studies is the marginal productivity condition derived from a CES production function with constant returns to scale, as given by:

$$Y = A[a_L \cdot L^\rho + a_K \cdot K^\rho]^{1/\rho}$$

where Y is output; A is technical change; L is labour and K is capital. The parameter ρ gives the elasticity of substitution between labour and capital (σ) as follows:

$$\sigma = 1/(1-\rho)$$

The elasticity of substitution between labour and capital (σ) is the wage elasticity estimated in the error correction model literature (Dixon, Freebairn and Lim 2005).

In error correction models, the impact on employment of a change in wages (that is, the elasticity of substitution between labour and capital) is estimated after controlling for other factors such as output, capital stock and price changes.

The substitution elasticity between labour and capital estimated in the error correction model approach can be related to a more general employment elasticity (ε) as demonstrated in Hamermesh (1993, pp. 24–27). The general employment elasticity is derived from a cost function under the assumptions of competitive markets, marginal cost pricing and constant returns to scale. The general employment elasticity, ε , is related to the substitution elasticity between labour and capital, σ , by:

$$\varepsilon = -[1-S_L]\sigma - S_L \cdot \eta$$

where S_L is the share of labour in total costs and η is the product demand elasticity. In this general form of the employment elasticity, the first term on the right side is the output constant elasticity of labour, a short term concept. The second term is the second round effect on employment as output changes in response to the change in wages.

Sources: Dixon, Freebairn and Lim (2005); Hamermesh (1993, pp. 24–27, 29–31).

Table C.15 Australian error correction model estimates of the effects on employment and output of average wage changes

<i>Study [Coverage]</i>	<i>Time period of analysis</i>	<i>Employment measure used</i>	<i>Independent variables</i>	<i>Short-run wage elasticity</i>	<i>Longer-run wage elasticity</i>	<i>Longer-run output elasticity</i>	<i>Speed of adjustment^a</i>
Debelle and Vickery (1998)	1978:Q1 to 1997:Q4	Hours worked in non-farm sector	Real hourly labour costs, non-farm GDP, time trend	-0.21★★★	-0.40★★★	1.09★★★	-0.54 (to 2 years)
	1969:Q1 to 1997:Q4	Hours worked in non-farm sector	As above	-0.51★★★	-0.68★★★	1.19★★★	-0.41 (to 2 years)
Dungey and Pitchford (1998)	1984:Q4 to 1997:Q1	Persons employed	Real earnings, GDP, average weekly hours, time trend	n/a	-0.40★★★	1.30★★★	n/a
Downes and Bernie (1999)	1971:Q1 to 1998:Q3	Private sector: persons employed and vacancies	Real wages, hours worked, output and a time trend		-0.82	n/a	(2 to 3 years) ^b
Lewis and MacDonald (2002)	1959:Q3 to 1998:Q3	Persons employed in non-farm sector	Real weekly wages, GDP, time trend	n/a	-0.46★★★	1.05★★★	(1 to 1.5 years) ^b
	1966:Q4 to 1998:Q3	Hours worked	As above	n/a	-0.58★★★	1.29★★★	n/a
Dixon, Freebairn and Lim (2005)	1969:Q1 to 2004:Q1	Persons employed in non-farm sector	Real average earnings plus payroll tax, real non-farm GDP, standard hours, time trend	-0.11★★★ (one quarter)	-0.32★★★	1.1★★★	-0.26★★★ (3 to 4 years)
Karanassou and Sala (2008)	1970 to 2006	Persons employed	Real weekly wages, GDP, time trend	n/a	-0.50★★	0.97	n/a
Yuen and Mowbray (2009)	1985:Q1 to 2008:Q4	Persons employed	Real wage, GDP, time trend	-0.2 (one quarter)	-0.49★★★	1.11★★★	-0.43★★★ (to 2 years)
Hutchings and Kouparitsas (2012)	1972:Q4 to 2011:Q4	Persons employed	Real average earnings plus payroll tax, GDP, time trend	-0.14★★★ (one quarter)	-0.40★★★		-0.15★★★ (7 to 8 years)

Statistical significance: ★★★: 1 per cent; ★★: 5 per cent; and ★: 10 per cent. ^a Rate of adjustment each quarter back to longer-run trend. A negative value indicates a reduction in the gap from the longer-run trend. ^c The study reports the time that employment takes to adjust to its long run trend, but does not report the estimated value of the speed of adjustment parameter.

There has been some debate around Lewis and MacDonald's (2002) approach. In particular, Dowrick and Wells (2004) derive an alternative expression for the general employment elasticity by assuming that changes in nominal wages affect the price of output. This contrasts with the approach taken by Lewis and MacDonald (2002, 2004) which assumes that prices are not affected by the wage change. Dowrick and Wells (2004) also conclude that the error correction model's longer-run output elasticity is an inappropriate proxy for the product demand elasticity, η , because it is a feature of the production function and not derived from an aggregate demand equation.

Despite this difference, the key point of agreement between Dowrick and Wells (2004) and Lewis and MacDonald (2002) is that the employment elasticities derived in the error correction model literature are based on the assumption that there is no change in output, capital or price as a result of the wage change being examined. If output and capital were allowed to respond to the wage change, the employment effect may be expected to be larger.

This is illustrated by the work of Debelle and Vickery (1998) and Downes and Bernie (1999) who incorporate their error correction model estimates of the labour-demand substitution elasticity into a broader macro-econometric model. In this way they account for the second round effects on employment, for example, from changes in output (table C.16).

Table C.16 Australian empirical studies of the total (including second round effects) effects on employment of average wage changes

<i>Study</i>	<i>Employment measure used</i>	<i>Method of analysis</i>	<i>Elasticity estimate</i>
Debelle and Vickery (1998)	Hours worked in non-farm sector	Macro-econometric model of the Australian labour market (simulation of a permanent two per cent decline in real wage)	-1.1 ^a
Downes and Bernie (1999)	Persons employed and vacancies in private sector	Macro-econometric model (simulation of a permanent two per cent reduction in NAIRU ^b)	-1 (year 1) -4.8 (10 years)
Lewis and MacDonald (2002)	Persons employed (non-farm wage and salary earners)	Based on error correction model	-0.8 ★★ ★
	Hours worked	As above	-0.9 ★★ ★

Statistical significance: ★★ ★: 1 per cent; ★★: 5 per cent; and ★ 10 per cent. ^a The authors regard this as an underestimate of the employment effect because their model does not model capital growth and its implications for employment (Debelle and Vickery 1998, pp. 258–260). ^b NAIRU: non-inflationary rate of unemployment. The level of unemployment below which inflation rises.

Recognising the differences in approach, overall, the error correction model based literature indicates that second round employment effects are important, particularly in the medium to longer-run (table C.17).

Table C.17 Estimates of the effects of on employment of average wage changes in the Australian error correction model literature

Summary of the range in the literature

	<i>Persons</i>	<i>Hours</i>
Estimates of the labour-capital substitution elasticity		
All employment	0.3 to 0.6	0.4 to 0.7
All employment excluding public sector	0.8	
General employment elasticity estimates		
All employment	-0.8	-0.9 to -1.1
All employment excluding public sector	-1 (1 year) -4.8 (10 years)	

Sources: Debelle and Vickery (1998); Dixon, Freebairn and Lim (2005); Downes and Bernie (1999); Dungey and Pitchford (1998); Hutchings and Kouparitsas (2012); Karanassou and Sala (2008); Lewis and MacDonald (2002); and Yuen and Mowbray (2009).

Labour share equations approach

In a published research paper, Daly et al. (1998) estimated the impact on youth employment of a change in average earnings of youth relative to adults (table C.18). They used cross sectional data from the Australian Workplace Industrial Relations Survey for the year 1995 (AWIRS95). The AWIRS95 data did not include any information on capital, and the authors therefore assumed weak separability in the cost function. Given this, they estimated the share of youth hours of employment in total hours of employment as a function of youth average weekly earnings relative to adult average weekly earnings and output (proxied by total hours worked in the workplace) and an education index.

The paper generally found a statistically significant negative relationship between youth employment and youth wages (table C.18). The paper also reported evidence that adult employment was negatively affected by youth wages, suggesting complementarity between youth and adult employment.

The paper reported youth employment elasticity estimates for:

- the full data sample
- a group of industries that are large employers of youth (retail trade, accommodation, construction and manufacturing)
- a group of industries that employ youth more intensively (retail trade, accommodation, cultural and recreation services and personal services)
- a selection of individual industries, specifically retail trade, accommodation, manufacturing, construction, cultural and recreation services and personal services.

Table C.18 Youth own-wage elasticity estimates in Daly et al
1995

	<i>Youth–adult female</i>	<i>Youth–adult male</i>
Full sample	-15.50***	-16.88***
Large employers of youth	-10.91***	-11.06**
Intensive employers of youth	-6.65***	-6.92***
Retail trade	-2.08***	-2.14***
Accommodation	-5.06***	-4.97***
Manufacturing	-20.03***	-20.32***
Construction	0.22	-0.11
Cultural and recreation services	-2.47	-2.59
Personal services	n/a	-18.19***

Statistical significance: ***: 1 per cent; **: 5 per cent; and *: 10 per cent.

Source: Daly et al. (1998, p. 57,62).

The authors identified a number of possible shortcomings in their methodology. They reported evidence that the weak separability assumption may not hold and, as a result, the omission of capital from the equations may have biased the own-wage and cross-wage elasticity estimates (including the adult employment elasticity with respect to the youth wage).

The authors also reported that the magnitude of the elasticity estimates for some equations was unreliable because of the small share of youth in the relevant data sample. They indicated this to be the case at least for the full sample and for Manufacturing, Construction and Personal services.

They also reported that there may be aggregation bias in the full sample and group estimates because the production structure may vary between industries.

A number of additional issues have been raised concerning the results of Daly et al. by Junankar, Waite and Belchamber (2000). In particular:

1. the use of average weekly earnings may have introduced spurious correlation because average weekly earnings (on the right hand side of the equation) are determined by using hours of employment (on the left hand side of the equation)
2. the use of a virtual wage to proxy for youth wages in those workplaces that did not employ youth may have introduced bias into the estimates to the extent that the virtual wage is determined by those factors that also determine hours of employment
3. the use of total hours of employment as a proxy for output may have contributed to bias in the results.

Junankar, Waite and Belchamber (2000) indicated that these problems may have given rise to unreliable results, including the result not otherwise found in the literature that adult labour was complementary to youth labour rather than being a substitute for youth labour.

C.4 General equilibrium modelling of the impact of wage changes

In addition to the econometric and partial equilibrium estimates of the impact of wage changes on employment, ‘general equilibrium models’ have also been used to analyse the nature and dynamics of responses in the aggregate demand for labour to changes in wages.

The employment responses in such models depend on various factors, including the ‘elasticity of substitution’ between labour and capital and the capital (or labour) intensity of industries. When a wage change occurs in just one segment of the labour market, the employment response also depends on the capacity to substitute between different types of labour and on the responsiveness of labour supply to relative wage changes (leading to inter-regional migration and movement between industries and/or occupations).

General equilibrium models typically assume that producers seek to maximise profits subject to technological, resource and other market constraints. The ‘short run’ partial employment elasticity with respect to a uniform economywide wage change implied by these assumptions (ϵ) can be derived from the labour–capital substitution elasticity (σ) and the share of labour in primary factor costs (S_L) (Dixon, Madden and Rimmer 2010):

$$\epsilon = -\sigma / (1 - S_L).$$

This is a short-run concept of the elasticity of employment when capital is fixed but output can adjust in response to changes in factor prices (including real wages) and substitution between labour and capital. If output were fixed, then the elasticity would be given by the first term on the right side of equation 3 in box C.3.

Based on a review of the econometric evidence by Debelle and Vickery (1998), a ‘short-run’ national employment elasticity of -0.5 was targeted in the MONASH computable general equilibrium model of the Australian economy in the study (Dixon, Madden and Rimmer 2010). Given that the share of labour (S_L) in the MONASH model used in that study was about 0.7, the elasticity of labour–capital substitution (σ) in MONASH was set at 0.15 in each industry.

A 2010 application of the MONASH model considered the impact of a one-off permanent increase in real award wages in 2005 using a version of the MONASH model that distinguished between award and non-award workers, and which allowed for an unemployment–vacancy mismatch combined with atrophying of the skills of unemployed people over time (Dixon, Madden and Rimmer 2010). The model allowed after tax (non-award) wage rates to adjust in the short to medium-run in response to a change in employment conditions.

As the study involved dynamic simulations, implied average and award-wage elasticities can be derived for each year’s results. The average-wage elasticity of total employment was -0.47 after one year and the corresponding award-wage elasticity of total employment

was -0.13 (table C.19). These one-year elasticities are broadly similar to those derived from the econometric studies reviewed in sections C.2 and C.3. Reflecting a gradual increase in the opportunity for capital-labour substitution, the value of both elasticities increased with time. For example, after 11 years, the implied average wage elasticity was -1.28 and the award wage elasticity was -0.35.

Table C.19 Implied general equilibrium employment elasticities in Dixon, Madden and Rimmer
MONASH model

	<i>Year 1</i>	<i>Year 11</i>
Total employment elasticity with respect to average wage	-0.47	-1.28
Total employment elasticity with respect to award wage	-0.13	-0.35

Source: Dixon, Madden and Rimmer (2010).

In an earlier paper, Dixon and Rimmer (2001) analysed the macroeconomic effects of combining a freeze on award wage rates in Australia with the provision of earned tax credits to low wage workers. They assumed that the reduction in award wages was fully accommodated by an expansion in the supply of labour, reflecting the assumed introduction of an earned income tax credit.

While using a different model database, the implied employment elasticities are generally similar to the 2010 study, albeit with a slightly lower average-wage elasticity after a decade (-0.9 compared with -1.28) (table C.20).

Table C.20 Implied general equilibrium employment elasticities in Dixon and Rimmer
MONASH model

	<i>Year 1</i>	<i>Year 10</i>
Total employment elasticity with respect to average wage	-0.4	-0.9
Total employment elasticity with respect to award wage	-0.2	-0.4

Source: Dixon and Rimmer (2001).

Another approach is taken in Downes and Hanslow (2009) using both the Monash Multi-Regional Forecasting (MMRF) model and the AUS-M model. They considered the macroeconomic effects of a hypothetical freeze in the real federal minimum wage from 2006 to 2008 relative to the 3.2 per cent increase in the real federal minimum wage that actually took place. In the implementation of MMRF, they assume there is no permanent change in aggregate employment. Therefore, the only wage effects that remain in the long run are changes in relativities between occupations and industries that reflect how the minimum wage footprint differs across the economy.

They simulate the same scenario in AUS-M, a macro-econometric model with a reduced form general equilibrium framework (Downes and Hanslow 2009, pp. 72–76). The implied employment elasticity with respect to the minimum wage reaches its highest point in 2009, but is still below -0.01 (table C.21). The impact on aggregate wages is assumed to be temporary and therefore the projected response to the wage pressure generated by the initial fall in unemployment would unwind, thereby returning aggregate wages and employment to their counterfactual level. There is therefore no employment response by 2014.

Table C.21 Implied general equilibrium employment elasticities in Downes and Hanslow
AUS-M model

	2008	2014
Total employment elasticity with respect to average wage ^a	-0.9	0
Total employment elasticity with respect to minimum wage ^b	(-)	0

(-) Negative, between -0.05 and 0. ^a Calculated as the employment percentage deviation in Downes and Hanslow (2009, fig. 8) divided by the wage inflation percentage deviation reported in Downes and Hanslow (2009, fig. 6). ^b Calculated as the employment deviation in Downes and Hanslow (2009, fig. 8) divided by the real change in the federal minimum wage reported on Downes and Hanslow (2009, p. 10).

Source: Downes and Hanslow (2009, pp. 10,24–25).

D Employment arrangements

Appendix D draws together data on various aspects of the workplace relations system to present an overall picture of Australia's employment arrangements. As different data sources characterise employment arrangements in several different ways and vary in their populations and methods, the appendix attempts to confront and reconcile their findings, while applying a framework consistent with this report.

Section D.1 outlines the framework and data sources used to quantify employment arrangements. Section D.2 discusses the concepts used to define employment arrangements in more detail, how these are used to measure employment arrangements and the results. Section D.3 presents the overall findings.

D.1 Framework and data sources

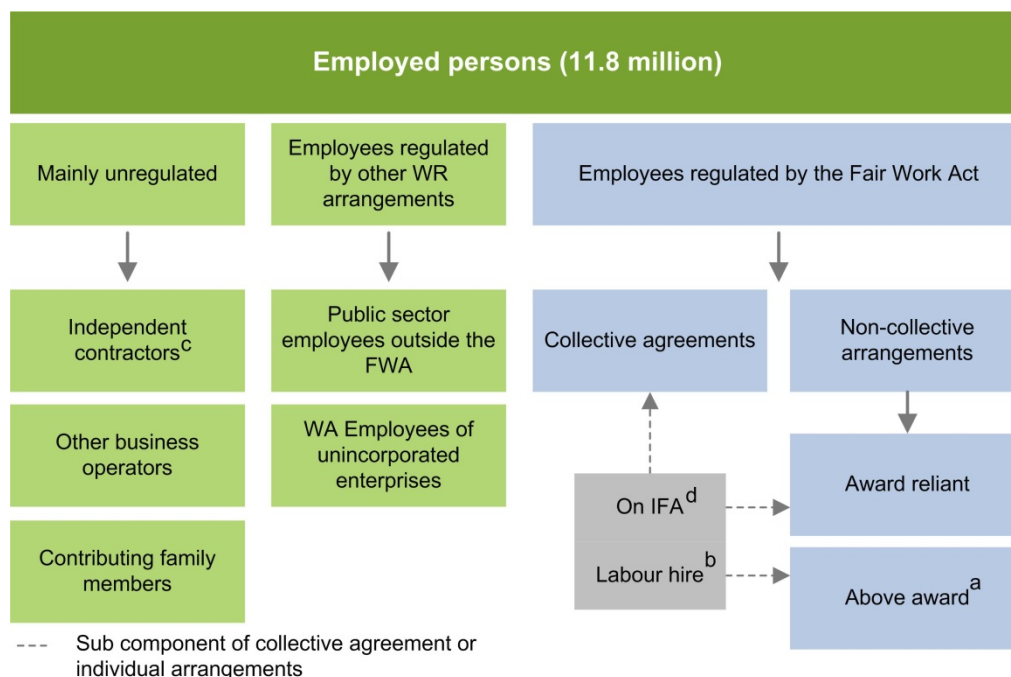
Persons in work may be classified according to various aspects of their employment or business operation. This appendix classifies workers in a manner consistent with the issues examined within this report.

The classification of 'employed persons' (the term used by the ABS and adopted for the purposes of this appendix), which includes employees and other workers, presented below is broad in scope (figure D.1). It includes all workers, and requires a combination of data sources. Moreover, the classification of workers differs from some existing approaches. For example, the Department of Employment (sub. 158) has classified employees according method of setting pay and whether they are low paid, but has not classified non-employees. On the other hand, the Productivity Commission (2013) has previously classified employees according to forms of work, but not according to pay setting arrangements. The Productivity Commission's approach for the purposes of this report includes all employed persons, differentiating according to the regulations that apply and method by which their pay is set. These aspects are most relevant to this inquiry.

In the first instance, employed persons may be classified as either:

- employees regulated by the *Fair Work Act 2009* (Cth) (FW Act)
- employees regulated by other workplace relations arrangements, or
- mainly unregulated persons.

Figure D.1 Employment arrangements framework



^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.

Mainly unregulated persons include the self-employed and contributing family members. Employees regulated by other workplace relations arrangements include those working in the public sector within states that have not referred their WR powers (chapter 18), as well as employees of Western Australian unincorporated enterprises. These workers are not regulated by the FW Act.

Employees covered by the FW Act are the primary concern of this report. Quantifying the number of these employees reveals the reach of the national workplace relations system.

Among employees covered by the FW Act, pay may be set in a number of ways. Pay setting can be undertaken collectively — through enterprise bargaining (chapter 15) — or non-collectively. Employees that set their pay non-collectively may be paid at the award rate or above.

In addition to pay setting, employees can be differentiated according to their use of individual flexibility arrangements (IFAs) (chapter 16) or employment through labour hire (chapter 20) — both of which are aspects of employment examined within this report.

As IFAs are made as part of a collective agreement or award (that is, the employee is covered by both the collective agreement or award and the IFA, the use of IFAs is incremental to other pay-setting methods.

The Productivity Commission's estimates of labour hire prevalence include only employees.

Data sources

This broad classification of employed persons requires several data sets to estimate the prevalence of each group of workers. Several Australian surveys report on employment arrangements, including:

- the Australian Bureau of Statistics (ABS) Survey of Employee Earnings and Hours (EEH)
- the ABS Forms of Employment (FOE) Survey
- the Fair Work Commission (FWC) Australian Workplace Relations Study (AWRS)
- the FWC Award Reliance Survey (ARS)
- the Melbourne Institute Household, Income and Labour Dynamics in Australia (HILDA) survey
- the FWC General Manager's (FWCGM) report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements.

The ABS EEH survey provides statistics on the composition and distribution of employee earnings, along with job characteristics such as paid hours of work and the method of setting pay. The survey was conducted yearly between 1993 and 1995 and then every two years from 1996 onwards. The survey methodology of the EEH involves sampling employers, rather than households. As such, it is a linked employer-employee data set. Importantly, EEH estimates reflect information about jobs, rather than employed persons.¹⁸¹

The annual ABS FOE survey is a supplement to the ABS Labour Force Survey, and collects information on the nature of employment arrangements in Australia, such as status as an employee, independent contractor, or other business operator. Additionally, information on employment characteristics such as hours worked, industry and occupation are also available. In its most recent release, the survey included 26 321 respondents. The

¹⁸¹ In this appendix, EEH estimates have been used to calculate the *proportion of jobs* that have pay set either collectively, at the award rate or above the award rate. These proportions have then been combined with FOE figures to estimate the *absolute number of employed persons* in various pay setting arrangements in their main job. This assumes that pay setting proportions across all jobs are equal to pay setting proportions for employees in their main job.

FOE survey has recently been replaced by a new publication, *Characteristics of Employment, Australia*, with the first release due towards the end of 2015.

The AWRS was conducted in 2014 and includes linked data on employers and employees. All together, the study included 3057 enterprises and 7883 employees. The survey collects information on employment arrangements from both employers and employees.

The ARS was commissioned by the FWC to examine the composition of the award reliant workforce. The survey was undertaken in 2013 and includes 11 569 employers from the private sector, of which 2781 completed the survey's supplementary detailed questionnaire.

The HILDA survey collects information from Australian households covering a wide range of topics, including family relationships, education, income, health and employment. The first year of the survey covers 2001-02 with survey waves released annually thereafter. This first wave included 13 969 individual respondents and 6872 household respondents.

Finally, the FWCGM report examined the use of individual flexibility arrangements. It surveyed 2650 employers and 4500 employees, and was undertaken during March and June in 2012 to cover the period from January 2010 to July 2012. The data collected related to employer and employee awareness of IFAs, the prevalence and nature of existing IFAs, as well as the characteristics of employers and employees that implement IFAs.

Survey design and scope

Inconsistencies in design can drive different results across surveys. For example, surveys that exclude the public service are likely to underreport the prevalence of employees on enterprise agreements, since this method of setting pay is more prevalent in the public sector. While such omissions are not easily corrected statistically, they can inform the likely direction of bias for an estimate.

The sampled population is a major inconsistency across the surveys listed above. HILDA, AWRS, AWS and the EEH have all excluded separate groups from their sampling (table D.1). The HILDA sample includes the broadest range of employees, with its major omissions limited to those who live remotely. AWRS, AWS and EEH all exclude workers in agriculture, forestry and fishing, in addition to other, less significant omissions.

Table D.1 Population of surveys used in this appendix

<i>Survey</i>	<i>Scope</i>	<i>Definition of an employee</i>
EEH	All employing organisations in Australia <u>except</u> : <ul style="list-style-type: none"> enterprises primarily engaged in agriculture, forestry and fishing private households employing staff foreign embassies, consulates, etc. 	A person who works for a public or private employer and receives remuneration in wages, salary, or a retainer fee from their employer while working on a commission basis, or for tips, piece-rates, or payment in kind; or a person who operates his or her own incorporated enterprise with or without hiring employees
FOE	As for the ABS Labour Force Survey — occupants of private and non-private dwellings covering approximately 0.32 per cent of the civilian population of Australia aged 15 years and over.	People who work for a public or private employer and receive remuneration as wages or salary. They are engaged under a contract of service (an employment contract) and take directions from their employer/supervisor/manager/foreman on how the work is performed. The definition differed from that in the Labour Force survey from November 2008.
AWRS	National system employers and employees, <u>except</u> : <ul style="list-style-type: none"> enterprises with fewer than 5 employees enterprises classified into the Agriculture, Fishing and Forestry ANZSIC 2006 industry division Enterprises in the Defence industry (ANZSIC sub-division 76: Defence) 	Workers employed directly by an enterprise on a permanent, casual or fixed term contract basis who are paid a wage/salary. This definition excludes workers who are paid a fee for service on a consultancy or individual contractor basis, unpaid workers who are not paid for the services they provide and business partners/working proprietors.
AWS	Non-public sector organisations operating within the national workplace relations system (national system), <u>except</u> : <ul style="list-style-type: none"> businesses in the Agricultural, forestry and fishing industry division which were excluded (pursuant to the approach in the Australian Bureau of Statistics (ABS) Employee Earnings and Hours (EEH) 2012 Survey 	Not provided.
HILDA	Household members of private dwellings in Australia, with the following (relevant) <u>exceptions</u> : <ul style="list-style-type: none"> certain diplomatic personnel of overseas governments, customarily excluded from censuses and surveys; members of non-Australian defence forces (and their dependents) stationed in Australia; residents of institutions (such as hospitals and other health care institutions, military and police installations, correctional and penal institutions, convents and monasteries) and other non-private dwellings (such as hotels and motels); and people living in remote and sparsely populated areas. 	No definition of an employee is provided. However, the HILDA survey includes data that classifies respondents according to the ABS definition of employment status, in addition to its own, which differentiates employees of own business. These two data items include: <u>Current employment status</u> <ul style="list-style-type: none"> Employee Employee of own business Employer/Self-employed Unpaid family worker <u>Current employment status (ABS defined)</u> <ul style="list-style-type: none"> Employee Employer Own account worker Contributing family member

Sources: ABS (*Labour Force, Australia, April 2015*, Cat. no. 6202.0), ABS (*Employee Earnings and Hours, Australia, May 2014*, Cat. no. 6306.0), ABS (*Forms of Employment, Australia, November 2013*, Cat. no. 6359.0), Michelle Summerfield et al. (2015). FWC (2015k).

While employees governed by the federal workplace relations system are the main concern of this inquiry, a number of surveys collect information from both state and federal system workers. As chapter 18 outlines, state public sector workers and local government employees in New South Wales, Queensland, South Australia, Western Australia and Tasmania are covered by state-based systems, along with employees working in Western Australian unincorporated enterprises (chapter 18). Some surveys examine only federal system workers, others differentiate state and federal workers, while others contain both but do not allow for differentiation. The potential for these differences to influence results have been factored in to the Productivity Commission's final estimates.

Inconsistency also stems from whether information was collected from employers or employees. For employer surveys, responses are assisted by employment records, whereas employee surveys tend to reflect that a proportion of employees are uncertain as to the nature of their employment arrangement. Wilkins and Wooden (2011) noted the significant problem of measurement error in pay setting data derived from employee reports, and that comparisons with employer sourced data showed a tendency to overstate award reliance. However, in all surveys 'don't know' and/or 'other' responses comprise a small proportion of the sample and do not preclude the use of these surveys as means of measuring the prevalence of the various employment arrangements.

The surveys used had varied response rates. In instances where non-respondents differ systematically from respondents, there is the potential for bias. ABS surveys have high response rates, compared with HILDA, AWRS and AWS. Indeed the FWC notes:

It is important to note that AWRS data should not be a substitute for ABS catalogues that provide more robust estimates of the characteristics of the employee populations in Australia. This is primarily due to the significantly larger sample sizes and higher response rates that ABS estimates are based on. (FWC 2015k)

D.2 Measuring employment arrangements

Aspects of the employment relationship are measured in different ways across surveys and this can introduce additional inconsistencies. Measures for the various aspects of the employment relationship covered in this appendix are discussed below.

Mainly unregulated employment arrangements

Independent contractors and employers

The ABS Labour Force survey, FOE survey (a supplement to the Labour Force survey) and the HILDA survey provide data on contracting arrangements and business ownership.

