



Employment Law Centre of WA (Inc)

Working for WA Workers

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Workplace Relations Inquiry
Productivity Commission
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To whom it may concern

Workplace Relations Framework Inquiry

The Employment Law Centre of Western Australia (Inc) (**ELC**) welcomes the opportunity to make a submission to the Productivity Commission in relation to its inquiry into the Workplace Relations Framework (**Inquiry**).

ELC is a community legal centre which specialises in employment law. It is the only not for profit legal service in Western Australia offering free employment law advice, assistance and representation. ELC assists over 4,000 callers each year through our Advice Line service and provides approximately 400 employees each year with further assistance. Through these activities, ELC has first-hand experience of the workplace relations framework and an informed perspective on proposals regarding the framework.

Please see our submission below. We would be happy to provide further information in relation to the Inquiry and to participate in public hearings in Western Australia should there be any opportunity to do so.

Yours faithfully

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1. Summary of recommendations

There are a number of ways in which the *Fair Work Act 2009* (Cth) (**FW Act**) should be improved, as set out in the body of our submission below.

In summary, ELC recommends as follows:

National Employment Standards

Special maternity leave

RECOMMENDATION 1. That pregnant employees be entitled to special maternity leave regardless of their length of continuous service.

Parental leave

RECOMMENDATION 2. That the parental leave provisions of the FW Act be amended so that the entitlements of two members of an employee couple are not linked.

RECOMMENDATION 3. That penalties apply where an employer refuses a request for extended unpaid parental leave other than on reasonable business grounds.

Flexible working arrangements

RECOMMENDATION 4. That penalties apply where an employer refuses a request for flexible working arrangements other than on reasonable business grounds.

RECOMMENDATION 5. That it not be necessary for an employee to have completed 12 months of continuous service before being eligible to make a request for flexible working arrangements.

Consultation about changes to rosters and working hours

RECOMMENDATION 6. That section 64 of the FW Act be amended to include the consultation clause in section 205(1A) of the FW Act so that it applies to non-award and non-agreement covered employees.

Annual leave

RECOMMENDATION 7. That section 94(5) be amended to limit the amount of leave that an employer can require an employee to take at a particular time. We suggest that the limit be set at 50% of the employee's yearly annual leave entitlement.

Compassionate leave

RECOMMENDATION 8. That the definition of “immediate family” in s 12 of the FW Act be extended to include step parents, step sisters and step brothers.

Unfair Dismissal

Limitation period

RECOMMENDATION 9. That the limitation period for unfair dismissal claims be increased to 90 days from the date of dismissal.

Out of time applications

RECOMMENDATION 10. That there be no reference to ‘exceptional circumstances’ in section 394(3) of the FW Act and that FWC instead be allowed to accept an unfair dismissal claim outside the limitation period if FWC considers it would be unfair not to do so.

Qualifying periods

RECOMMENDATION 11. That the minimum period of employment be removed from the criteria for determining whether an employee is eligible to make an unfair dismissal claim.

RECOMMENDATION 12. That an employee’s length of service be a relevant consideration in determining whether a dismissal is harsh, unjust or unreasonable.

Remedies

RECOMMENDATION 13. That FWC be required, or at least permitted, to consider shock, distress, humiliation and hurt in awarding compensation.

Penalties

RECOMMENDATION 14. That pecuniary penalties be an available remedy in unfair dismissal claims.

Appeals

RECOMMENDATION 15. That the provisions of the FW Act relating to appeals in unfair dismissal matters be amended so that it is not necessary to establish that it is in the public interest to allow an appeal in order to obtain leave to appeal.

Casual employees

RECOMMENDATION 16. That casual employees not be automatically excluded from making unfair dismissal claims.

RECOMMENDATION 17. That the fact that an employee is a casual employee be a relevant consideration in determining whether a dismissal is harsh, unjust or unreasonable.

Fixed term employees

RECOMMENDATION 18. That the FW Act be amended so that employees whose contracts are terminated at the end of a fixed term are protected from unfair dismissal in the same way as other employees.

Small Business Fair Dismissal Code

RECOMMENDATION 19. That the Small Business Fair Dismissal Code be amended, in relation to summary dismissal, to include obligations on the employer to:

- particularise the alleged serious misconduct and the grounds on which the allegation is made; and
- give the employee a reasonable opportunity to respond to the allegation.

RECOMMENDATION 20. That the Small Business Fair Dismissal Code be amended to remove the following:

“For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.”

Compensation cap

RECOMMENDATION 21. That there be no cap on the amount of compensation that may be awarded in unfair dismissal matters.

Written reasons for dismissal

RECOMMENDATION 22. That the FW Act be amended to require employers to provide employees who have been dismissed with written reasons, upon request.

Anti-Bullying Laws

RECOMMENDATION 23. That the anti-bullying provisions be broadened to apply to employees who have resigned or been dismissed from a workplace in which they experienced bullying.

RECOMMENDATION 24. That FWC’s powers to deal with bullying be extended to allow the FWC to impose civil penalties and to make orders compensating a victim for bullying that has occurred.

General Protections

RECOMMENDATION 25. That Part 3-1 of the FW Act be redrafted in plain English and in a more succinct manner.

RECOMMENDATION 26. That FWC forms be revised and simplified.

Reverse onus of proof

RECOMMENDATION 27. That the reverse onus of proof provisions in general protections claims be maintained.

Limitation period for claims involving a dismissal

RECOMMENDATION 28. That the limitation period for general protections claims involving a dismissal be increased to 90 days (in line with our recommendation above that the limitation period for unfair dismissal claims be increased to 90 days).

Out of time applications

RECOMMENDATION 29. That there be no reference to 'exceptional circumstances' in section 366 of the FW Act and that FWC instead be allowed to accept a general protections claim outside the limitation period if the FWC considers it would be unfair not to do so.

Definition of "workplace right" and "workplace instrument"

RECOMMENDATION 30. That the definition of 'workplace instrument' in section 12 of the FW Act be extended to include common law contracts and workplace policies.

Filing fees

RECOMMENDATION 31. That the filing fee for general protections claims not involving dismissal or discrimination be reduced so that the same fee applies to all general protections claims.

