



Australian Government  
Productivity Commission

# Workplace Relations Framework

Productivity Commission  
Draft Report  
*Overview*

August 2015

This is a draft report prepared for further public consultation and input. The Commission will finalise its report after these processes have taken place.

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### **Publications enquiries**

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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](http://www.pc.gov.au)).

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# Opportunity for further comment

You are invited to examine this draft and comment on it by written submission to the Productivity Commission, preferably in electronic format, by **18 September 2015**. Further information on how to provide a submission is included on the inquiry website <http://www.pc.gov.au/inquiries/current/workplace-relations>.

The final report will be prepared after further submissions have been received and public hearings have been held, and will be forwarded to the Australian Government by the end of November 2015.

## Public hearing dates and venues

Location	Date	Venue
Bendigo, VIC	Friday 4 September 2015	TBC
Hobart, TAS	Monday 7 September 2015	The Old Woolstore 1 Macquarie Street
Melbourne, VIC	Tuesday 8 September 2015	Rattigan Room Productivity Commission Level 12, 530 Collins Street
Canberra, ACT	Friday 11 September 2015	Hearing Room Productivity Commission Level 2, 15 Moore Street
Perth, WA	Monday 14 September 2015	Hotel Mercure Perth 10 Irwin Street
Adelaide, SA	Tuesday 15 September 2015	Stamford Plaza Adelaide 150 North Terrace
Sydney, NSW	Thursday 17 September 2015	The Grace Hotel 77 York Street
Ipswich, QLD	Monday 21 September 2015	TBC

## Commissioners

For the purposes of this inquiry and draft report, in accordance with section 40 of the *Productivity Commission Act 1998* the powers of the Productivity Commission have been exercised by:

Peter Harris      Presiding Commissioner

Patricia Scott    Commissioner

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# 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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# OVERVIEW



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## Key points

- A workplace relations (WR) framework must recognise two features of labour markets.
  - Labour is not just an ordinary input. There are ethical and community norms about the way in which a country treats its employees.
  - Without regulation, employees are likely to have much less bargaining power than employers, with adverse outcomes for their wages and conditions.
- The challenge for a WR framework is to develop a system that provides balanced bargaining power between the parties, that encourages employment, and that enhances economic efficiency. It is easy to over or under regulate.
- Set against that framework, Australia's WR system is not dysfunctional — it needs repair not replacement.
- Toxic relationships between employers and employees can sometimes surface due to poor relationship management rather than flaws in the WR framework.
- Contrary to perceptions, Australia's labour market performance and flexibility is relatively good by global standards, and many of the concerns that pervaded historical arrangements have now abated. Strike activity is low, wages are responsive to economic downturns and there are multiple forms of employment arrangements that offer employees and employers flexible options for working.
- Nevertheless, several major deficiencies need addressing.
- While the Fair Work Commission (FWC) undertakes many of its functions well, the legalistic approach it adopts for award determination gives too much weight to history, precedent and judgments on the merits of cases put to it by partisan lobbyists. A preferred approach to award determination would give greatest weight to a clear analytical framework supported by evidence collected by the FWC itself.
- There is also concern that the appointment process for FWC members can lead to inconsistencies in some of its decisions, a problem that a new 'fit for purpose' governance model involving all Australian jurisdictions could resolve.
- The *Fair Work Act 2009* (Cth) and sometimes the FWC can give too much weight to procedure and too little to substance, leading to compliance costs and, in some cases, poor outcomes
  - some minor procedural defects in enterprise bargaining can require an employer to recommence bargaining
  - an employee may engage in serious misconduct but may receive considerable compensation under unfair dismissal provisions due to procedural lapses by an employer.
- These problems could be easily remedied without removing employee protections.
- Minimum wages are justified, and the view that existing levels are highly prejudicial to employment is not well founded. However, significant minimum wage increases pose a risk for employment, especially when set against a weakening labour market. Minimum wages are also often paid to higher-income households.
- Complementary policies that provide in-work benefits — such as wage subsidies or an earned income tax credit — might support higher incomes for lower paid employees, while not damaging employment. However, there are challenges in developing effective policies of this kind.

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## Key points (continued)

- Awards are an Australian idiosyncrasy with some undesirable inconsistencies and rigidities, but they are an important safety net and a useful benchmark for many employers. The FWC should address specified troublesome hotspots on a thematic basis, rather than completely replace them.
- Penalty rates have a legitimate role in compensating employees for working long hours or at unsociable times. They should be maintained. However, Sunday penalty rates for cafes, hospitality, entertainment, restaurants and retailing should be aligned with Saturday rates.
- Enterprise bargaining generally works well, although it is often ill-suited to smaller enterprises. However,
  - the ‘better off overall test’ used to assess whether an agreement leaves employees better off compared with the award can sometimes be applied mechanically, losing some benefits of flexibility for employees and employers. Switching to a no-disadvantage test with guidelines about the use of the test would encourage win-win options. The same test should be used for individual arrangements
  - bargaining arrangements for greenfields agreements pose risks for large capital-intensive projects with urgent timelines. A limited menu of bargaining options would address the worst deficiencies, while taking account of the different nature of greenfields projects.
- Individual flexibility arrangements have many possible advantages, but their take up is relatively low. In part, this reflects ignorance of their existence. But there are perceptions (sometimes not well based) of defects that also constrain their use. These could be resolved, including by providing information on their use, extending the termination period of the arrangements and by moving to the no-disadvantage test.
- There is scope for a new form of agreement — the ‘enterprise contract’ — to fill the gap between enterprise agreements and individual arrangements. This would offer many of the advantages of enterprise agreements, without the complexities, making them particularly suitable for smaller businesses. Any risks to employees would be assuaged through a comprehensive set of protections, including the right to revert to the award.
- Industrial action in Australia is at low levels. Only some minor tweaks are required:
  - processes for secret ballots can be overly complex
  - aborted strikes and brief stoppages are sometimes ingeniously used as bargaining leverage by unions, but a few simple remedies can address this without affecting the legitimate use of industrial action
  - there may be grounds to give employers more graduated options for retaliatory industrial action other than locking out its workforce.
- It seems to be too easy under the current test for an employer to escape prosecution for sham contracting. Recalibrating the test may be justified.
- Migrant workers are more vulnerable to exploitation than are other employees, and this is especially true for illegally working migrants. This may require more proportional penalties to deter exploitation and further resourcing of the Fair Work Ombudsman to detect it.

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# Overview

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

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

*The key message of this inquiry is that repair, not replacement, should be the policy imperative. The adapted system needs to give primacy to substance over procedure, rebalance some aspects of the system that have favoured some parties over others, and revitalise its principal regulator. An improved workplace framework must involve decision making that is not unnecessarily beholden to precedent or to dated labour market structures. It must rely much more on evidence as a basis for its future direction, including information on the relevance of new developments in labour relations. The framework's broader menu of bargaining arrangements and the more coherent wage setting capacity of its key institution will underpin greater responsiveness to emerging social and economic developments (for example greater demand for flexible work arrangements with shared child care, an even greater shift to the 24/7 economy, and further automation of services).*

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

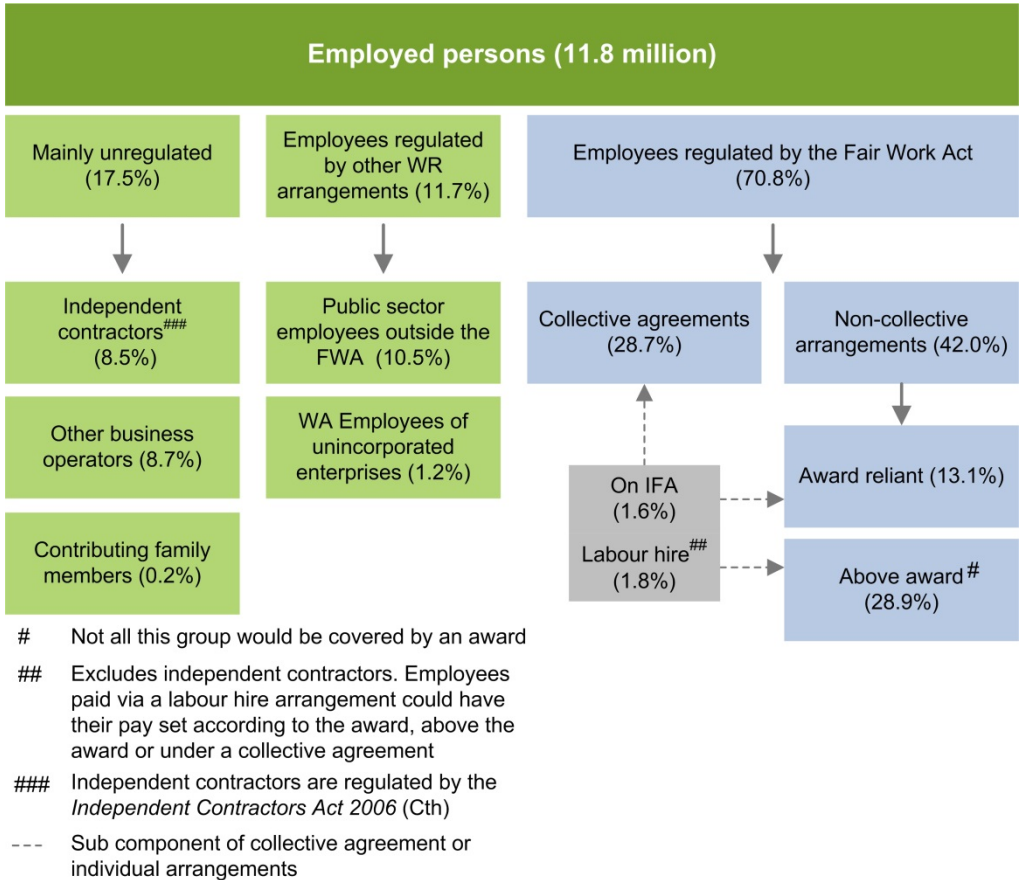
The workplace relations (WR) framework comprises a complex array of labour laws, regulations and institutions. Along with market forces, accepted practices, cultural norms and the common law, these shape people's behaviour, the nature of their workplaces and their working lives.

The national system directly affects millions of Australian workers. In mid-2015, around 11.8 million people worked in more than 2 million workplaces around Australia. Of these people, around 70 per cent were covered directly by federal workplace laws (figure 1), and others are indirectly affected. For instance, an owner-manager of a small firm must comply

with WR laws, while the choices of people to become self-employed are strongly influenced by the alternative wages and conditions that they could receive by being an employee. There are also more than 700 000 unemployed whose job prospects are affected by the system. Even employees outside the national system (some state public servants and some employees captured by the separate Western Australian system) find that their arrangements are shaped by the national arrangements. Further, to the extent that the WR system embodies community expectations about fairness or influences national prosperity and productivity, all Australians have a stake in its effectiveness.