The ABS FOE survey publication presents information about the nature of different types of employment arrangements and the conceptual framework classifies employed persons as either employees (table D.1), independent contractors or other employers (other business operators) (table D.2).

Independent contractors are employed under a commercial contract, which distinguishes them from employees, who are employed under an employment contract. (Shomos, Turner and Will 2013) noted the difficulties in estimating the prevalence of independent contractors and the extent to which some independent contractors should be classified as employees. According to the ABS FOE survey, an independent contractor can include employees who are able to draw funds from the business for their personal use and invoice clients (ABS 2013b). This is broadly aligned with the definition in the HILDA survey.

Other business operators have their own business, with or without employees, and differ from independent contractors in that they generate their income from managing staff or providing goods and services to the market rather than providing their services to a client (ABS 2013b). Other business operators include owner managers of incorporated businesses (OMIEs) (the owner is separable from the business entity) and owner managers of unincorporated enterprises (OMUIEs) (the owner is inseparable from the business entity) (ABS 2013b). The HILDA survey includes similar labels (table D.2). Some surveys allow owner-managers to be classified as employees. The term ‘employee’ in this appendix will not include such workers. Table D.2 outlines the classification of forms of employment for a number of labour force surveys.

The FOE and HILDA surveys suggest that independent contractors and business owners can be engaged through labour hire arrangements. Productivity Commission estimates based on HILDA survey data suggest that around 10 per cent of independent contractors and 7 per cent of business owners are engaged using labour hire arrangements. Labour hire arrangements are not excluded from the estimates of independent contractors and business operators. (This category is discussed separately below with respect to employees.)

Whereas the proportion of employed persons who are independent contractors is similar between the FOE and HILDA surveys, it differs for business operators.

The FOE survey indicates that 8.5 per cent of employed persons (excluding employees) are independent contractors, which is slightly lower than the comparable measure in the HILDA survey of 9.1 per cent (figure D.2). The FOE estimate of business operators of 8.8 per cent is higher than the HILDA survey estimate of 5 per cent (figure D.2). However, combined, as a proportion of employed persons, the two classifications are broadly similar (16 per cent for the FOE survey and 14 per cent for the HILDA survey).

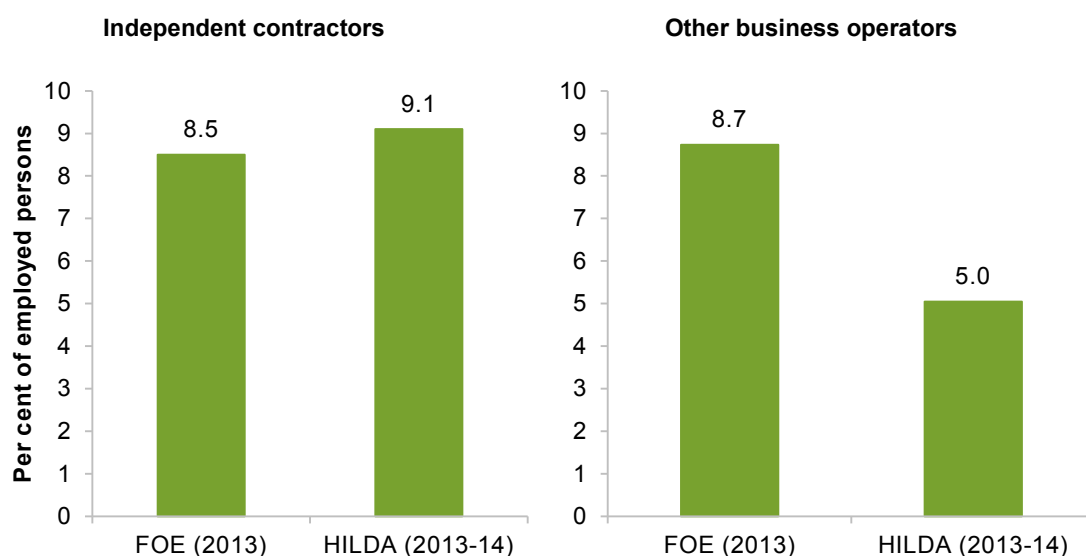
Table D.2 Employment arrangement classifications: Independent contractors, business operators and contributing family members

<i>Survey</i>	<i>Classification label</i>	<i>Definition</i>
FOE	Independent contractor	Independent contractors operate their own business and contract to perform services but do not have the legal status of an employee (that is they are engaged under a commercial contract not an employment contract). They can be an incorporated or an unincorporated business. The Commission has included employees who are able to make drawings from a business and invoice clients.
FOE	Other business operator	Other business operators operate their own business, with or without employees, but are not independent contractors. Unlike independent contractors, they generate income from managing staff or selling goods or services to the public, rather than providing labour services to a client directly. Other business operators can be either an incorporated or unincorporated business.
EEH	Owner manager of incorporated enterprise	Working proprietors of incorporated businesses with an individual arrangement which sets the main part of their pay.
HILDA	Independent contractor	<ul style="list-style-type: none"> • usually issue invoices (including tax invoices) to bill clients for the work that they do for them • usually earn income from using their skills and effort, not just from owning their business • do <u>not</u> spend most of their work time dealing with administrative tasks and paperwork for their business • may be able to negotiate the terms of their work contract • may perform work for more than one client • may subcontract work to another person or business
HILDA	Employment status – employee of own business or employer/self-employed	Works in own business (incorporated or unincorporated) with or without employees.
Labour Force	Contributing family worker	Works without pay in an economic enterprise operated by a relative.
Labour Force	Own account worker	Operates their own unincorporated economic enterprise or engages independently in a profession or trade and hires no employees.
Labour Force	Employer	Operates their own unincorporated economic enterprise or engages independently in a profession or trade, and hires one or more employees.

Sources: ABS (*Forms of Employment, Australia, November 2013*, Cat. no. 6359.0), ABS (*Employee Earnings and Hours, Australia, May 2014*, Cat. no. 6306.0), Roy Morgan (nd) ABS (*Census Dictionary, 2006*, Cat. no. 2901.0), November 2006).

The discrepancy between the ABS and HILDA surveys could be due to either differences in definitions between the surveys, or classification differences and this is leading either to the ABS over-estimating, or the HILDA survey under-estimating, the proportion of employed persons who are business operators. Having regard to the larger ABS sample size, the ABS FOE survey estimates will be used for the purposes of the appendix.

Figure D.2 **Independent contractors and employers by survey**



Sources: Productivity Commission estimates based on ABS (Cat. no. 6359.0, November 2013).

Contributing family members

A contributing family member works without pay in a family business or on a farm. The ABS detailed quarterly Labour Force survey indicates that 26 400 persons were contributing family members in May 2014 (ABS 2015f).

Contributing family members are not included in the number of employed persons in the FOE survey, and are therefore added to employed persons to estimate the numerator for the purposes of estimating the proportion of those in less regulated employment arrangements. Contributing family members comprise 0.2 per cent of employed persons.

Employees regulated by other WR arrangements

State public sector employees

States have referred their industrial relations powers federally to differing degrees. For example, while all employees in the Northern Territory are covered by the federal industrial relations system, in New South Wales state and local government employees are covered by the New South Wales industrial relations system. In total, around 1.2 million employees are covered by a state industrial relations system, and therefore not covered by the FW Act. This group comprises approximately 10.5 per cent of all employed persons.

Western Australian employees

Western Australia's industrial relations system applies to unincorporated businesses and the state public sector. While the number of state public sector workers is directly measured by ABS Employment and Earnings (Public Sector) there is no current survey that directly measures of prevalence of employees within Western Australian unincorporated enterprises. The Western Australian Department of Commerce (2014) used the 2010 issue of EEH to estimate the number of these employees, producing an estimate of 23.8 per cent of Western Australian employees. Assuming that the share of employees in Western Australian unincorporated enterprises has remained constant since 2010 would imply that these workers account for around 1 per cent of employed persons in Australia.

Employees regulated by the FW Act

Employees in collective agreements

Broadly, employees can be classified as setting their pay on collectively or non-collectively (which can be subsequently classified as award reliant and above award). Within the federal system, pay is set collectively through enterprise bargaining.

The definition of collective pay setting is fairly consistent across surveys (table D.3). Since AWRS and ARS sample only federal system employees, their definitions refer to enterprise agreements, which is consistent with the purposes of this appendix. While these surveys include unregistered enterprise agreements, the number of employees reporting their use is small. EEH surveys both federal and state system workers, and thus includes a range of collective industrial instruments in its definition. However, state and federal system workers are distinguished within the survey, though for around 12 per cent of respondents jurisdiction is 'not determined'. While HILDA references enterprise agreements in its definition, its inclusion of state system workers suggests that respondents covered by collective agreements within the state systems have also been allocated to this classification. In addition, HILDA measures the prevalence of pay set by a combination of individual and collective arrangements. For the purposes of this appendix, these employees are classified as in collective arrangements.

Collective pay setting is not necessarily mutually exclusive to pay set according to the award (a category below). Indeed, some employees on an enterprise agreement may be paid at award rates. The ARS and AWRS classify these employees as on collective agreements.

Table D.3 Employment arrangement classifications: Collective agreement

<i>Survey</i>	<i>Classification label</i>	<i>Definition</i>
EEH	Collective agreement	<p>Collective agreements set pay and conditions for a group of employees through a negotiation process.</p> <p><u>Including</u></p> <ul style="list-style-type: none"> • Enterprise agreements • Workplace, industry, site or project collective agreements • Preserved Collective State Agreements • Enterprise Bargaining Agreements (EBA) or Certified Agreements (CA) • Enterprise awards and consent awards • Unregistered or verbal collective agreements <p><u>Excluding</u></p> <ul style="list-style-type: none"> • Notional Agreements Preserving State Awards (NAPSAs) (include in Question 22) • Awards and individual agreements or individual contracts
AWRS	An enterprise agreement (EBA, collective agreement)	<p>A registered enterprise agreement is lodged with the Fair Work Commission (formerly Fair Work Australia) and approved. An unregistered enterprise agreement would not have been lodged and approved (for example, an informal pay-setting arrangement that applies to a group of employees at a workplace).</p>
ARS	An enterprise agreement (EBA, collective agreement)	<p>A registered enterprise agreement is lodged with Fair Work Commission (formerly Fair Work Australia) and approved. An unregistered enterprise agreement would not have been lodged and approved (for example, an informal pay-setting arrangement that applies to a group of employees at a workplace).</p>
HILDA	Collective (enterprise agreement)	<p>An agreement made at the workplace or firm between the employer and either a union or a group of employees. <i>It may sometimes be known as an Enterprise Agreement.</i></p>
HILDA	Combination of collective/enterprise agreement and individual agreement	<p>This will apply in those cases where an employee is covered by a collective (that is, enterprise) agreement, but is paid above the rate specified in that agreement.</p>
<p><i>Sources:</i> ABS (<i>Employee Earnings and Hours, Australia, May 2014</i>, Cat. no. 6306.0, May 2014), FWC (2015i), Roy Morgan Research (nd), Wright and Buchanan (2013).</p>		

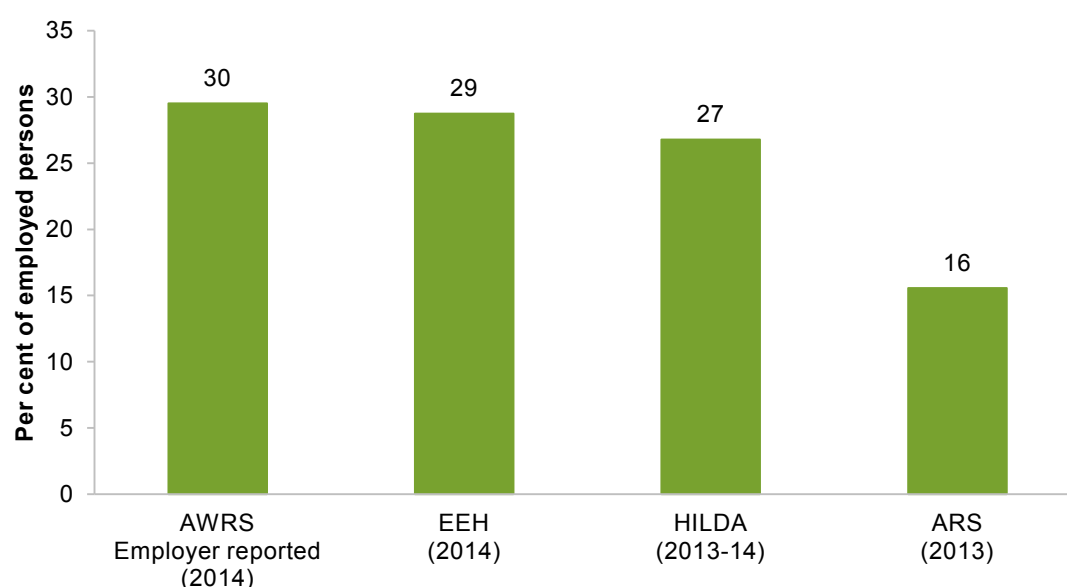
Estimates of collective agreement prevalence are fairly consistent with the exception of ARS (figure D.3). This may partly result from ARS excluding public sector workers, who are more likely have pay set collectively. The HILDA estimate is also relatively low. This is consistent with employee-based surveys under-reporting the use of collective agreements and over-reporting award reliance. On the other hand, HILDA includes state system workers, who are more likely to use collective agreements. AWRS produces the highest estimate. This may be expected, given its exclusion of employees that work in business with less than 5 employees, which have lower rates of collective agreement use.

The estimates of EEH are most likely to accurately reflect the use of collective agreements, given its use of employer-reported data and high response rate. EEH differentiates federal and state systems employees, though for around 12 per cent of these employees jurisdiction

is listed as not determined. This incomplete classification is unlikely to substantially affect results. Excluding employees with undetermined jurisdiction produces an estimate of 29.1 per cent of employed persons. Conversely, including these employees results in an estimate of 28.9 per cent.

Additionally, the EEH excludes employees in agriculture, forestry and fishing. However, this is also unlikely to affect its estimate substantially. The labour force survey estimates that the agriculture, forestry and fishing industry includes around 183 100 employees. At most, including the employees could reduce the estimate to 28.1 per cent of employed persons, and increase the estimate to 29.7 per cent.¹⁸² Together, this suggests that around 28.7 per cent of employed persons are on collective agreements under the FW Act.

Figure D.3 Prevalence of FW Act employees in collective arrangements among all employed persons^{a,b}



^a Respondents reporting 'don't know' or 'other' have been excluded from this analysis and estimates have been adjusted accordingly. ^b Initial estimates have been calculated as a share of employees, and then multiplied by 70.8% (the estimated share of employees covered by the FW Act) to approximate the share of total employed persons.

Sources: Productivity Commission estimates based on ABS (*Employee Earnings and Hours, Australia, May 2014*, Cat. no. 6306.0), AWRS (2014), HILDA Release 13, ARS (2013).

¹⁸² Assuming that all agriculture, forestry and fishing employees were not on collective agreements, or that all employees were on collective agreements, respectively.

Employees in non-collective arrangements

For the purposes of this appendix, employees who have not had their pay set collectively are classified as in non-collective arrangements. Pay set by these arrangements may be equal to the award or higher, and measures of pay setting typically classify non-collective arrangements according to this distinction. Those with pay set exactly equal to the award are classified as award reliant, while those with pay above the award are classified as on an above award individual agreement.

Award reliance

The measurement of award reliance is fairly consistent across surveys. Although the information provided to respondents regarding the definition of an award varies (table D.4), all surveys classify award reliant employees as those who have their pay set at the exact award rate. In the case of AWS and AWRS, this measure explicitly excludes those paid at the award rate on an enterprise agreement.

Table D.4 Employment arrangement classifications: Award reliant

<i>Survey</i>	<i>Classification label</i>	<i>Definition</i>
EEH	Award only	Awards are legally enforceable determinations of Federal and State industrial tribunals or authorities that set pay and conditions. <u>Including</u> <ul style="list-style-type: none">• Modern awards• Australian Pay and Classification Scales (Pay Scales)• Notional Agreements Preserving State Awards (NAPSAs)• Transitional awards• Pre-reform awards <u>Excluding</u> <ul style="list-style-type: none">• Enterprise awards and consent awards (included as collective agreements)• Collective agreements and individual agreements or individual contracts
AWRS	An award	An award contains the minimum conditions of employment – including pay rates – that apply to employees in particular industries or occupational groups. The award can be used to set wages at exactly the applicable rate specified in the award, or at an amount above the award rate.
AWS	An Award	An award contains the minimum conditions of employment – including pay rates – that apply to employees in particular industries or occupation groups.
HILDA	Paid exactly the Award (or APCS)	No description provided.

Sources: ABS (*Employee Earnings and Hours, Australia, May 2014*, Cat. no. 6306.0), FWC (2015i), Roy Morgan Research (nd), Wright and Buchanan (2013).

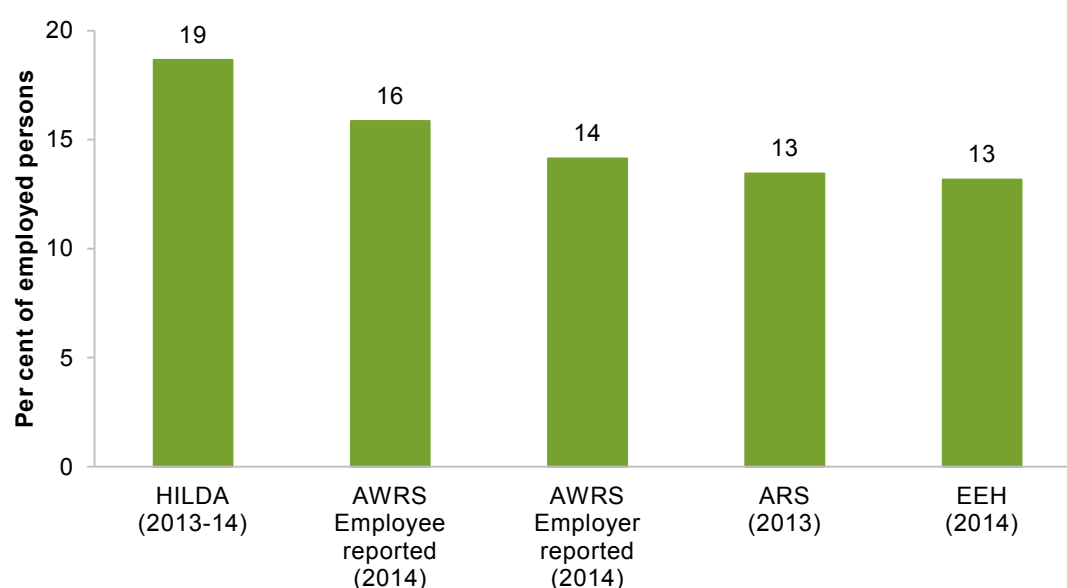
Award reliance estimates are broadly consistent (figure D.4). That said, there is some variation attributable to survey design. Both employee-reported measures show a higher

prevalence for award reliance, which likely reflects a lesser awareness of pay setting arrangements among employees and a bias towards assuming award pay rates.

Among the employer-reported surveys, population estimates of award reliance are consistent. This is despite differing sample designs that are likely to introduce bias in differing directions. For example, the exclusion of small business in AWRS is likely to result in underestimation of award reliance.

Again, EEH estimates are most likely to accurately reflect award reliance. It produces a population estimate of 12.9 per cent or 13.6 per cent, dependent on the inclusion of those with undetermined jurisdiction. Accounting for the potential impact of excluding employees in the agricultural, forestry and fishing sector produces a maximum point estimate of just over 14.5 per cent and a minimum of 12.9 per cent. Around 13.1 per cent of employed persons appear to be paid at the relevant federal award rate.

Figure D.4 Prevalence of award reliant FW Act employees among all employed persons ^{a,b}



^a Respondents reporting 'don't know' or 'other' have been excluded from this analysis and estimates have been adjusted accordingly. Further adjustments were made to provide an estimate as a proportion of employed persons. ^b Initial estimates have been calculated as a share of employees, and then multiplied by 70.8% (the estimated share of employees covered by the FW Act) to approximate the share of total employed persons.

Sources: Productivity Commission estimates based on ABS (*Employee Earnings and Hours, Australia, May 2014*, Cat. no. 6306.0), AWRS (2014), HILDA Release 13, ARS (2013).

Above award arrangements

This classification covers all employees who are not paid according to a collective agreement and are not paid the exact award rate. This is a residual group that could be sub-classified a number of ways — for example, some will have award-based pay,¹⁸³ some will be above the FW Act high income threshold or in an occupation not traditionally covered by awards. As a residual category, this group likely includes a heterogeneous body of employees (although likely to comprise highly paid professionals in certain industries (appendix E)). The classifications used in surveys are listed in table D.5.

Table D.5 Employment arrangement classifications: above award arrangements

<i>Survey</i>	<i>Classification label</i>	<i>Definition</i>
EEH	Individual arrangement	Individual agreements or contracts set the pay and conditions for an individual employee. They may be verbal or written and signed by the employee. <u>Including</u> <ul style="list-style-type: none">• Individual Transitional Employment Agreements (ITEA)• Australian Workplace Agreements (AWA)• Preserved employment contracts• Informal individual arrangements <u>Excluding</u> <ul style="list-style-type: none">• Collective agreements and awards
AWRS	An individual arrangement	An individual arrangement is a wage-setting practice where an award or enterprise agreement does not play a role in determining the amount an employee is paid.
AWRS	Over award	Over-award is a method where pay is set with reference to an award rate (that is, as the base) but not at exactly the applicable award rate
AWS	Other pay-setting arrangements	Individual arrangements may include both ‘above award’ and ‘award’ rates of pay. An individual agreement is an agreement between a business/organisation and a single employee . It may also be called a common law contract.
HILDA	Individual agreement (or contract)	An agreement (formal or informal) between the employee and employer. It may be verbal or written. It could simply be a letter of appointment.

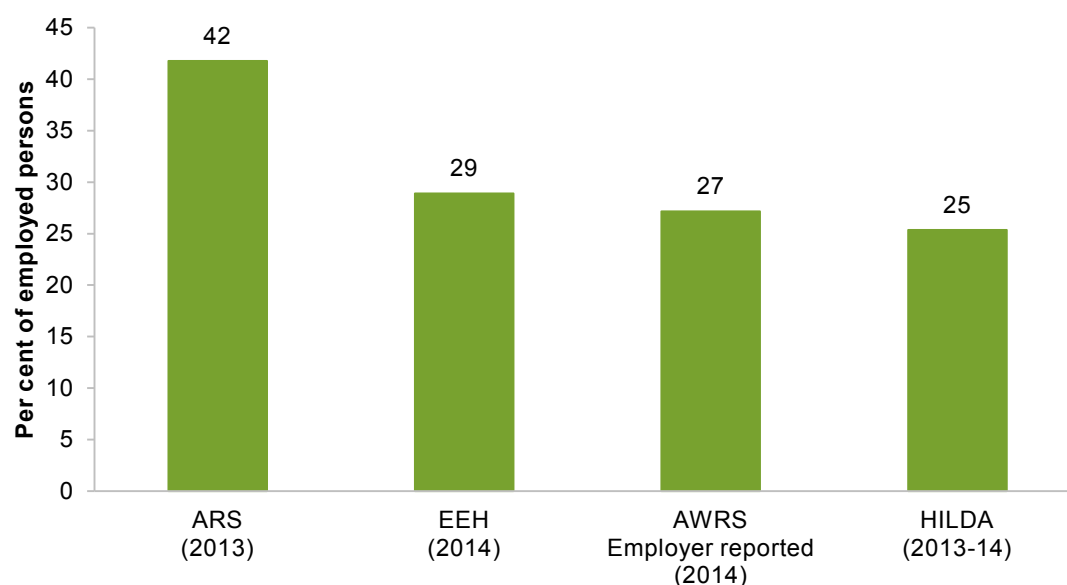
Sources: ABS (Employee Earnings and Hours, Australia, May 2014, Cat. no. 6306.0), FWC (2015i), Roy Morgan Research (nd), Wright and Buchanan (2013).

While the ARS provides a relatively high estimate of employees on above award arrangements, the remaining surveys are fairly consistent (figure D.5). The higher estimate from the ARS is likely driven by its focus on private sector employers. The same rationale suggests that the inclusion of state workplace relations system employees within the HILDA results in downward bias.

¹⁸³ Where ‘award-based pay’ refers to pay setting influenced by, but not set at, the award rate.

EEH produces an estimate of between 28.9 per cent and 29.5 per cent, depending on whether employees with ‘not determined’ jurisdiction status. At most, the inclusion of agricultural employees may decrease the point to 28.2 per cent and increase the point estimate to around 29.8 per cent. Around 28.9 per cent of employed persons appear to be on above-award individual arrangements.

Figure D.5 Prevalence of FW Act employees in above award individual arrangements among all employed persons ^{a,b}



^a Respondents reporting ‘don’t know’ or ‘other’ have been excluded from this analysis and estimates have been adjusted accordingly. Further adjustments were made to provide an estimate as a proportion of employed persons. ^b Initial estimates have been calculated as a share of employees, and then multiplied by 70.8% (the estimated share of employees covered by the FW Act) to approximate the share of total employed persons.

Sources: Productivity Commission estimates based on ABS (*Employee Earnings and Hours, Australia, May 2014*, Cat. no. 6306.0), AWRS (2014), HILDA Release 13, ARS (2013).

Individual flexibility arrangements

IFAs are a separate individual arrangement negotiated directly between an employer and an employee under an award or enterprise agreement. IFAs modify some aspects of the employee’s pay and conditions, with the remainder determined by the relevant award or enterprise agreement. This means the employee is on both an award or an enterprise agreement and has a separate individual arrangement (the IFA).

IFA data are collected in the FWCGM and AWRS employer and employee surveys (table D.6).

Table D.6 Survey methodology — individual flexibility arrangements

<i>Survey</i>	<i>When survey conducted</i>	<i>Survey question</i>
FWCGM employer	March to June 2012	Asks the employer about written arrangements with an employee made since 1 January 2010 that modified a condition of employment contained in a modern award or enterprise agreement, and whether this was an IFA.
FWCGM employee	March to June 2012	Asks the employee whether they had made a written arrangement with an employer since 1 January 2010 that changed or modified one or more employment conditions and follow questions to determine if this was an IFA.
AWRS employer	February to July 2014	Asks if the employer made an IFA with any employees since 1 July 2012, and how many employees the employer has agreed to an IFA with since that time.
AWRS employee	February to July 2014	Asks the employee if they had made an IFA since 1 July 2012 which modified one or more of their employment conditions contained in a modern award or enterprise agreement. If yes, employees were asked if the IFA was still in effect.

Sources: FWC (nd), O'Neill (2012b).

The FWCGM in 2012 estimated that around 3 per cent of employees had an IFA. The AWRS 2014 employer and employee surveys provide the most recent data on IFAs, but the employer survey does not provide disaggregated data on the incidence of IFAs amongst employees; only whether the employer has created an IFA over the period being surveyed.

The AWRS employee survey does provide data on the number of IFAs in effect during the survey period (February to July 2014) which could proxy for a ‘point in time’ estimate. However, the estimate of the number of IFAs reported by employees does not necessarily match the estimates from the employer survey. Therefore, to obtain a point in time estimate it includes employees who had created an IFA since July 2012 which was still in effect at the time of the survey, and whose employer had created at least one IFA in the same period.

Productivity Commission estimates of the percentage of employees with an IFA suggests that 2.3 per cent of employees, or 1.6 per cent of employed persons, had an IFA.

IFAs are discussed further in chapter 16 (on individual arrangements) and in appendix E.

Labour hire

Labour hire data are sourced from the ABS (FOE) and HILDA surveys (table D.7). ABS data on labour hire arrangements were last published in 2012 (in respect of November 2011).

Table D.7 Employment arrangement classifications: Labour hire

<i>Survey</i>	<i>Classification label</i>	<i>Definition</i>
FOE	Found job through a labour hire firm/employment agency <ul style="list-style-type: none">• Paid by a labour hire firm/employment agency• Not paid by a labour hire firm/employment agency	People who found their current job through a labour hire firm/employment agency, and were either paid or not paid by the firm or agency.
HILDA	Employed through a labour hire firm	Employed through a labour-hire firm or temporary employment agency, that is, the agency pays the wage.