Process and procedure

RECOMMENDATION 32. That employees be able to lodge one claim form with FWC, setting out general protections and unfair dismissal claims in the alternative.

RECOMMENDATION 33. That general protections claims always be dealt with in FWC after conciliation (rather than proceeding to the Federal Magistrates Court or the Federal Court if conciliation is unsuccessful).

Alternative forms of employment – labour hire

RECOMMENDATION 34. That employment protections such as unfair dismissal be extended to labour hire workers.

2. Preliminary comments about ELC's submission

Given the large number of questions posed in the Productivity Commission's issues papers and the limited amount of time provided to respond, ELC has chosen only to respond to key issues that are of most relevance to our client base.

ELC is a community legal centre which specialises in employment law. It is the only not for profit legal service in Western Australia offering free employment law advice, assistance and representation. ELC assists over 4,000 callers each year through our Advice Line service and provides approximately 400 employees each year with further assistance. We do not assist employees who are members of a union, nor do we assist independent contractors. We do not provide advice on workers' compensation, tax, superannuation or immigration law.

The fact that we have not chosen to respond to a particular question does not in itself indicate that we do not have a view on this issue or that we endorse the views put forward by the Productivity Commission in the issues papers.

Our submission should also be read in conjunction with our comments at the end of this submission (in section 15) noting our concerns about the scope of the Inquiry and the way in which consultation has been conducted.

Our submission follows the order of the issues raised in the issues papers. The Productivity Commission's specific questions are included in the submission where relevant.

3. Minimum wage

The minimum wage is an essential feature of the workplace relations framework in Australia and should not be removed or reduced.

3.1 Minimum wage provides a safety net

The concept of a minimum wage was first established in Victoria by the *Factories and Shops Act 1896* (Vic). The 1907 *Harvester Decision*¹ then set the foundation for the federal minimum wage.²

Since then, the minimum wage has played and continues to play an important role in providing a safety net for vulnerable employees. Such employees rely on the minimum wage to achieve basic living standards.

Increases in the cost of living are felt most by low-paid employees. In relative terms, low income earners will experience a greater reduction in purchasing power than high income earners where there is an increase in living costs. An increase in living costs potentially decreases living standards where there is no comparable increase in household income, particularly amongst the low paid.

Even where Australian employees earn the minimum wage, they are at risk of falling below the poverty line. According to the recent Henderson poverty line for a family comprising two adults, one of whom is working, and two dependent children, the poverty line is \$954.89 per week.³ The current minimum wage is \$640.90 per week. This suggests that if anything, the minimum wage needs to be increased.

3.2 Social inclusion through workforce participation

In addition to providing a basic safety net, the minimum wage may also enhance workforce participation, which in turn promotes social inclusion.

Research conducted by Fair Work Australia found that “[m]inimum wages may play a role in providing the financial incentives for people to take up, or increase their hours in, jobs paid at minimum wages, or may enhance social inclusion through their role in providing a safety net.”⁴

Further, it found that paid work “is considered to promote social inclusion by increasing people’s resources (such as income, access to goods and services and human capital), developing their social networks and support, and improving their mental and/or physical health.”⁵

3.3 The ratio of Australia’s minimum wage to the median wage has fallen in recent years

As noted by the Productivity Commission in Issues Paper 2, the “ratio of the minimum wage to median full-time adult earnings has significantly fallen over the period from 2004 to 2012.”⁶ In other words, the minimum wage has not kept up with median earnings in the last decade.

¹ *Ex Parte HV McKay* (1907) 2 CAR 1 (*‘Harvester Decision’*).

² See also J Rob Bray, ‘Reflections on the Evolution of The Minimum Wage in Australia: Options for the Future’ (Working Paper No 01/2013, HC Coombs Policy Forum, Crawford School of Public Policy, The Australian National University, 2013) 3.

³ Melbourne Institute of Applied Economic and Social Research, *Poverty lines: Australia*, ISSN 1448-0530, September Quarter 2014.

⁴ Lucy Nelms and Dr Constantine Tsingas, Minimum Wage and Research Branch, Fair Work Australia, *Literature review on social inclusion and its relationship to minimum wages and workforce participation*, Research Report 2/2010, February 2010, p. 36.

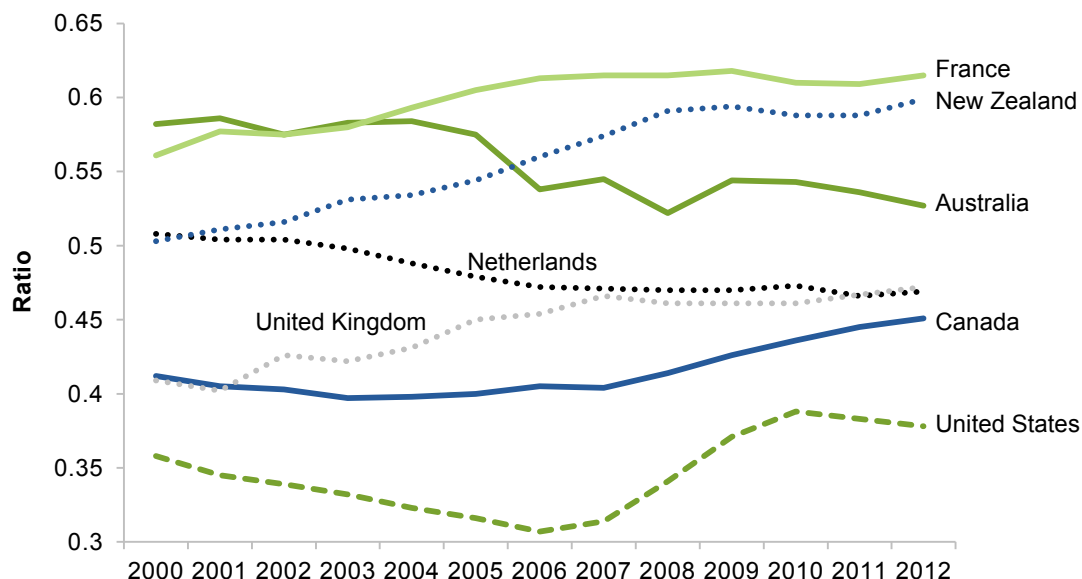
⁵ *Ibid.*

⁶ Productivity Commission, *Workplace Relations Framework: Safety Nets*, Issues Paper No 2 (2015) 6,

The following figure is also set out in Issues Paper 2, to illustrate how Australia's ratio of minimum wage to median wage compares with other member countries for the Organisation for Economic Co-operation and Development (OECD):

Figure 2.1 Minimum to median wages for several OECD countries

2000–2012^a



^a Based on the ratio of the adult Federal Minimum Wage to the median of full time adult ordinary weekly cash earnings.