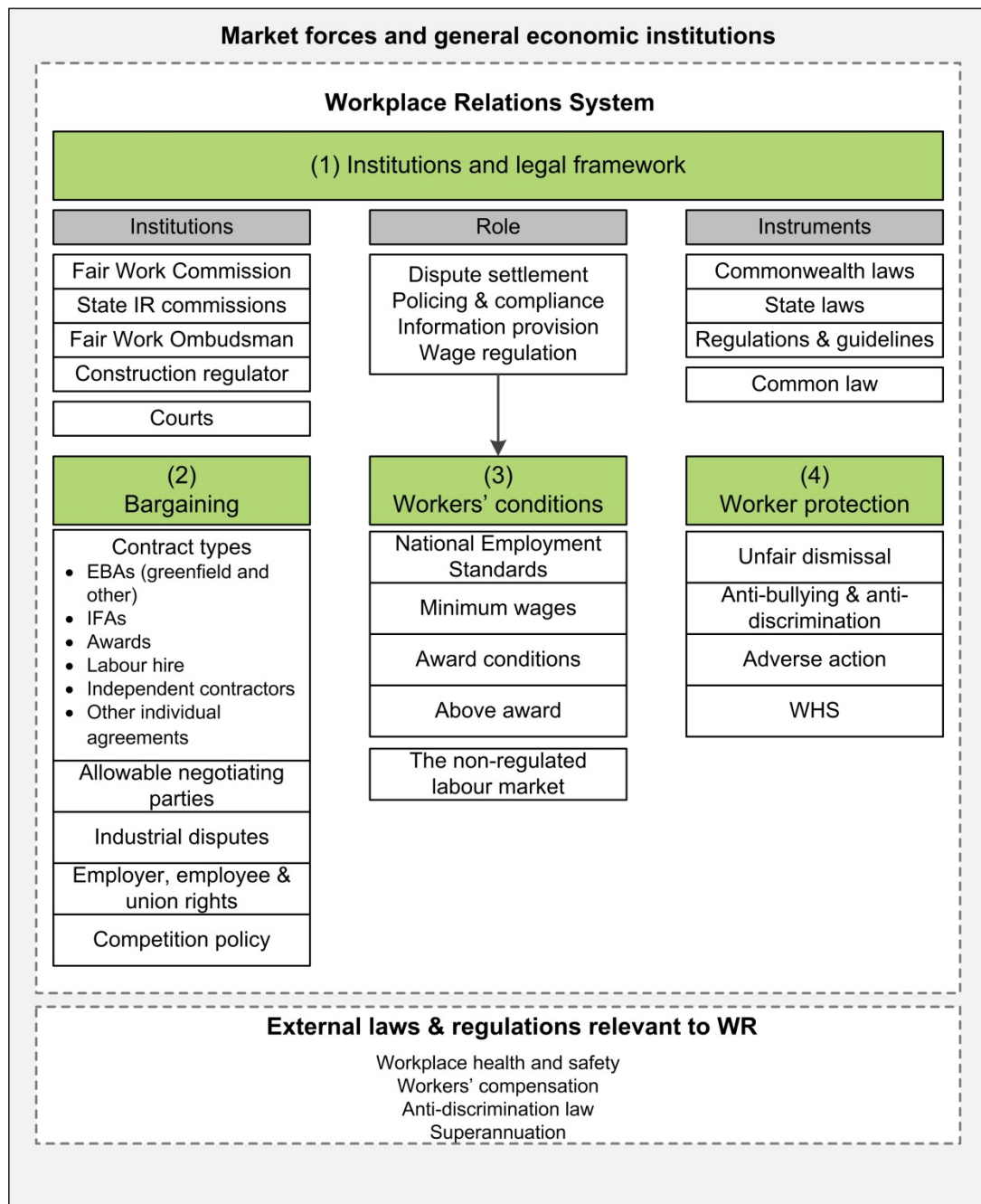
The premise of any WR system is that, absent specific workplace legislation and oversight, employees would particularly suffer from unequal bargaining power. Most stakeholders recognised this. Of course, bargaining power is not always in the hands of employers. Aspects of the *Fair Work Act 2009* (Cth)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

Figure 1 Employment arrangements, 2015



In trying to produce a balanced system, WR legislation, institutions and regulation are now highly elaborate and broad ranging (figure 2). However, market forces play a larger role in most wage outcomes and, in the longer term, have a strong impact on conditions.

**Figure 2 The main elements of the current workplace relations arrangements**



For example, wage growth is strongly influenced by the business cycle, long-run productivity and sectoral changes.

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

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

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

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

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

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

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

Moreover, some of the Productivity Commission's recommendations in this draft report are not new. The 2012 review of the Fair Work Act identified a range of worthwhile reforms, some of which were not acted on at the time. But this inquiry does not simply

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traverse the territory of the previous review. The terms of reference require the Productivity Commission to cover all those aspects of workplace relations that impinge upon the ability of the system as a whole to adapt to longer-term structural shifts and changes in the global economy.

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

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

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

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

The labour market has accommodated well to large shifts in labour supply. Many more women, more mature age workers and large numbers of skilled migrants have entered the labour market. For example, the current level of skilled migrant intake is almost three times higher than levels of the late 1990s. Most people who experience unemployment do not do so for long. The shift away from making solid things to services has largely been achieved without growing unemployment.

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

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

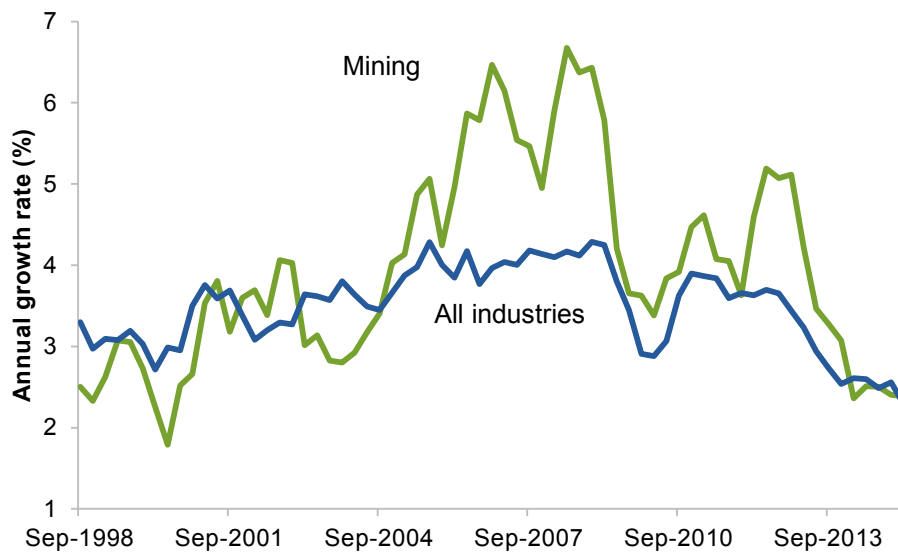
Surmise aside, there is little robust evidence that the different variants of WR systems over the last 20 years have had detectable effects on measured economywide productivity. This does not mean there are no effects, but simply that they apply at the enterprise and industry level and are hard to identify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

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However, there are some potentially concerning trends. In particular, youth unemployment is rising, and by more than the growth in the unemployment rates of prime-aged people in the labour market. Underemployment and long-term unemployment has also risen in recent years.

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



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## 2 Institutional reform

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

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

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

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

### **The heavy weight of history**

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

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

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

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

The implication is that the FWC should develop clearer analytical frameworks and proactively undertake its own data collection and systematic high-quality empirical research as the key basis for its award decisions and wage adjustments. (While the FWC does initiate some research, much of it is of limited specific relevance to its actual decisions.) The FWC should not just impartially hear evidence from parties, but also engage with parties that do not usually make submissions, such as those representing consumers and the jobless.

### **The virtue of consistency**

While the Fair Work Act sometimes compels members of the FWC to give too much weight to procedure over substance (as discussed later), the attitudes of individual members also play a role. Guidelines issued by the FWC about statutory interpretation and performance assessment of members should curtail this.

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## Governance

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

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

First, the FWC should have two distinct divisions. A *Minimum Standards Division* would have responsibility for wage determination, and would undertake the annual wage review and make award determinations. Its members should primarily have expertise in economics, social science and commerce, not the law. A *Tribunal Division* would be responsible for the quasi-judicial functions of the FWC, such as decisions relating to unfair dismissals, adverse actions, approval of agreements, rights of entry and industrial disputes. Its members should have broad experience and be drawn from a range of professions, including the law, commercial dispute resolution, ombudsman's offices and economics.

Second, the processes for appointing members of the FWC also require reform. The Australian, state and territory governments should create an expert appointments panel, which would provide a merit-based shortlist of candidates for the two divisions. The relevant Australian Government minister would then choose members from the shortlist for a fixed tenure (with the potential for renewal). Both the panel and the relevant minister would need to be satisfied that the person would be widely seen as having an unbiased and credible framework for reaching conclusions and determinations.

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

Structural changes of this nature will take some time, but action on some fronts is needed, and can be taken, now. The FWC already has the capacity to appoint more experts as advisors to its members and to take an activist and evidence-based approach to an assessment of awards. A change in mindset requires no legislation, and a move in this direction under the strategic guidance of the President would be a major step.

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### 3 The safety net

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

#### Minimum wages

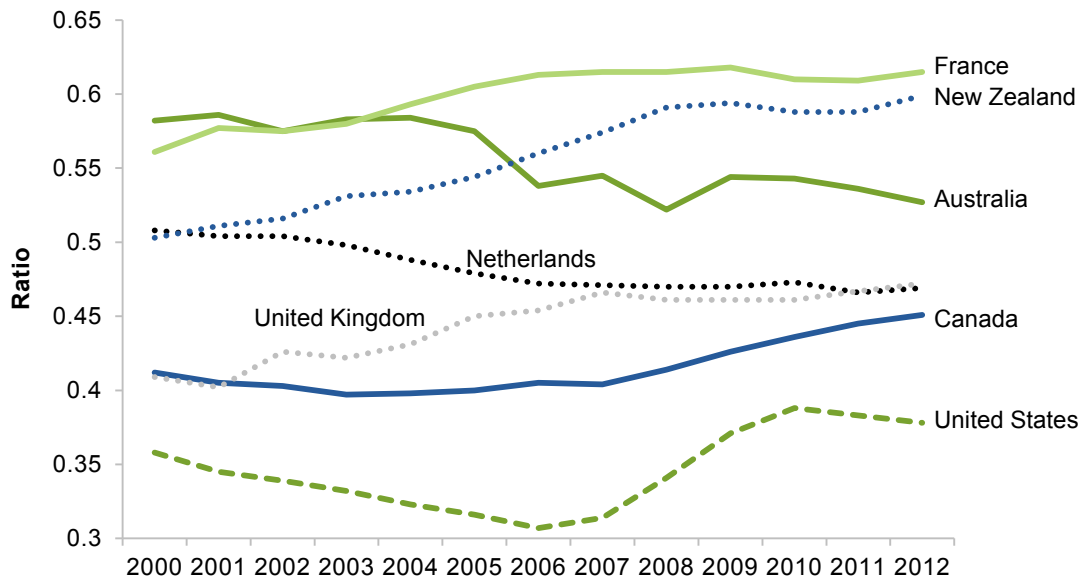
Minimum wages in Australia are set by an FWC Expert Panel, taking into account changes in economic conditions and representations, especially from the government, business and union stakeholders. It generally awards modest rises in minimum wages, and its predecessors have occasionally suspended increases during downturns. A commonly used measure of the comparative level of the minimum wage is its ratio to the median wage rate, which also enables meaningful comparisons with other countries. While the minimum-to-median wage ratio remains high in Australia compared with most other countries (France and New Zealand being the notable exceptions), it has declined over the past decade. Indeed, no other OECD country has shown such a strong trend decline (figure 4).