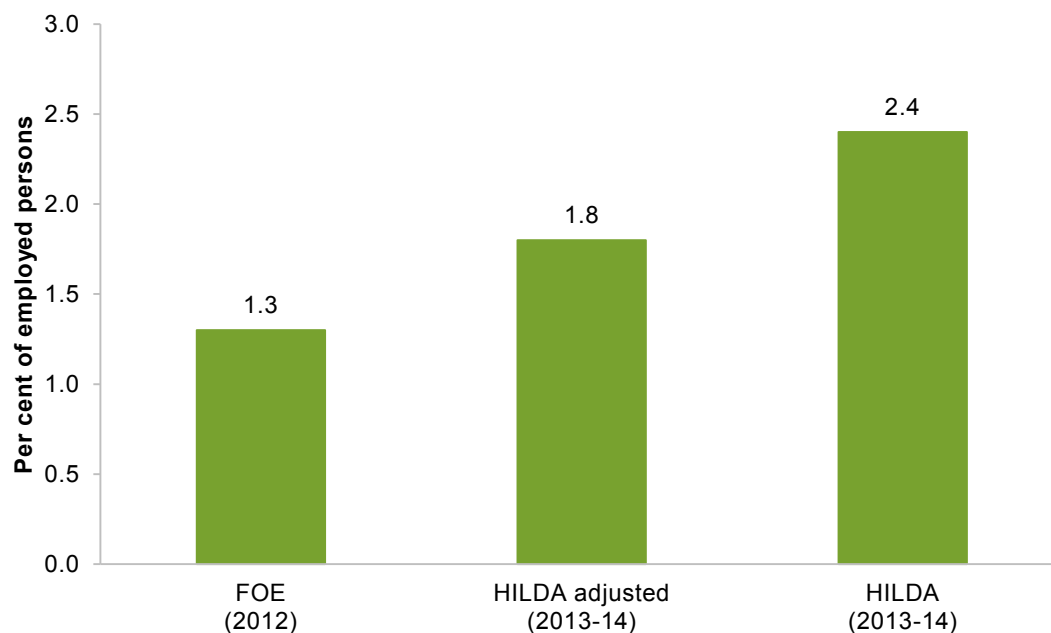
Sources: ABS (*Forms of Employment, Australia, November 2011*, Cat. no. 6359.0, April 2012), Melbourne Institute (nd).

For the purposes of determining employment arrangements, this appendix classifies an employment arrangement as a labour hire arrangement where the labour hire firm or agency (rather than the employer at whose workplace the employee is engaged) pays the employee's wage.

The estimates of the proportion of employed persons paid through labour hire arrangements are of a similar (small) magnitude, but vary slightly between the ABS FOE and HILDA surveys. The ABS reports that in 2011, 1.3 per cent of employed persons were paid through a labour hire arrangement and the estimate from HILDA for 2013-14 is 2.4 per cent. The latter is broadly in line with a 2002 HILDA estimate of 2.9 per cent presented in a Productivity Commission staff working paper (Laplagne, Glover and Fry 2005).

The labour hire category in both the FOE and HILDA surveys appears to include employees, independent contractors and business operators who are hired by labour hire firms. However, it is only employees who are engaged through a labour hire arrangement who are of interest. Restricting the HILDA estimates to this group (and to avoid double counting), it is estimated that around 1.8 per cent of employed persons are employees on labour hire arrangements (HILDA adjusted, figure D.6).

Figure D.6 **Prevalence of FW Act employees in labour hire**

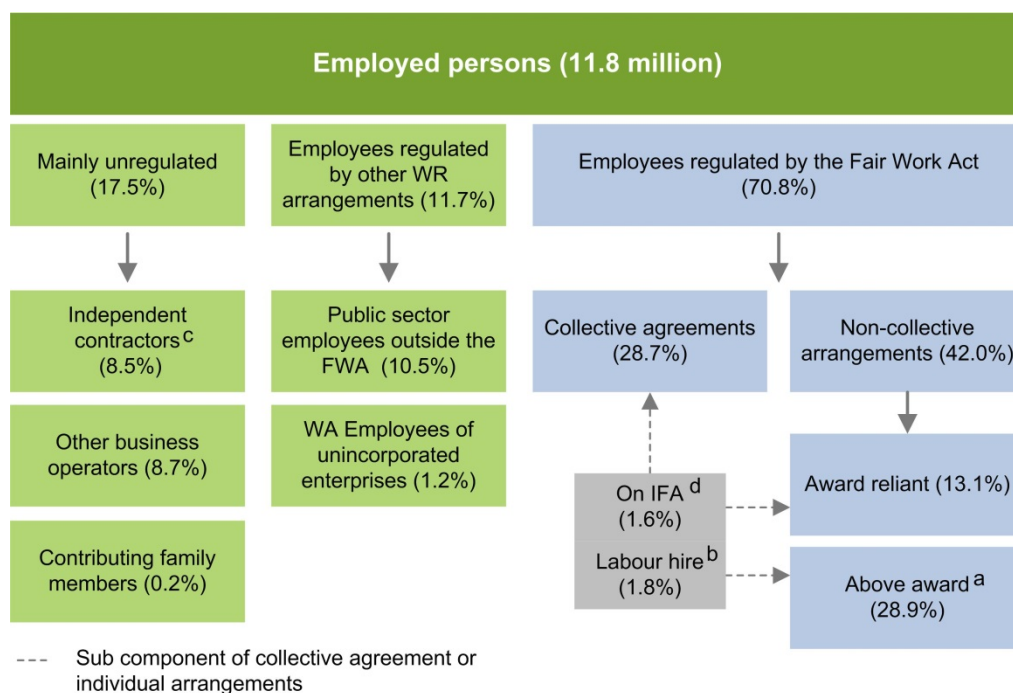


Source: Productivity Commission estimates based on ABS (*Forms of Employment, Australia, November 2012*, Cat. no. 6359.0, April 2013) and HILDA.

D.3 Conclusion

Applying the analysis in the appendix, figure D.7 provides an overview of the distribution of employed persons as determined by the framework discussed in section D.1 and the analysis in section D.2.

Figure D.7 Distribution of employment arrangements



^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.

E Statistical overview of employment arrangements

While chapters 7, 20 and 22 in this report discuss the evidence on the nature, uptake and trends in various types of agreements and awards, they generally do not provide the data on these matters. This appendix fills that gap by setting out a statistical overview of the various employment arrangements and the characteristics of individuals that use them. Such evidence is important in understanding the economic significance of some of the issues raised in the chapters on awards and agreements.

While a variety of surveys collect statistical information on employment arrangements (as noted in appendix D), this appendix primarily draws on the Australian Bureau of Statistics (ABS) Survey of Employee Earnings and Hours.

Trends in the use of different employment arrangements

Across the Australian labour market, enterprise agreements (EA) and above award individual arrangements are the most commonly used employment arrangements¹⁸⁴ (in terms of the proportion of employees using them) with each of these arrangements used by around 40 per cent of employees (figure E.1). However, these patterns of use are not consistent throughout the economy — they vary widely across a number of factors, including the size of the employer, industry, occupation, wages and other characteristics.

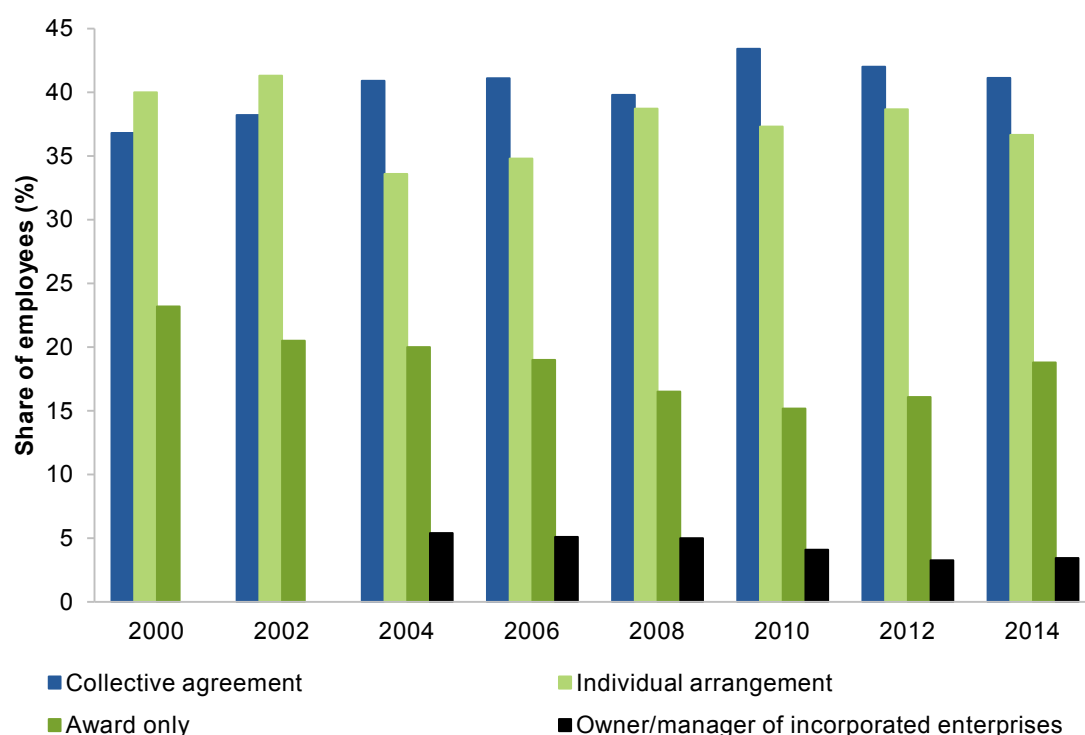
Employer size

The prevalence of each employment arrangement varies markedly with firm size. The share of employees on EAs is significantly higher in larger enterprises, while individual arrangements are dominant in smaller firms (figure E.2). Award usage also decreases with

¹⁸⁴ The ABS Survey of Employee Earnings and Hours classifies employees in the ‘collective agreement’ category if they had the main part of their pay set by a collective agreement (registered or unregistered) or enterprise award. Employees are classified to the ‘individual arrangement’ category if they have their pay set by an individual contract, individual agreement registered with a Federal or State industrial tribunal or authority, common law contract (including for award or agreement free employees), or if they receive over award payments by individual agreement. Employees are classified as ‘award only’ if they are paid at the rate of pay specified in the award, and are not paid more than that rate of pay.

firm size. This suggests that transaction and compliance costs may play an important role in determining the type of wage setting arrangement used.

Figure E.1 Use of different employment arrangements
Proportion of employees (per cent), 2000 – 2014

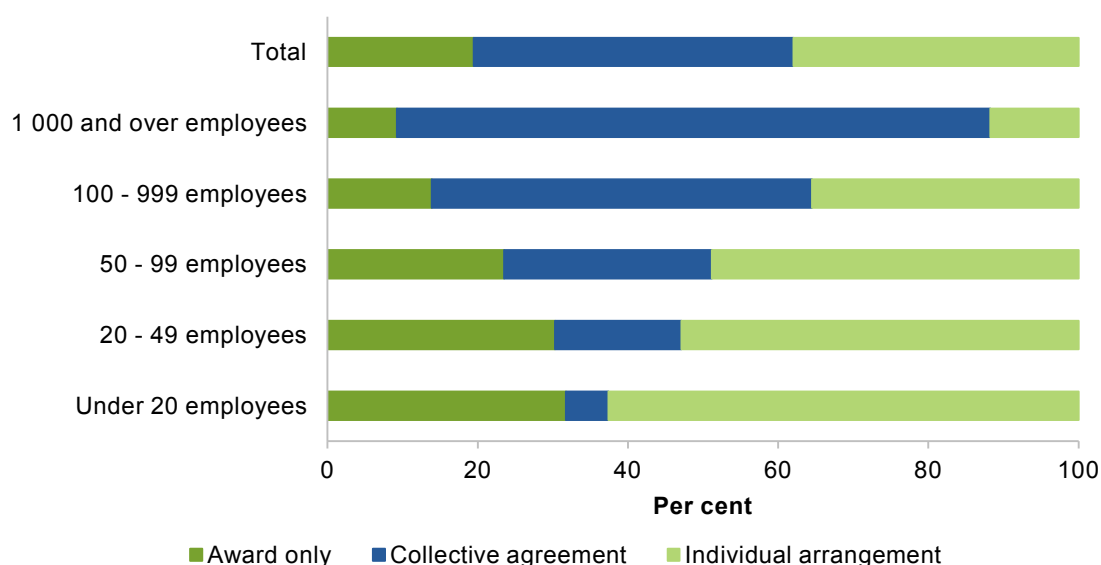


This survey was not designed as a time series, so caution should be exercised when comparing data between different years. Working proprietors of incorporated enterprises are counted as employees on an individual arrangement. Includes all collective arrangements, not only federal enterprise agreements.

Source: ABS (*Employee Earnings and Hours, Australia, May 2014*, Cat no. 6306.0, released 19 February 2015).

Figure E.2 Share of employees using employment arrangements — by employer size

Share of employees in each enterprise size group, 2012

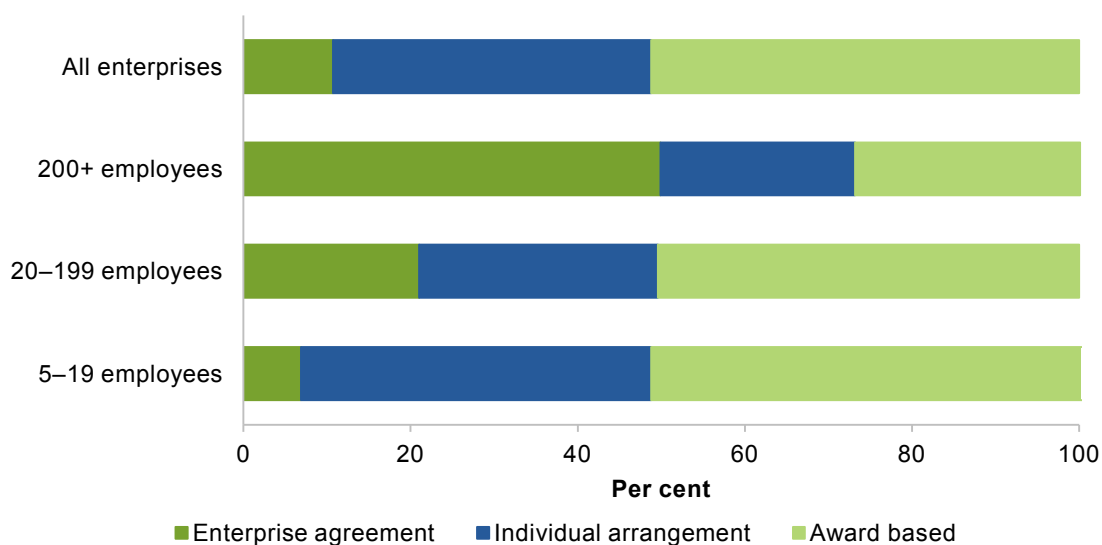


Source: ABS (*Employee Earnings and Hours, Australia, May 2014*, Cat no. 6306.0, released 19 February 2015).

The measured frequency of each arrangement changes somewhat when measured by the number of *employers* using them (figure E.3 and table E.1). EAs are much less frequent under this measure — this reflects that EAs used by a small number of large firms can each cover many employees. While EAs are the arrangement most commonly used by firms with 200 or more employees, individual and award based arrangements are still used to set the pay of a majority of employees in roughly half of these large firms. Individual and award based arrangements are the primary arrangement used by the largest proportions of firms, particularly those with less than 200 employees.

Figure E.3 Share of employers using employment arrangements for the largest proportion of employees

Share of employers (per cent), by employer size



^a Base = 2971 for enterprise agreement, individual arrangement and award based analysis. Includes enterprises that had a main employment arrangement calculated as the method that was used to set pay for the largest proportion of employees. Excludes 86 enterprises where two methods of setting pay were used in equal proportion.

Award based is setting a pay rate at exactly the applicable award rate. Over award is a method where pay is set with reference to an award rate (that is, as the base) but not at exactly the applicable award rate.

Source: Fair Work Commission (2015d).

Table E.1 Employment arrangements used for at least one employee

Share of employers (per cent)

<i>Pay setting method</i>	<i>Per cent ^a</i>
Enterprise agreement – registered agreement	11.5
Enterprise agreement – unregistered agreement	2.5
Individual arrangement	63.5
Award-reliant	31.3
Over award	30.9

^a Does not add up to 100 per cent as employers may use multiple methods of setting pay.

Base = 3043 for enterprise agreement and individual arrangement analysis. Records where do not know, missing and unknown pay setting arrangements have been excluded (14 enterprises).

Base = 2869 for award reliant and over award analysis. Records where do not know, missing and unknown wage setting arrangements have been excluded (89 enterprises).

Award reliant is setting a pay rate at exactly the applicable award rate. Over award is a method where pay is set with reference to an award rate (that is, as the base) but not at exactly the applicable award rate.

Sources: Fair Work Commission (2015d, p. 35), AWRS 2014 Employee Relations Survey.

The results reflect that there are a very large number of employing businesses, many of whom would find standard enterprise bargains unwieldy when they already have recourse to award based and individual arrangements as their standard employment template. However, the data suggest a possible gap in contract types where a business wishes to craft an agreement that varies the award, but finds the enterprise bargaining arrangements too costly a route to achieve this. A new potential type of statutory arrangement, the ‘Enterprise Contract’, as elaborated in chapter 23 may fill this gap.

Industry

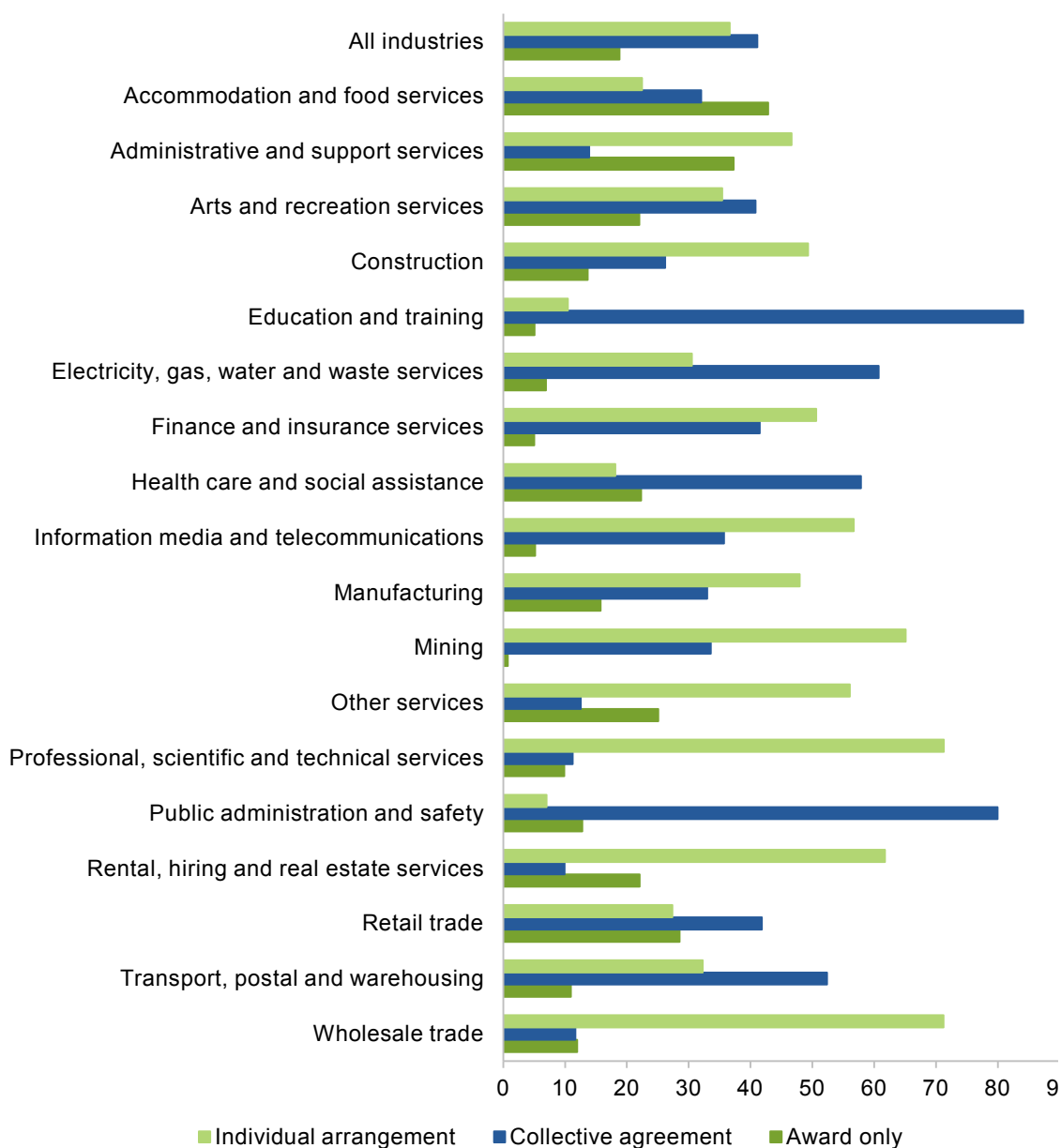
As figure E.4 shows, industry sectors vary widely in their use of different employment arrangements. Employees who work in education and training, public administration and safety and electricity, gas, water and waste services industries are most likely to have their pay set by a collective agreement.

By contrast, individual arrangements are the primary means of setting pay in the professional, scientific and technical services, wholesale trade, mining, rental hiring and real estate services, and information, media and telecommunications service sectors. More than 98 per cent of employees using individual arrangements are in the private sector.

Award reliant employees are more likely to work in the accommodation and food services; administrative and support services; retail trade; other services; and health care and social assistance industries. These industries have been consistently award reliant over the last six years, and, in several other industries, award reliance has been increasing.

Figure E.4 Employment arrangements by industry

Proportion of employees (per cent)

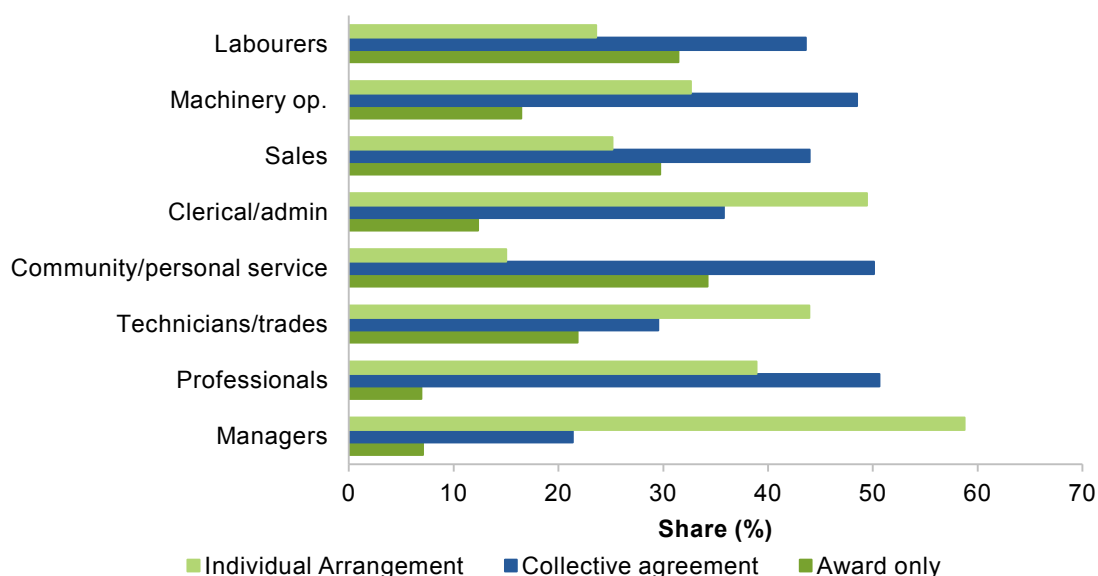


Source: ABS (*Employee Earnings and Hours, Australia, May 2014*, Cat no. 6306.0, released 19 February 2015).

Occupation and job characteristics

The relative frequency with which the various employment arrangements are used varies widely between occupational groups (figure E.5).

Figure E.5 **Employment arrangements by occupation**



Source: ABS (*Employee Earnings and Hours, Australia, May 2014*, Cat no. 6306.0, released 19 February 2015).

The occupations with the highest use of EAs are community service workers and professionals, followed by machinery operators and drivers, sales workers and labourers. Most workers on EAs are employed on a permanent or fixed term (rather than casual) basis (figure E.6).

Employees on individual arrangements more commonly work as managers, clerical or administration workers, technicians and trades workers or professionals (figure E.5). The overall picture that emerges is that individual arrangements are more likely to be made by higher paid professionals in a subset of industries.

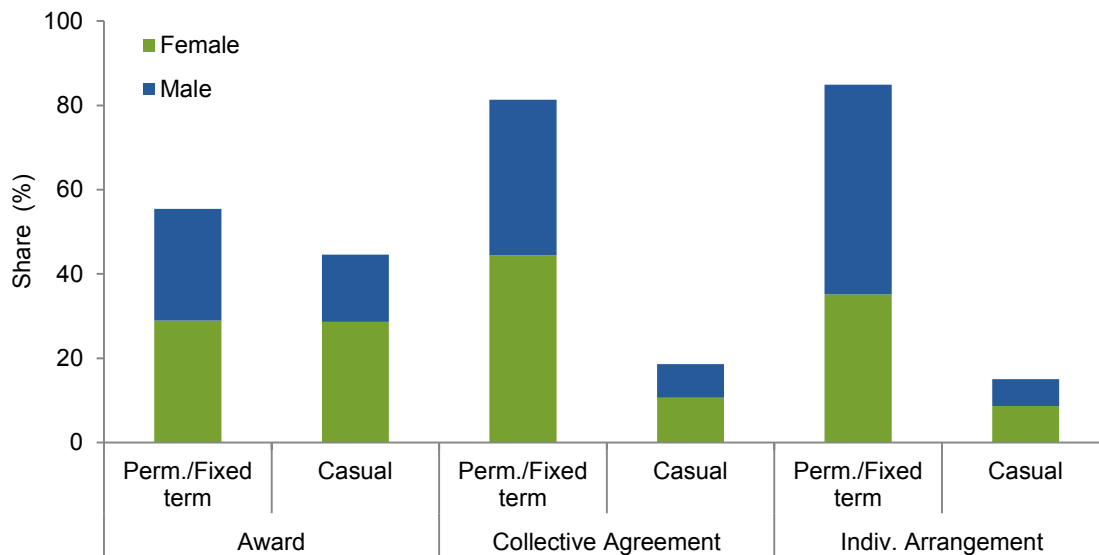
Award reliant employees are most likely to work as community and personal service workers, sales workers, labourers, and technicians and trades workers (figure E.5). Bolton and Wheatley (2010) used the unit record file from the 2006 Employee Earnings and Hours survey to disaggregate the occupation groups of award reliant employees further. They reported that:

- the majority of award reliant community and personal services workers were either carers and aides (and of these, most were personal carers and assistants or child carers) or hospitality workers. Of all hospitality workers, 60.7 per cent were found to be award reliant. Of all child carers, 69.4 per cent were award reliant
- among award reliant sales workers, the majority were sales assistants and sales persons

- within the group of award reliant labourers, cleaners and laundry workers and food preparation assistants made up the majority. Fifty six per cent of cleaners and laundry workers and 46.2 per cent of food preparation assistants were award reliant.

Award reliant employees are also much more likely to work casually when compared with other employment arrangements (figure E.6). Employees in rural and regional areas are more likely to be award reliant (almost one in four) compared with employees in metropolitan areas (around one in six) (Wright and Buchanan 2013).

Figure E.6 Permanent and casual employment by employment arrangement and gender, 2014 ^a



^a The permanent and casual bars add to 100 per cent for each employment arrangement..