Data source: OECD.Stat database.

The Productivity Commission itself states that “no other OECD country has experienced a decline in the ratio as steep as Australia”.⁷

This is compelling evidence that the Australian minimum wage should be increased, rather than decreased.

3.4 Conclusion on minimum wage

For the reasons above, ELC is strongly of the view that the minimum wage should be retained and should not be reduced. In fact, an argument can be made for the minimum wage to be increased, to ensure that employees who receive the minimum wage do not fall below the poverty line, and to reflect increases in Australia's median adult earnings in recent years.

⁷ Ibid.

4. National Employment Standards (NES)

4.1 *What, if any, particular features of the NES should be changed?*

The NES as a whole strike a balance between the needs of both employers and employees, and generally operate effectively, in accordance with the legislative intent.

In particular, we support the following components of the NES and submit that they should be maintained.

- *Family-friendly measures*⁸ – ELC strongly supports the retention of these measures which, among other things, provide for parental leave, special unpaid maternity leave, a return to work guarantee and an entitlement for pregnant employees to be transferred to a safe job. These measures give flexibility to employees with family responsibilities, improve their retention in the workforce, and assist to ensure that such employees are not unfairly disadvantaged in the workplace.
- *Maximum weekly hours of work*⁹ – Specifying maximum weekly hours of work for employees is a work health and safety issue that should be strongly protected.
- *Paid personal leave*¹⁰ – Allowing employees who are unfit for work due to illness or injury to take leave is also a work health and safety issue that must be protected. Also, carer's leave is vital for employees who have family responsibilities and must be maintained.
- *Notice of termination or payment in lieu*¹¹ – This provision allows employers to manage their business and staff, while ensuring that an employee whose employment is terminated is not unduly disadvantaged by that termination and has time to plan for the end of their employment and to find alternative employment.

However, it is ELC's view that the NES should be strengthened in the areas discussed below.

4.1.1 Family-friendly measures

1. Special maternity leave

ELC supports the retention of unpaid special maternity leave to enable employees to take leave if they are suffering from a pregnancy-related illness or if the pregnancy ends unexpectedly without resulting in the birth of a living child.¹²

At present, a pregnant employee is only entitled to unpaid special maternity leave if she has completed at least 12 months' continuous service.¹³

In our view, all employees who meet the other eligibility criteria should be entitled to this leave, irrespective of their period of service.

Otherwise, pregnant employees who have been working for an employer for less than 12 months could be left in a situation where they are suffering from severe and debilitating symptoms resulting from their pregnancy but do not technically have an entitlement to take

⁸ FW Act, Part 2-2, Divisions 4 and 5.

⁹ FW Act s 62(1).

¹⁰ FW Act s 96.

¹¹ FW Act s 117.

¹² FW Act s 80.

¹³ FW Act s 67 and s 80 note 1.

time off – for example, because they are casual employees or because they have not accrued sufficient paid personal leave at that time.

Extending special maternity leave entitlements to employees who have completed less than 12 months' continuous service should not be unduly onerous for employers, given that the leave is unpaid leave and given that the number of employees who would potentially be entitled to this leave will be necessarily limited.

RECOMMENDATION 1. That pregnant employees be entitled to special maternity leave regardless of their length of continuous service.

2. Parental leave

The parental leave provisions of the FW Act¹⁴ should be simplified.

The existing provisions are complex, largely because the entitlements of two members of an 'employee couple' are linked together.¹⁵ In our view, it is unnecessary to link two parents' entitlements together. Most parents do not work for the same employer, and they may not be financially interdependent. The substance of the parental leave provisions should be retained, with necessary amendments, without linking the two entitlements.

RECOMMENDATION 2. That the parental leave provisions of the FW Act be amended so that the entitlements of two members of an employee couple are not linked.

While employees have a right to request an extension of unpaid parental leave for a further 12 months, this right is unenforceable and without remedy. No sanctions apply if the employer refuses the request, even if the refusal is not on reasonable business grounds.¹⁶ An employee who has been unreasonably refused an extension cannot take any action against the employer, even if the employer has breached section 76(4) of the FW Act.

RECOMMENDATION 3. That penalties apply where an employer refuses a request for extended unpaid parental leave other than on reasonable business grounds.

3. Right to request flexible working arrangements

The right to request flexible working arrangements is similarly limited. No penalties apply if the employer refuses the request, even if the refusal is not on reasonable business grounds.¹⁷

Further, only employees who have completed 12 months of continuous service are entitled to request flexible working arrangements.¹⁸

¹⁴ FW Act s 70.

¹⁵ FW Act ss 71, 72 and 76.

¹⁶ FW Act s 76.

¹⁷ FW Act s 76

¹⁸ FW Act s 65(2).

ELC is of the view that the right to request flexible working arrangements should be strengthened by introducing sanctions where the employer refuses the request other than on reasonable business grounds. Further, it should not be necessary for an employee to have completed 12 months' service before being able to request flexible working arrangements. Taking into account the stated purpose of this entitlement, which is to assist parents or carers of a child under school age with the care of the child,¹⁹ this entitlement should be available to all employees, irrespective of their length of service.

RECOMMENDATION 4. That penalties apply where an employer refuses a request for flexible working arrangements other than on reasonable business grounds.

RECOMMENDATION 5. That it not be necessary for an employee to have completed 12 months of continuous service before being eligible to make a request for flexible working arrangements.