There are several rationales for minimum wages:

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

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

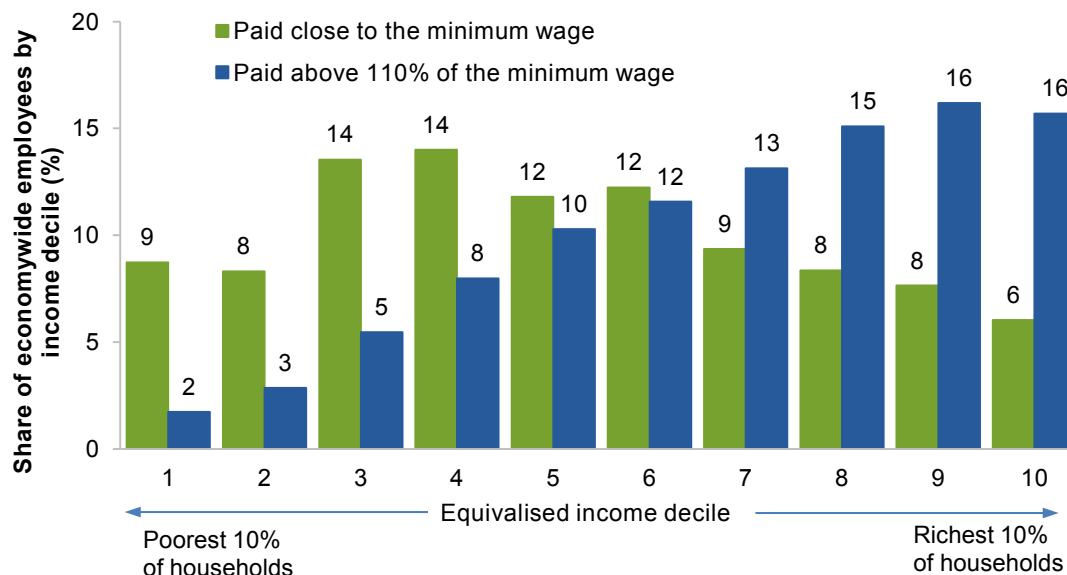
Figure 4 Minimum to median wages for several OECD countries



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

- how those pay increases affect all other wages in the economy. Australia’s unique system of awards creates hundreds of wage floors for different jobs whose annual growth rates are linked to changes in the adult minimum wage
- the overall income of households where some people are paid at the minimum wage or whose wage level is strongly related to it. Many employees with wages linked to the minimum wage are not in low-income households. In 2013-14, around 30 per cent of such wage earners were in the richest 40 per cent of working households (figure 5). This reflects that many higher-income households have some family members in low paid jobs.
- the degree to which it reduces employment and hours worked. Unemployment is not only strongly associated with lower income levels, but has highly adverse effects on people’s wellbeing. As emphasised throughout this report, labour market outsiders tend to have little voice in the current WR system, a defect that requires correction
- possible dynamic effects. On the one hand, people facing the risks of unemployment at high minimum wages may acquire skills to avoid this. On the other hand, for many people, minimum wage jobs are a temporary part of their working lives, and indeed such jobs can be a ‘stepping stone’ into the world of work and higher paid jobs later.

Figure 5 **Many people receiving wages around the minimum wage are from middle income households**



Nevertheless, there is strong evidence that the minimum wage (and awards) tend to assist those lower paid households that retain jobs, with a high share of low-income working households on the minimum wage. In 2013-14, the likelihood that an adult employee in the lowest decile of working households was at or close to the minimum wage was around seven times higher than that for the top decile of households (figure 6).

### Policy implications

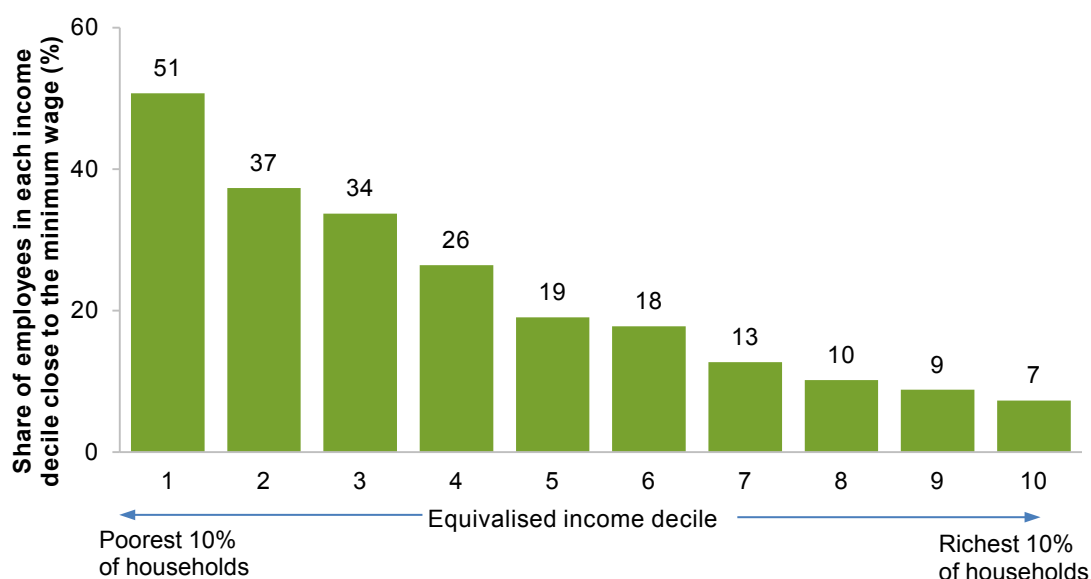
Against that background, while some minimum wage is justified, the FWC faces Goldilocks’s dilemma of determining the level that is ‘just right’.

That level has a long-run and short-run dimension. On the former score, it could be expected that long-run minimum wages would grow approximately in line with economywide productivity levels and maintain a roughly fixed ratio to median wages. That long-run ratio might sometimes shift with the skills and capabilities of the jobless and those employees paid close to the minimum wage. For example, if the average skills of existing jobless people improved over a sustained period, there would be more scope to increase minimum wages without significant adverse effects on their employment prospects.

Over the shorter run, another set of considerations comes into play. Given the highly adverse outcomes of unemployment for people’s wellbeing, whenever the economy is weakening (as appears to be the case now), there are grounds for the FWC to temporarily adopt a conservative approach to minimum wage setting. This does not require that

minimum wages fall, but rather that they grow at less fast a pace than during normal economic times. Notably, real labour productivity in the market sector increased by 13 per cent over the five years from 2008-09 to 2013-14. Were this trend to continue, it would be possible to increase the real incomes of the low paid, but set real minimum wage increases just below the productivity growth rate, thereby simultaneously encouraging employment of people currently priced out of the labour market (and assuaging underemployment). In improved economic circumstances, minimum wages would catch up to restore their long-run ratio to median wages.

**Figure 6 But an employee in a low income group is much more likely to be paid around the minimum wage rate**



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

In contrast, some countries have multiple geographically varying rates with large disparities between rates across regions. For example, Canada, Japan and the United States have different minimum wages by state (and indeed, in some US states, even variations between cities, Los Angeles being an example). In principle, such minimum wage variations look attractive as they could be set at levels that took account of local labour market conditions, thus reducing unemployment risks. However, there are many practical difficulties in an Australian context, including doubtful constitutionality, interactions with modern awards and the tax and transfer system, and complexity for national employers. (Notably, few employers have called for geographically varying rates, even in regions

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where the labour markets are relatively weak.) The Productivity Commission does not propose their introduction.

### Complementary measures

A critical question is the degree to which the regulated wages system can effectively achieve its re-distributional and social equity goals. Minimum wages were developed at a time when it was typically only a man who worked in a household and when the social welfare system was weakly developed — both of which have now changed. However, the welfare system itself has a limited capacity to alleviate income inequality because it can stigmatise people, also discourage employment and embed social disadvantage.

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

By design, EITCs encourage labour force participation, and the evidence usually suggests that they do this, especially for single parents, though their effectiveness depends on their exact design. However, they do have several drawbacks, including high levels of overpayments (around one quarter of the funds in the United States), reduced incentives to work for second earners in some households, and barriers to working above a certain level of hours as household income rises. They must also be financed through taxes, which have their own adverse economic effects. In an Australian context, any EITC would also interact with a well-developed tax-transfer system, which is also intended to improve the incomes of the low paid. The interactions between that system and an EITC would need to be carefully assessed.

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

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

The Productivity Commission is seeking views on whether there are grounds for giving further consideration to an EITC as a complement to minimum wages.

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

## **Wages for juniors, apprentices and trainees**

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

Australia is one of around the fifty per cent of OECD countries that set youth wages as a share of the adult rate. Indeed, notwithstanding the high ratio of the adult minimum wage to median wages, Australian youth wages start at comparatively low levels relative to those in many other countries. For example, a fast food level 1 employee aged under 16 years could have more than a year of experience, but would get \$7.59 an hour (44 per cent of the adult minimum wage). In many states in the United States, many such employees would receive at least US \$8. The decisive test in some countries is not age per se, but also experience, with substantially lower wages for someone with short experience in a job. In the United States, the federal minimum wage is around 60 per cent of the adult minimum for a person aged under 20 who has worked with their employer for less than 90 days. New Zealand has a similar system, with no minimum wage for people aged less than 16 years, and a discounted wage for 16- and 17-year olds with less than six months job experience with their employer.

The Productivity Commission is wary about making any precipitate changes to the current system of youth wages if that was to put at risk the employment of more vulnerable people with lower skills. The transition from education to work is one of the critical pathways, and changes that affected employment of the less academically able could have adverse generational impacts. That said, the Productivity Commission is exploring a hybrid option that recognises that experience or competency might sometimes justify a higher minimum wage.

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

These complex issues go beyond the scope of this inquiry as they also involve concerns about the adequacy of skill formation and competency-based training and pay arrangements. The Australian Government should undertake a comprehensive review of

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Australia's apprenticeship and traineeship arrangements. This review should provide an assessment of the appropriate structure of junior and adult training wages, as well as government incentives.

## National Employment Standards

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

Nonetheless, there are concerns about several aspects of the National Employment Standards.

The Standards specify eight national public holidays on which people are entitled to a paid day of leave (and penalty rates of typically 250 per cent if they work). Public holidays can yield community benefits by enabling coordinated social activities, particularly on days of major cultural or spiritual significance. However, many people treat *some* national public holidays as just normal days off, which throws doubt on their community function. The FW Act allows awards and enterprise agreements to include terms that allow an employer and their employees to observe a public holiday gazetted by government on a date other than the one prescribed, but not all awards contain such provisions. All awards should include the provisions so that the option of swapping holidays is available to all workplaces.

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

State and territory public holidays represent a policy conundrum in a national WR system, given that a substantial goal of the new system was to avoid interstate variations. The Australian Government should amend the National Employment Standards so that employers are not required to pay for leave or any additional penalty rates for any *newly*

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designated state and territory public holidays. (Existing state holidays should be grandfathered.) Of course, employers and employees could still negotiate pay for any new state-declared public holiday, but that would be at their discretion, not state governments.