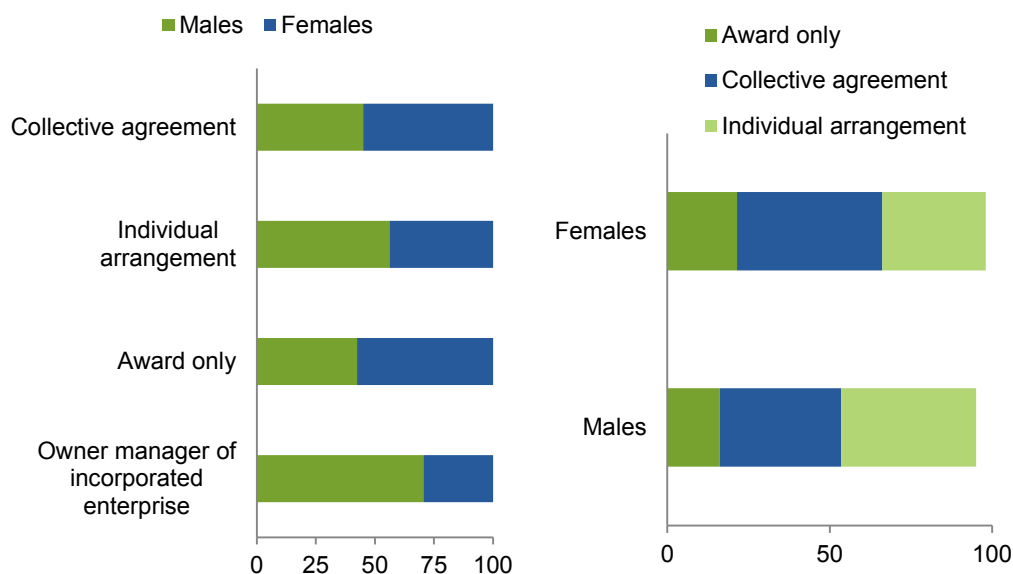
Source: ABS (*Employee Earnings and Hours, Australia, May 2014*, Cat no. 6306.0, released 19 February 2015).

Gender and age

The prevalence of different employment arrangements also appears to vary with gender. Employees on awards and collective agreements are more likely to be female, and of all female employees, a higher proportion is award reliant or on a collective agreement compared with males (figures E.7). By contrast, individual arrangements are more commonly used by male employees. Rozenbes (2010) suggests that this is largely due to the different industrial composition of employment for males and females, with females more likely to work in industries with higher award reliance.

Figure E.7 Gender differences in methods of setting pay

Share of total (%), 2014



Source: ABS (*Employee Earnings and Hours, Australia, May 2014*, Cat no. 6306.0, released 19 February 2015).

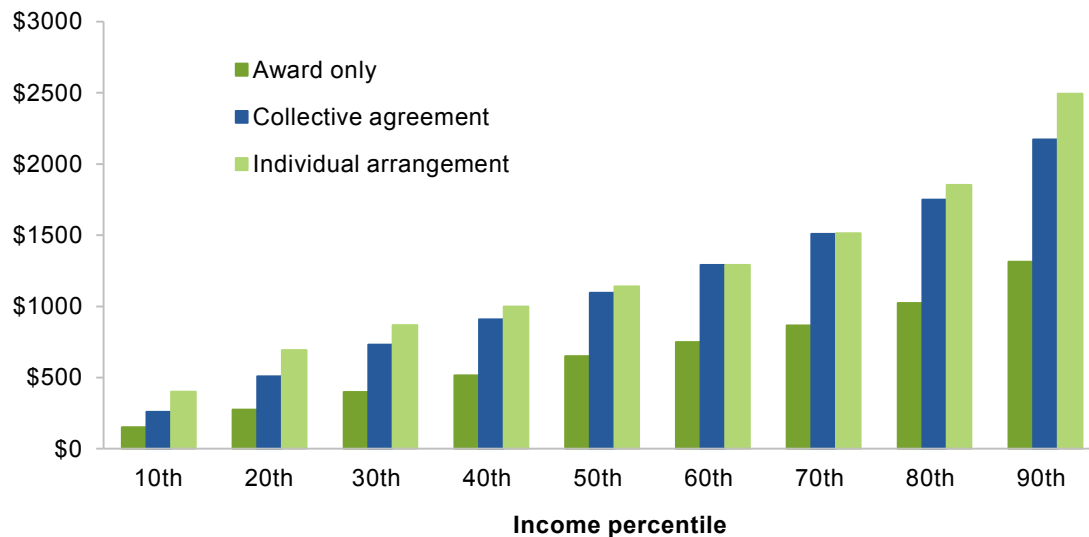
Employment arrangements also vary with age. Award reliant employees are younger on average (35.7 years) than employees who have their pay and conditions set by another method (40.6 years for collective agreements, 39.4 years for individual arrangements and 48.3 years for owner managers of incorporated enterprises) (ABS 2014c). Data from the Australian Workplace Relations Study also suggest that job tenure affects the likelihood that an employee's pay is set by an individual arrangement — 81 per cent of those who had been with their employer for ten or more years had their pay set using an individual arrangement, compared with 23 per cent of those who were with their employer for less than a year.

Wage differences between employment arrangements

While the apparent difference in average weekly earnings between employees on collective agreements and individual arrangements is rather small, the earnings of employees on award reliant arrangements are both lower and more evenly distributed across earning deciles (figure E.8). The gap between award earnings and those for other employment arrangements also increases in higher income deciles for each arrangement. This is rather unsurprising, given the use of awards as a safety net below which wages and conditions cannot be reduced.

Figure E.8 Average weekly earnings by employment arrangement

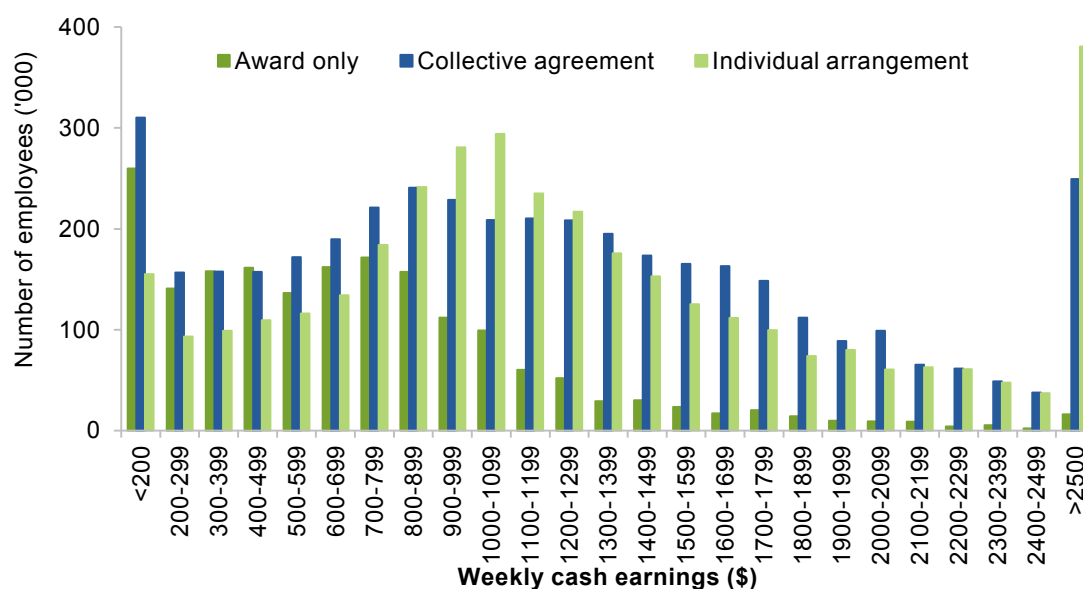
By income percentile for each employment arrangement, 2014



Source: ABS (*Employee Earnings and Hours, Australia, May 2014*, Cat no. 6306.0, released 19 February 2015).

Figure E.9 Employment arrangements by weekly cash earnings

Number of employees in earnings bracket, 2014

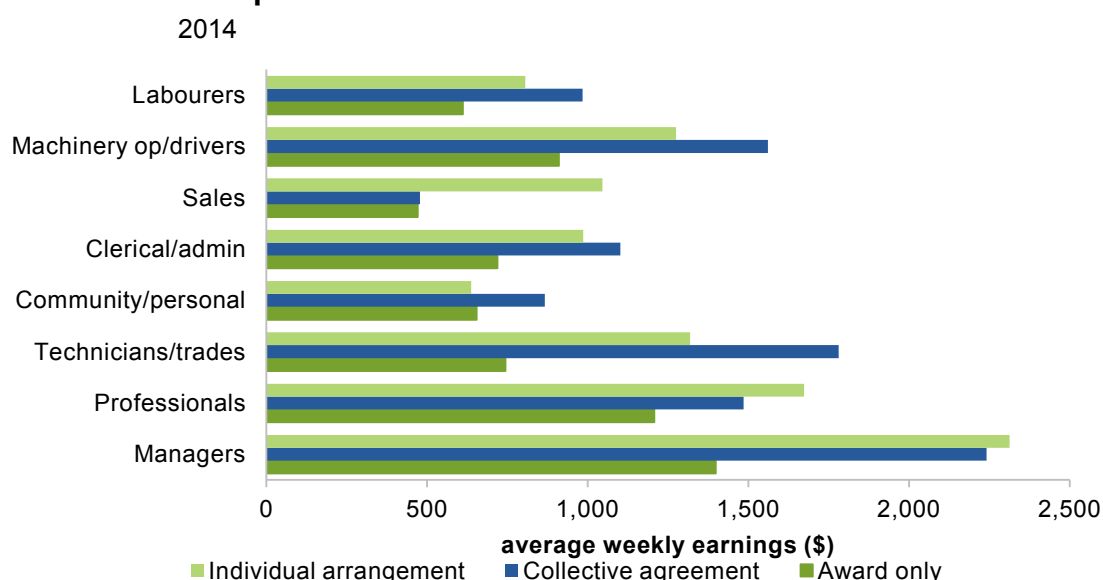


Source: ABS (*Employee Earnings and Hours, Australia, May 2014*, Cat no. 6306.0, released 19 February 2015).

The relative frequency of each employment arrangement can also be arranged by weekly cash earnings (figure E.9). This reveals similar results to those above — among award employees, most (roughly four fifths) are on below average incomes, while roughly half of employees on collective agreements and individual arrangements earned below average incomes. Of all employees earning above the Australian average weekly earnings of \$1128.90 in 2014, roughly 7 per cent were on awards. Individual arrangements and collective agreements made up the remaining share of above average earning employees in roughly equal measure — though collective agreements were more common in ‘upper middle’ weekly earnings brackets while individual arrangements were particularly dominant in the top weekly earnings bracket.

While employees on individual arrangements on average earn more than those on other arrangements, this general trend does not hold for all occupations. In particular, technicians and trades workers, community and personal service workers and machinery operators and drivers on collective agreements have higher average earnings than their counterparts do on individual arrangements (figure E.10). By contrast, average earnings are substantially higher for sales workers and slightly higher for managers and professionals, on individual arrangements when compared with those under collective agreements. And, despite being in the minority, employees on individual arrangements in the public sector earn around 60 per cent more than those in the private sector (a difference that is more than that for collective agreements, but less than that for awards).

Figure E.10 **Average weekly earnings by employment arrangement and occupation**



Source: ABS (*Employee Earnings and Hours, Australia, May 2014*, Cat no. 6306.0, released 19 February 2015).

It is important not to causally attribute all of the differing distributions of income to the type of employment arrangement because of the likely effects of selection biases. People with less skilled jobs are generally paid less and more likely to be on an award, while those with higher skill jobs are more likely to be on individual arrangements or EAs. For example, remuneration is higher for occupations such as professionals and managers and this group tends to have pay set using individual arrangements rather than awards or EAs (figure E.5). This does not mean that bargaining (on a collective or individual level) produces no premiums for employees, but that such premiums cannot be simply inferred by a face value comparison of the figures.

Differences between types of enterprise agreements

Not all EAs are the same. They can cover a single existing enterprise, a new enterprise that has yet to commence operations (a greenfields agreement) or, in relatively rare instances, multiple enterprises (table E.2).

The use of greenfields agreements has grown. Greenfields agreements make up 10 per cent of all EAs, up from 6.4 per cent in September 2011. Greenfields agreements are most prevalent in the construction industry, where over two thirds of agreements are greenfields agreements. Other high users by industry are: administrative and support services (6.4 per cent); manufacturing (5.3 per cent); mining (5.2 per cent); transport, postal and warehousing (3.6 per cent); and professional, scientific and technical services (3.1 per cent) (McCallum, Moore and Edwards 2012, p. 169). These six industries have accounted for around 91 per cent of all greenfields agreements approved under the *Fair Work Act 2009* (Cth) (FW Act).

Table E.2 Single enterprise agreements are most common

Enterprise agreement approval applications lodged with the FWC, by year

<i>Type of application</i>	<i>2011-12</i>	<i>2012-13</i>	<i>2013-14</i>
Single enterprise	7 812	6 333	5 945
Greenfields	705	712	749
Multi-enterprise	48	42	60
Total	8 565	7 087	6 754

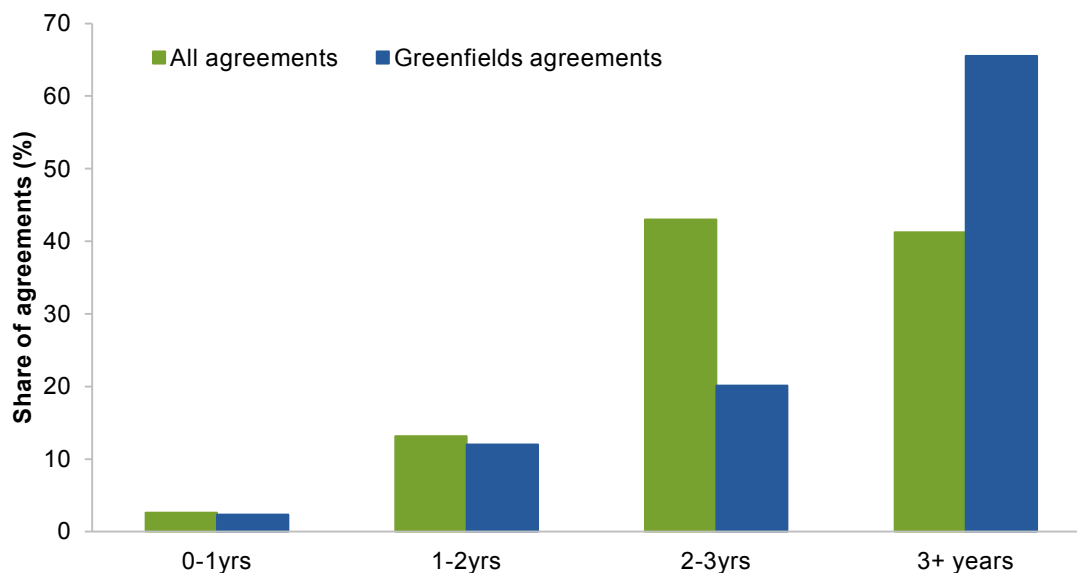
Source: Fair Work Commission (2014b, p. 58).

Enterprise agreement durations

While enterprise agreements have a maximum duration of four years, roughly 60 per cent of current agreements have durations of three years or less (figure E.11). Greenfields agreements tend to have longer durations — two thirds of current greenfields agreements have durations of more than three years.

Figure E.11 **Durations of current (not yet expired) enterprise agreements**

Proportion of agreements (per cent)



Source: Data provided to Productivity Commission by the Department of Employment.

Union coverage

While most EAs cover a union, around 30 per cent do not (figure E.12). However, it appears that non-union agreements are more common among smaller enterprises because over 90 per cent of employees whose pay is set by an EA are on union covered agreements. Around two fifths of employees covered by union agreements do not belong to a union, a rate which is apparently higher than many other countries (Peetz and Preston 2009, p. 448).

Figure E.12 Unions and enterprise agreements^a

For agreements lodged in each quarter



^a An agreement is identified as being 'union' where the decision approving the agreement notes in accordance with s201(2) of the FW Act that the agreement covers the union(s) which has/have given notice under s183(1) that it/they want the agreement to cover them. It is recognised that this is a proxy measure as the data measures coverage rather than bargaining presence.

Source: Department of Employment (2015c, p. 32).

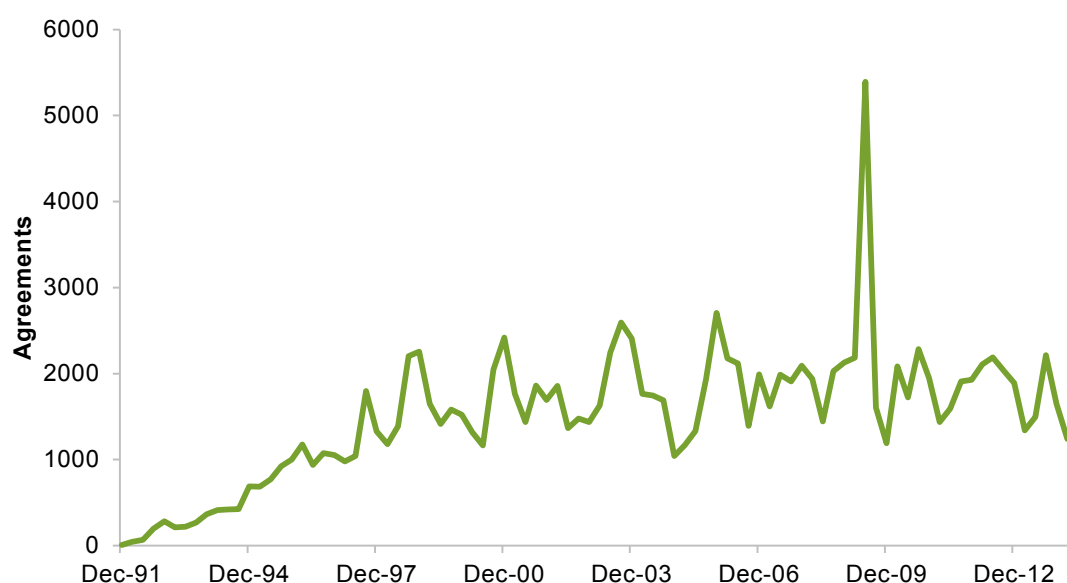
Long term trends in agreement lodgments

The number of EAs lodged has stayed roughly constant in the past decade, although there were very substantial changes from quarter to quarter (figure E.13). (The spike in 2009

immediately preceded commencement of the FW Act.) Lodgments are the flow of new EAs, and are added to the existing stock of EAs. The stock has risen over time, though it has fallen most recently (figure E.14). The number of employees covered by lodged EAs has also been relatively stable, which suggests no substantial change in the distribution of firm sizes that make new agreements (figure E.15).

Figure E.13 Trends in lodgments of enterprise agreements

National system agreements, Dec quarter 1991 to June quarter 2014 ^a

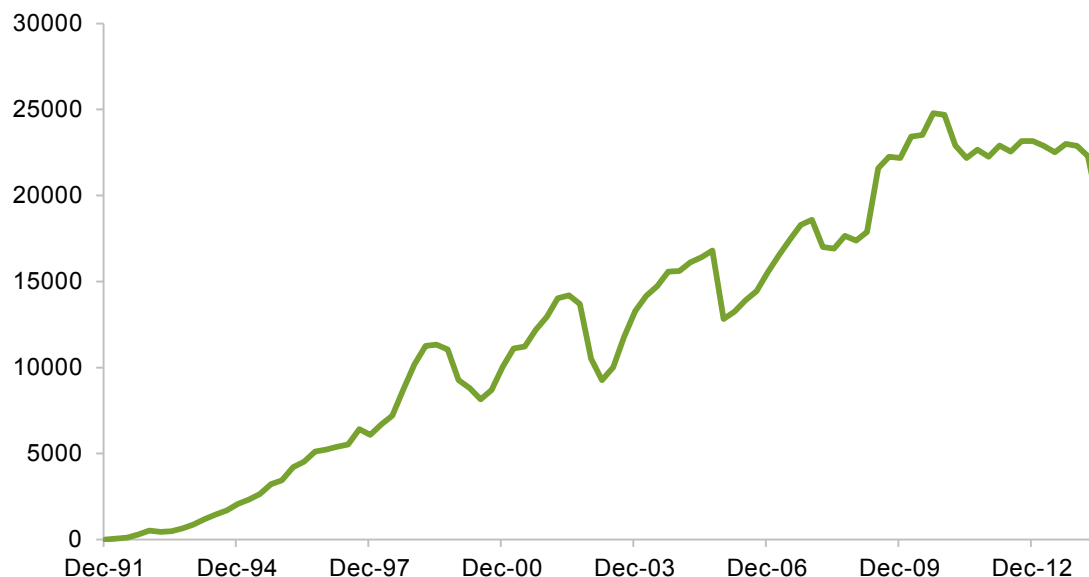


^a The jump in agreements in mid-2009 coincides with the last days to lodge an agreement under the *Workplace Relations Act 1996* (Cth).

Source: Department of Employment Trends in Enterprise bargaining data.

Figure E.14 The number of agreements

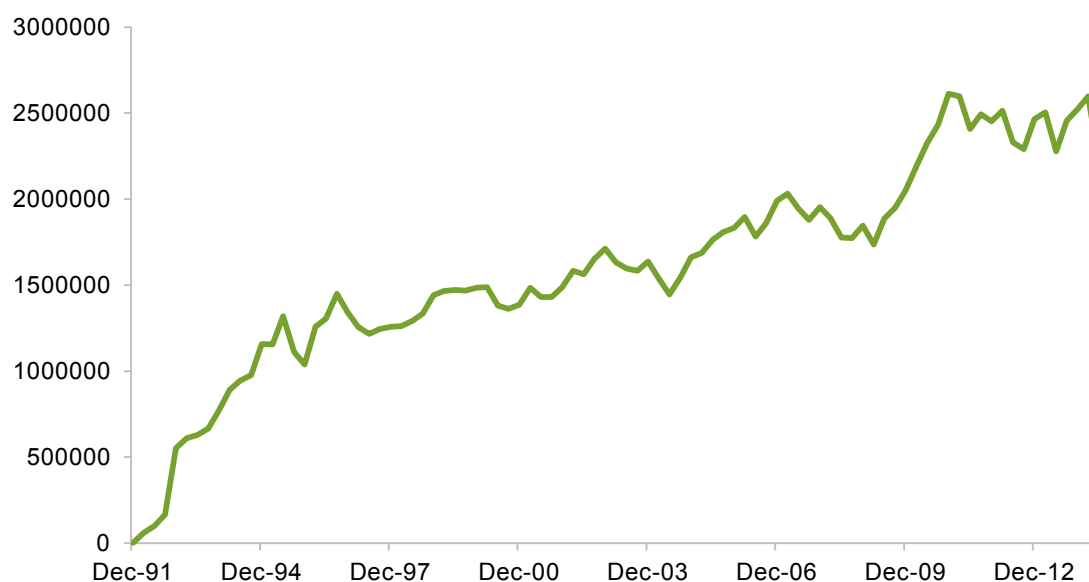
National system agreements, Dec quarter 1991 to June quarter 2014



Source: Department of Employment Trends in Enterprise bargaining data.

Figure E.15 The number of employees covered by agreements

National system agreements, Dec quarter 1991 to June quarter 2014



Source: Department of Employment Trends in Enterprise bargaining data.

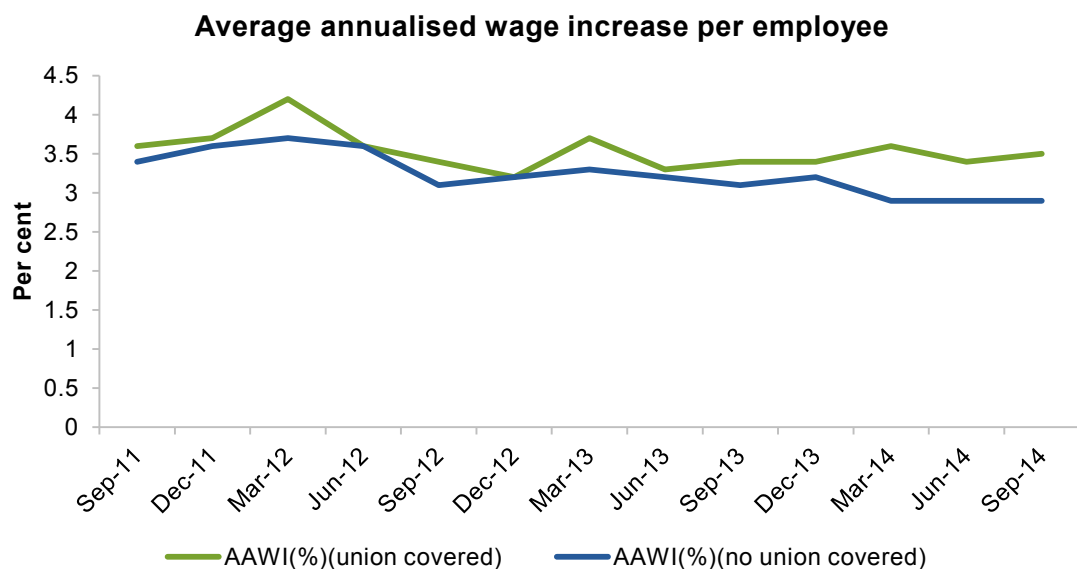
When compared with the number of enterprises, the data also suggests that the propensity for enterprises to form agreements has risen. For example, the number of enterprises employing 200 or more people (the enterprises most likely to have agreements) increased by 20 per cent from June 2003 to June 2014, but agreements increased by 125 per cent over this period.¹⁸⁵

Wages and conditions under enterprise agreements

Wage growth rates also vary by EA type over the last few years. They appear to be slightly higher in union covered agreements compared with other EAs (figure E.16).

Figure E.16 Union covered enterprise agreements have slightly higher wage outcomes

AAWI per employee, for agreements lodged in the nominated quarter



a AAWI = Average Annualised Wage Increase per employee. **b** Agreement and employee estimates are for all federal wage agreements in the period, while estimates of AAWI per employee are based on quantifiable wage agreements.

An agreement is identified as being 'union' where the decision approving the agreement notes in accordance with s201(2) of the FW Act that the agreement covers the union(s) which has/have given notice under s183(1) that it/they want the agreement to cover them. It is recognised that this is a proxy measure as the data measures coverage rather than bargaining presence.

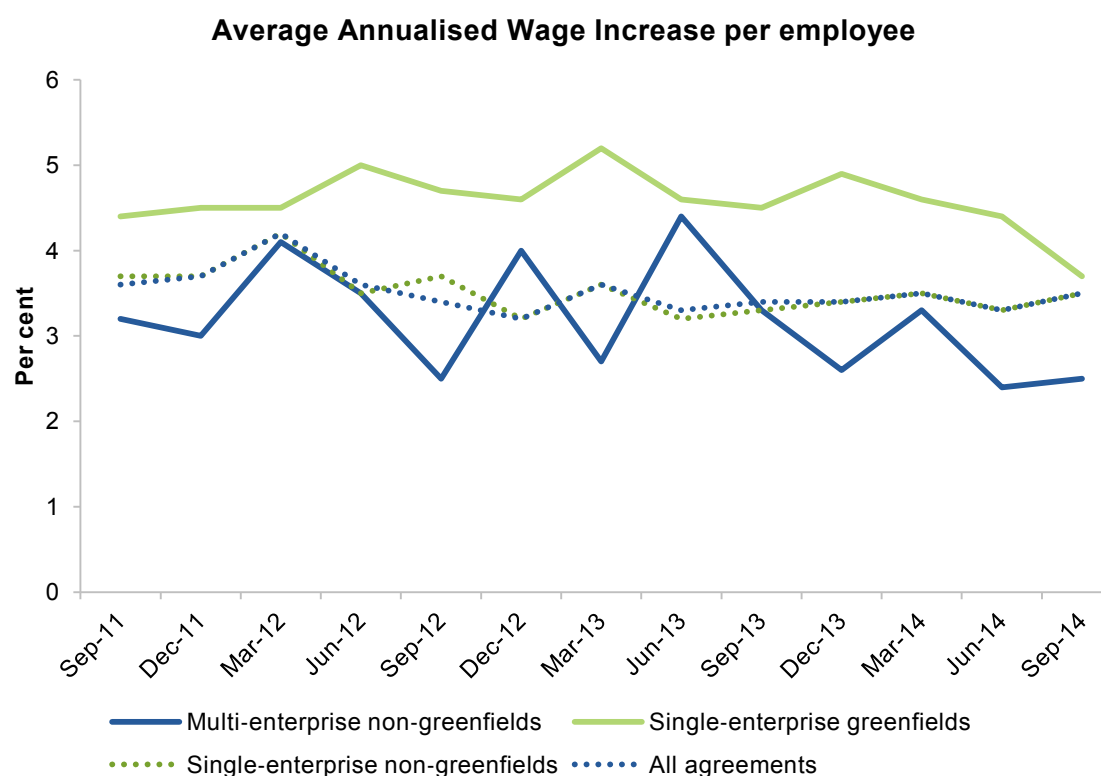
Source: Department of Employment (2015c, p. 32).

¹⁸⁵ Based on ABS 2015, *Counts of Australian Businesses, Including Entries and Exits*, Australia, Cat. No. 8165, released 2 March 2015.