4.1.2 Working hours

1. Consultation about changes to rosters or working hours

The FW Act provides that modern awards and enterprise agreements must contain a term requiring employers to consult with employees about changes to regular rosters and ordinary hours of work.²⁰

Currently, there is no corresponding provision requiring employers to consult with non-award and non-agreement covered employees regarding changes to rosters and working hours.

For many such employees, particularly those with family or carer's responsibilities, changes to regular rosters or ordinary hours can be a serious issue, and may affect their ability to continue working. Such employees have all of the same requirements as award/enterprise agreement covered employees in relation to changes to rosters and working hours. They may need to consult with family members in relation to any changes, make alternative childcare or other arrangements, and restructure other aspects of their lives in order to accommodate any changes.

It is therefore important for such employees to be consulted in advance about such changes so that they can make alternative arrangements if required. It is also important for employees to be involved in any decision-making processes regarding such changes so that employers can take into account any employees' ideas regarding alternatives to the proposed change.

RECOMMENDATION 6. That section 64 of the FW Act be amended to include the consultation clause in section 205(1A) of the FW Act so that it applies to non-award and non-agreement covered employees.

¹⁹ Explanatory Memorandum, p. x.

²⁰ FW Act s 205(1A).

4.1.3 Leave entitlements

1. Annual leave

Under section 94(5) of the FW Act, an employer may require an award/agreement free employee to take annual leave where reasonable to do so.

As currently drafted, there is nothing in the FW Act to prevent an employer from requiring an employee to take their entire annual leave at a time that suits the employer. This is patently unfair.

In our view, there should be a limit to the amount of annual leave that an employee can reasonably be required to take at a time that suits the employer. We suggest that the limit be set at 50% of the annual leave entitlement each year.

RECOMMENDATION 7. That section 94(5) be amended to limit the amount of leave that an employer can require an employee to take at a particular time. We suggest that the limit be set at 50% of the employee's yearly annual leave entitlement.

2. Compassionate leave

Under section 104 of the FW Act, an employee is entitled to 2 days' paid compassionate leave for occasion when a member of the employee's immediate family or household:

- (a) contracts or develops a personal illness that poses a serious threat to his or her life;
- (b) sustains a personal injury that poses a serious threat to his or her life; or
- (c) dies.

The term "immediate family" is defined to include:²¹

(a) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or

(b) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee.

One omission from this list of people is step parents, step sisters and step brothers – i.e. if an employee's step father, step mother, step sister or step brother were to pass away, there would appear to be no entitlement to compassionate leave.

In our view, there is no reason to exclude step parents, step sisters or step brothers from the definition of "immediate family".

RECOMMENDATION 8. That the definition of "immediate family" in s 12 of the FW Act be extended to include step parents, step sisters and step brothers.

²¹ FW Act s12.

5. Award system

The existing modern award system is generally working well.

The consolidation of awards and transitional instruments and replacement with fewer modern awards is a significant improvement. The modern awards are generally well-drafted and the consistency of provisions across modern awards makes them much easier to interpret.

ELC supports the retention of the existing award system.

6. Penalty rates

Penalty rates are an essential part of the existing workplace relations framework and should be retained.

Employees who work weekends, public holidays and hours that are unsocial, irregular or unpredictable should be compensated for working those hours in the form of penalty rates, as contemplated in the modern awards objective in the FW Act.²²

We strongly disagree with the contention that “the social rationale for penalty rates has declined as weekends have increasingly lost their historically special character as days of rest for some people, and as community and consumer expectations about buying goods and services have shifted in Australia towards a 24/7 economy.”²³

Employees who work in industries where penalty rates are commonplace – such as retail, hospitality, manufacturing and utilities industries – are typically low paid and rely on penalty rates as a substantial component of their overall earnings.²⁴ A reduction in penalty rates would likely have a disproportionate effect on women and rural and regional workers, who are more likely to rely on penalty rates to meet their household expenses.²⁵

Further, employers have provided limited evidence that penalty rates have had the negative effects claimed, such as causing them to employ fewer workers on a Sunday. In FWC’s 2013 penalty rates decision, the Commission noted the “significant evidentiary gap in the cases put [by employers]”.²⁶

FWC stated that “[i]t is particularly telling that there is no reliable evidence regarding the impact of the differing Sunday (or other) penalties when applied upon actual employer behaviour and practice.”²⁷

FWC continued: “[t]here is also no reliable evidence about the impact of the existing differential Saturday and Sunday penalties upon employment patterns, operational decisions and business performance.”²⁸

For these reasons, penalty rates should be preserved.

²² FW Act s 134(1)(da).

²³ Productivity Commission, *Workplace Relations Framework: Safety Nets*, Issues Paper No 2 (2015) 14.

²⁴ Tony Daly, ‘Evenings, nights and weekends: Working unsocial hours and penalty rates (Report, Centre of Work + Life, University of South Australia, October 2014) 11, 12, 18 and 19; The McKell Institute, ‘The Economic Impact of Penalty Rate Cuts on Rural NSW: A Retail Industry Case Study’ (Discussion Report, 2014) 17.

²⁵ Tony Daly, ‘Evenings, nights and weekends: Working unsocial hours and penalty rates (Report, Centre of Work + Life, University of South Australia, October 2014) 18 and 19.

²⁶ *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635, [234].

²⁷ *Ibid.*

²⁸ *Ibid.*

7. Bargaining – the Better Off Overall Test

7.1 *Should the BOOT be met for all employees subject to an agreement, or should the test focus on collective welfare improvement for employees?*

The BOOT should be met for *all* employees subject to an agreement and not just some employees. Where an employer seeks to obtain the benefits of entering into an enterprise agreement, this should not be at the expense of some employees.

8. Individual Flexibility Arrangements

8.1 *How should a WR system address the desire by some employers and employees for flexibility in the workplace?*

The existing workplace relations system adequately addresses the desire for flexibility and no further change is required.

For instance, employers and employees can enter into enterprise agreements, allowing them to vary the terms of the relevant modern award for the workplace.

Further, employers and employees can enter into individual flexibility arrangements, allowing them to vary the terms of the relevant modern award in respect of an individual employee.