Long service leave (LSL) is an Antipodean idiosyncrasy. It was invented in the mid-19<sup>th</sup> century to allow citizens to sail to and back from England every decade. Despite its peculiar origins, it now has strong community support. However, the National Employment Standards do not prescribe any consistent national LSL arrangements, so that there are relatively complex interstate variations. This means that national employers must deal with a diversity of qualifying periods and entitlements for LSL across the different arms of their national operations. This has been a longstanding complaint, and the last review of the Fair Work Act recommended a uniform national approach. Any change would produce winners and losers, and this may explain why there has been little appetite by states to change the status quo. Overall, there remains some uncertainty about the net benefits of moving to a uniform system, the appropriate transition to any such standard, and the scope for some more minor simplification of the current system.

## Awards

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

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

- For many years, awards were determined in response to industrial disputes, while now reviews are scheduled as a stipulation of the Fair Work Act and are primarily used to reassess their relevance, iron out anomalies, and ensure that the Modern Awards Objective of the Fair Work Act is met. The Modern Awards Objective comprises various unobjectionable, but often competing, goals. Awards must take into account the living standards of the low paid, the need to promote social inclusion through increased workforce participation, the need to provide additional remuneration for working during unsociable hours, on shifts, or on public holidays, and the likely impact of

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awards on business, productivity, regulatory burden, employment growth, inflation and the performance of the economy.

- With the advent of enterprise bargaining in 1993, the primary role for awards shifted from being an instrument for setting actual wages and conditions to contributing to a broader safety net containing various floors for wages and conditions (that is, from a key driver of the system to a safety net). As part of this safety net, awards help to balance the unequal bargaining power of employees and employers and increase the wages and conditions for some employees above those that they would be able to negotiate on their own. Awards have been effective in this role by reducing the dispersion of pre-tax employment income (especially in the lower half of the household wage distribution) and increasing the wages of low-wage workers.
- Through the award modernisation process, thousands of awards were collapsed to just 122, so the system is simpler than earlier.

It is therefore likely that modern awards are less rigid and costly than their historical predecessors. Nevertheless, they remain relatively inflexible and are often ambiguous, imposing costs for employers and employees. (Even the Fair Work Ombudsman is sometimes unclear about the interpretation of clauses.) In some instances, they are more historical relics of the relative bargaining strength of past protagonists than a carefully thought out way of remunerating employees.

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

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

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

One relatively straightforward step — already partly underway — relates to the form of awards, rather than their content. Awards should be easier to understand and no more

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complex than they need to be. As the Business Council of Australia notes, many awards are unclear on penalty rates and overtime requirements. Awards should be in plain English and be written to avoid the mistakes and misunderstandings that arise from the present ambiguities of awards.

A more fundamental challenge is how to address the more systemic flaws in awards, without repeating the transitional costs of award modernisation. After the completion of the current four yearly award review (whose scope is considerably constrained), the FWC should adopt a different approach to its amendments to awards. It should undertake careful empirical analysis into the aspects of awards that are the source of the greatest problems — ‘hotspots’. It should then consider how it might vary awards to address these on a thematic basis. Those hotspots cannot be determined ahead of analysis, but any analytical framework would attempt to identify the award variations (such as in allowances, wage rates, penalty rates, and spans of hours) that were genuinely problematic, rather than merely untidy.

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

However, there is no need for the FWC to review all aspects of awards, term by term. That would be an ambitious task, with diminishing returns and high costs for stakeholders. Once the current four yearly review has been completed, these periodic reviews should cease. Future assessments should be undertaken on a needs basis.

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

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

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

- shift loadings, and weekend and evening pay premiums. These are requirements placed on employers to pay additional wages at certain times of the day or on certain days of the week, and are not dependent on how many hours in total a person has worked during the week
- overtime rates, which represent higher wage rates for hours worked greater than the usual ordinary hours listed under an award or an agreement
- payments for working on public holidays.

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

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

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

### Sunday penalty rates in the cafes, hospitality, entertainment, restaurants and retailing industries

In recent years, there has been intense debate about penalty rates for just one type of work — weekend work in the hospitality, entertainment, retailing, restaurants and cafes industries.

The same controversies have not occurred for other industries. The community, employers and customers have long accepted weekend work and associated high penalty rates in other parts of the economy (agriculture, transport, utilities, those parts of manufacturing requiring continuous production, health and emergency services). Notably, in New Zealand, where regulated penalty rates no longer apply, employers still pay penalty rates commensurate with Australian rates for many of these industries.

However, for many years, the community did not accept weekend work where seven-day operations were not essential for the community or for the efficient operation of the economy. The crucial development in the past few decades has been the growing demand for the weekend supply of certain services, precisely in the industries where penalty rates have become a controversial issue. Increased female workforce participation rates, the reduction in religious observance, changing social norms about shopping times, the softening of trading hour restrictions, and the emergence of international online commerce will have contributed to this.

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However, the quid pro quo to growing consumer demand on weekends is the requirement that *someone* must supply the labour to provide these services at these times. Australian surveys show that most employees value weekends more highly than weekdays. In an unregulated well-operating market, it could be expected that penalty rates would be needed to elicit sufficient labour supply on weekends. But labour markets are not perfect (which is why workplace relations systems exist in the first place). Individual businesses possess some bargaining power in respect of the labour they hire, with the risk that market-set penalty rates would be lower than they should be. Community standards about the reasonable rates for working on weekends in such industries are also relevant.

The question is then whether regulated weekend penalty rates are set at the ‘right’ level. In the controversial industries, the average skill levels are low, job tenure short, much of the work is part-time and casual, the average age of employees is low and award dependence is relatively high. The frictions from moving from job to job do not appear to be high. The overall evidence suggests that the employers in such industries are not likely to have the same level of bargaining power over their employees as in many other industries, and accordingly, that the businesses are likely to have a weaker capacity to depress wages on weekends.

Large premiums in wage rates for such employees are more likely to elicit reductions in the demand for hours and employment than in many other industries. While the FWC and its predecessors have always (legitimately) argued that the social costs from working asocial hours warrant some penalty rate, they have generally not considered the relevance of the strength of bargaining imbalances and the type of employee in determining penalty rates.

Moreover, on average, award modernisation raised average penalty rates in the relevant industries. This is notwithstanding that one plank underpinning regulated weekend penalty rates — the notion of deterring weekend work — is now acknowledged by the FWC, unions and businesses as irrelevant.

The result is some surprising anomalies, particularly in relation to Sunday penalty rates. Under the present award, an inexperienced level 1 pharmacy assistant with limited qualifications who worked ordinary hours on a Sunday is paid around 40 per cent more than the usual weekly rate for an experienced pharmacist (who requires four years of undergraduate training, a one-year internship and ongoing professional development). In effect, the return to skills are much lower than the returns from working at a different time of the week — and by a large margin.

Moreover, rates for Sundays (usually around 200 per cent of base pay) appear particularly at odds with rates for times that are also important for social activities (evenings), and to an even greater degree for times that pose clearly demonstrated health risks (night shifts and rotating shifts). Evening/afternoon shift penalty rates can be as low as 10 per cent and night shift loadings as low as 15 per cent (figure 7). Survey evidence shows that the overall social costs of daytime work on Sundays are similar to Saturdays, and consistently lower than evening work (figure 8).

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The Productivity Commission recommends that Sunday rates in the hospitality, entertainment, retailing, restaurants and cafes industries should be brought into line with Saturday rates.

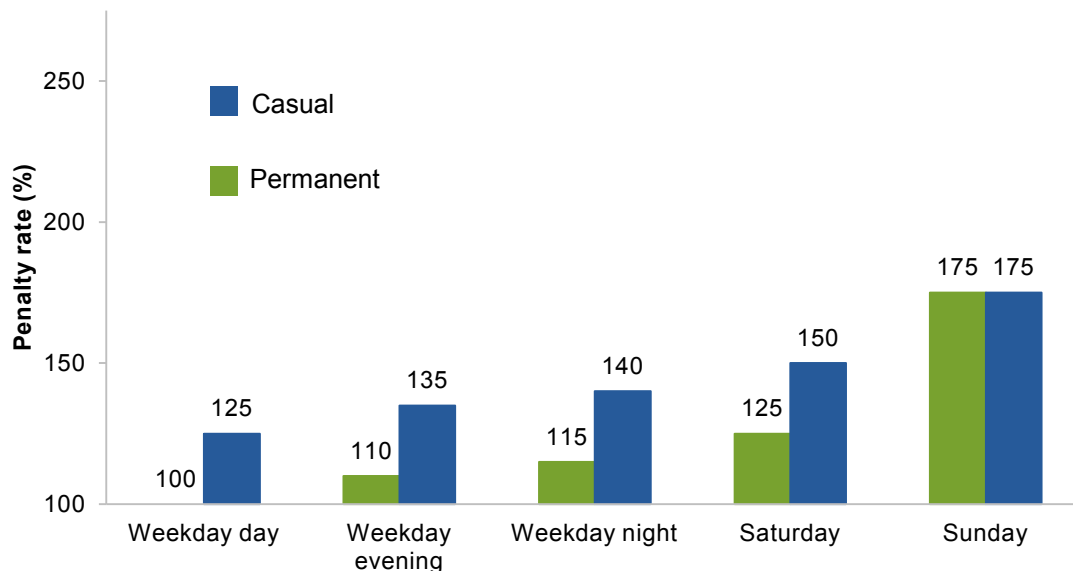
Employment and hours worked on Sundays would rise after the change. Lower regulated penalty rates are likely to increase the opening hours of businesses and encourage higher staffing ratios, with the job opportunities that this presents for people. It would also provide a greater capacity to employ more experienced, often permanent, employees (whose hourly labour costs are particularly high under current penalty rates). Lower penalty rates would also be likely to reduce the incidence of weekend work by small business owner-managers, who often work long hours to avoid high labour costs.

Reductions to Sunday penalty rates will particularly affect the incomes of people who work Sundays only. While there are relatively few such workers in the hospitality, entertainment, retailing, restaurants and cafes industries, the Productivity Commission proposes a lag before any change occurs, allowing people to adjust their lives and working patterns. Moreover, there will be positive outcomes for people who cannot currently obtain jobs in the relevant industries.