Greenfield agreements also appear to have higher wage growth rates than other EAs (figure E.17). The gap between average annualised wage increases for greenfields agreements and non-greenfields agreements under the FW Act has expanded. The gap was 1.4 per cent for the period October 2011 to June 2014, up from 0.7 per cent (from the period October 2009 to September 2011). Industry level data reveal that this widening gap is primarily due to a growth in the wages growth gap for manufacturing and mining industries in particular, but also for construction and transport.

Figure E.17 Wage increases are slightly higher for greenfields agreements

Average annualised wage increase, per employee



Source: Department of Employment (2015c).

EAs allow parties to vary the terms of awards, subject to a better off overall test. There appears substantial scope to go below the award from some aspects of working arrangements, such as penalty or overtime rates (based on data provided by the Department of Employment from a sample of 216 agreements that broadly represent different industries). For example, of the people who are paid a Sunday penalty rate (and where it was possible to determine whether the provision is below, equal to or above the award), around one quarter are on less than the award, one quarter are above the award, and fifty per cent are exactly at the award (tables E.3 and E.4).

Table E.1 Day worker provisions in enterprise agreements

Overtime and weekend penalty rates

	<i>Below award</i>	<i>Equal to award</i>	<i>Above award</i>	<i>Other/unclear ^a</i>	<i>No relevant provision</i>
	%	%	%	%	%
Weekday overtime for full time	12.5	55.1	19.9	6.9	5.6
Weekday overtime for part time	24.5	38.9	11.6	6.9	18.1
Saturday overtime	16.2	40.7	30.6	7.4	5.6
Sunday overtime	7.9	75.5	3.7	7.4	5.6
Weekend penalty rates — Saturday	6.0	13.9	7.4	7.4	65.3 ^b
Weekend penalty rates — Sunday	5.6	13.9	6.0	6.5	68.1 ^b

^a Those agreements which have information on the relevant provision but for which it is not possible to decide that the provision is below/equal to/above the award, for example, the overtime rates have been absorbed into the agreement's wage rates. ^b This percentage is high mostly because the day work in enterprise agreements is undertaken on a Monday to Friday basis.

Source: Department of Employment data, unpublished.

Table E.2 Shift worker provisions in enterprise agreements

Overtime, weekend penalty rates and shift loadings

	<i>Below award</i>	<i>Equal to award</i>	<i>Above award</i>	<i>Other/unclear ^a</i>	<i>No relevant provision ^b</i>
	%	%	%	%	%
Weekday overtime	11.6	44.9	7.9	6.5	29.2
Saturday overtime	18.1	35.6	12.5	4.6	29.2
Sunday overtime	6.0	58.3	2.3	4.2	29.2
Weekend penalty rates - Saturday	3.7	23.6	15.3	6.0	51.4
Weekend penalty rates - Sunday	3.2	25.0	13.0	6.0	52.8
Shift loadings - overall	9.7	21.8	26.4	13.0	29.2
Day Shift Loading	4.6	6.9	18.5	40.7	29.2
Afternoon Shift Loading	14.8	27.3	20.8	7.9	29.2
Night Shift Loading	8.3	30.6	27.3	4.6	29.2
Continuous Night Shift Loading	9.7	15.3	16.7	29.2	29.2

^a Those agreements which have information on the relevant provision but for which it is not possible to decide that the provision is below/equal to/above the award, for example, the overtime rates have been absorbed into the agreement's wage rates. ^b Depends on the provision. For shift work it is mostly because the agreement does not cover shift workers. For weekend penalty rates it is mostly because the day work is undertaken on a Monday to Friday basis.

Source: Department of Employment data, unpublished.

F Penalty rates

This appendix provides supporting material on penalty rates — mainly of a statistical nature — for chapters 10 to 15.

It is structured as follows:

- Section F.1 explains some of the terminology used for describing weekend penalty rates.
- Section F.2 examines the prevalence of weekend working (including differences in the importance of Saturday versus Sunday employment) across the economy.
- During standard non-weekend hours, casual employees are typically given a loading (typically 25 per cent) on the wage rates applying to permanent employees. However, depending on the award, there is considerable variability in the treatment of loadings for casual workers for weekend work. Section F.3 examines this issue, and mathematically derives an approach that provides neutral incentives for employing casuals over permanent employees on weekends (with the policy implications discussed in chapter 15).

F.1 Some terminology

While notionally simple to understand, the terminology describing weekend penalty rates is sometimes confusing. Different parties express penalty rates in different ways. Penalty rates are referred to variously as:

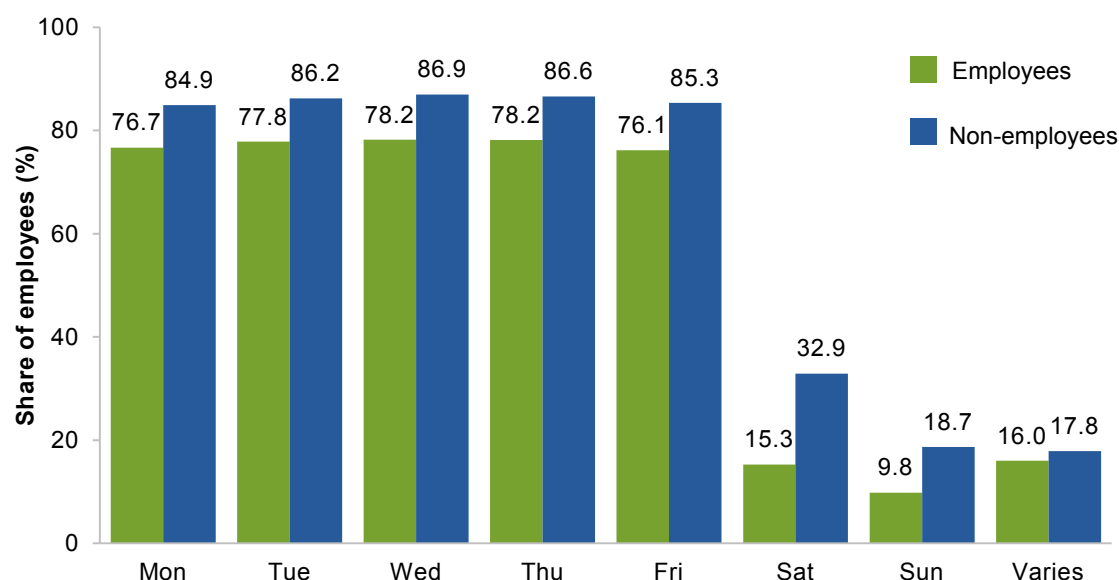
- (a) a multiple of hours worked. So ‘time and a half’ means that an employee working one hour on a weekend would be paid as if they had worked 1.5 hours at the base wage rate (for example, as in the Storage Services and Wholesale Award 2010, p. 25)
- (b) a percentage loading on the base wage. For example, time and a half would mean a loading of 50 per cent (as in the Fast Food Industry Award 2010, p. 23). The Fair Work Ombudsman as referred to penalty loadings as penalty rates (FWO 2015p)
- (c) the percentage of the base hourly rate (or an index relative to the normal rate times 100). So time and a half would be referred to as a penalty rate of 150 per cent (as in the Funerals Award 2010, p. 25).

Since (b) and (c) can both be referred to as penalty rates, it is important in any analysis to use the same nomenclature. Because of its more common usage, the Productivity Commission uses (c). In this case, with a base wage of \$20 per hour and a penalty rate of 150 per cent, the base wage would be \$30 per hour.

F.2 Prevalence of employment on weekends: the current facts

While Monday to Friday still remain the predominant working days for Australian employees (figure F.1),¹⁸⁶ around three million, or one third of, employees work on the weekend, mostly on just one of these days, in a given week. A negligible share of employees worked only on weekends (table F.1). Of employees who work outside the conventional Monday to Friday routine, Saturday is the most prevalent working day. Only around one in ten people worked on a Sunday, mostly in combination with some weekdays. These estimates relate to a given week, but over longer periods of time, a much greater share of people work on weekends (box F.1).

Figure F.1 **Patterns of work by the day**
Share of the employed working on given days (%)



Source: ABS 2014, *Forms of Employment, Australia, November 2013*, Cat. No. 6359.0, released 7 May.

¹⁸⁶ While not as rigorous as the ABS Time Use survey, other more recent survey data suggest similar prevalence rates of weekend work (Skinner and Pocock 2014, p. 28).

Table F.1 Who works on weekends?
November 2013^a

<i>Period working</i>	<i>Employees</i>	<i>Independent contractors</i>	<i>Other business operators</i>
	<i>Share of group in each working time arrangement</i>		
	%	%	%
Worked Monday to Friday only	54.8	44.5	35.3
Worked between 1 and 4 days weekdays only	13.4	11.6	9.4
People who only worked weekends	1.6	0.4	0.7
People who worked 5 weekdays and 1-2 weekend days	8.3	22.6	35.2
People who worked 4 or less weekdays and 1-2 weekend days	21.9	20.9	19.4
Total	100.0	100.0	100.0
Worked Saturday	15.3	25.3	40.3
Worked Sundays	9.8	12.7	24.4

^a The data relate to the nature of working in a reference week.

Source: Unpublished data provided by the ABS 2014, *Forms of Employment, Australia, November 2013*, Cat. No. 6359.0, released 7 May 2014.

Box F.1 How many people *really* work on weekends?

The ABS data about people's weekend working arrangements are based on their working patterns during a particular reference week. A person answering that they worked on a weekend may have only done so for that week, and for no other times of the year, while someone who usually works on a weekend may not have done so in the reference week. Accordingly, the ABS estimates of working arrangements provide a point prevalence estimate. This is likely to significantly understate the prevalence of weekend working over a longer period, such as over the last few months or year.

Some surveys do not use the ABS 'reference week' approach, and will accordingly provide a different perspective on the prevalence of weekend work. For example, the Longitudinal Study of Australian Children asks employed parents of young children about their *usual* working patterns. Based on the 2004 wave of LSAC, around 24 per cent of fathers of children aged 4-5 years worked every week on weekends (20 per cent of mothers), but many worked on weekends more irregularly. Only 28 per cent of fathers and 46 per cent of mothers never worked on weekends (Baxter 2009, p. 16). This is a special group of employees, but if anything, it would be expected that they would tend to have a lower inherent likelihood of working on weekends. In that case, weekend working prevalence rates may be higher for the average employee.

The share of total hours worked outside standard times is also much lower than the share of people working outside non-standard times (Venn 2003). This indicates that average hours of weekend employees are less than the average for employees generally. Given that many employees working on weekends rely on income from work on weekdays, any percentage

change in penalty rates does not have an equivalent proportional effect on people's incomes.

A significant number of people who work on weekends are not relevant to a discussion of penalty rates for weekend day work because they are salaried, work on weekends as part of rotating or other shift arrangements, are independent contractors or business operators. These individuals are not eligible for penalty rates.

- In 2013, around one million business operators¹⁸⁷ and independent contractors worked on weekends (and like employees, typically on other days of the week too). These do not receive penalty rates for weekend work.
- In 2012, around 16 per cent of all employees worked on rotating, regular or irregular shifts.¹⁸⁸ While dated, other information suggests that around 70 per cent of people on such shifts worked them partly on weekends.¹⁸⁹ Accordingly, the relevant share of employees covered by standard weekend day penalty rates is even lower than suggested by table F.1 (and subject to statistical uncertainties suggests that the share of employees who are eligible to weekend penalty rates might be around 20 per cent).¹⁹⁰

New Zealand as a comparison

New Zealand industrial laws no longer prescribe penalty rates for weekend work, although collective enterprise agreements and some individual contracts include them. However, these are not very common (McLaughlin and Rasmussen 1998). The Productivity Commission has not recommended emulation of the New Zealand approach, but the differences between the countries' labour markets may provide some clues about the effects of different pay arrangements. Some data — presented in chapter 14 — suggest that Sunday restaurant opening is more frequent in New Zealand than Australia, although that information has limitations (as discussed in the chapter).

There is also some comparative evidence concerning weekend work by the employed. In New Zealand, 50.6 per cent of the workforce (including the self-employed and business owners) worked on weekends, while the comparative figure for Australia who 'usually' worked on weekends was 34.2 per cent. The two figures are affected by different survey

¹⁸⁷ These are owner-managers of incorporated and unincorporated enterprises.

¹⁸⁸ ABS 2013, *Working Time Arrangements, Australia, November 2012*, Cat. No. 6342.0, released 3 May.

¹⁸⁹ ABS 2010, *Shift Workers, Australian Labour Market Statistics*, October 2010, Cat. No. 6105.0.

¹⁹⁰ 31.8 per cent of employees worked at least partly on a weekend, which would include shift workers who were employed on weekends. The share of employees who are shift workers employed on weekends is around 0.7 x 16 per cent, which is 11.2 per cent. Accordingly, a rough estimate of the number of employees working weekends excluding shift workers is around 20 per cent of employees.

methodologies, with the gap between them likely to be smaller if a ‘like with like’ comparison was possible.¹⁹¹

Trends

While variations in survey methodologies make it difficult to determine precise trends over long periods, there is good evidence that weekend work has become more important. Over the last two decades, the weekend employment share across the economy appears to have grown by around 5 percentage points — a significant shift in working patterns (figure F.2). It appears that part-time employment has been an important feature of this increase, since other information on how Australians spend their time shows no change in the relative significance of *working hours* supplied on weekends. Between 1992 and 2006, the share of total weekly hours worked on weekdays was respectively for females, 90.5 and 89.9 per cent, and for males 89.1 per cent and 88.7 per cent.¹⁹²

These data tend to miss some important trends operating at the industry level. Although there are limited ABS data at the industry level on working time arrangements, chapter 11 indicates that real retail sales have increased substantially over the long run. Other evidence also suggests that weekend trading in the retail sector has increased in importance (PC 2011a).

There has been progressive liberalisation of Sunday trading. Victoria completely deregulated in 1996, as did the Australian Capital Territory in 1997, but other jurisdictions have been slower to make changes. However, the (sometimes partial) deregulation that occurred in South Australia (2003), Queensland (2004), New South Wales (2008) and Western Australia (2012) must have increased the number of employees working in the Australian retail sector on Sundays. This observation is supported by the difference between spending patterns in jurisdictions with no trading hour restrictions and ones that had preserved such restrictions (chapter 14).

Trends of weekend work for different employment types

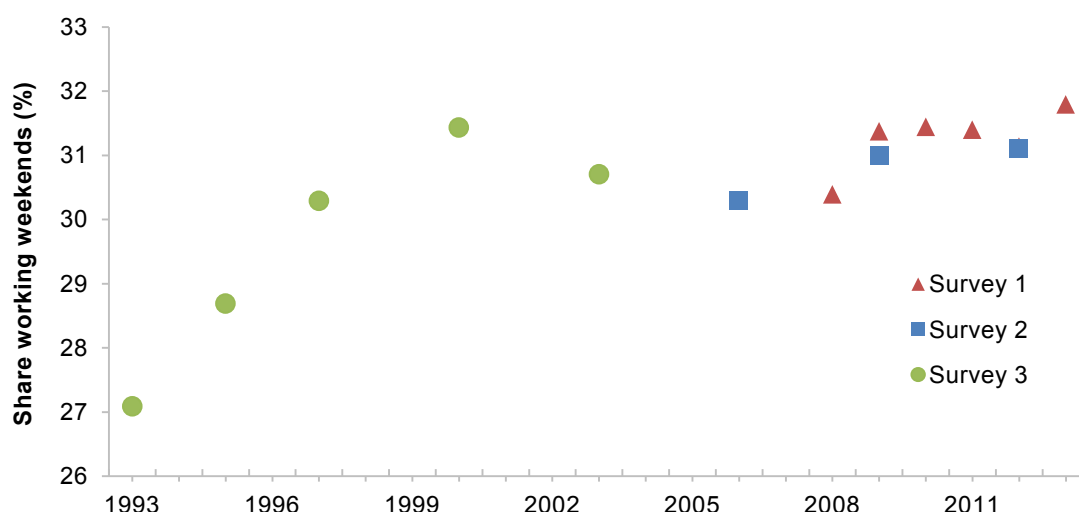
The working patterns of various employment types also provide a different perspective on the determinants of working on weekends. Contractors and business operators do not receive penalty rates and are free to supply their labour at any time, and so penalty rates cannot influence their pattern of working. The odds of working on weekends for other

¹⁹¹ Data are from the ABS 2014, *Forms of Employment, Australia*, November 2013, and Statistics New Zealand, 2013, *Survey of Working Life*: December 2012 quarter. The Australia survey is based on data collected during a reference week, but relates to usual working patterns, and so can relate to a longer period. The New Zealand data relate to a month’s experience of working arrangements. Accordingly, a New Zealander who worked just once in a month on a weekend, but does not usually follow this working pattern will be recorded as a weekend worker, while an Australian would not be.

¹⁹² Calculated from ABS 2008, *How Australians Use Their Time, 2006*, Cat. No. 4153.0, table 2.

business operators is 2.7 times higher than employees, while the odds of weekend work for independent contractors are 1.7 times higher than employees (table F.1).

Figure F.2 Patterns of working weekends over time
1993 to 2013, employees only^a



^a While substantially overlapping, the surveys employ different definitions for employees and jobs, which should be noted. Survey 1 is the ABS Forms of Employment survey and only covers people employed as wage and salary earners under a contract of service (an employment contract). The data relate to people categorised as such employees in their main job, but includes periods of work in all their jobs if they are multiple jobholders. Survey 2 is the Working Time Arrangements survey (WTA), and includes owner managers of incorporated enterprises as 'employees'. As for survey 1, the data cover people working in single and multiple jobs. Survey 3 is the Working Arrangements survey, the predecessor to the WTA, and uses the same definition of employees, but only relates to periods of work in the employee's main job.

Sources: ABS *Forms of Employment* (Cat. No. 6359) and *Working (Time) Arrangements*, Cat. No. 6342.

In part, this will reflect the capacity for contractors and business operators to work flexibly and to increase their income by working more hours, but it may also reflect that penalty rates discourage the engagement of employees on weekends. Several participants in this inquiry considered that business operators had poor life balance because they could not afford to employ other workers on weekends). Since 2008, the share of independent contractors and business operators working on weekends has generally increased slightly, although Sunday working actually fell for independent contractors (figure F.3).

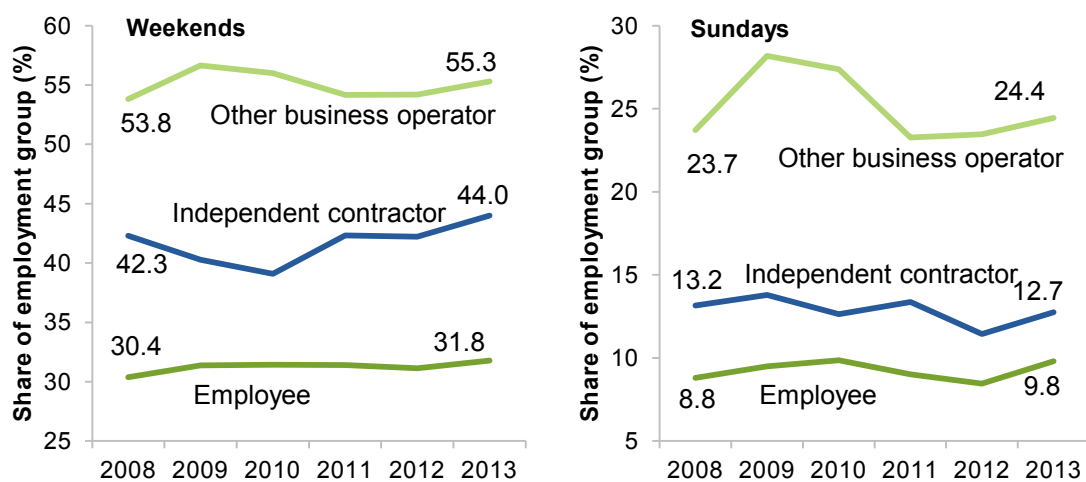
Another, more stark trend is the relative growth rates in the numbers of people working on Saturdays versus Sundays (figure F.4). This reveals that there has been a strong growth in working on Sundays by employees in particular. Indeed, the growth in employees working on Sundays was around double that of employees working on Saturdays or more generally. As in the case of consumer demand, there has been a striking shift to Sunday work.

F.3 Penalty rates for casual employees

There are more complex (non-semantic) issues about the interaction of penalty rates and casual loadings, which can have significant effects on the earnings of casual workers on weekends and on the incentives of employers when making choices about who to roster at different times.

Figure F.3 **Contributions to weekend work by employment type**

Share of weekend work, 2008–2013^a



^a In some cases, people said that their days of work varied, in which case they could not be identified as usually working on Sundays, and are therefore excluded from the calculations for Sundays.

Source: ABS, *Forms of Employment*, Cat. No. 6359.0.

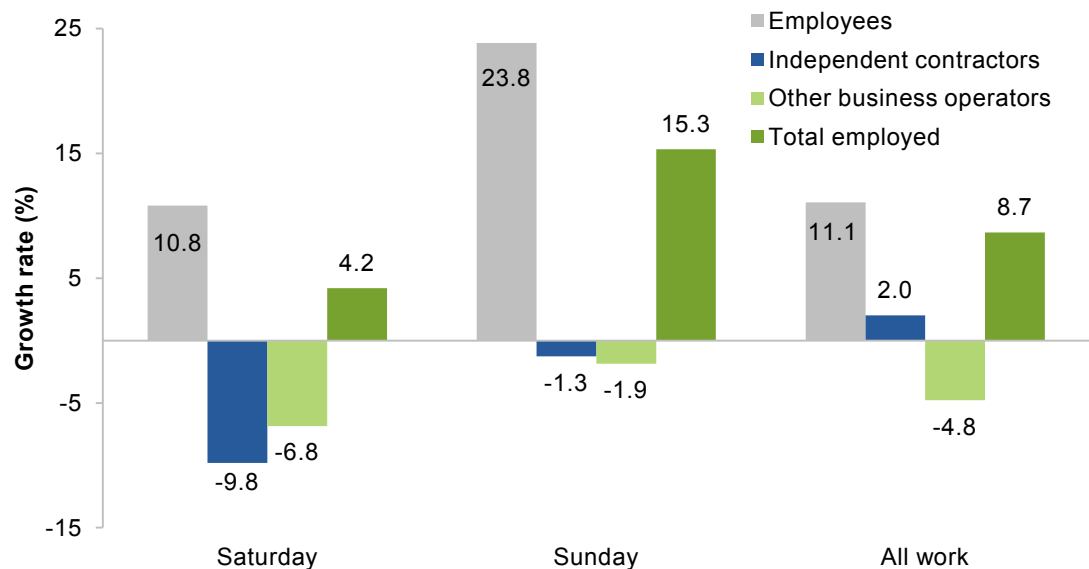
Casual loadings for standard hours of work vary between awards, and have also changed considerably over time. Historically, there has been no coherent framework for casual loadings. At times, they have simply been a benefit paid in some recognition of employment uncertainty (Graham, sub. 117, p. 4; Campbell and Brosnan 2005). The factors that might reasonably be included in casual loadings have depended on the industrial tribunal considering the matter (including industrial relations tribunals). The most common casual loading is now 25 per cent.

Three methods for calculating penalty rates for casuals

There are three basic models for calculating penalty rates for casuals, and these involve the different treatment of the casual loading. The different methods can lead to substantial variations in the final weekend wage rate, and diverging relative employment costs for casuals compared with permanent employees.

Figure F.4 **Relative growth in Saturday and Sunday work**

Percentage change in numbers employed (2008 to 2013)^a



^a In some cases, people said that their days of work varied, in which case they could not be identified as usually working on Sundays, and are therefore excluded from the calculations for Sundays.

Source: ABS, *Forms of Employment*, Cat. No. 6359.0.

The default approach in awards is to calculate the penalty wage rate as:

$$\text{Penalty wage} = \text{Base wage} \times (\text{Casual loading} + \text{Penalty rate}) / 100$$

where the penalty rate is based on the definition given in (c) in section F.1, while the casual loading is expressed as the percentage increase in the base wage. Accordingly, with a penalty rate of 150 per cent, a casual loading of 25 per cent and a base wage of \$20 per hour, the penalty wage would be \$35 per hour.

Other awards specify their casual loading as ‘all purpose’, in which case the penalty rate applies to the casual rate, not to the base rate (for example, as for a casual mining industry services employee covered by the Mining Industry Award 2010). In this case, the penalty wage is:

$$\text{Penalty wage} = \text{Base wage} \times (1 + \text{Casual loading} / 100) \times \text{Penalty rate} / 100$$

Accordingly, with the same base and premium rates as in the previous example, the penalty wage would be \$37.50 per hour, which reflects the compounding effects of the different rates. To obtain the same result as in method 1, the penalty rate would have to have been 162.5 per cent.

Finally, in some awards, the weekend penalty rate (on the base rate) is the same for casual and permanent workers. For example, in the Hair and Beauty Industry Award 2010, the

penalty rate is 133 per cent of the basic non-casual wage for Saturdays regardless of whether the employee is a casual or not. A casual employee usually receiving a 25 per cent loading on weekdays would receive 33 per cent more than the non-casual basic rate. Were the default approach used, the implied penalty rate would be 8 per cent.

The three methods can have important impacts. For example, with a base wage of \$20, a casual loading of 25 per cent and a Saturday penalty rate of 50 per cent, then depending on the method, the Saturday rate is one of \$30, \$35 or \$37.50 per hour. Therefore, comparisons across awards that rely only on the various standalone rates can miss important differences in wage outcomes. These have potentially significant effects on the choices of employees and employers (and on the equitable treatment of casuals). For example, there are incentives in some industries — such as hairdressing — to employ casual employees on weekends to reduce wage costs.

This raises the question of whether one of the three methods is preferred to the others, a matter also posed by Graham (sub. 117). He suggests three possible objectives in determining the appropriate casual rate:

- equitable treatment with permanent employees
- discouragement of casualisation (suggesting that the ultimate cost of employing a casual to an employer should be higher than that of a permanent employee)
- a method that is easily managed by employers.

The first could also be restated as the rate that makes an employer indifferent between hiring a casual and a permanent employee. In general, if an employer was only obliged to pay the same hourly rate for a casual employee with the same skill classification as a permanent employee, then their total labour costs would be lower because:

- they would not be obliged to pay wages for any recreational or personal leave (and nor would any leave loading be applied where an award included that as a provision for permanent employees)
- redundancy payments would not be paid if the employee was dismissed
- the costs associated with termination notice would be avoided
- there would be greater freedom to change rostering
- it is easier to terminate their employment because more tests under the *Fair Work Act 2009* (Cth) must be met (for example, in relation to tenure and the regularity of employment).¹⁹³

¹⁹³ Graham notes that casuals forgo training and are less likely to be promoted. While casuals might prefer to have more training or better career prospects, employers are also aware that the rate of return on training for a person who has a higher likelihood of leaving is lower than for most permanent employees. Accordingly, the lower costs of training is less clearly characterised as saved expenditure.

The main contributors to casual loadings are forgone recreational and personal leave entitlements.

What is the cost-neutral casual penalty rate?

If the underlying objective of regulated casual loadings and penalty rates is to avoid distortions in the market for casuals and permanent employees or (equivalently) to serve the ‘equal pay for equal work’ principle (the equity goal proposed by Graham in sub. 117), then casuals should receive the cash *equivalent* to benefits for permanent employees. *This is subject to the proviso that their patterns of work and skill levels are identical.*

To make the calculations easier, but still illustrating the essential points, suppose that the only penalty rate was for weekend work. The total cost of a permanent employee for a given number of weekend and weekday hours can be calculated as:

$$C_p = h_1 w_1 (1 + \phi / 100 + \lambda / 100) + h_2 w_1 (\beta + \phi + \lambda) / 100$$

where:

- h_1 is hours worked during weekdays, while h_2 is hours during weekends
- w_1 is the standard hourly wage
- $\phi w_1 / 100$ is the implicit value of the benefits earned by permanent employees and not paid to casuals (such as standard paid personal and recreational leave, but excluding the value of any leave loadings)
- $\lambda w_1 / 100$ is the value of any leave loading for leave entitlements. The rationale for leave loadings is that were a person at work, for certain industries, they would have earned penalty rates on some of the days they worked. The (typical) 17.5 per cent loading added to the annual leave is intended to compensate for this. It spreads the value of penalty rates on weekends across all annual leave entitlements regardless of the times of the week that gave rise to those entitlements. A conceptually more sound model would apply a (higher) leave loading for hours on weekends, and no such loading for entitlements accruing on weekdays. However, the latter approach would be more complex, and so an averaging formula is used where weekend (or in other circumstances, shift) work is a customary feature of permanent employees’ working patterns. In any case, leave loadings are now often seen as simply another entitlement, regardless of the actual weekend/shift patterns of employees in an enterprise (Kelly, Plowman and Watson 2002)
- β is the percentage penalty rate (based on the definition given in (c) in section F.1). For example, double time would be defined as a penalty rate of 200 per cent.