9. Unfair dismissal

9.1 *Do Australia's unfair dismissal processes achieve their purpose, and if not, what reforms should be adopted, including alternatives (or complements) to unfair dismissal provisions?*

The overarching purpose of the unfair dismissal processes is to strike a balance between an employee's certainty of employment and to avoid employees being harshly, unfairly or unreasonably dismissed, while acknowledging that employers have a requirement to manage their businesses.²⁹

The current unfair dismissal framework has too great a focus on protecting businesses from unfair dismissal claims, at the expense of employees. The current framework protects too narrow a range of employees from unfair dismissal. This is discussed further below.

9.1.1 Limitation periods

Under section 394(2) of the FW Act, the limitation period for unfair dismissal claims is 21 days from the date of dismissal, unless the Fair Work Commission (**FWC**) considers that there are "exceptional circumstances" justifying an out of time application.

ELC is concerned that many employees with legitimate unfair dismissal claims are prevented from making a claim merely because of the 21 day limitation period. This is evidenced by ELC's statistics.

In the 2014 calendar year, at least 186 callers contacted ELC for advice on making an unfair dismissal claim under the FW Act after the 21 day limitation period had expired.

These statistics only represent vulnerable employees from Western Australia who specifically sought advice from ELC and met our eligibility criteria to receive advice.

If statistics were gathered for all employees across the country who considered that they had been unfairly dismissed and were potentially prevented from making a claim because they were outside the 21 day limitation period, it is likely that it would be a significantly larger number – perhaps in the multiple hundreds or thousands.

In ELC's experience, many recently dismissed employees are not aware of their rights and do not know how to lodge an unfair dismissal claim or who to go to for advice or assistance.

Some employees are in such a state of shock at having been dismissed that they do not seek redress for an unfair dismissal until days, weeks and sometimes months after the dismissal. Many employees prioritise finding new employment following a dismissal.

When dismissed employees finally do seek assistance, it may not be possible for them to obtain legal advice and prepare an unfair dismissal claim straight away.

These problems are exacerbated where the employee is from a non-English speaking background, has literacy issues or a disability, is unfamiliar with the relevant laws and the Australian legal system, or is in a rural, regional or remote location.

As we understand, the rationale for the short limitation period was to encourage and facilitate a "quick resolution of claims and increase the feasibility of reinstatement as an option".³⁰ However, ELC's experience has been that the majority of employees who make

²⁹ Explanatory Memorandum p. v; Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 11193 (Julia Gillard).

³⁰ Explanatory Memorandum [222].

unfair dismissal claims are not seeking reinstatement because they feel that the relationship is irreparable.

Further, there are other ways to expedite the resolution of claims. For example, streamlining Commission processes and promoting effective conciliation.

We note that the 21 day limitation period for unfair dismissal claims is in stark contrast to most liberal democratic states, as illustrated in the table below. The three most directly comparable jurisdictions, the United Kingdom (**UK**), Canada and New Zealand, provide 3-month (in the case of UK) and 90-day (in the case of Canada and New Zealand) limitation periods for unfair dismissal claims.

Jurisdiction	Section	Limitation period
Australia	s 394(2)(a) of FW Act	21 days
UK	s 111(2) of ERA³¹	3 months
New Zealand	s 114 of ERA³²	90 days The limitation period starts on the date on which the relevant action occurred, or when this came to the notice of the employee, whichever is the later.
Canada	s 240 of CLC³³	90 days
Sweden	ss 40,41 of EPA³⁴	<p><u>Where employee seeks reinstatement</u></p> <p>Between 2 weeks and 1 month</p> <p>Where the employee was not informed of the procedure for claiming that the notice of termination was invalid at the time of dismissal, the longer limitation period of 1 month applies.³⁵</p> <p><u>Where employee seeks damages</u></p> <p>4 months</p>

ELC is of the view that the FW Act does not achieve its goal of genuine unfair dismissal protection because the short limitation period prevents large numbers of employees from making unfair dismissal claims.

³¹ *Employment Rights Act 1996* (UK) c 18, s 111(2).

³² *Employment Relations Act 2000* (NZ) s 114(1).

³³ *Canada Labour Code*, RSC 1985, c L-2, s 240(2).

³⁴ *Employment Protection Act* (Sweden) SFS 1982:80, ss 40 and 41 [Ministry of Employment (Sweden) trans, *Employment Protection Act* (1982:80) (2008)].

³⁵ *Employment Protection Act* (Sweden) SFS 1982:80, ss 40 and 8 [Ministry of Employment (Sweden) trans, *Employment Protection Act* (1982:80) (2008)].

RECOMMENDATION 9. That the limitation period for unfair dismissal claims be increased to 90 days from the date of dismissal.

9.1.2 Out of time applications

Though unfair dismissal claims made outside the 21 day limitation period may be accepted if there are “exceptional circumstances”,³⁶ in practice this is rarely done. The FWC has interpreted “exceptional circumstances” narrowly³⁷ and very few claims are accepted outside the 21 day limitation period. In the 2013-2014 financial year, only 63 of 243 out of time applications were accepted.³⁸

In many instances, the short limitation period, together with the strict application of the “exceptional circumstances” test, has had the effect of denying legal protection to persons with a disability, who are of a non-English speaking background, who are in rural or remote areas, and/or who have taken alternative steps to dispute their dismissal.

The “exceptional circumstances” threshold has proven to be high. In other legislation, the test for allowing claims outside the limitation period is far less strict and the decision-maker has far more discretion to allow a late claim in appropriate circumstances.

For example, in Western Australia, the WA Industrial Relations Commission (**WAIRC**) may accept an employee’s unfair dismissal claim out of time if the WAIRC considers that “it would be unfair not to do so”.³⁹

Similarly, the WA Equal Opportunity Commissioner may accept a discrimination complaint out of time “on good cause being shown”.⁴⁰

ELC submits that, rather than relying on the ‘exceptional circumstances’ test, it would be preferable for the FWC to have discretion to allow out of time applications in appropriate circumstances, taking into account the factors set out in section 394(3) of the FW Act. The test in the *Industrial Relations Act 1979* (WA) appears to provide a suitable example.