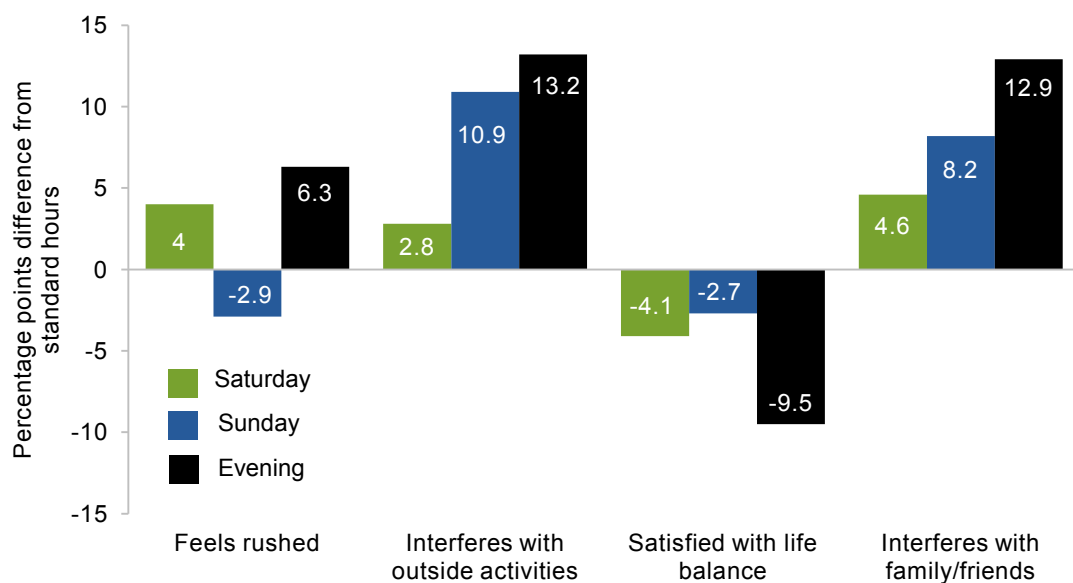
In the longer run, businesses would not be the beneficiaries of deregulated penalty rates given the high levels of competition in the relevant industries. Instead, consumers would benefit from more convenient access to services they value highly and, in some cases, lower prices (for example, through the ending of Sunday surcharges in restaurants and cafes). Failure to recognise the current impacts of high Sunday rates in the relevant industries will also have longer-run effects by frustrating new business models (and the employment they can bring). For example, there are complementarities between online supply and opening hours of some bricks and mortar stores, as in ‘click and collect’ services.

Changes to Sunday penalty rates would desirably occur as part of the current four yearly review.

**Figure 7 Effective penalty rates by day and time of the week**  
Permanent and casual employees in the hospitality industry



**Figure 8 The social ‘disabilities’ of working on Sundays are always less than evening work and sometimes less than Saturdays<sup>a</sup>**



<sup>a</sup> The results control for other factors that affect social disabilities, such as having young children.

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## 4 Protecting employees

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

### Unfair dismissal

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

Unfair dismissal arrangements reflect that employees and employers are not always angels. Employees may underperform, be disruptive or behave badly. Firms and labour markets can only function efficiently if managers have the power to demand behavioural change by poorly performing employees and, absent that, to dismiss or otherwise penalise them. On the other hand, employers may bully workers, make unreasonable demands (such as working longer without pay or overlooking safety issues) or may dismiss people based on prejudice, whimsy or without due process. Accordingly, there is a need for some balance between the prerogative of businesses to manage and the rights of employees to fair treatment.

The prevalence statistics show that unfair dismissal claims remain relatively small in proportional terms across the Australian labour force and that employers only infrequently encounter unfair dismissal cases. It appears that even where employees are dismissed with cause, around 90 per cent make no claims, and of those that do, around half receive compensation.

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

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

The most problematic aspect of the current legislation is that an employee who has clearly breached the normal expectations of appropriate work behaviour may nevertheless be

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deemed to have been unfairly dismissed because of procedural lapses by the employer. For example, in one case a business dismissed two employees after they assaulted their supervisor.<sup>1</sup> The FWC concluded that their physical assault was a valid reason for dismissal, but that the employer's failure to follow certain procedures meant that the dismissals were unjust, unreasonable and therefore unfair.

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

- The Fair Work Act should be amended so that procedural errors alone are not sufficient to award compensation or restore employment in what would otherwise be regarded as a valid dismissal. Nevertheless, procedural errors by an employer should, at the discretion of the FWC, lead to either advice to the employer, or where serious or repeated, financial penalties.
- There should be more upfront filters that focus on the merits of claims.
- Somewhat higher lodgment fees may also assist in limiting the automatic recourse to the FWC, but these would likely have to be tailored to an employee's income, and vary depending on whether conciliation or arbitration was being sought. The Productivity Commission is seeking more views on this.
- To reduce some of the present inconsistencies, the governance of the FWC should be reformed along the lines discussed earlier.
- The emphasis on reinstatement as the *primary* goal of the unfair dismissal provisions should be removed. Good legislation should not give primacy to a goal that is rarely achieved and not necessarily even in the interests of the parties involved.
- The above reforms, complemented by further targeted provision of information and regulator engagement with small business, will deal with many of the current issues experienced by small businesses. Subject to implementation of these reforms, the Small Business Fair Dismissal Code should be removed. The basic premise of assisting small business to navigate the complexities of unfair dismissal legislation is reasonable, but the Code does not achieve that outcome and provides a false sense of security.

## The general protections

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

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<sup>1</sup> *Sheng He v Peacock Brothers & Wilson Lac v Peacock Brothers* (2013) FWC 7541.

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However, there are some deficiencies in the current arrangements.

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

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

A further issue is that business restructuring (for example, moving to labour hire arrangements or adopting labour-displacing technology) sometimes has adverse consequences for existing unionised employees. Some employers claim that such consequences may be depicted as adverse action, which could stymie efficient transformation of businesses. However, while there are some instances where the adverse action provisions may have hampered an employers' legitimate prerogative to manage their businesses to maximise productivity and minimise costs, there is little evidence that unions have systematically frustrated structural change. Accordingly, any response to this apparent problem has to be circumspect.

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

Courts are now also successfully addressing a previously identified prime problem. Some key High Court cases have established legal precedents that an adverse action case will not succeed because of some coincident possible breach of a workplace right (such as dismissal of a union official who has performed poorly). To the extent that the precedent is observed in

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other cases, adverse action would require that such a breach was, on examination of the subjective intentions of the decision maker, the main reason for the dismissal.

Other modest reforms can address the other limitations:

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

These measures would not throw the baby out with the bathwater. Strong protections should remain in force.

## **Anti-bullying**

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

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

While some have questioned whether anti-bullying provisions needed to be incorporated into the Fair Work Act given the other avenues for addressing the issue, the expected barrage of claims has not materialised. In fact, over 2013-14, the FWC received only 197 applications for an order to stop bullying (FWC 2014), with 21 finalised by a decision. Of these, only one application resulted in an order to stop bullying. However, the provision is resource intensive for the FWC as evidence provided by applicants can be extensive, if not always substantive.

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

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## 5 Enterprise bargaining

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

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

### Where a staple can undo an agreement

Peabody Moorvale Pty Ltd<sup>2</sup> provided three pages — stapled together — to all of the employees to be covered by a proposed enterprise agreement. Some bargaining ensued, an agreement was struck and the agreement was lodged with the FWC. However, by attaching the three documents together, the employer contravened requirements about the form of notice to be given to employees. The FWC had no real discretion in the matter, and was obliged by the Fair Work Act to reject the agreement. So, absurdly, the employer had to recommence the agreement process. There is a convincing variety of similar examples.

While there are often good reasons for imposing procedural requirements (for example, to prevent employers including extraneous and potentially misleading information in a notice to employees), substance rather than form should prevail, which is a recurring theme in this inquiry. In this type of instance, the solution is that the FWC should have the discretion to overlook a procedural defect (that poses no risks to employees) without requiring an undertaking by the employer.

### Good faith bargaining

The good faith bargaining requirements appear to be working relatively well. While some have advocated for time limits on bargaining, this would reduce the incentives for parties

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<sup>2</sup> *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FWCFCB 2042 (2 April 2014).

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to agree among themselves. A central tenet of the shift to enterprise bargaining was to step away from third party arbitration. The FWC already has sufficient powers to step in, as a matter of last resort, when there are repeated breaches of the requirements. The good faith bargaining requirements should also be applied to greenfields negotiations, as recommended by the 2012 review of the Fair Work Act.

### The better off overall test (BOOT)

The application of the BOOT is creating uncertainty during the bargaining process and at the agreement approval stage. The main source of confusion lies with how to assess whether the relevant groups of employees (or prospective employees in the case of a greenfields agreement) are better off overall compared with the relevant award. A particularly vexing issue — for both enterprise agreements and individual flexibility arrangements — is how to trade off non-monetary benefits against other benefits of an award.

While the BOOT is not in principle defective, in practice it has sometimes lent itself to a ‘line by line’ approach, which involves assessing whether the relevant class of employees are made better or worse off by each individual term in the agreement when compared with the relevant term in the award. The intention of the BOOT was that it should be a global test, which takes into account the sum of all the benefits of an agreement and tests those against the overall benefits of the award. Shifting to a new ‘no-disadvantage’ test is likely to assist in supporting that intention. It would still ensure that employees were not disadvantaged compared with the award — an essential requirement — while allowing employees and employers to develop agreements that represent wins for both parties. Changing to this test should be complemented by more detailed, practical guidance on the new no-disadvantage test from the FWC (in concert with similar advice given by the Fair Work Ombudsman to employers and employees developing individual arrangements or enterprise contracts — see later).

### Greenfields agreements pose major dilemmas in regulatory design

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

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

There are no easy solutions. Avoiding all uncertainty for employers would shift the balance of power too far in their direction. Allowing the FWC to determine the 'best' outcome would be at odds with the desirability of leaving essentially commercial decisions in the hands of those parties with the greatest information. The Productivity Commission has devised a menu approach, which would allow parties to choose between three options. If an employer and union have not reached a negotiated outcome for a greenfields agreement after three months, the employer would be able to:

- continue negotiating with the union. This would only occur if the employer was confident that a reasonable agreement could be reached, and that the cost of waiting was not prohibitive. It is nevertheless likely that constructive dialogue between the parties — not always guaranteed by the instinctive culture of the two parties — may go a long way
- request that the FWC undertake 'last offer' arbitration of an outcome by choosing between the last offers made by the employer and the union. The FWC would not re-open the matter to make its own judgment, but would merely act as an umpire for the two choices put to it. Knowing this, the parties to the agreement would have strong incentives to make reasonable claims. It would, however, still require that the FWC consider the proposals with a high degree of expected impartiality. The 2012 review of the Fair Work Act also recommended that 'last offer' arbitration be used to resolve stalemates in greenfields negotiations
- submit the employer's proposed greenfields arrangement for approval by the FWC without any need for union agreement, with a 12-month nominal expiry date. At that point, the business would have hired employees, and a normal enterprise bargaining round could occur. The advantage of this menu option is that the employer would have the capacity to negotiate tradeoffs with employees that unions might be unwilling to accept. On the other hand, such bargaining could also lawfully trigger industrial action, with the potential to delay a large already committed project. This would give employees and their representatives a potentially high degree of leverage. An employer facing those risks would be unlikely to select this menu option. It would, however, be much more likely to be attractive to non-capital-intensive greenfields arrangements in which an employer wanted to engage positively with its employees.

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

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

### The content of enterprise agreements

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

The range of matters that should be permitted in an enterprise agreement is an area of fierce contention. Employers generally wish to reduce the range of matters over which bargaining can occur, based on the primacy they give to managerial prerogative, while employees seek a more expansive range of matters (for example, in relation to the use of labour hire or subcontractors):

- There are grounds for changes to the Fair Work 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)).
- In terms of permitted matters more broadly, the Fair Work Act deliberately moved away from the legislative prescription in previous regimes to a reliance on jurisprudence about ‘matters pertaining’. This concedes that it is hard (and perhaps undesirable) to set out a white or black list of *all* permitted matters without reference to context. Apart from the employment of labour hire employees and contractors, further evidence is required to assess whether particular sorts of terms should or should not be permitted.