For casuals, the wage cost is:

$$C_c = h_1 w_1 (1 + \eta / 100) + h_2 w_1 \varepsilon / 100$$

where ε is the percentage casual penalty rate and η is the percentage casual loading. Typically, η is set at 25 per cent, but it could be anything that the regulator settled on, and will depend on the basis on which it determines the loading. Historically, this was a matter of substantial contention (Queensland Industrial Relations Commission 2001).

If the efficient and equitable outcome is that $C_c = C_p$ then this implies that the penalty rate that achieves that is:

$$\varepsilon = h_1 / h_2 (\lambda + \phi - \eta) + (\lambda + \phi + \beta)$$

If the casual loading is equivalent to $(\lambda + \phi)$, then the casual penalty rate is:

$$\varepsilon = (\text{casual rating} + \text{penalty rate})$$

which gives a casual wage on a weekend as *Penalty wage* = *Base wage* \times (*Casual loading* + *Penalty rate*) / 100, which is the default method described earlier. Graham (trans., p. 878) recognises that some awards in HERRC fall short of the penalty rate that would achieve neutrality using this approach, but is unconvinced that the above formulation is the right one. However, neither of the other two methods would achieve parity of the effective wages of casuals versus permanent employees.

The validity of the result above depends on calculating the casual loading consistent with the forgone benefits of permanent work. This may not always occur (a point made by Graham, sub. 117 and Shomos, Turner and Will 2013, p. 13). On the one hand, since many permanent employees do not use all of their personal leave entitlements (and these cannot be reimbursed on employment termination), the imputed value to casual employees of the permanent employees' entitlement to personal leave should use its actuarial value, not the maximum entitlement. On the other hand, the casual loading might not adequately reflect the leave loading available to permanent employees, thereby favouring the employment of casuals. However, in this respect, accounting for leave loadings is generally now recognised as an aspect in calculating casual loadings (AIRC 2003).

The implication of this analysis is that unless there are flaws in the calculation of casual loadings or that casual employees at a given classification level are less skilled than their permanent counterparts, the default method for calculating casual penalty rates is the optimal approach. This means the standard casual loading should be added to the penalty rate applying to a permanent employee, which does not occur for all awards in the HERRC industries.

G Productivity and Australia's workplace relations framework

Over the last 25 years, the workplace relations (WR) framework has undergone substantial change. Much of this change has affected aspects of the WR framework that have been theoretically and empirically linked to productivity, such as employment protection and the locus of wage determination. However, the aggregate productivity effects of recent reforms have been subject to debate. Diverging views primarily result from the paucity of data and difficulty of disentangling the effect of WR reform from other potential productivity drivers.

This appendix outlines recent trends in productivity and its potential drivers (section G.1). It discusses theoretical links between Australia's recent WR frameworks and productivity, and examines the existing empirical evidence for such a relationship (section G.2). The appendix concludes that, while there are grounds to suggest that recent WR reforms have affected productivity, there is little evidence of such an effect (section G.3).

G.1 Recent productivity trends and determinants

Productivity measures the efficiency of production. More specifically, it enumerates the ratio of inputs to outputs in economic activity (box G.1). Key measures include labour, capital and multifactor productivity. Research into the relationship between productivity and the WR framework has focused on labour and multifactor productivity.

Australia's productivity in recent years has exhibited two major developments. First, labour and multifactor productivity increased markedly from around 1991-92 to 2003-04. During this time, they grew at 2.5 and 1.6 per cent respectively, while capital productivity remained steady. In the following years, labour productivity has grown at a reduced rate of 1.8 per cent, while MFP has remained flat, and capital productivity has declined (figure G.1).

Box G.1 What is productivity?

Productivity (the ratio of output produced to inputs used) measures how efficiently inputs, such as capital and labour, are used to produce outputs in the economy. It is sometimes referred to as productive efficiency.

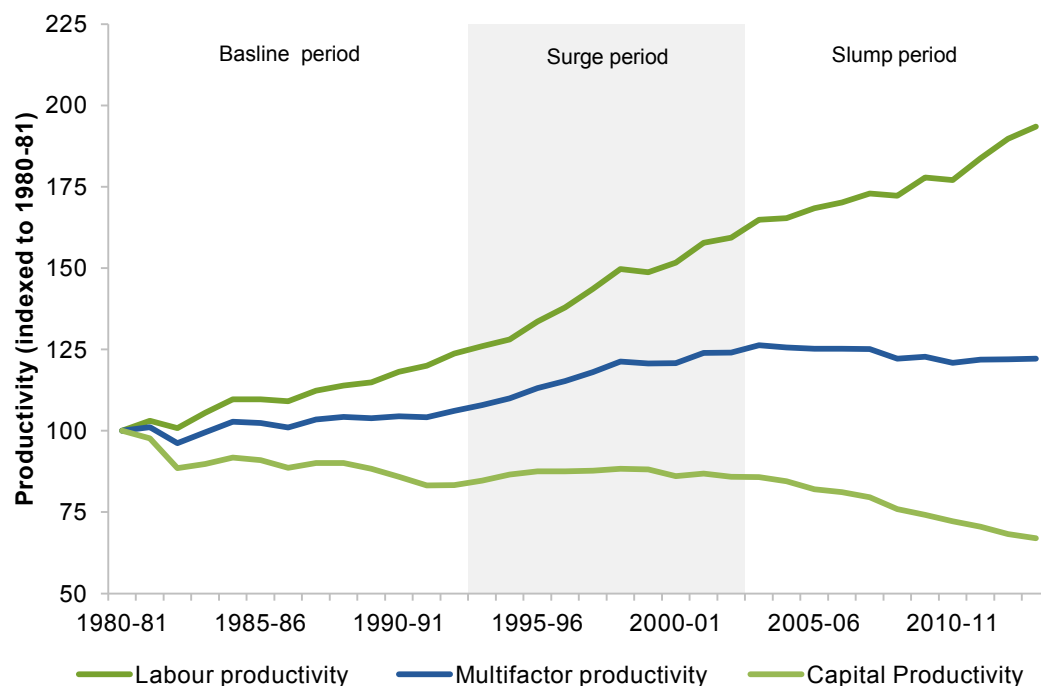
Productivity increases if output grows faster than inputs (or shrinks more slowly). Conventionally, growth of productivity is measured as the growth of output over and above the growth of inputs.

The ABS aggregate multifactor productivity (value adding output produced per unit of combined inputs of labour and capital) is the measure that comes closest to the underlying concept of productivity — efficiency of producers in producing output using both labour and capital. Growth of multifactor productivity is the growth of output over and above the growth of labour and capital inputs.

Labour productivity measures output produced per unit of labour input. Growth of labour productivity is the growth of output over and above the growth of labour input — it captures the value added from growth in capital (including more advanced technologies intrinsic in the new investment) that supports increased output without the increased use of labour (referred to as capital deepening) and multifactor productivity.

Source: Productivity Commission (2015e).

Figure G.1 Recent trends in productivity
1980-81 to 2013-14



Source: ABS 2015, *Estimates of Industry Multifactor Productivity*, Cat No. 5260.0.55.00.

The determinants of these broad patterns have been a key concern in productivity research. Explanations of the productivity ‘surge’ have largely centred on:

- *Micro-economic reform.* Beginning in the 1980s, Australian governments introduced wide-ranging reforms that increased competition and exposure of Australia to international markets. For example, the privatisation of energy, water, communications and transport services promoted commercial incentives. Similarly, the reduction of trade barriers increased competition (PC 1999)
- *Technological change.* The adoption of new technology — in particular, information communications technology (ICT) — increased significantly throughout the 1990s. Australia was an early adopter of ICT and one of the first countries to experience strong productivity growth in the 1990s. Moreover, industries with higher rates of ICT adoption experienced higher rates of productivity growth (Banks 2002)
- *Post-recession growth.* Productivity growth generally increases after a recession due to the reengagement of underutilised capital and labour. During downturns, firms often reduce output without an equivalent reduction in capital and labour. While productivity generally declines in the short-term, strong growth is typically observed as output increases. While this is a potential contributor to Australia’s strong productivity growth in the early 1990s, the duration of the surge suggests that capacity utilisation was not the primary driver (Connolly and Gustafsson 2013).

On the other hand, the weaker growth in productivity following 2003-04 has been linked to a range of factors, including:

- *Abated effects of the 1990s reforms.* Some have argued that microeconomic reforms of the 1990s had a one-off effect on productivity, and, absent further major reform, as the effects of earlier reforms have diminished, productivity growth has declined (Connolly and Gustafsson 2013)
- *Increased terms of trade.* The effects of an increase in the terms of trade were concentrated in mining. To exploit the higher export prices, mining firms sought to expand operations, with initial capital investment not matched by additional output. Moreover, attempts to increase output were also associated with mining of lower value deposits. More generally, throughout the economy, firms faced less pressure to cut costs, increasing the ratio of inputs to outputs. (Parham 2012)
- *Infrastructure bottlenecks.* Some have pointed to infrastructure bottlenecks in the mining and transport industries, driven by growth in output, as a further driver of poor recent productivity performance. Australia experienced relatively low investment in infrastructure during the 1990s, with the ratio of infrastructure capital stock to GDP declining in the early 2000s (Connolly and Gustafsson 2013).

Further, others have doubted the materiality of the 1990s productivity surge. For example, Quiggin (2001b) has attributed the increase in measured productivity to greater work intensity, while Hancock (2005) challenged the notion that the observations over the period represent a statistically significant increase in growth.

In broad reviews of Australia's productivity, there has been little consideration given to WR reforms as a contributor to recent productivity trends, despite theoretical grounds for such a relationship. This may partly reflect the likely impact of WR reform — as compared with other drivers — and also a lack of empirical evidence for such an effect (see, for example, Parham 2013a)

G.2 WR and productivity

Several aspects of WR have been linked to productivity. Chapter 33 outlines how employment protection, bargaining regimes, minimum conditions, and the ease of making agreements can affect aggregate outcomes such as productivity. These aspects of WR regulation have been central to changes in Australia's framework over the last 25 years (box G.2).

Is there evidence that WR reforms have affected productivity?

Identifying the effects of specific WR reforms is challenging for a number of reasons. First, the effect of the WR system on productivity is not easily separated from other causes because a wide range of other factors contribute to outcomes. Where such changes coincide with reform of the WR framework, empirical identification of a causal relationship is difficult. Additionally, the extent of lags between WR reform and potential productivity effects further complicates analysis. WR reforms are often implemented in stages, and economic effects may lag policy implementation.

For the reasons outlined above, any comparison of trends in productivity and their relationship with the WR framework should be interpreted with caution. Given the wide array of factors that affect productivity, and the complicated relationship between productivity and WR reform, rudimentary comparisons may be misleading. Nonetheless, such comparisons may inform initial inquiry into WR effects.

Productivity and the *Industrial Relations Reform Act 1993* (Cth)

The introduction of the *Industrial Relations Reform Act 1993* (Cth) (IRR Act) coincided with increased productivity growth (figure G.2). Indeed, the IRR Act was implemented as Australia experienced its productivity surge. Some have investigated the possibility that the IRR Act increased productivity, particularly through its introduction of enterprise bargaining.

Box G.2 **An outline of recent developments in Australia's WR framework**

Industrial Relations Act 1988 (Cth)

- *Bargaining:* Between 1988 and 1993 a number of measures were introduced to shift the locus of wage determination to the enterprise level. Most significantly, 1993 amendments limited the power of the AIRC to reject agreements and a 'no-disadvantage test' was introduced.
- *Industrial action:* The IR Act post-1993 introduced a limited legal 'right to strike' during the bargaining period.
- *Unfair dismissal:* Federal unfair dismissal protections, previously contained primarily in awards, were introduced to statute. Employees exempt from these provisions included those with less than six months service, earning a high income or on fixed term contracts.

The Workplace Relations Act 1996 (Cth)

- *Bargaining:* The *Workplace Relations Act 1996* further shifted the locus of bargaining to the individual level with the introduction of statutory individual agreements named Australian Workplace Agreements (AWAs). In terms of enterprise agreements, award coverage was no longer required for agreement making, and a new test required that agreements must reduce 'overall' terms and conditions to be rejected. Employers were no longer required to inform relevant unions of bargaining.
- *Industrial action:* The WR Act created additional grounds on which bargaining periods and industrial action could be suspended or terminated.
- *Unfair dismissal:* Further restrictions on unfair dismissal were introduced, with casual employee exclusions extended to those with less than 12 months service.

The Workplace Relations Amendment (Work Choices) Act 2005 (Cth)

- *Minimum conditions:* Work Choices shifted a number of minimum conditions from awards to the Australia Fair Pay and Conditions Standards (AFPCS). These conditions included aspects of pay, leave, and hours of work.
- *Bargaining:* Work Choices removed the no-disadvantage test, with agreements tested only against the AFPCS. However, in 2007, a fairness test that assessed agreement conditions against the relevant award was introduced.
- *Unfair dismissal:* Unfair dismissal protections were removed from federal system employees that worked in businesses with 100 or fewer employees.

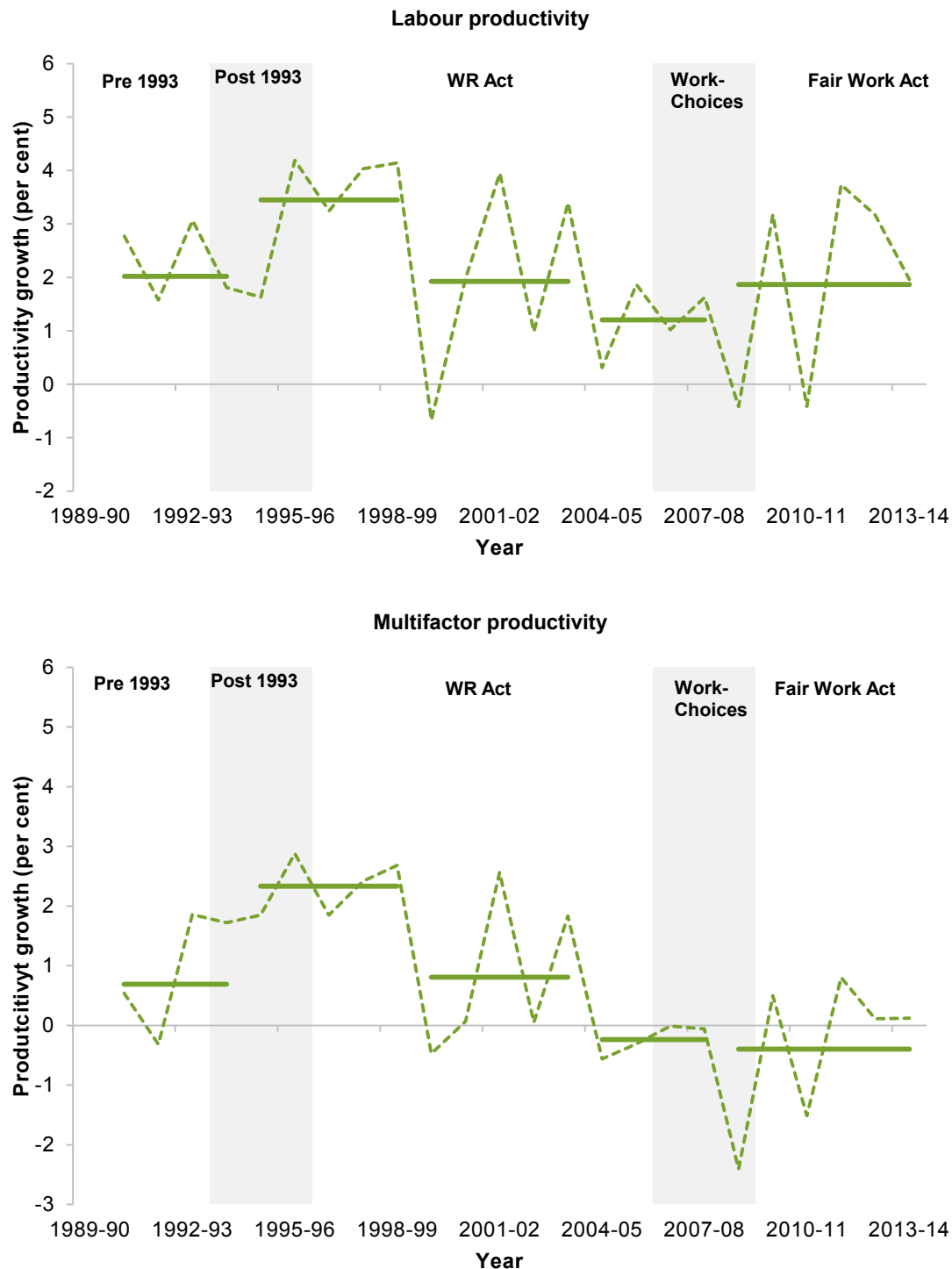
Fair Work Act 2009 (Cth)

- *Minimum conditions:* The FW Act introduced the NES, which inherited many conditions from the AFPCS and added others relating to leave, termination and redundancy.
- *Safety net:* 3700 state and federal awards were simplified and rationalised to 122 modern awards.
- *Unfair dismissal:* Unfair dismissal protections were restored for employees in business with 100 or fewer employees

Source: McCallum et al. (2012).

Figure G.2 Productivity and WR regimes

1989-90 to 2013-14



Source: ABS 2015, *Estimates of Industry Multifactor Productivity*, Cat No. 5260.0.55.002.

Examining productivity at the industry level, Loundes, Tseng and Wooden (2003) have noted that productivity growth was most pronounced in labour intensive industries, such as wholesale, retail trade and construction, while Banks (2002) suggests that the move to enterprise bargaining may have facilitated the incorporation of ICT into production.

On the other hand, Hancock (2011) highlights the lack of productivity growth in mining (an industry expected to benefit from improved industrial relations) over the same period. Moreover, he notes that the growth of productivity does not align with the introduction of enterprise bargaining for mining and electricity, gas and water.

Overall, industry level examinations have provided little conclusive evidence of a link between the IRR Act and productivity.

A number of firm level studies have examined the productivity effects of enterprise bargaining using the Australian Workplace and Industrial Relations Survey (AWIRS) and the ABS Business Longitudinal Survey (BLS) (box G.3).

Box G.3 Firm levels sources of data on productivity

The Australian Workplace and Industrial Relations Survey (AWIRS)

The 1995 AWIRS contains WR related information on a wide range of firms and employee characteristics. It includes firms that employ at least 5 employees. In total, 1075 workplaces with between 5 and 19, and 2001 workplaces with 20 or more employees were surveyed. While the survey contains a rich set information on many aspects of WR, information on productivity is limited to the subjected evaluations of employers.

The ABS Business Longitudinal Survey (BLS)

The ABS Business Longitudinal Survey (BLS) followed firms from 1994-95 to 1997-98. It contains unit record data on Australian businesses, recording information on a wide range of their attributes, such as industry, age, union membership, employment arrangements and financial outcomes. Crucially, the BLS contains information on use of enterprise agreements and allows for the calculation of productivity.

Sources: ABS (2008b); Hawke and Wooden (1997).

Using AWIRS, Salaheen and McCalman (2000) find no evidence of a link between self-reported productivity growth and the use of enterprise contracts, though they note that the timing of the survey may not have allowed sufficient time for productivity effects to emerge. Using the same data set, Crocket (2000) similarly finds no evidence of a link between the use of enterprise agreements and productivity growth.

Using the BLS, Wooden and Tseng (2001) examine the relationship between firms that implement enterprise agreements and productivity. The authors report a statistically significant positive relationship, though note that their findings did not necessarily imply a causal effect. Indeed, Loundes, Wooden and Tseng (2003) report that a technique more suited to detecting a causal relationship suggests a statistically non-significant effect of

enterprise bargaining. Overall, the authors conclude that given the paucity of data and limited research in this field, the effect of enterprise bargaining on productivity remains unclear.

Productivity and later reforms

The reforms following the move to enterprise bargaining have attracted less commentary. This may be partly attributable to the absence of an obvious link between *aggregate* productivity performance and WR reform. While a decline in growth of labour and multifactor productivity coincided with the implementation of the WR Act and WorkChoices, there is little theoretical or empirical support for a causal relationship.

Given the lack of information provided by aggregate productivity statistics, firm level evidence is a natural area of further inquiry. Using the BLS, Farmakis-Gamboni and Prentice (2011) examined the potential effects of the WR Act on productivity attributable to its restrictions on union influence from 1994-95 to 1997-98. They reasoned that the WR Act reduced union power, and therefore may have affected productivity in firms with high levels of unionisation. Supporting this notion, the study found higher rates of productivity growth in such firms whilst statistically controlling for other factors. However, these results should be interpreted with caution. While the study controls for factors such as firm size, industry and workforce characteristics, there is still potential that unobserved factors have influenced productivity differentially across unionised firms.

Reforms following the WR Act have received even less attention from researchers. The brief operation of WorkChoices has limited the scope for analysis of its effect on productivity. That said, Peetz (2007) noted lower productivity growth since its introduction, as compared with Australia's long-run average. He does not suggest WorkChoices to be a reason for this level of growth, instead highlighting the lack of evidence for assertions that WorkChoices has improved productivity.

The possible productivity effects of the FW Act have not been examined extensively. In their post-implementation review of the FW Act, McCallum, Moore and Edwards (2012) outlined slow productivity growth associated with WorkChoices and the FW Act, but concluded that the WR framework does not explain this limited growth.

G.3 Conclusion

Despite strong theoretical grounds for expecting productivity effects from WR reform, Australian studies have found little evidence of such a relationship. The absence of evidence is attributable to limited data and, more fundamentally, the difficulty of disentangling the determinants of productivity growth. Indeed, economically significant productivity effects of reform may nonetheless be empirically unidentifiable, given the 'noise' in the productivity data, the multiple factors that contribute to productivity growth

and the fact that the effects of policy changes occur with a lag, potentially over many years.

H Bargaining power

Key points

- Most agree that the central goal of workplace relations policy is to reduce the superior bargaining power of employers over employees that would occur in the absence of regulation. However, such power is often poorly defined and its causes under-examined.
- Bargaining power originates from the relative costs to contracting parties from failing to reach an agreement, with the result that one party can achieve leverage to re-distribute returns from the other.
 - for example, the cost of not employing a given employee may be low for the employer, while high for the employee.
- The neoclassical model of a perfectly competitive labour market predicts that imbalances in bargaining power cannot persist, with both employers and employees being 'price takers'.
- However, there are a variety of factors that can differentiate the labour market (or at least many parts of it) from the perfectly competitive model, including:
 - information asymmetries and search costs
 - a lack of voluntary entry and exit from the labour market
 - impediments to labour mobility
 - employers with substantial purchasing power in the labour market (monopsonists).
- These factors mean that wages are generally set by employers and employees through bargaining, rather than purely by a competitive market rate. The resulting wage thus reflects relative differences in the bargaining power of parties.
- In the absence of regulation, imbalances in bargaining power would often be tilted towards employers, but in some circumstances may favour employees or unions.
- To counteract perceived inequalities in bargaining power, governments respond with policies such as enforcing minimum standards within the labour market (for example, minimum wages), and allowing employees to unionise and collectively bargain.
- A key regulatory concern is to ensure that in mitigating the risks of excessive employer bargaining power, regulations do not overcompensate by granting excessive power to employees.

Inequality of bargaining power is a pervasive concept in workplace relations policy around the world. Its pivotal role was recognised as far back as Adam Smith's 1776 treatise on *The Wealth of Nations*. The view put by Otto Kahn-Freund that the 'main object of labour law [is] to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship' remains the

dominant perspective (Creighton and Stewart 2010, p. 5), and has long been influential among Australian commentators:

It is unrealistic to postulate a world devoid of market power — of a multitude of separate employers and separate workers freely contracting with each other, each too insignificant to influence overall market outcomes. That kind of world affords no place for the large employer, nor does it encompass trade unions which seek to counter the employers' market power and to establish power of their own. (Hancock 1982, p. 43)

Consequently, perceived or actual inequalities in bargaining power between employees and employers have profoundly shaped recent workplace relations policy debates. Indeed, references to imbalances in bargaining power featured in more than 100 submissions by stakeholders to this inquiry. While most of these¹⁹⁴ concerned perceived disadvantages of employees in the bargaining process, a number of participants¹⁹⁵ noted their belief that employees and unions enjoy superior bargaining power under the regulatory status quo.

This appendix further explores the notion of unequal bargaining power and to what extent it can shape the design of a workplace relations framework. It first attempts to define the concept, before exploring its possible causes and explanations within the economic literature. Finally, it outlines some common institutional and policy responses that are used to correct unequal bargaining power.

What is inequality of bargaining power?

Despite its ubiquity in workplace relations literature and policy (where inequality of bargaining power is often taken as a given) there is comparatively less discussion of how the concept should be defined or explained. A general definition of bargaining power concerns the relative costs to parties from withdrawing from an impending contract. For example, the cost to an employer from not hiring a given employee is likely to be much less than the costs to the employee of failing to obtain a desired job. Employees typically

¹⁹⁴ This included FECCA (sub. 69); Queensland Council of Unions (sub. 73, sub. DR305); Australian Workers' Union (sub. 74); St Vincent de Paul Society National Council (sub. 78); JobWatch (sub. 84, sub. DR285); Queensland Nurses Union (sub. 86, sub. DR309); Kingsford Legal Centre (sub. 87); Catholic Commission for Employment Relations (sub. 99); Linney Strategies (sub. 113); South Australian Government (sub. 114); Andrew Stewart and others (sub. 118); Queensland Government (sub. 120); Australian Nursing and Midwifery Federation (sub. 132); Australian Institute of Employment Rights (sub. 140); Footscray Community Legal Centre (sub. 143); Transport Workers Union (sub. 145); ACTU (sub. 167); SDA (sub. 175, sub. DR306); Group of individuals (sub. 188); Legal Aid NSW (sub. 197); Professionals Australia (sub. 212); Jobs Australia (sub. 221); Australian Services Union (sub. DR283); Australian Catholic University (sub. DR284); National Foundation for Australian Women (sub. DR288); Electrical Trades Union (sub. DR300); Western Community Legal Centre (sub. DR329); National Working Women's Centres (sub. DR345)

¹⁹⁵ Including Simon Price (sub. 93); AMMA (sub. 96); CCIWA (sub. 134, sub. DR323); Australasian Railway Association (sub. 155); NECA (sub. 159); ACCI (sub. 161); Housing Industry Association (sub. 169); Glencore (sub. 185); APPEA (sub. 209); Allens (sub. DR310)

celebrate when they obtain a new job, but a new hire does not typically elicit the same response from an employer.

Some commentators generally describe bargaining power in terms of a party's capacity to influence the wage rate — in effect, parties with greater bargaining power are 'wage setters' while those with less bargaining power are 'wage takers' (Kaufman 1989).

The notion of parties being price setters or takers necessarily implies that employers and employees can engage in some form of bargaining over wages. This requires there to be some difference between the lowest wage that a worker would be willing to accept (their reservation wage) and the highest wage that an employer would be willing to pay them (the marginal revenue product of labour, or MRPL). This differs from simple models of a perfectly competitive labour market (discussed further below), where both parties are wage takers with the wage rate set equal to the MRPL.

Where employers enjoy superior bargaining power, employees may be paid a wage that is less than their MRPL. The extent of the employer's bargaining power may be reflected by the relative size of this gap. Employees could also use a bargaining advantage in their own favour to raise wages above the MRPL that would be observed in a competitive market. These higher wages are sustained by decreasing the amount of labour employed by a firm, increasing the ratio of capital to labour and hence raising the MRPL at the expense of the employer's returns to capital.

There are no bargaining imbalances in a purely competitive labour market

The simple neoclassical model of a competitive labour market is built upon a number of core assumptions, including: that:

- there are a large number of employers and employees in the labour market
- employees and firms can freely switch between new jobs and workers, and enter and exit the market, at little or no cost
- parties are well-informed when making decisions — for example, knowing the quality of a new employee's work, or what the working conditions of a new job will be.