RECOMMENDATION 10. That there be no reference to ‘exceptional circumstances’ in section 394(3) of the FW Act and that FWC instead be allowed to accept an unfair dismissal claim outside the limitation period if FWC considers it would be unfair not to do so.

9.1.3 Qualifying periods

Currently, an employee is not entitled to bring an action for unfair dismissal if, at the time of the dismissal, the length of the employee’s employment:

- was less than 12 months, in the case of a small business employer; or
- was less than 6 months, in any other case.⁴¹

³⁶ FW Act ss 394(2)(b) and 394(3).

³⁷ See for example, *Robert Lim v Downer EDI Mining* [2009] FW Act 457.

³⁸ FWC, *Annual Report 2013-14* (15 October 2014) 126.

³⁹ *Industrial Relations Act 1979* (WA) s 29(3).

⁴⁰ *Equal Opportunity Act 1984* (WA) s 83(5).

⁴¹ FW Act ss 382 and 383.

The Explanatory Memorandum to the Fair Work Bill (**Explanatory Memorandum**) indicated that it was the Government's intention to implement unfair dismissal laws that would protect employees while allowing businesses to effectively manage their workforce.⁴²

It has been ELC's experience since the FW Act has been in effect that these 6 month and 12 month qualifying periods exclude a large section of the workforce from making unfair dismissal claims.

In the 2014 calendar year, at least 135 callers who sought advice from ELC on unfair dismissal under the FW Act were prevented from making a claim because they had not completed the relevant qualifying period. This represents 8.6% of callers who contacted us about unfair dismissal under the FW Act.

As noted elsewhere, these statistics only represent employees from Western Australia who specifically sought, and were eligible to obtain, assistance from ELC. Nationally, the numbers of employees who are prevented from making an unfair dismissal claim because of the qualifying period are likely to be significantly higher.

Clearly, a significant number of employees are being prevented from making unfair dismissal claims as a result of the arbitrary qualifying periods which exist in the FW Act.

This poses serious questions as to whether the unfair dismissal process is achieving its purpose of protecting both employers and employees.

ELC submits that rather than there being a blanket exclusion preventing employees who have only worked for an employer for a particular period from making unfair dismissal claims, the employee's length of service should instead be something that FWC takes into account in determining the fairness of the dismissal. This is how unfair dismissal laws work in Western Australia.

Under the *Industrial Relations Act 1979* (WA), an employee is potentially eligible to make an unfair dismissal claim regardless of his or her length of service. However, the WAIRC, in determining if a dismissal is harsh, oppressive or unfair must have regard to whether the employee was dismissed during a period of probation or had been employed for less than three months.⁴³ In this way, the rights of employees to seek remedies where they have been unfairly dismissed are more appropriately balanced with the rights of employers to manage their workforces. This ensures that the unfair dismissal regime better achieves its purpose.

RECOMMENDATION 11. That the minimum period of employment be removed from the criteria for determining whether an employee is eligible to make an unfair dismissal claim.

RECOMMENDATION 12. That an employee's length of service be a relevant consideration in determining whether a dismissal is harsh, unjust or unreasonable.

⁴² Explanatory Memorandum, p. v; Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 11193 (Julia Gillard).

⁴³ *Industrial Relations Act 1979* (WA) s 23A(2).

9.1.4 Remedies

If an employee is eligible to be paid compensation in lieu of reinstatement, section 392(4) of the FW Act expressly prohibits consideration of shock, distress, humiliation or analogous hurt caused by the dismissal when calculating compensation.

At common law, it is possible to award damages for mental distress, shock and humiliation resulting from a breach of an employment contract or from a harsh, unjust or unreasonable termination of employment.⁴⁴ Even under the FW Act regime, compensation has been awarded for distress and humiliation in an adverse action claim.⁴⁵

There is no reason why compensation for shock, distress and humiliation should not be awarded in unfair dismissal claims where appropriate. Many ELC clients experience shock and distress in connection with unfair dismissal. This is a form of loss which should be compensable.

By way of comparison, New Zealand workplace laws expressly state that a compensation order may take into account any humiliation, loss of dignity and injury to the feelings of the employee.⁴⁶

To the extent that this exclusion was enacted to limit the financial burden to employers in dealing with unfair dismissal claims, we submit that these concerns have been addressed by the imposition of the compensation cap in sections 392(5) and 392(6) of the FW Act which limits compensation to 6 months' wages or half of the high income threshold, whichever is lower (discussed further below). Further, we submit that making such loss compensable will have the desirable effect of encouraging employers to have regard to the manner of dismissal and the impact of dismissal on the employee when dismissing the employee.

RECOMMENDATION 13. That FWC be required, or at least permitted, to consider shock, distress, humiliation and hurt in awarding compensation.

9.1.5 Penalties

Under the FW Act, penalties can be awarded in respect of general protections claims⁴⁷ and other breaches of the FW Act (such as breaches of the NES),⁴⁸ but they cannot generally be awarded in respect of unfair dismissal claims.⁴⁹

In ELC's view, FWC should have discretion to award penalties in respect of unfair dismissal claims in appropriate circumstances.

Obviously a pecuniary penalty would not be appropriate in every unfair dismissal case. However, some unfair dismissal cases involve deplorable conduct on the part of the employer. One such case is that of *Kaye v Fahd and Others*.⁵⁰ Ms Kaye received notice of her termination by way of an unanticipated SMS message. She had no record of

⁴⁴ *Emmerson v Housing Industry Association Ltd* [1999] FCA 500 (Ryan JR); *Burazin v Blackstown City Guardian Pty Ltd* (1996) 142 ALR 144, 157; *Liu and Ors v Coms 21 Limited* Print S3571 Guidice P, Duncan DP and Larkin C (25 February 2000) 6.

⁴⁵ *Australia Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* [2011] FCA 333.

⁴⁶ *Employment Relations Act 2000* (NZ) s 123(1)(c).

⁴⁷ FW Act s 539 items 11 and 12.

⁴⁸ FW Act s 539.