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

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

Multiple non-union bargaining representatives who represent small groups of employees can add considerably to the cost and smooth progression of bargaining. There should be a requirement that a non-union party can only act as a bargaining representative if they have secured the support of a reasonable share of the workforce. (The Productivity Commission has proposed 5 per cent, but a different value may readily achieve the same objective.)

## 6 Individual arrangements

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

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

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

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

It is surprising that employees and employers have not used individual flexibility arrangements more frequently, as they offer considerable flexibility, provide protections for employees, and are not hard to make. One immediate and easily implemented reform

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would be simply to better advertise the option of an individual flexibility arrangement to employees and employers. Many have not even heard of them.

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

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

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

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

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## **A possible new type of agreement that spans individual and enterprise agreements — the enterprise contract**

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

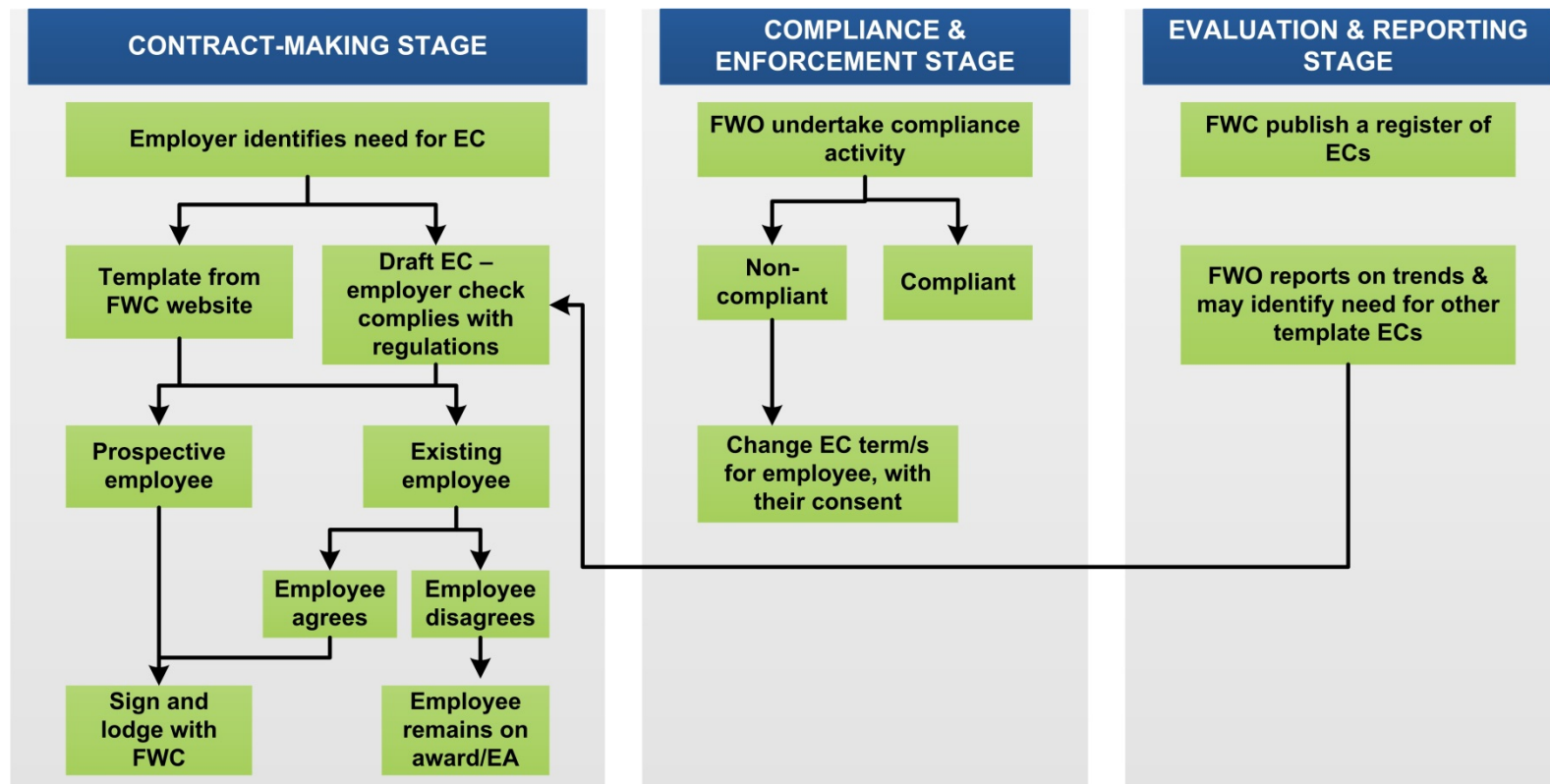
In principle, businesses could still achieve flexible arrangements across their operations by negotiating enterprise agreements but, as discussed later, such agreement making is still rare amongst small and medium-sized businesses. This is because the procedural aspects of such bargaining can be daunting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

To meet the needs of such businesses, the Productivity Commission is floating the option of a new type of statutory arrangement — the enterprise contract (figure 9).

This would permit employers to vary an award for entire classes of employees (level 1 retail employees, for example), or for a group of particular employees, without having to negotiate with each party individually or to form an enterprise agreement.

It would effectively amount to a collective individual flexibility arrangement, but with some further flexibility. Employers could offer it to all prospective employees as a condition of employment (resembling enterprise agreements, where new employees are covered by an existing agreement when they are hired). No employee ballot would be required for the adoption of an enterprise contract, nor would any employee group be involved in its preparation and agreement unless the employer wished this to be the case. As in enterprise agreements, employers and individual employees could still negotiate individual flexibility arrangements as carve outs from the enterprise contract if they mutually agreed.

Figure 9 Making an enterprise contract



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The enterprise contract would be accompanied by a comprehensive suite of safeguards and measures to reduce the transaction costs of its adoption:

- Existing employees would be able to choose whether to sign on or stay with their existing employment contract.
- The enterprise contract would be lodged with the FWC, but unlike enterprise agreements would not require ex ante approval. Ex post, lodgment would enable the FWC, after a complaint by a covered employee, to test compliance using the (holistic) no-disadvantage test, as for individual flexibility arrangements. Where a complaint was upheld, the Fair Work Ombudsman would be empowered to vary the contracts of all other relevant employees.
- Lodgement would also allow the FWC or the Fair Work Ombudsman to analyse the nature and trends in such agreements, and to provide a basis for industry templates that would enable any business to adopt an agreement with the surety that it would pass a no-disadvantage test (with equal certainty for an employee). Transparency would also allow employees to assess where any particular ‘take it or leave it’ contract fitted among the spectrum of offerings provided by various competing businesses, giving them information that could influence their choice of employer.
- The employer would be required to provide employees with a written form of the contract, so they were aware of its entitlements and obligations. The incremental costs of doing this would be negligible, as the business would have to lodge the agreement with the FWC. This would be particularly easy where the employer adopted a template. The Fair Work Ombudsman would provide an easy guide for employers and employees about enterprise contracts.
- Employees could exit the enterprise contract after one year and return to the award (or any other agreed contract).

The enterprise contract would also have an expiry date, at which time parties would have to select among various contract options, including continuation of the current contract, an adapted version, separate individual arrangements or an enterprise agreement. In the latter respect, enterprise contracts might provide a natural vehicle for progression to standard enterprise agreements as employees could, after one year, elect through a majority vote to commence enterprise bargaining.

However, the desirability, practicalities and detailed design of an enterprise contract needs to be tested further.

## **7 Industrial disputes and right of entry**

The credible threat of industrial action by both employees and employers is an important negotiating tool for parties engaging in enterprise bargaining, helping to reduce asymmetries in information and bargaining power. Nevertheless, there need to be rules that

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ensure that neither employers nor employees hold too much power and that take account of the economywide effects of major disputes.

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

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

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

- The Fair Work Act permits industrial action after the expiry of an enterprise agreement, but before bargaining has commenced. Since employees can always compel an employer to commence negotiations through a majority vote, there is no rationale or community interest in permitting industrial action prior to bargaining. This was also recommended by the 2012 review of the Fair Work Act.
- Secret ballots are an essential part of industrial disputes regulations since they reduce risks of coercion by employers or employee representatives, prevent hollow threats of disputes that do not actually have employee consent, and provide a clear point at which the FWC can intervene in circumstances where the parties have not genuinely been trying to reach an agreement. Nevertheless, they can be overly burdensome, with two leading legal academics noting that the existing provisions have ‘proved to be a fruitful source of revenue for the legal profession’. Unions have said much the same, and the Productivity Commission agrees that there might be some scope for simpler and lower cost arrangements, and is accordingly seeking further feedback on this issue.
- Aborted strikes and brief stoppages can involve low costs for employees, but impose disproportionate transaction costs on employers (and customers). For example, a one-minute stoppage would legally obligate the employer to suspend pay to employees

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for that duration, despite there being considerable administrative costs in doing so. It is ironic that the ‘no strike pay’ measure, which was intended to reduce coercion, can be used to strengthen the bargaining power of the striking party. Similarly, a business may be advised of a strike and implement costly measures to address the disruption that it expects to ensue (for example, rescheduling deliveries or carriage of passengers), and yet the strike may then be called off. To reduce the use of this strategic ploy, employers that have engaged in a reasonable contingency response to what ultimately was an aborted industrial action should be given the capacity to stand down the relevant employees for the duration of that response. Employers should also be able to pay employees for short duration strikes or to deduct pay for periods that are more administratively feasible.

- There may be grounds to grant employers more graduated options for retaliatory industrial action than the ‘nuclear’ lock-out option. The Productivity Commission is seeking views on what would be practical and proportional.
- The penalties for unlawful industrial action (by any party) should be increased, as this would allow the FWC and the Federal Court more scope to apply penalties commensurate with the harm associated with such action.

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

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

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

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The provisions providing rights of entry by union officials to worksites are broadly sound, though at times both sides play games with each other. That said, there are grounds for the FWC to consider more closely the impacts on employers and employees before making any orders concerning disputes about the frequency of right of entry requests.

## **8 Sham contracting**

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

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

Some have argued that the current common law approach to determining whether a worker is an employee or an independent contractor lacks clarity. The lack of clarity associated with this approach — which balances multiple factors including the length of employment as well as the choice of work, manner of work, hours of work and payment for work rather than relying on a single indicator — makes it hard to identify the genuine status of employment arrangements, makes enforcement difficult and leads to inadvertent errors. While the existing common law definition of a subcontractor may not always be easy to apply, it is hard to develop a better legislative definition or test.

The requirement that an employer must have been 'reckless' for them to be prosecuted for misrepresenting the nature of an employment contract appears to be a high hurdle for legal action. Changing from a test of 'recklessness' to a test of 'reasonableness' would help discourage sham contracting, including through the regulators' out-of-court actions, though such a change needs to be tested further.

## **9 Public sector bargaining**

Public sector bargaining differs from bargaining in the private sector in several ways. The most obvious of these is that there are relatively few employers, but public sector employees account for a substantial amount — around 16 per cent — of the total

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workforce. Moreover, in some cases, government is also a legislator and a regulator — effectively making and enforcing the laws it uses to hire workers.

Governments have *potential* market power because while individual agencies may negotiate with their employees, the government can set rules for such agreement making, and close off certain bargaining options by simply tightening the purse strings. In some instances, governments are also the dominant hirer or funder of people performing certain jobs (teaching, nursing, emergency services, disability and aged care).