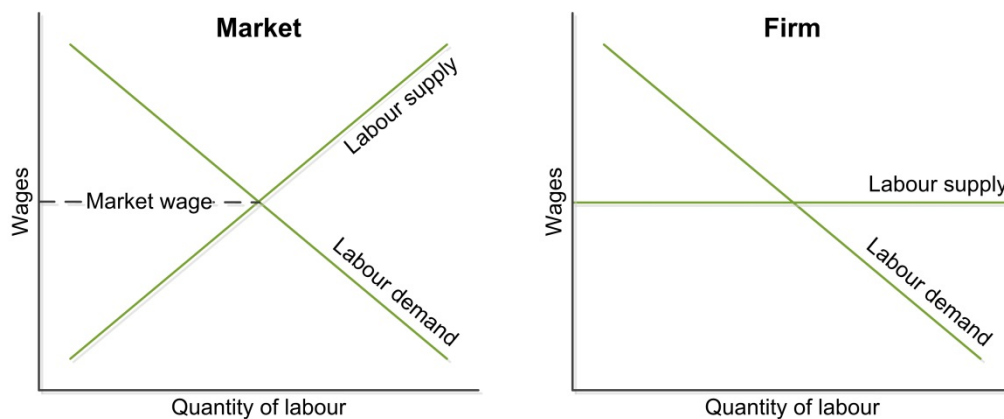
A key inference that arises from the above assumptions is that there are no bargaining imbalances between employers and employees. Rather, all market participants are 'price-takers', with the market-clearing wage level set equal to the MRPL (figure H.1). Parties that attempt to deviate from this market price are disciplined by market forces. For example, an employee that demands higher wages will be replaced by other willing workers, and an employer that offers lower wages will lose their employees to other firms.

The neoclassical model also suggests that were employers in an industry to pay workers below their MRPL, any increase in their profits would be short-lived. This is because the model predicts that in response to higher profits within that industry, new firms would

enter the market to attempt to capture a share of those profits. This would be expected to have the combined effect of both bidding up wages through increased labour demand in the industry, and decreasing prices in the product market through an expansion in supply.

Similarly, employees obtaining higher wages than the competitive MRPL would expect to see their wages fall in due course. While capital is assumed to be fixed in the short run, lower returns to capital would influence the investment decisions of firms, leading to reduced labour demand, wages and aggregate supply, and increases in product prices (increasing the MRPL).

Figure H.1 The simple neoclassical labour demand and supply^a curves
At the market level and the individual firm level



^a At sufficiently high wage levels, the neoclassical labour supply curve may also be illustrated at the market level as bending back towards the left, as the 'income effect' becomes dominant.

As such, the neoclassical model suggests that even if bargaining imbalances do somehow arise, they will be temporary, and in the long run, employees will be paid wages equal to their MRPL.

Labour markets are more imperfect than most

Very few markets reflect the assumptions that underpin the basic neoclassical model of competitive markets outlined above. But this does not necessarily render the model analytically inoperable — it can still often be used, albeit with some caveats, to approximate the anticipated responses of 'workably competitive' markets to changes in economic conditions and policies.

However, labour markets have some distinctive features that can make them particularly poorly approximated by the competitive market model. In some sections of the labour market, these features can give rise to bargaining imbalances that substantially impact the employment relationship. These features include:

- information asymmetries and search costs
- impediments to individuals freely entering and exiting the labour market
- barriers that limit the mobility of labour between segments of the labour market
- monopsonistic employers.

Information asymmetries and search costs

The process of job searching is rife with uncertainty and information gaps for both employees and employers. For employees, information that may be lacking or difficult to access may include:

- the quality and value of their skills to an employer
- the distribution of wages in the market for the particular job they are applying for
- how many other people they are competing with for the same job
- the conditions of the job they are applying for. Job advertisements fail to capture many aspects of employment (for example, workplace morale or the behaviour of managers), and can even omit salient details (for example, some job advertisements do not specify a wage). Heterogeneity across businesses also means that an employee's experience with one type of occupation in a given industry may not provide much information about the likely experience in a similar job with a notionally similar employer. Employees can only discover the nature of a job by working in it (unlike many goods markets, where the full nature of the product is well known prior to purchase).

For employers, it may be similarly difficult to judge the value of a potential employee's skills or personal attributes, and other opportunities or offers the employee is considering.

The job search process is also sequential in nature. Employees generally do not receive numerous wage offers simultaneously and choose the best offer. Instead, offers arrive at infrequent intervals, with an employee facing the choice of accepting an offer, or turning it down and continuing to search. Individuals therefore must weigh the costs of further job searching (such as time spent without wages, the effort of job searching, and the risk of being perceived as less employable as unemployment persists) against the likelihood of receiving a better offer in the future. The choices that individuals will make may vary widely based on factors such as their search costs, their level of confidence in obtaining future offers, and their aversion to risk.

These characteristics mean that employees and employers face nontrivial costs (or 'search frictions') when locating one another and deciding whether to enter into an employment

contract. This is a significant deviation from the standard assumptions of neoclassical markets. As such, labour markets are often described as search markets¹⁹⁶ in the economic literature (Albrecht 2011; McCall 1970; Rogerson, Shimer and Wright 2004; Uren 2014). Search theory models of the labour market attempt to account for idiosyncrasies such as uncertainty, search costs and sequential offers.¹⁹⁷ These models can help explain empirically observed phenomena in labour markets, such as unemployment and differences in wages across firms, that differ from theoretical competitive outcomes.

Many workers cannot voluntarily enter and exit the labour market

An important assumption that underpins the notion of perfect competition is that sellers can freely enter and exit the market, and change their output, in response to changes in demand and prices. When the price of a good increases, supply increases from existing sellers expanding their production and new firms entering the market to capture a share of the higher prices. Conversely, when the price of a good decreases, firms exit the market or reduce their production levels.

The neoclassical labour market model continues this assumption through the ‘labour vs leisure’ tradeoff. In response to higher wages, employees spend less time in leisure¹⁹⁸ activities and more time working, because the rewards for working are higher (the ‘substitution effect’), until their wages are so high that workers begin to prioritise leisure because their income is high enough already (the ‘income effect’). Thus the model predicts that were wages to fall, workers decrease their working hours or exit the labour market altogether.

This predicted pattern of behaviour may be clearly observable in some parts of the labour market. For example, the long working hours of highly paid professionals suggest that some individuals are willing to expand their working hours in response to higher remuneration. Similarly, in a couple household with children, one parent may only be willing to return to the workforce as a second earner if remuneration is sufficiently high to offset any personal and financial costs of placing children in childcare.¹⁹⁹

However, there are both theoretical reasons and empirical evidence to suggest that the upward-sloping labour supply curve predicted by the labour-leisure tradeoff may not

¹⁹⁶ The labour market isn’t the only market with search characteristics — for example, the housing market has also been cited as an example of a market with search frictions (Albrecht 2011; Uren 2014).

¹⁹⁷ Search theory is a field of growing prominence in economics. The 2010 Nobel Prize in Economics was awarded to Diamond, Mortensen and Pissarides for their analysis of markets with search frictions.

¹⁹⁸ Noting the erroneous nature of the term ‘leisure’ in some tradeoffs, for example childcare.

¹⁹⁹ This is consistent with numerous empirical studies which find that the labour supply of married women is much more elastic (that is, wage-sensitive) than the labour supply of men (Cai 2010; Dandie and Mercante 2007; Evers, Mooij and Vuuren 2008).

sufficiently approximate reality for many parts of the labour market, particularly at lower wage levels.

Simple models of the labour-leisure tradeoff fail to account for the need for a person to meet their basic immediate needs for food and shelter. Without a sufficient source of assets or non-labour income, individuals cannot realistically choose to engage in 100 per cent leisure — they must earn at least some minimum level of income in order to sustain themselves and any dependents. Kaufman (2013, p. 771) criticised the tradeoff as ‘less labour vs leisure and more labour vs homelessness and starvation’ — though clearly that is hyperbole in the context of the modern welfare state.

The requirement for a minimum level of income has important implications for the shape of the labour supply curve at lower wage levels. It suggests that below a particular wage level, the supply of labour may actually increase as wages decrease — individuals must work longer hours to earn enough to support themselves. Therefore, some studies have suggested that rather than the labour supply curve being a backward-bending curve, as predicted by the neoclassical model of the labour market, it may be more accurately approximated by an ‘inverted S’ shape.²⁰⁰ This is perhaps best demonstrated by an ‘added worker effect’, where secondary earners from households (for example, a spouse or children) join the workforce when household income falls.

It could be argued that the existence of a social safety net, such as unemployment benefits, means that individuals do have alternatives to engagement with the labour market. *Unintended* unemployment is, however, not the willing choice often implied by arguments noting the existence of unemployment benefits as skewing the labour vs leisure tradeoff. Moreover, there a number of reasons why the existence of a welfare system may not set an adequate floor for wages and conditions, including that:

- unemployment benefits and other welfare payments are deliberately restricted through stringent eligibility criteria to limit the capacity for individuals to use them as a substitute for paid work. Those who voluntarily leave paid work must wait a specified period (currently eight weeks in Australia) before they can access unemployment benefits, while those who are receiving benefits are required to actively seek work with a new employer. There are also various rules relating to age and household status that may make a person ineligible for any benefit
- unemployment, especially long-term unemployment, can be highly stigmatizing, and can compromise an individual’s future employability (for example, through perceived or actual loss of skills).

200 The phenomena of a negative wage elasticity for labour supply at lower income levels has been empirically approximated in a number of studies, including Licona (2000); Dessing (2002); Dasgupta and Goldar (2006); Bhalotra (2007); Bendewald (2008). While much of the literature is focused on less developed economies, Dessing (2008) found that the model still bears some relevance for industrialised economies.

For these reasons, some individuals may prefer to, or be required by circumstance to, work longer hours for lower wages, rather than leave employment and access welfare payments, in order to meet their basic needs. While this may be a rational decision for individuals to make, it nonetheless contradicts the predictions of the neoclassical labour supply model.

There are other queries raised about the simple neoclassical model, but it is unnecessary to pursue them all in this appendix.

Impediments to labour mobility

A key element for well-functioning markets is the capacity for inputs to be mobile between geographic areas as well as between sectors. Greater labour mobility can ensure that workers are located in areas where there is sufficient demand for labour. Less mobility means that surpluses and shortages of labour, and the resulting impacts on wages, are more likely to arise and persist with changes in economic conditions.

Some participants suggested that the labour market does not function as a workably competitive market due to the immobility of labour. For example, the Australian Council of Trade Unions (ACTU) argued:

Real world labour markets are at best characterised as dynamic monopsonies in which many of the ‘frictions’ which prevent adjustment are not perverse incentives or dysfunctional institutions but important parts of the social fabric. Take ‘labour immobility’, for example. People are tied to particular locations not simply because selling their house may be difficult, but because they are tied to family, schooling and community networks which are vital to their social well-being. In a similar vein, many households are now dependent on two breadwinners and both need to find new employment opportunities if they seek to move. (sub. 167, pp. 76-77)

Indeed, in its own research on geographic labour mobility, the Productivity Commission (PC 2014b) has previously observed that these types of personal and locational factors — such as age, life events, family circumstances, dual-income households, housing, local infrastructure and education — can be significant determinants of an individual’s labour mobility. These factors mean that labour may be less mobile than other inputs for production (for example, raw materials or machinery).

While these factors can cause rigidities at the individual level, the Productivity Commission also found that in Australia, labour broadly appears to be responsive to market signals, with people moving to areas with better job and income opportunities. Further, impediments to mobility have also been reduced by the greater capacity for long-distance commuting and temporary immigration. Technological advances in transport and communication have also broadened the extent of geographic labour mobility in Australia. That said, high unemployment can be concentrated in some areas because people with some skills, personal traits, family circumstances and housing needs cannot readily move between regions.

Traditional monopsony

The neoclassical model of labour markets is dependent on there being many employers purchasing labour in the market, thus ensuring that no employer has sufficient purchasing power to influence the market price of wages (referred to as a monopsony).

However, in reality, some markets can consist of monopolistic or oligopolistic employers that wield substantially more purchasing power, giving rise to labour markets with monopsonistic characteristics. While ‘one company towns’ (the traditional example of a monopsony) are generally considered a relic of the past, conventional monopsonies still persist in some sectors, for example government-provided services such as health, education, policing and defence. Further, in other markets, factors such as barriers to entry or product differentiation (monopolistic competition) may mean that entry by new employers would not place as much upward pressure on wages as the neoclassical model would predict.

These imperfections can lead to bargaining imbalances

The key insight from the characteristics outlined in the previous section is that the behaviour of labour markets and wages can deviate from the predictions of the neoclassical model — wages are not necessarily equal to the competitive MRPL.²⁰¹ Rather, wages may be set within a range of values that both the employer and employee are willing to agree to. Thus the employment relationship partially resembles a bilateral monopoly, with rents to be divided between the employer and employee — this gives rise to the process of bargaining over wages (Manning 2003; Uren 2014).

As mentioned previously, bargaining power is effectively the capacity for one party to capture a greater share of the wedge between the reservation wages of the two parties. At its core, bargaining power is a function of a party’s capacity to hold out in negotiations and seek alternatives. This may relate to differences in search costs and the relative availability of other workers or employers. Differences in these costs usually favour the employer, as noted by Sloan (2011):

The idea of unequal bargaining power arises from differences in the exit costs for the two sides to the transactions — the consequences for an employer of losing a worker are generally less significant than the consequences for the worker of losing the job.

²⁰¹ As noted by Uren (2014), there is ample empirical evidence that identical workers do not receive identical wages. Numerous studies have found evidence of wage dispersion between sectors, firms and individuals that aren’t accounted for by differences in factors such as skill level. For example, Krueger and Summers (1988) found evidence of persistent wage differentials across industries, even after controlling for factors such as worker skill. In another study, Oreopoulos, von Wachter and Heisz (2012) found show that even after a recession has ended, students who graduated university during a recession continue to receive lower wages than those who graduated outside recessions.

Some economists, primarily from the institutional school of thought, attribute varying bargaining power to the different characteristics of employees, such as skills, education, income, and social advantage (Kaufman 2013). They also emphasise the importance of macroeconomic conditions. Institutionalists argue that generalised or persistent unemployment in the labour market means that workers can be forced to accept reductions in wages or face unemployment.

It is important to note that while many employers may possess substantial bargaining power, this does not necessarily mean they will always have the incentive to abuse it or exploit their workers. There is a substantial body of economic literature dedicated to the study of efficiency wage theory, which suggests that employers can have an incentive to pay employees above market wages in order to attract higher productivity workers and incentivise greater effort (Yellen 1984).

While many inquiry participants presumed that inequality of bargaining power is an inherent part of the employment relationship, the balance of bargaining power will not always favour employers. For example, employees may develop firm-specific or sector-specific skills that make them hard to replace (though firm-specific skills may also make it difficult for the employee to seek alternative employers). For some employees with particularly scarce or valuable skills, the conventional dynamic of employees as job seekers may be reversed, with employers ‘head hunting’ them from their current jobs by offering more attractive wages and conditions. In some instances, employees may use occupational licenses that limit the availability of competitors for jobs (usually backed by statute or regulation) to increase wages — the recent Competition Policy Review identified similar concerns about various parts of the medical and legal professions and the building trades (Harper et al. 2015, p. 140).

However, the existence of strong employee bargaining power in some cases does not offset a lack of bargaining power in other circumstances. The answer lies in targeted policies that address imbalances in bargaining power where they are more likely to arise, while allowing the flexibility for less regulated negotiations to occur where bargaining power is more equal. This is discussed further below.

Though bargaining imbalances remain, they have likely diminished over time

Some inquiry participants suggested that historical views about inequality of bargaining power are less relevant in modern workplaces. For example, the Chamber of Commerce and Industry of Western Australia argued:

A common theme in the draft report is that industrial action provides a counterbalance to ‘reduce asymmetries in information and bargaining power between parties’. Whilst this is reflective of the traditional view of the master and servant relationship which resulted in the development of Australia’s industrial relations system during the 1890’s and 1900s, it does not reflect the current relationship between employees and employers. (CCIWA, sub. DR323, pp. 31–32)

Kaufman (1989) noted that a number of factors influencing bargaining power have changed since World War II, including:

- improved macroeconomic management, which has reduced unemployment and the frequency and magnitude of economic downturns
- the expansion of social safety nets, such as unemployment benefits (noting the limitations discussed previously in this appendix), which have reduced the consequences of unemployment on individuals
- reductions in traditional forms of monopsony, due to improvements in transportation, communication and urbanisation
- reductions in discriminatory practices in employment.

Information asymmetries and search costs that impede the efficient operation of the labour market are also decreasing. The decreasing costs of communication and obtaining information, primarily through the proliferation of online resources, makes it easier for potential employers and employees to be matched and obtain information about one another. For example, employees can more readily assess the value of their labour by accessing online resources detailing the typical wages for a given occupation. They can also assess the economic circumstances of an employer through the online availability of a firm's financial reporting. In some sectors, the process of wage setting is increasingly resembling a conventional marketplace, with temporary employees placing competitive bids for work online.

The changing pattern of bargaining imbalances suggests that the policies used by government to ameliorate inequalities in bargaining power may need to be adapted over time to suit evolving circumstances.

However, while some of the factors that can contribute to inequality in bargaining power have diminished over time, this does not lead to the conclusion that imbalances in bargaining power no longer exist. First, even if diminished, many of the prerequisites for unequal bargaining continue to exist. Second, while technology may have reduced search costs, the greater complexity of many jobs may have partly offset this effect. Third, bargaining imbalances need not only occur in low-skill occupations, but may arise in some specialised high-skill labour markets. For example, there was agreement by major Silicon Valley firms not to solicit employees from competitors, and bilateral agreements between competitors to prevent wage bidding. This resulted in substantial damages (that appear likely to rise above the initial US \$325 million settlement value) (Caves 2014, 2015). However, as in traditional monopsony, such cases are rare.

Responses to bargaining imbalances

Minimum wages and conditions

One means of countering imbalances in bargaining power is for governments to create a set of minimum wages and employment conditions that all employment relationships must satisfy. In Australia, these comprise minimum wages (chapter 4), awards (chapters 7 and 8) and the National Employment Standards (chapter 16). A regulated floor of minimum conditions limits the extent to which employers can use any superior bargaining power to obtain lower wage outcomes.

Minimum employment conditions also help reduce the information asymmetries and transaction costs that give rise to bargaining imbalances. Provided that parties are aware of these safety nets, both individuals and employers will be better informed during bargaining than if no set of minimum conditions was available for reference as a starting point. Awards also lower the entry and exit costs to an employment relationship by providing a default template of conditions that both parties can be guaranteed. This means that the labour market may function more efficiently, with lower search frictions, when regulated minimum employment conditions are in place. Indeed some employers have welcomed awards on that basis.

An important characteristic of minimum wages and conditions is that they only address bargaining imbalances at the lower end of the income scale. While they constrain the capacity for employers to suppress the wages of low-paid workers, they do not affect the ability for employers and employees to reach mutually satisfactory bargains above the safety net.

Collective bargaining

Another common element of workplace relations systems is the use of collective bargaining by employees (chapter 20). Outside the workplace relations context, collective bargaining is generally seen as anticompetitive (chapter 31). However, collective bargaining may help reduce inequalities in bargaining power in a number of ways:

- collective action concentrates the bargaining power of employees. As mentioned above, the consequences to an employer from a single employee walking away from negotiations and seeking alternatives can be very small. However, when negotiating collectively, the stakes are raised as the employer faces the prospect of their whole workforce (or a substantial part of it) walking off the job through industrial action
- by covering all employees at a firm under a single collective agreement, employees do not face competition from the prospect of other employees willing to work for less than the agreement's terms
- the information asymmetries in bargaining are reduced, with more experienced or knowledgeable union representatives negotiating on behalf of less informed employees

-
- transaction costs are reduced, as parties only have to bargain once across many employees.

It is worth cautioning that the rebalancing of bargaining power through collective bargaining can go too far, and tilt bargaining imbalances towards the employees or union. In particular, the capacity to use protected industrial action may give employees substantial bargaining power, especially if employers have large capital commitments that must be paid for, or time-critical production processes. This can necessitate regulatory checks on the bargaining power of employees — for example, constraints on the use of industrial action (chapter 27) and secondary boycotts (chapter 31).

I Trends in Australian incomes and wages

For a large part of the last 25 years, Australia has experienced strong growth in wages. This has coincided with accelerated productivity growth and, more recently, unprecedented increases in the terms of trade. However, this strong growth in average wages has been accompanied by increasing income dispersion and a decreasing labour income share. These trends are partially explained by trends in the terms of trade, wage regulation, productivity and technical change.

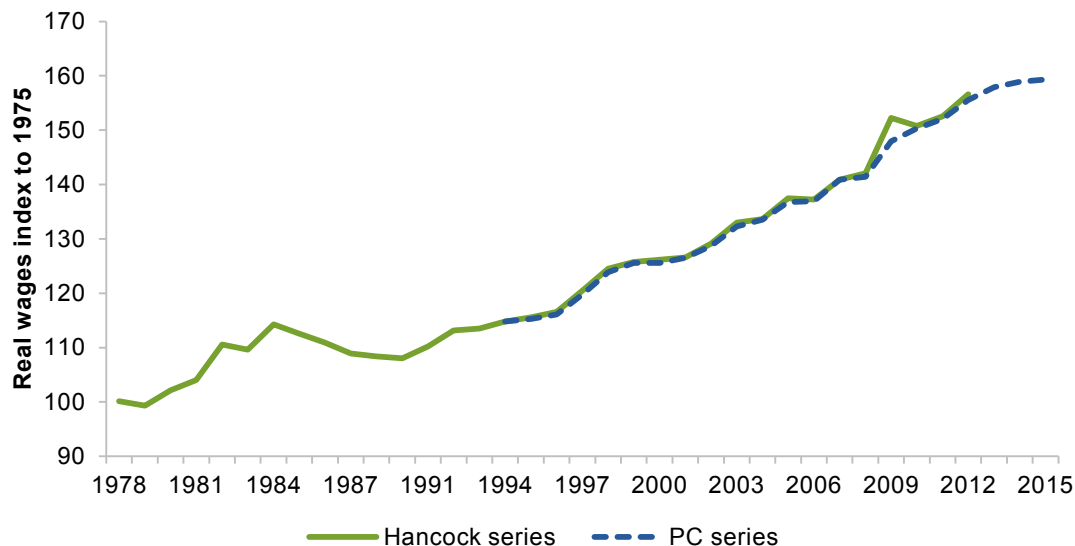
This appendix outlines developments in average wages over the last 30 years (section I.1). It then examines changes in the distribution of real wages in Australia (section I.2), and discusses several key factors that influence wage outcomes (section I.3).

I.1 Average wages and incomes over the last 25 years

Following five years of real wage decline, Australian incomes grew strongly from 1990 to 2013 (figure I.1). Over this period, real ordinary time earnings among full-time males increased more than 45 per cent, averaging growth of 1.7 per cent annually. Relatively slower growth of the wage price index suggests that a significant portion of wage growth is attributable to changes in the nature and duration of work, as well the characteristics of workers (figure I.2, see box I.1 for an outline of wage measures).

Despite strong growth in wages from 1990 to 2013, earnings have since been relatively flat. Indeed, they have remained below 2013 levels for total earnings among all employees, and for full-time earnings for ordinary hours. Moreover, total earnings among full-time employees are only marginally above 2013 levels. While a number of factors have contributed to this lack of earnings growth — such as a lower terms of trade and increased spare capacity in the labour market — earnings have increased even less than these developments would typically suggest (Jacobs and Rush 2015).

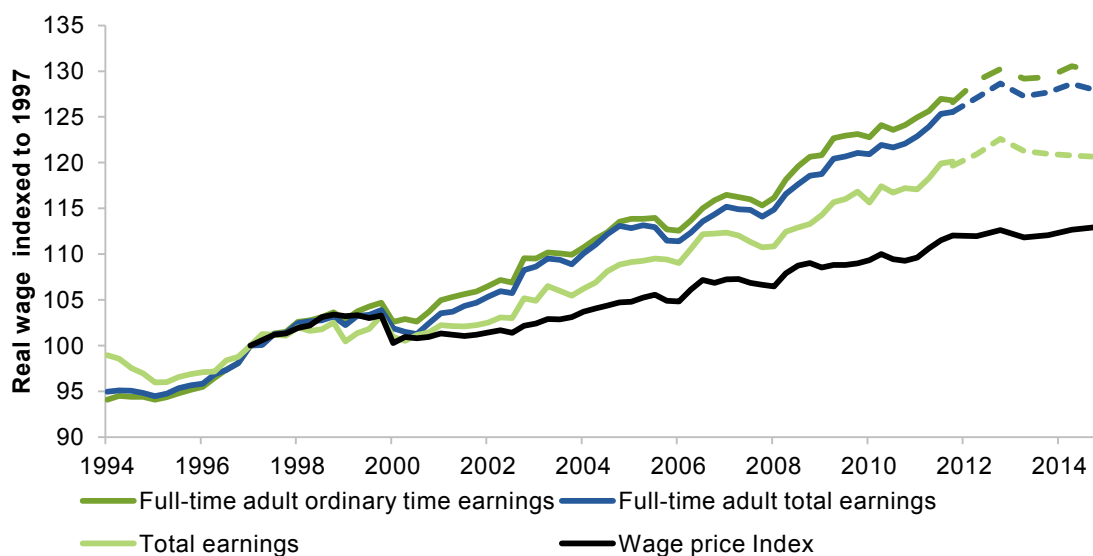
Figure I.1 Real male earnings^a
1975 to 2015, deflated by CPI and indexed to 1975



^a This figure extends a series extracted from Hancock (2014) using the most recent release of the ABS Average Weekly Earnings. Hancock's series links data from various releases of the ABS *Average Weekly Earnings*.

Sources: Productivity Commission estimates based on ABS 2015, *Average Weekly Earnings, Australia*, Cat. No. 6302.0 and Hancock (2014).

Figure I.2 Various measures of Australian incomes and wages
1994–2015, deflated by CPI and indexed to 1997



Sources: ABS 2015, *Average Weekly Earnings, Australia*, Cat. No. 6302.0; ABS 2015, *Wage Price Index, Australia*, Cat. No. 6345.0.

Box I.1 Some ABS surveys that contain information on income and wages

A range of wage and income measurements are available for examining trends in living standards and business costs in Australia. The varied construction of these measurements reflects the purpose for which they have been developed. Below, several surveys and the wage and income measures that they contain are outlined.

Average weekly earnings

The ABS AWE survey is undertaken biannually, measuring the level of average earnings in Australia. It covers a wide range of wage and salary earners, with the most significant omission those employed in agriculture, forestry and fishing. The survey measures:

- full-time adult average weekly ordinary time earnings
- full-time adult average weekly total earnings
- All employees average weekly total earnings.

Wage price index

The ABS WPI measures change in wages, controlling for the nature and quantity of work performed, as well as the characteristics of workers. As such, changes in the wage price index gauge pure price changes and are constructed using similar methodology to the consumer price index. WPI measures include:

- ordinary time hourly rates of pay excluding bonuses index
- ordinary time hourly rates of pay including bonuses index
- total hourly rates of pay excluding bonuses index
- total hourly rates of pay including bonuses index.

Employee earnings and hours

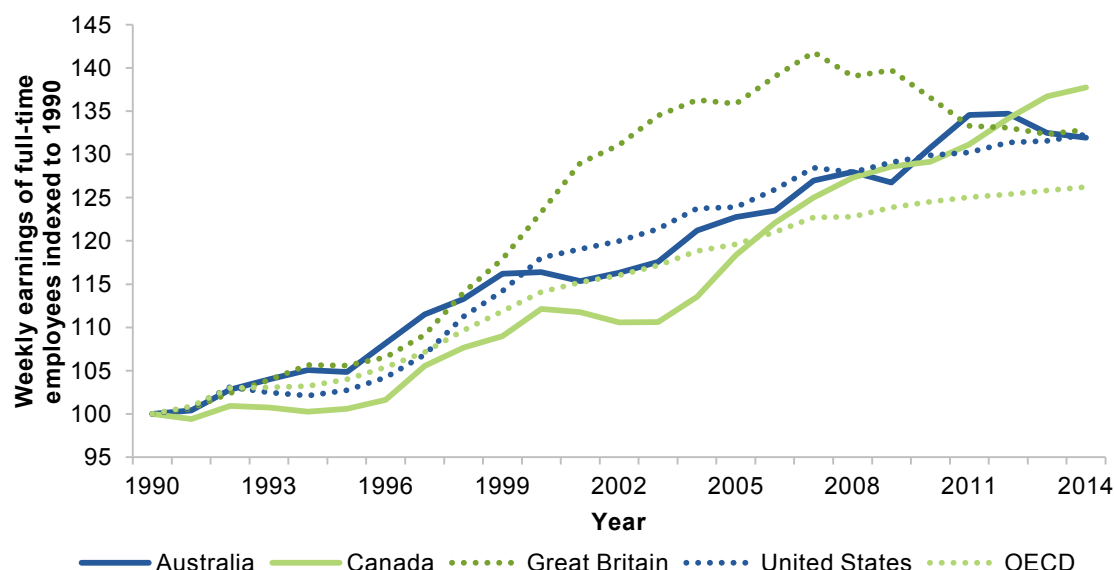
The ABS EEH contains detailed statistics on the composition and distribution of employee earnings, paid hours of work and the method according to which pay is set. The EEH sample consists of employees only (including owner-managers of incorporated enterprises), with information collected from employers.