⁴⁹ The only penalties that can be awarded in respect of unfair dismissal claims are where a person contravenes a costs order – see FW Act s 539 item 13.

⁵⁰ [2013] FWC 1059.

unsatisfactory performance in her 19 years of service with the employer and was described as being “loyal and hardworking.”⁵¹ No reason was given at all for the dismissal. As such, she was never given a chance to respond to any such reason. Her dismissal was described by the presiding Deputy President of the FWC as being the “one of the worst unfair dismissals on record.”⁵² Even then, the Deputy President was unable to award a penalty against the errant employer.

Further, many employees who are eligible to make both unfair dismissal claims and general protections claims choose to make an unfair dismissal claim simply because they find unfair dismissal an easier concept to understand. In those circumstances, we submit that FWA should be able to order that a pecuniary penalty be paid where appropriate.

RECOMMENDATION 14. That pecuniary penalties be an available remedy in unfair dismissal claims.

9.1.6 Appeals

Where an employee or an employer wishes to appeal a decision relating to an unfair dismissal application, they must establish not only that there was an error in the original decision, but also that it is in the public interest to allow the appeal.⁵³

In our view, this requirement excludes many applicants from having their matters re-heard, even where the case arguably warrants re-hearing.

ELC submits that this requirement is overly restrictive, both for employees and employers. ELC is of the view that the “public interest” test should be removed from the provisions relating to unfair dismissal appeals.

Even in the absence of the “public interest” test, the thresholds required for a permission to be granted are sufficiently high. An applicant who wishes to appeal a FWC decision must prove an appealable error by the FWC in its first decision.⁵⁴ Appealable errors of law are usually serious errors such as a denial of procedural fairness, jurisdictional error or an error of principle.⁵⁵ Moreover, the FW Act expressly states that if the decision contains an error of fact, the decision is only appealable if the error of fact was significant.⁵⁶ We submit that these high thresholds in relating to an appealable error are an adequate safeguard against any frivolous appeals that the “public interest” test was designed to protect against.

Also, the task of assessing “public interest” is highly discretionary and involves a broad value judgment⁵⁷. Previous FWC decisions seem to have interpreted this term narrowly.⁵⁸ On one hand, appeals raising “any issue of importance or general application” are said to be in the public interest.⁵⁹ However, in a recent case before the FWC Full Bench, safety issues relating to public transport were found to be of insufficient “public interest” to warrant permission to appeal.⁶⁰

⁵¹ *Kaye v Fahd and Others* [2013] FWC 1059, [139].

⁵² *Kaye v Fahd and Others* [2013] FWC 1059, [132].

⁵³ FW Act s 400.

⁵⁴ *Maleknia v University of Sydney* [2015] FWCFB 609; *Anderson v Thiess Pty Ltd* [2015] FWCFB 478; *Ginnane v Ambergold Holdings Pty Ltd* [2015] FWCFB 522.

⁵⁵ *Galati v Veneto Club* [2015] FWCFB 521; *Jeffrey v IBM Australia Limited* [2015] FWCFB 397; *Singh v MSS Security Pty Ltd* [2015] FWCFB 393.

⁵⁶ FW Act s 400(2).

⁵⁷ *O’Sullivan v Farrer* (1989) 168 CLR 210 applied in *Hogan v Hinch* [2011] HCA 4, [69].

⁵⁸ *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78, [43].

⁵⁹ *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWA 5343, [27].

⁶⁰ *KDC Victoria Pty Ltd v Farmer* [2015] FWCFB 454, [32].

RECOMMENDATION 15. That the provisions of the FW Act relating to appeals in unfair dismissal matters be amended so that it is not necessary to establish that it is in the public interest to allow an appeal in order to obtain leave to appeal.

9.2 *Are the tests used by the FWC appropriate for determining whether conduct is unfair, and if not, what would be a workable test? Are the exemptions to unfair dismissal appropriate, and if not, how should they be adapted?*

ELC submits that the blanket preclusion of employees who do not meet the significant minimum employment period threshold and the express exemptions of certain types of employees (such as casual employees, fixed term employees and trainees)⁶¹ from making an unfair dismissal claim are unreasonable. In our view, the considerations relating to allowing unfair dismissal claims by these types of employees are more appropriately dealt with by the FWC in determining if a dismissal is harsh, unjust or unreasonable.

9.2.1 Qualifying periods

As discussed in section 9.1.3 above, an employee is barred from bringing an unfair dismissal claim if the employee does not meet the minimum employment period of 6 months (or 12 months if the employer is a small business employer).⁶²

In ELC's experience, this criterion has the effect of excluding many employees, especially vulnerable employees, from bringing an unfair dismissal claim and leaves them open to exploitation by their employers.

Thus, we submit that there should not be a blanket exclusion preventing employees who do not meet the qualifying period criteria from making an unfair dismissal claim. As is the case in respect of unfair dismissals claims heard in the WAIRC, the FWC should instead take into account the employee's length of service in awarding compensation and determining whether the dismissal was harsh, unjust or unreasonable.

In that regard, we repeat Recommendations 11 and 12.

9.2.2 Casual employees

Under the FW Act, casual employees are also prevented from making unfair dismissal claims, irrespective of the harshness or unreasonableness of the dismissal.⁶³

The only situation where a casual employee can make an unfair dismissal claim under the FW Act is where the employee can demonstrate that he or she has worked on a regular or systematic basis and that he or she had a reasonable expectation of ongoing employment on a regular and systematic basis.⁶⁴ In other words, the employee must demonstrate that he or she is not a true casual employee, but tantamount to a permanent employee.

Under Western Australian legislation, casual employees are not excluded from making unfair dismissal claims. However, the WAIRC may nonetheless, and often does, take into

⁶¹ FW Act ss 384 and 386.

⁶² FW Act ss 382 and 383.

⁶³ FW Act s 384.

⁶⁴ FW Act s 384.

account the fact that the dismissed employee is a casual employee in determining whether the dismissal is harsh, oppressive or unfair.⁶⁵

It is preferable for casual employees not to be automatically excluded from making unfair dismissal claims under the FW Act but instead for their casual status to be something that FWC takes into account in determining whether the dismissal was unfair.