It is hard to test the degree to which governments exercise any such power, or when they might do so. There is some evidence that pay rises are lower during periods of fiscal stringency but, on the whole, pay rates catch up during upturns in the business cycle. There is also evidence that, after having accounted for differences in skills and experience, wage levels for female employees in the public sector are higher than those of their counterparts in the private sector. There is scant evidence of a premium or a discount for males. Taken in concert, this evidence suggests that the wages of public sector employees have not been systematically depressed. This may be due to several factors, including the high unionisation rates in parts of the public sector, a desire to attract and retain high quality employees and cyclical budget pressures. However, what is true for the whole may not be true for all occupations.

There are also many challenges in bargaining in the public sector that are less evident for private employers. In most cases, there are no paying customers in the normal sense. Productivity is not easily measured, though linkages between pay rises and productivity in enterprise agreements are far more common in public sector than private sector agreements. The agreements set by agencies often involve what one public service commissioner referred to as the ‘adoption of interminable or excessively bureaucratic processes’ for managing underperformance. There are no easy fixes for these challenges — and probably the best solutions need to be developed at the agency level.

## 10 Migrant workers in Australia

Although covered under the Fair Work Act, permanent and temporary migrant workers face higher risks of exploitation. These can be for several reasons, such as limited English language skills or lack of awareness of their rights in the workplace. A remedy is to provide additional resources to the Fair Work Ombudsman to strengthen its existing risk-based approach to monitoring employers. This would allow the Ombudsman to enhance information sharing with other departments and conduct more investigations and audits. Recommendations from the Independent Review into the 457 visa program in 2014 — such as increasing deterrents for employers — could also be expanded to cover all employment-related visa classes.

In addition to permanent and temporary migrant workers, it is estimated that at least 50 000 migrants are working in breach of the *Migration Act 1958* (Cth). As a result, they are not

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covered under the Fair Work Act. 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. Unlike many other employees, an unlawfully working migrant worker is unlikely to complain, reducing the most common avenue for discovering exploitation.

As a deterrent, employers can face fines or imprisonment under the Migration Act for employing these migrants, but depending on how these penalties are applied, an employer may still benefit from hiring and exploiting a migrant working in breach of their visa conditions. This is largely due to the fact that an employer currently does not have to pay the difference between what the worker was actually paid and their minimum entitlements under the Fair Work Act.

A solution to eliminate an employer's benefit from hiring such migrants would be to impose a two-part penalty on employers: a punishment for breaching the Migration Act and a fine equal to at least whatever the worker was underpaid over the duration of their employment.

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# Draft recommendations, findings and information requests

## OVERALL DRAFT REPORT FINDING

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

## Chapter 3 Institutions

### DRAFT RECOMMENDATION 3.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) to establish a Minimum Standards Division as part of the Fair Work Commission. This Division would have responsibility for minimum wages and modern awards. All other functions of the Fair Work Commission should remain in a Tribunal Division.

### DRAFT RECOMMENDATION 3.2

The Australian Government should amend s. 629 of the *Fair Work Act 2009* (Cth) to stipulate that new appointments of the President, Vice Presidents, Deputy Presidents and Commissioners of the Fair Work Commission be for periods of five years, with the possibility of reappointment at the end of this period, subject to a merit-based performance review undertaken jointly by an independent expert appointment panel and (excepting with regard to their own appointment) the President.

Current non-judicial Members should also be subject to a performance review based on the duration of their current appointment. Existing Members with five or more years of service would be subject to review within three years from the commencement of these appointment processes with reviews to be staggered to reduce disruption. Non-judicial Members with fewer than five years of service would be reviewed at between three to five years, depending on the date of their appointment.

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#### DRAFT RECOMMENDATION 3.3

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

- an independent expert appointment panel should be established by the Australian Government and state and territory governments
- members of the appointment panel should not have had previous direct roles in industrial representation or advocacy
- the panel should make a shortlist of suitable candidates for Members of the Fair Work Commission against the criteria in draft recommendation 3.4
- the Commonwealth Minister for Employment should select Members of the Fair Work Commission from the panel's shortlist, with appointments then made by the Governor General.

#### DRAFT RECOMMENDATION 3.4

The Australian Government should amend the *Fair Work Act 2009* (Cth) to establish separate eligibility criteria for members of the two Divisions of the Fair Work Commission outlined in draft recommendation 3.1.

Members of the Minimum Standards Division should have well-developed analytical capabilities and experience in economics, social science, commerce or equivalent disciplines.

Members of the Tribunal Division Membership should have a broad experience, and be drawn from a range of professions, including (for example) from ombudsman's offices, commercial dispute resolution, law, economics and other relevant professions.

A requirement for the Panel and the Minister for Employment respectively is that they be satisfied that a person recommended for appointment would be widely seen as having an unbiased and credible framework for reaching conclusions and determinations in relation to workplace relation matters or other relevant areas.

#### DRAFT RECOMMENDATION 3.5

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

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## Chapter 4 National Employment Standards

### DRAFT RECOMMENDATION 4.1

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

### DRAFT RECOMMENDATION 4.2

The Australian Government should amend the National Employment Standards so that employers are not required to pay for leave or any additional penalty rates for any newly designated state and territory public holidays.

### DRAFT RECOMMENDATION 4.3

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

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### INFORMATION REQUEST

*The Productivity Commission seeks information on whether it would be practical for casual workers to be able to exchange part of their loading for additional entitlements (for example personal or carer's leave) if they so wish, and whether such a mechanism would be worthwhile.*

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## Chapter 5 Unfair dismissal

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### INFORMATION REQUEST

*The Productivity Commission seeks further views on possible changes to lodgment fees for unfair dismissal claims.*

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#### DRAFT RECOMMENDATION 5.1

The Australian Government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal applications 'on the papers', prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation processes.

#### DRAFT RECOMMENDATION 5.2

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

- an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent 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 financial penalties.

#### DRAFT RECOMMENDATION 5.3

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).

#### DRAFT RECOMMENDATION 5.4

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).

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## Chapter 6 The General Protections

### DRAFT RECOMMENDATION 6.1

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.

### DRAFT RECOMMENDATION 6.2

The Australian Government should modify s. 341 of the *Fair Work Act 2009* (Cth), which deals with the meaning and application of a workplace right.

- Modified provisions should more clearly define how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment.
- The FW Act should also require that complaints are made in good faith; and that the Fair Work Commission must decide this via a preliminary interview with the complainant before the action can proceed and prior to the convening of any conference involving both parties.

### DRAFT RECOMMENDATION 6.3

The Australian Government should amend Part 3-1 of the *Fair Work Act 2009* (Cth) to introduce exclusions for complaints that are frivolous and vexatious.

### DRAFT RECOMMENDATION 6.4

The Australian Government should introduce a cap on compensation for claims lodged under Part 3-1 of the *Fair Work Act 2009* (Cth).

### DRAFT RECOMMENDATION 6.5

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.

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## Chapter 8 Minimum wages

### DRAFT RECOMMENDATION 8.1

In making its annual national wage decision, the Fair Work Commission should broaden its analytical framework to systematically consider the risks of unexpected variations in economic circumstances on employment and the living standards of the low paid.

## Chapter 9 Variations in uniform minimum wages

### DRAFT RECOMMENDATION 9.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that the Fair Work Commission is empowered to make temporary variations in awards in exceptional circumstances after an annual wage review has been completed.

### INFORMATION REQUEST

*The Productivity Commission seeks information on whether the structure of junior pay rates should be based on a model other than age, such as experience or competency, or some combination of these criteria.*

### DRAFT RECOMMENDATION 9.2

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

- the role of the current system within the broader set of arrangements for skill formation
- the structure of awards for apprentices and trainees, including junior and adult training wages and the adoption of competency-based pay progression
- the factors that affect the supply and demand for apprenticeships and traineeships, including the appropriate design and level of government, employer and employee incentives.

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## Chapter 10 Measures to complement minimum wages

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### INFORMATION REQUEST

*The Productivity Commission invites participants' further input on the feasibility, merits and optimum design on an earned income tax credit in Australia, what its introduction might mean for future minimum wage determinations and employment outcomes, and in what conditions it would be appropriate to implement such a scheme.*

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## Chapter 12 Repairing awards

### DRAFT RECOMMENDATION 12.1

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

- remove the requirement for the Fair Work Commission to conduct four yearly reviews of modern awards
- add the requirement that the Minimum Standards Division of the Fair Work Commission review and vary awards as necessary to meet the Modern Awards Objective.

To achieve the goal of continuously improving awards' capability to meet the Modern Awards Objective, the legislation should require that the Minimum Standards Division:

- use robust analysis to set issues for assessment, prioritised on the basis of likely high yielding gains
- obtain public guidance on reform options.

### DRAFT RECOMMENDATION 12.2

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that the Minimum Standards Division of the Fair Work Commission has the same power to adjust minimum wages in an assessment of modern awards as the minimum wage panel currently has in annual wage reviews.

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## Chapter 14 Regulated weekend penalty rates for the hospitality, entertainment, retail, restaurants and cafe industries

### DRAFT RECOMMENDATION 14.1

Sunday penalty rates that are not part of overtime or shift work should be set at Saturday rates for the hospitality, entertainment, retail, restaurants and cafe industries.

Weekend penalty rates should be set to achieve greater consistency between the hospitality, entertainment, retail, restaurants and cafe industries, but without the expectation of a single rate across all of them.

Unless there is a clear rationale for departing from this principle, weekend penalty rates for casuals in these industries should be set so that they provide neutral incentives to employ casuals over permanent employees.

### DRAFT RECOMMENDATION 14.2

The Fair Work Commission should, as part of its current award review process, introduce new regulated penalty rates as set out in draft recommendation 14.1 in one step, but with one year's advance notice.

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### INFORMATION REQUEST

*The Productivity Commission seeks views on whether there is scope to include preferred hours clauses in awards beyond the current narrow arrangements, including the scope for an arrangement where an employer would be obliged to pay penalty rates when it requested an employee to work at an employee's non-preferred time in the employment contract.*

*What would the risks of any such 'penalty rate' agreements be and how could these be mitigated?*

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## Chapter 15 Enterprise bargaining

### DRAFT RECOMMENDATION 15.1

The Australian Government should amend Division 4 of Part 2-4 of the *Fair Work Act 2009* (Cth) to:

- allow the Fair Work Commission wider discretion to approve an agreement without amendment or undertakings as long as it is satisfied that the employees were not likely to have been placed at a disadvantage because of the unmet requirement.
- extend the scope of this discretion to include any unmet requirements or defects relating to the issuing or content of a notice of employee representational rights.

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### INFORMATION REQUEST

*The Productivity Commission seeks feedback on whether there is a mechanism that would only restrain pattern bargaining:*

- *where it is imposed through excessive leverage or is likely to be anticompetitive*
- *while allowing it in circumstances where it is conducive to low transaction cost agreements that parties genuinely consent to.*

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### DRAFT RECOMMENDATION 15.2

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. Enterprise agreements should not be able to restrict the terms of individual flexibility arrangements.

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### DRAFT RECOMMENDATION 15.3

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 so, the business would have to satisfy the Fair Work Commission that the longer period was justified.

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DRAFT FINDING 15.1

The case for imposing statutory requirements for 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.