Sources: ABS 2015, *Average Weekly Earnings, Australia*, released 13 August Cat. No. 6302.0; ABS 2015, *Wage Price Index, Australia*, released 18 November, Cat. No. 6345.0; ABS, *Employee Earnings and Hours*, released May 2014, *Australia*, Cat. no. 6306.0.

Whilst Australia's income growth since 1990 has been strong, relative to comparable countries it has not been exceptional (figure I.3).²⁰² Indexed to 1990, increases in Australian full-time weekly income has been similar to that observed in the United States and the United Kingdom, albeit with some significant differences in the intervening years, reflecting varied wages drivers across countries. Similarly, incomes in Canada have not significantly diverged from those of Australia, though Canada has experienced strong growth in recent years.

²⁰² However, from 2004 to 2011 income growth was particularly high in Australia, increasing more than twice the average of OECD countries.

Figure I.3 Average full-time weekly incomes in comparable OECD countries^{a,b}
Indexed to 1990



^a Average wages are obtained by dividing the national-accounts-based total wage bill by the average number of employees in the total economy, which is then multiplied by the ratio of the average usual weekly hours per full-time employee to the average usually weekly hours for all employees. This indicator is measured in USD constant prices using 2012 base year and Purchasing Power Parities (PPPs) for private consumption of the same year. ^b The construction of this income measure is such growth is not only due to change in average wages, but also change in average weekly hours among full-time workers.

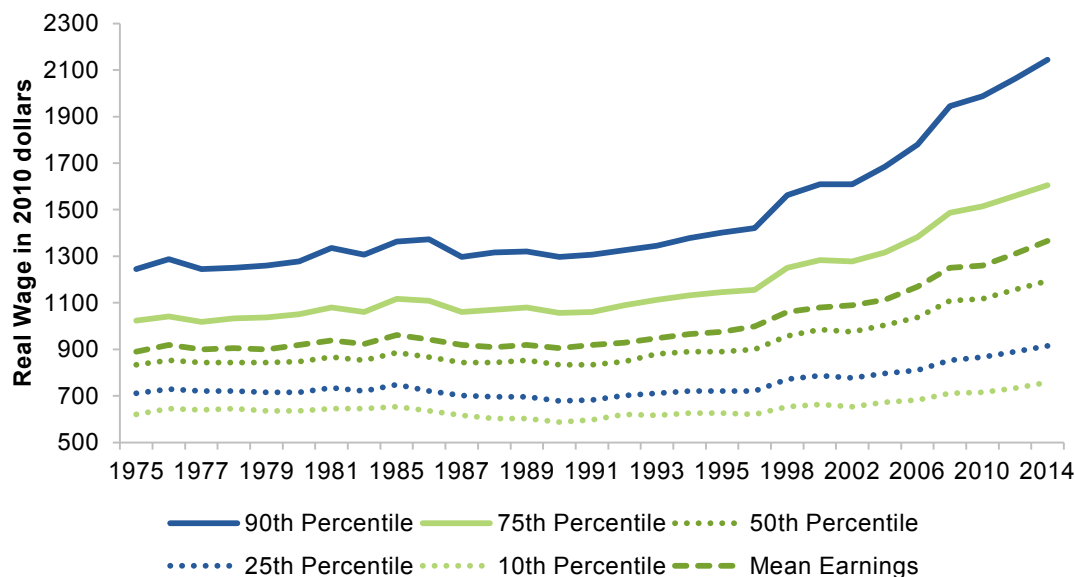
Source: OECD (2015b).

I.2 Wages and income distribution

Trends in the distribution of wages can reveal important developments not apparent in averaged outcomes. Such developments can have significant implications for overall income inequality, given the dominant contribution of labour earnings to total income.

Examining growth across various earnings percentiles over the last 30 years suggests a significant increase in earnings inequality beginning in the mid-1990s (figure I.4 and figure I.5). Growth at the upper end of the earnings distribution has been higher in both absolute and relative terms. Whilst real earnings at the 90th percentile have increased by 70 per cent, they have increased less than 30 per cent for the 10th percentile. Summary measures of earnings inequality reflect this pattern of earnings growth. The Gini coefficient for labour earnings — a measure positively correlated with inequality — has increased for individuals from 0.35 to 0.41 over the period from 1988-89 to 2009-10 (Greenville, Pobke and Rogers 2013).

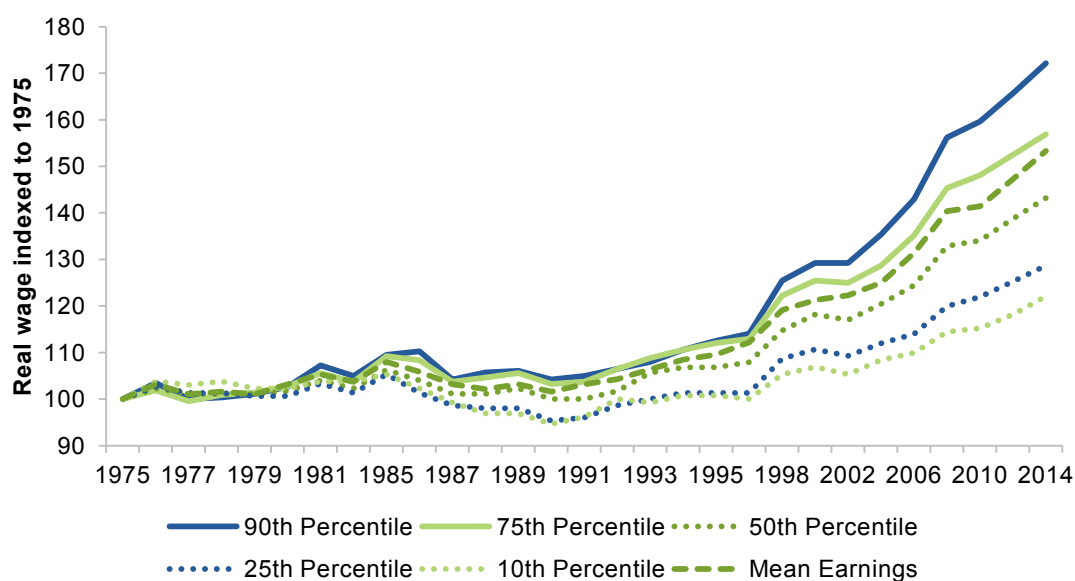
Figure I.4 Trends in the distribution of absolute real earnings^a
1975 to 2014, deflated by CPI



^a This figure extends data extracted from Bray's (2014) series to include data for 2012 and 2014. Bray's series applies smoothing to account for the inclusion of salary sacrificing beginning in 2006.

Sources: ABS (*Employee Earnings and Hours, Australia, May 2014*, Cat. no. 6306.0); Bray (2014).

Figure I.5 Trends in the distribution of indexed real earnings^a
1975 to 2014, deflated and indexed to 1975



^a See above.

Sources: ABS (*Employee Earnings and Hours, Australia, May 2014*, Cat. no. 6306.0); Bray (2014).

Trends in wages within and between groups of employees can be revealing. Using quantile regression,²⁰³ Watson (forthcoming) finds that changes in the wage distribution have been primarily driven by changing returns to occupation, industry, age and education that vary throughout the wage distribution. For example, the distribution of wage premia for males has changed significantly for construction and finance jobs since the early 1980s, such that the premia for high-paid positions has increased substantially, while the premia for low-paid positions has changed relatively little. As a result, the wage profile in these industries has become increasing inequality-inducing. Similarly, the return to tertiary education has become increasingly inequality-inducing for both males and females. Watson (forthcoming) attributes these changes to factors such as increased managerial flexibility, deregulation of the labour market and the decline in trade union influence. Wilkins and Wooden (2014) note the potential influence of decentralised wage setting.

I.3 Key drivers of real wages and incomes

Wages are determined by a complex set of interacting factors. Over the last 25 years, trends in Australia's terms of trade, WR regulation and productivity have all influenced wage outcomes.

Output prices and terms of trade

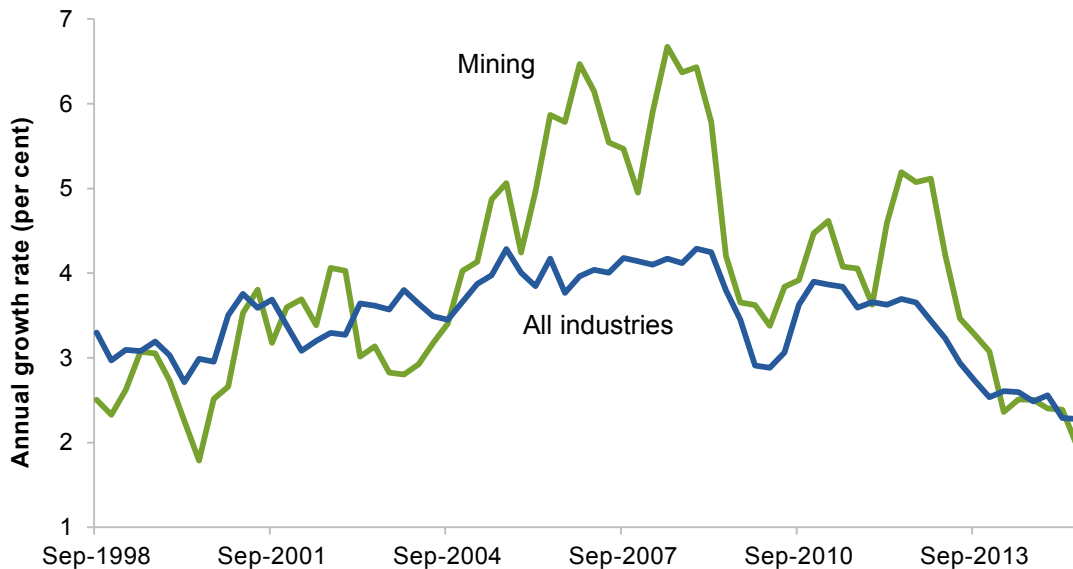
As the prices that employers receive increase, employers are better able pay higher wages. Moreover, other flow-on effects of higher output prices can also contribute to higher wages. As firms respond to higher returns by increasing levels of output, for example, they require more labour. This increased labour demand can lead to higher wages as suitable labour becomes increasingly scarce.

These dynamics have been observed in Australia over the course of the mining boom, with strong growth in terms of trade from the mid-2000s to 2011. The rapid expansion in mining operations and increased demand for upstream services increased wage pressures. This contributed to a substantial differential in wage growth for the mining sector compared with other sectors (figure I.6). The construction industry also saw significant wage growth, partly driven by construction work during the investment stage of the mining boom, but also by competition for labour between the mining and construction industries.

²⁰³ Quantile regression estimates the relationship between values of the dependent variable at various quartiles and values of explanatory variables. For example, in the wages context, a positive coefficient for a variable indicating age in an equation representing the 75th percentile would imply that — all other factors equal — the value of the 75th percentile is higher as age increases. Comparing quantile regression results over time allows for an indication of the changing effect of explanatory variables on the wage distribution, as well the degree to which changes in wage inequality can be attributed to the changed prevalence these characteristics among workers, as compared with their wage premia.

Across the entire Australian economy, Downes et al. (2014) estimate that the mining boom increased real per capita household disposable income by 13 per cent.

Figure I.6 Growth in wage price index for mining and all industries
September 1990 to June 2015



Source: Wage Price Index, Australia, Cat. No. 6345.0.

Regulation

In Australia, WR regulation influences wages in several ways, though primarily through regulation of minimum wages in the Fair Work Commission's annual wage review and in awards. Since the early 2000s, the national minimum wage has declined substantially as a proportion of the median wage (chapter 4). Similarly, award rates have shifted further toward a safety net. This is evident in the declining incomes observed of those paid at award rates compared with other employees (chapter 7). Although recent trends in award rates may have contributed to increasing wage dispersion, the overall impact of awards — compared against their absence — is likely to have reduced inequality. Indeed, Borland and Woodbridge (1999, p. 97) and Whiteford (2013) have identified the award system as a contributor to Australia's relatively low level of income dispersion.

Productivity

Over the longer term, productivity growth is the primary driver of incomes and, in turn, living standards. Australia's strong productivity growth throughout the 1990s was a key contributor to Australia's strong wage growth, which coincided with increased employment and declining unemployment rates. Supporting this notion, Australia

experienced both a productivity ‘surge’ and strong wage growth during 1990s before many other OECD countries.

Productivity also has implications for wage and income distribution. For example, there is some evidence that technological change may contribute to increasing wage dispersion, with the effect driven by job polarisation. Increased employment among more high and low skilled occupations, along with reduced growth in middle-skill occupations has been observed widely across North America and Europe. This phenomena has also been observed in Australia over some periods, while job growth restricted to the higher end of the skill distribution has been observed in others (Borland and Coelli 2015).

A prominent explanation of these patterns is increasing automation of work, which most directly affects jobs that perform routinized, cognitive tasks. These jobs tend to be performed by middle-skilled employees. This influences patterns in employment growth, but it also has the capacity to affect wage dispersion. Although some workers are replaced by technology, others are made more productive. As Autor (2015) outlines, increased job growth among low and high-skill occupations is likely to drive increased wages among high-skill occupations, which require extensive training and are less easily filled, compared with low-skill occupations, for which additional labour is more readily available.

The labour income share

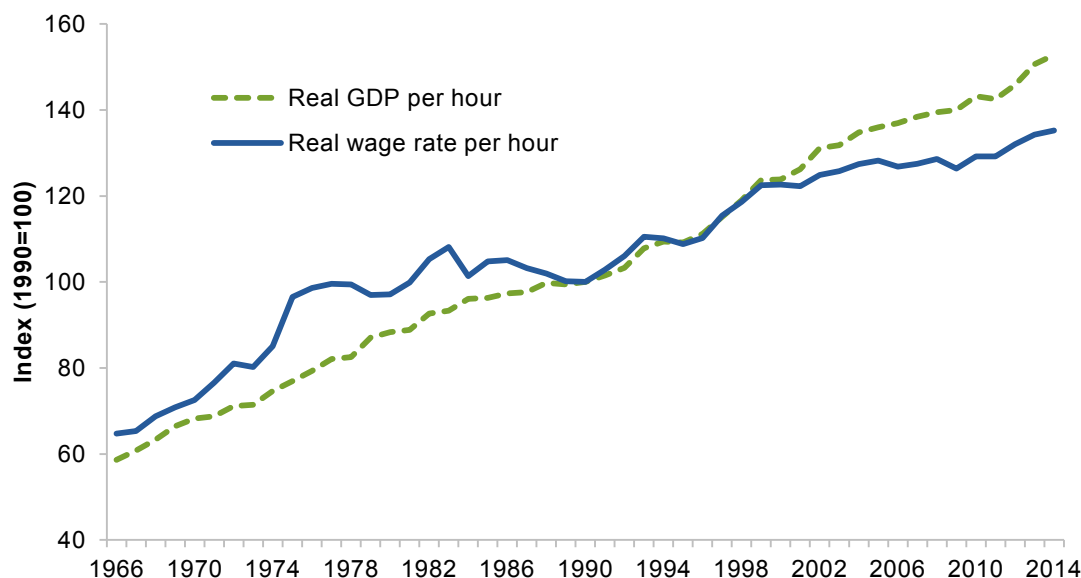
The link between productivity and growth in labour income is moderated by the labour income share. Briefly, the labour income share is the compensation allocated to employees as a proportion of total income. As such, changes in the labour income share are driven by relativities in the growth of real wages relative to labour productivity (figure I.7).²⁰⁴

During the 1990s, the labour share of income remained stable. However, beginning in the early 2000s, growth in labour productivity exceeded that of real wages, contributing to a decline in labour income share. The Australian Council of Trade Unions (ACTU) (2013a) found that the labour share of income declined from just over 65 per cent to just over 60 per cent during the 2000s.

A declining labour share of income has not been limited to Australia. Indeed, almost all OECD countries experienced a reduced labour share of income during the late 2000s (OECD 2012). The OECD estimates that total factor productivity (a proxy for technological development) and capital deepening jointly accounted for as much as 80 per cent of the within-industry decline in the labour share. The same study also attributes a portion of the reduced labour share to increased competition, which in turn reduces the bargaining power of employees.

²⁰⁴ In this instance, wages were deflated using the GDP price deflator. This contrasts with earlier figures in which wages are deflated using the consumer price index (CPI). The former more closely reflects costs to business, while the latter more closely reflects the value of wages to consumers.

Figure I.7 **Real wages and productivity**
1966 to 2014



^a Both series are deflated by the GDP implicit price deflator.

Sources: Productivity Commission estimates based on ABS *Australian System of National Accounts*, 2013-14, Cat. No. 5204.0; ABS *Labour Force, Australia, Detailed, Quarterly*, February 2015, Cat. No. 6291.0.55.003; RBA (1997) table 4.7 and 4.12.

Focussing on Australia, Parham (2013b) suggests that the decline in the labour share has been driven by strong growth in terms of trade, noting that whilst employees captured a relatively small share of increased revenue from higher output prices, the consumer wage increased significantly throughout the 2000s (even more than in the 1990s). As a result, a declining terms of trade may, to some extent, reverse recent trends in the labour income share.

I.4 Conclusion

Australia's wage and income growth over the past 25 years has been strong, driven by productivity growth and a boom in the terms of trade. However, distributional trends in incomes reveal increasing inequality, coupled with a declining labour share of income. As Australia's terms of trade returns to lower levels, continuing previous levels of wage growth will be a key challenge.

J Future research agenda

There is a strong need for greater evidence in regard to many aspects of the workplace relations (WR) framework. Unless both the available data and the appetite for enhanced empirical analysis in this area improve, the required body of evidence needed to undertake a rigorous analysis of the impact of the Productivity Commission's proposed reforms will be hard to attain. More importantly, the capacity for using evidence to further refine policies would be considerably lower than is desirable. In part, this deficiency should be overcome by putting more weight on evidence-based decision making by WR regulators.

The Productivity Commission therefore recommends an ongoing research agenda to ensure that future policy changes affecting the Australian labour market will be well supported.

The purpose of this appendix is to outline some of the key elements that may make up a future research agenda on the Australian labour market. An important threshold condition is that this research is policy relevant. This requires asking clear questions that are directed at policy-relevant problems that will elicit empirical evidence that provides directions for policy.

The appendix consists of two sections:

- Section J.1 discusses some of the main themes that have emerged during the Productivity Commission's inquiry regarding research gaps and prospective areas for future research. This analysis is not exhaustive, rather it is provided to form a basis, if needed, for more comprehensive considerations of further research and data collection.
- Section J.2 then provides more detailed information across a wider range of specific policy areas where more evidence could, and should, be collected to support decision making.

J.1 Some main research themes

Data gaps are a persistent problem

The need for more and better quality data is apparent across many areas of labour market research in Australia.

For example, on *minimum wages* and their effects on such things as employment, job choice, and movements both between jobs and between unemployment and employment, more comprehensive data would permit a deeper analysis of impacts.

On *penalty rates*, to use another example, better data is needed on the hours people work and other activities that they undertake during the week (disaggregated by time of day and day of the week). Whilst information on overtime and its compensation is available in cross-sectional ABS datasets, more insights could also be gained from longitudinal data.

In many cases, more could be achieved by changes in collection arrangements or through minor additions to include other matters for consideration. Key sources of data that, while already providing much needed detail, could be improved, include the datasets collected by the ABS, HILDA data, and the AWRS set. The latter is particularly amenable to improvement, both in terms of the frequency of collection and regarding response and engagement. To use another example, inclusion in the ABS's monthly Labour Force Survey of an indicator for casual employment could provide timely information on movements between casual and non-casual employment.

More extensive qualitative data would also be useful in some cases

Sometimes data is difficult to collect because it is qualitative, but would still be very useful to guiding policy in the future. For example, in regard to transfer of business, the Productivity Commission has recommended monitoring and evaluating 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. Such monitoring will require detailed qualitative data of this kind if it is to be effective.

International and jurisdictional comparisons have a role

During its inquiry, the Productivity Commission has drawn on international and/or state-by-state comparisons when considering issues. For instance, different employment protection laws in other countries were discussed in chapter 17 (unfair dismissal), and comparisons with Australia are of use when assessing the comparative strictness of the Australian framework and looking at potential impacts on such things as aggregate employment, labour force transitions and firm-level policies and procedures.

More could be done, and in part this is dependent on data comparability. For example, some participants argued that there is a case for the collection of matched employer-employee data in Australia, as occurs in New Zealand (Danielle Venn, pers. comm., 23 September 2015). This involves the use of administrative data which is then matched with survey data. Matched employee-employer data can yield insights in a range of areas, including dismissal, job flows and productivity. Development of matched data in

Australia would also permit interesting comparisons with New Zealand on such things as the impact of different labour market settings, for example, to assess wage outcomes for employees.

Improvements are needed in research involving the main WR bodies

The main workplace institutions in Australia, the Fair Work Commission (FWC) and the Fair Work Ombudsman (FWO), will also be important to future research endeavours (as would any other main WR institution in a reformed system). This includes a role in undertaking or commissioning research but, more broadly, also entails the provision of information to researchers separate from both organisations. (Research undertaken by the FWC has been discussed in several chapters of the main report, including chapter 3 (institutions), chapter 4 (minimum wages) and chapter 8 (repairing awards)).

The importance of research in informing the activities of these key bodies has also been emphasised throughout this report. The conciliation processes used by the FWC, discussed in chapters 17 (unfair dismissal), 18 (general protections) and 19 (anti-bullying), provide one example of this. Internationally, there is a paucity of research on conciliation procedures in labour courts and tribunals, although most countries have relatively high rates of cases settled out of court, even if no formal conciliation or mediation procedures are in place. Further research on conciliation procedures would provide an improved understanding of what works and would inform the development of practices over time.

J.2 A future agenda

Table J.1 below recommends areas for possible future research, grouped by policy issue. These recommendations reflect many of the gaps in data and rigorous research that the Productivity Commission has encountered during this inquiry.

For some of these research areas, data might already exist — in these cases, the Productivity Commission requests that those data be made available for research purposes.

For others, new or extended data collections and new research would need to be commissioned. As data collection and research agencies will incur additional costs to collect these data, this should only be undertaken once it has been established that the additional data and research will provide net benefits by allowing better-informed policy recommendations and decisions in the future.

Table J.1 Summary of identified research improvements

<i>Policy issue</i>	<i>Additional data collection and/or research requirements</i>	<i>Current status of data/research</i>	<i>Responsible organisation/s</i>	<i>Data set (if applicable)</i>
Alternative forms of employment	Survey data on workers who identify as labour hire employees and whether they are permanent, casual or independent contractors.	Incomplete	ABS	Expansion of ABS surveys to include this information
Awards	Longitudinal data on the proportion of employees on enterprise agreements who receive award wages and conditions — disaggregated by industry, occupation, region, sex, age, earnings	Incomplete	ABS, Department of Employment, FWC	Workplace Agreements Database, AWIRS, Others
Awards	Longitudinal data on how many employees are on each award – disaggregated by industry, occupation, region, sex, age, earnings	Incomplete	ABS	Expansion of ABS Employee Earnings and Hours
Awards	Extension of data on apprenticeships and traineeships — including information on the nature of courses and characteristics of those enrolled — disaggregated by award and classification.	Incomplete	Melbourne Institute	HILDA
Awards	Longitudinal data that links employees with their classification under the relevant award.	Missing	ABS, FWC	Expansion of ABS Employee Earnings and Hours, AWIRS
Awards	Structured data on award conditions, facilitating comparison of conditions across awards.	Incomplete	WSC (and until such time as the WSC is established, the FWC)	Existing FWC datasets and new WSC datasets (if established)
Compliance costs	Comparative assessment of compliance costs imposed on business by WR regulations before and after any legislative change.	Incomplete	Various	New and existing data, surveys
Compliance costs	Assessment of the contribution that unnecessary WR-related compliance costs make to the regulatory burden on business	Incomplete	Various	New and existing data, surveys
Compliance costs	Compliance costs of modern awards by sector	Missing	FWC	

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Table J.1 (continued)

<i>Policy issue</i>	<i>Additional data collection and/or research requirements</i>	<i>Current status of data/research</i>	<i>Responsible organisation/s</i>	<i>Data set (if applicable)</i>
Domestic violence leave	Better quality data on the incidence of family or domestic violence in a year. Data should include both frequency in aggregate (across the population) and the frequency of experience for each individual.	Incomplete	ABS	
Domestic violence leave	Data on the usage of domestic violence leave, where this has been included in enterprise agreements and the usage of other forms of leave for purposes related to domestic violence	Missing	FWC	
Employment protection legislation	Employee survey data or matched employee-employer surveys regarding worker dismissals	Out-of-date	ABS	Retrenchment and Redundancy, Cat. no. 6266.0 (last updated July 2001)
Employment protection legislation	Employee survey data seeking more information about circumstances around job separation	Incomplete	FWC	Inclusion of employee separation questions in any new round of the AWIRS survey.
Employment protection legislation	Longitudinal data on a cohort of dismissed workers.	Incomplete	Melbourne Institute	An expansion of HILDA to include examination of this issue.
Institutions	Further research on the Fair Work Commission's conciliation and arbitration activities following possible further institutional reform and reform of these processes	Incomplete	Fair Work Commission and other researchers and reviewers	Lodgment and outcomes data
Institutions	Further research on the Fair Work Ombudsman's enforcement and other activities in key areas, including migrant workers.	Incomplete	Fair Work Ombudsman and other researchers and reviewers	Case outcomes and other data

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Table J.1 (continued)

<i>Policy issue</i>	<i>Additional data collection and/or research requirements</i>	<i>Current status of data/research</i>	<i>Responsible organisation/s</i>	<i>Data set (if applicable)</i>
Migrant workers	Data on: industries and locations where exploitation occurs, and the types of businesses involved; characteristics of migrants that make them vulnerable to exploitation; and the types of exploitation carried out.	Missing	Various	Data that combines confidentialised data from the FWO's, ATO's, ASIC's and DIBP's enforcement activities. Information and feedback from industry and community groups.
Minimum wages	Further information on the factors that affect a person's capacity to get a job both in terms of job to job movements, and unemployment to job movements – disaggregated by age, sex, region, industry, occupation	Incomplete	ABS	Job Search Experience, cat. no. 6222.0, July 2013
Minimum wages	Information comparing the earnings of employees under 16 in New Zealand and Australia	Missing	ABS and Statistics New Zealand	New data
Minimum wages	Research identifying the main drivers of unemployment in Australia and New Zealand	Incomplete	Various	New and expanded data
NES	Longitudinal data on the proportion of casual workers who have requested conversion to permanent employment after fulfilling their qualifying period and the success rate of these requests (including whether the disposition of the employer has affected the worker's decision to exercise their right).	Missing	Melbourne Institute and various others	New data and possibly an expanded part of HILDA
NES	Longitudinal data on the proportion of workers who have become eligible for, take and/or cash out long service leave (including whether they take it in large chunks or in smaller portions).	Incomplete	Melbourne Institute and various others	New data and possibly an expanded part of HILDA

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Table J.1 (continued)

<i>Policy issue</i>	<i>Additional data collection and/or research requirements</i>	<i>Current status of data/research</i>	<i>Responsible organisation/s</i>	<i>Data set (if applicable)</i>
Penalty rates and overtime	Longitudinal data indicating which exact days of the week people always, often, sometimes or regularly work – disaggregated by factors such as earnings, employment type (full time, part time, casual), occupation and level of education	Incomplete	Melbourne Institute	HILDA
Penalty rates and overtime	Comparative information on the incidence of penalty rates in New Zealand (where they are not regulated) to Australia (where they are).	Missing	ABS and Statistics New Zealand	New data
Penalty rates and overtime	Data on the hours people work and other activities undertaken during the week (disaggregated by time of day and day of the week)	Incomplete	ABS	Time Use Survey, cat. no. 4153.0
Penalty rates and overtime	Longitudinal data on overtime hours and their compensation. Whilst this information is available in cross-sectional ABS datasets, more insights could be gained from the experience of employees over time .	Incomplete	Melbourne Institute	HILDA

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