DRAFT RECOMMENDATION 15.4

The Australian Government should amend the *Fair Work Act 2009* (Cth) to replace the better off overall test for approval of enterprise agreements with a new no-disadvantage test. The test against which a new agreement is judged should be applied across a like class (or series of classes) of employees for an enterprise agreement. The Fair Work Commission should provide its members with guidelines on how the new test should be applied.

*INFORMATION REQUEST*

*What should be the basis for the revised form of the no-disadvantage test, including whether, and to what extent past forms of the no-disadvantage test provide a suitable model and would be workable within the current legislative framework?*

DRAFT RECOMMENDATION 15.5

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

- a bargaining notice specifies a reasonable period in which nominations to be a bargaining representative must be submitted
- a person could only be a bargaining representative if they represent a registered trade union with at least one member covered by the proposed agreement, or if they were able to indicate that at least 5 per cent of the employees to be covered by the agreement nominated them as a representative.

DRAFT RECOMMENDATION 15.6

The Australian Government should amend the rules around greenfields agreements in the *Fair Work Act 2009* (Cth) so that bargaining representatives for greenfields agreements are subject to the good faith bargaining requirements.

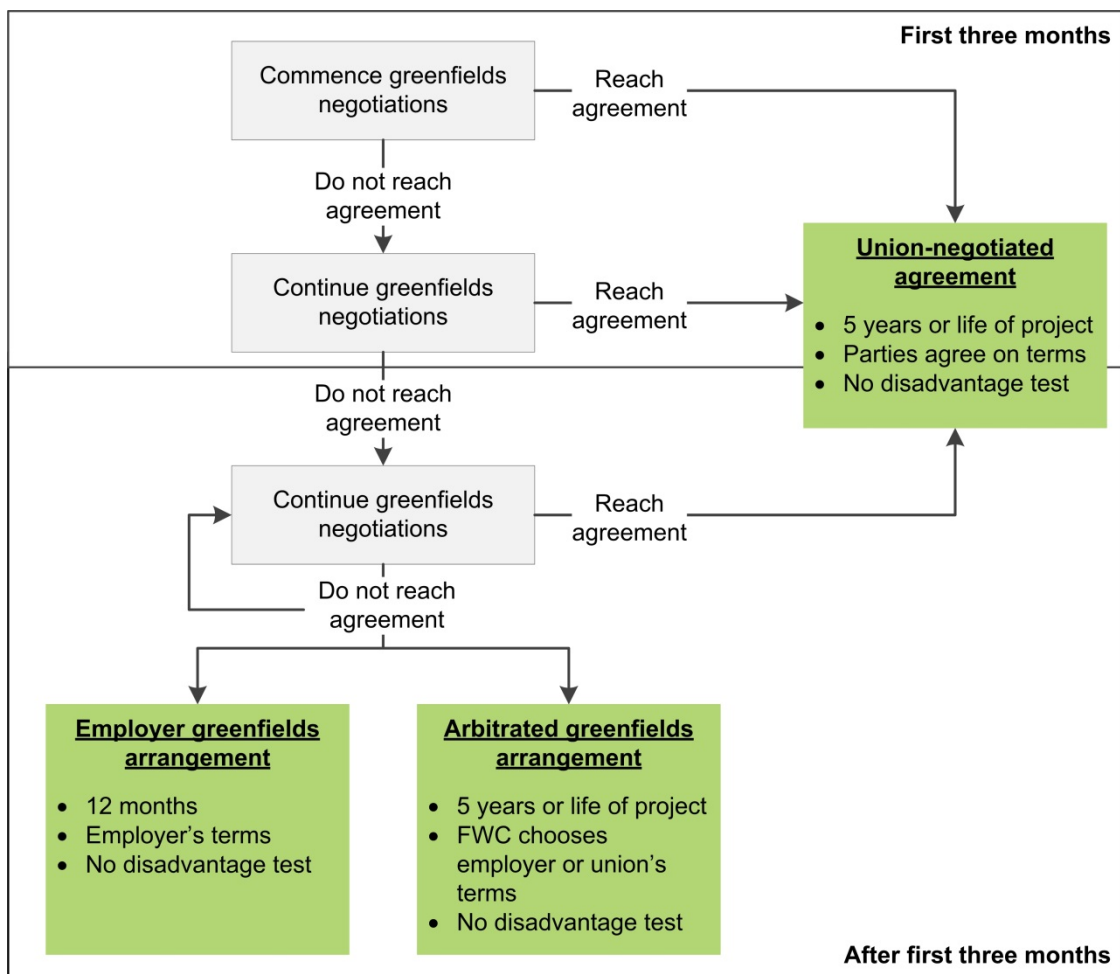
DRAFT RECOMMENDATION 15.7

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 (as illustrated in figure 15.5):

- continue negotiating with the union
- request that the Fair Work Commission undertake ‘last offer’ arbitration of an outcome 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 proposed no-disadvantage test.

Figure 15.5 **Greenfields agreement-making process**



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## Chapter 16 Individual arrangements

### DRAFT RECOMMENDATION 16.1

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. The Act should specify that the default termination notice period should be 13 weeks, but in the negotiation of an agreement, employers and employees could agree to extend this up to the new maximum.

### DRAFT RECOMMENDATION 16.2

The Australian Government should amend the *Fair Work Act 2009* (Cth) to introduce a new 'no-disadvantage test' (NDT) to replace the better off overall test for assessment of individual flexibility arrangements. The guidance in implementing the new NDT should also extend to collective agreements (as recommended in draft recommendation 15.4).

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 NDT, including template arrangements
- examine the feasibility, benefits and costs 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 NDT.

### DRAFT RECOMMENDATION 16.3

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 proposed Australian Small Business and Family Enterprise Ombudsman, the various state government offices of small business, major industry associations and employee representatives.

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## Chapter 17 The enterprise contract

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### INFORMATION REQUEST

*The Productivity Commission seeks information on the costs (including compliance costs) and benefits of an enterprise contract to employers, employees and to regulatory agencies. Particular areas that the Commission seeks information on are:*

- additional evidence on the potential gap in contract arrangements between individual arrangements (broadly defined) and enterprise agreements*
- the extent to which the enterprise contract would be a suitable addition to the current suite of employment arrangements, how it could fill the gap identified, and specific examples of where and how it could be utilised*
- clauses that could be included in the template arrangement*
- possible periods of operation and termination*
- the advantages and disadvantages of the proposed opt in and opt out arrangements.*

*In addition, the Productivity Commission invites participants' views on the possible compliance and implementation arrangements suggested in this chapter, such as their impact on employers, employees and regulatory agencies.*

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## Chapter 19 Industrial disputes and right of entry

### DRAFT RECOMMENDATION 19.1

The Australian Government should amend s. 443 of the *Fair Work Act 2009* (Cth), clarifying that the Fair Work Commission should only grant a protected action ballot order to employees once it is satisfied that enterprise bargaining has commenced, either by mutual consent or by a Majority Support Determination.

### INFORMATION REQUEST

*The Productivity Commission seeks further input from stakeholders on how protected action ballot procedures may be simplified to reduce compliance costs, while retaining the benefits of secret ballots. Potential simplifications include:*

- removing the requirement that a protected action ballot specify the types of actions to be voted on by employees, and instead simply requiring a vote in favour of any forms of protected industrial action*
  - amending or removing the requirement that industrial action be taken within 30 days of ballot results being declared*
  - granting the Fair Work Commission the discretion to overlook minor procedural defects when determining if protected industrial action is authorised by a ballot.*
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*INFORMATION REQUEST*

*The Productivity Commission seeks further input from stakeholders on how ‘significant harm’ should be defined when the Fair Work Commission is deciding whether to exercise its powers under s. 423 and s. 426 of the Fair Work Act 2009 (Cth).*

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DRAFT RECOMMENDATION 19.2

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 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 both parties (as is currently the case).

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*INFORMATION REQUEST*

*The Productivity Commission seeks further input from inquiry participants on whether s. 424 of the Fair Work Act 2009 (Cth) should be amended to allow industrial action to proceed where the Fair Work Commission is satisfied that the risk of a threat to life, personal safety, health or welfare is acceptably low.*

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DRAFT RECOMMENDATION 19.3

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

DRAFT RECOMMENDATION 19.4

The Australian Government should amend the *Fair Work Act 2009* (Cth) to grant the Fair Work Commission the discretion to withhold a protected action ballot order for up to 90 days, where it is satisfied that the group of employees has previously used repeated withdrawals of protected action, without the agreement of the employer, as an industrial tactic.

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DRAFT RECOMMENDATION 19.5

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that where employees engage in brief work stoppages that last less than the shortest time increment used by their employer for payroll purposes, the employer should be permitted to choose to either:

- deduct the full duration of the increment from employee wages. The maximum permissible deduction under this provision would be 15 minutes per person, 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.

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*INFORMATION REQUEST*

*While the Productivity Commission sees a prima facie case for allowing employers to deduct a minimum of 25 per cent of normal wages for the duration of any partial work ban that impacts on the performance of normal duties, the Commission requests feedback from stakeholders about the risks that such a change may entail.*

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*INFORMATION REQUEST*

*The Productivity Commission seeks further feedback from inquiry participants on what forms of more graduated employer industrial action should be permitted, and how these should be defined in statute.*

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DRAFT RECOMMENDATION 19.6

The Australian Government should increase the maximum ceiling of 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.

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DRAFT RECOMMENDATION 19.7

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 combined 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.

DRAFT RECOMMENDATION 19.8

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that unions that do not have members employed at the workplace and are not covered by (or are not currently negotiating) an agreement at the workplace, would only have a right of entry for discussion purposes on up to two occasions every 90 days.

## Chapter 20 Alternative forms of employment

DRAFT RECOMMENDATION 20.1

Terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the *Fair Work Act 2009* (Cth).

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*INFORMATION REQUEST*

*The Productivity Commission seeks feedback on the extent to which unpaid internships have become more commonplace across the economy, whether any growth in such arrangements has led to problems rather than opportunities, as well as the potential remedies to any specific issues.*

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## Chapter 21 Migrant workers

### DRAFT RECOMMENDATION 21.1

The Fair Work Ombudsman should be given additional resources for investigation and audits of employers suspected of underpaying migrant workers (including those in breach of the *Migration Act 1958* (Cth)).

The Migration Act should be amended so that employers can be fined by at least the value of any unpaid wages and conditions to migrants working in breach of the Migration Act, in addition to the existing penalties under the Act.

## Chapter 22 Transfer of business

### DRAFT RECOMMENDATION 22.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) so that an employee's terms and conditions of employment would not transfer to their new employment when the change was at his or her own instigation.

## Chapter 24 Competition policy

### INFORMATION REQUEST

*The Productivity Commission seeks further input from inquiry participants on whether the secondary boycott prohibitions in the Competition and Consumer Act 2010 (Cth) should be amended to:*

- *amend or remove s. 45DD(1) and s. 45DD(2)*
- *grant Fair Work Building and Construction a shared jurisdiction to investigate and enforce the secondary boycott prohibitions in the building and construction industry.*

## Chapter 25 Compliance costs

### INFORMATION REQUEST

*The Productivity Commission seeks data or other information on the extent to which the workplace relations system imposes unnecessary ongoing costs on unions, and how these costs are likely to be affected by draft recommendations proposed in this inquiry.*