RECOMMENDATION 16. That casual employees not be automatically excluded from making unfair dismissal claims.

RECOMMENDATION 17. That the fact that an employee is a casual employee be a relevant consideration in determining whether a dismissal is harsh, unjust or unreasonable.

9.2.3 Fixed term employees

Section 386(3)(a) of the FW Act prohibits fixed term employees from making unfair dismissal claims.

Employees on fixed term contracts often have no protection from unfair dismissal where the employer simply decides not to renew the employee's contract rather than terminating an existing contract. ELC has encountered a number of employees whose employers have engaged them on consecutive fixed term contracts, conceivably for the purpose of making it easier to dismiss employees without the employees having recourse to unfair dismissal protections.

In ELC's view, employees on fixed term contracts should be protected against unfair dismissal, in the same way as other employees. Employees on fixed term contracts are protected in this manner in the United Kingdom (**UK**).

Under section 95 of the *Employment Rights Act 1996* (UK) (**ER Act**), the situation where an employee's fixed term contract expires without being renewed is treated as a dismissal for the purposes of the Act. As a result, fixed term employees have the right to bring an unfair dismissal claim if the other criteria for the claim are met and there was not a fair reason for non-renewal.⁶⁶

Further, the *Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002* (UK) (**FTE Regulations**) provide certain fixed term employees with:

- the right not to be treated less favourably than permanent employees of the same employer doing similar work on the ground that they are a fixed term employee,⁶⁷ unless this can be objectively justified;⁶⁸ and
- the right to be recognised as a permanent employee where they have been continuously employed for four years or more on successive fixed term contracts, unless renewal on a fixed-term basis was objectively justified.⁶⁹

⁶⁵ For example, *Brenzi v Marine Fire Security Pty Ltd* [2004] WAIR 12573; *Cumberbirch v Total Peripherals Pty Ltd* (1995) 75 WAIG 2862; *Despot v Valley View Restaurant & Function Centre* [2005] WAIRC 02601.

⁶⁶ ER Act ss 94-95(2).

⁶⁷ FTE Regulations SI 2002/2034 r 4.

⁶⁸ FTE Regulations SI 2002/2034 r 3.

⁶⁹ FTE Regulations SI 2002/2034 r 8.

It is noteworthy that the FTE Regulations were developed in response to a broader European Union (EU) directive, which establishes minimum requirements in relation to the protection of fixed term employees across EU Member States (see Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP).

The ER Act and the FTE Regulations strike a desirable balance between protecting fixed-term employees, especially those on rolling fixed term contracts, and allowing employers to utilise fixed term contracts where they are necessary to meet genuinely temporary business needs.

RECOMMENDATION 18. That the FW Act be amended so that employees whose contracts are terminated at the end of a fixed term are protected from unfair dismissal in the same way as other employees.

9.3 *What are the strengths and weaknesses of the Small Business Fair Dismissal Code, and how, if at all, should the Australian Government amend it? Should the employment threshold be maintained, raised or lowered?*

Under the Small Business Fair Dismissal Code (**Code**), an employee can be summarily dismissed, without notice or warning, if that employee is believed, on reasonable grounds, to have committed serious misconduct such as theft, fraud or violence or serious breaches of occupational health and safety procedures. Such a dismissal will be deemed fair.

Further, if the employer reports theft, fraud or violence allegedly committed by the employee to the police, the dismissal of that employee will be deemed to be fair. In such circumstances, no proof of the employee's actual guilt is required⁷⁰ and an employee effectively has no right to respond to the dismissal.

Such an employee would only be able to bring an unfair dismissal action on the basis that the dismissal was not consistent with the Code.⁷¹ The only argument the employee may bring to establish that the employer did not comply with the Code is to assert that the employer did not have reasonable grounds to make a police report in relation to the employee's alleged misconduct.⁷²

In the absence of a positive obligation in the Code on the employer to articulate the grounds on which the allegation is made, it is difficult for an employee to prove that the grounds on which the employer made the report were unreasonable. This requires the employee to prove that the employer's decision-making process, which the employee would not generally be privy to, is unfair. The reverse onus of proof that is available in a general protections claim is not available in such a claim.

ELC submits that the Code should be amended to include obligations on the employer to:

- particularise to the employee the alleged serious misconduct and the grounds on which the allegation and associated dismissal are made; and
- give the employee a reasonable opportunity to respond to the allegation.

⁷⁰ See *Narong Khammaneechan v Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Café* [2010] FWA 7891.

⁷¹ FW Act ss 385 and 388.

⁷² Code para 2.

These amendments will give clarity to employers, employees and FWC as to what constitutes “reasonable grounds”.

RECOMMENDATION 19. That the Small Business Fair Dismissal Code be amended, in relation to summary dismissal, to include obligations on the employer to:

- particularise the alleged serious misconduct and the grounds on which the allegation is made; and
- give the employee a reasonable opportunity to respond to the allegation.

ELC also submits that the Code should not deem a dismissal to be fair if a police report has been made in respect of an allegation of theft, fraud or violence by the employee. There is an unintended effect of this deeming provision – if after the police report is made and after any police investigations or court processes, the employee is either never charged or is later found not guilty of the serious misconduct, the dismissal of the employee could nonetheless still be deemed to be fair. There is risk that employers could exploit this provision to the detriment of employees.

While we acknowledge that small business employers should be able to deal effectively with employees who have committed serious misconduct, in our view, the small business employers are sufficiently protected by the Code without this deeming provision.

We submit that the balance between protecting employers and employees can be achieved if the making of a report and any subsequent police investigations or convictions is made a necessary relevant consideration of the FWC in determining if the belief of serious misconduct was on reasonable grounds.

RECOMMENDATION 20. That the Small Business Fair Dismissal Code be amended to remove the following:

“For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.”

9.4 In cases where employers are required to pay compensation in lieu of reinstatement, are the current arrangements for a cap on these payments suitable?

The current compensation cap is the lesser of 26 weeks’ remuneration and half of the high income threshold.⁷³ The high income threshold is currently \$133,000 – i.e. the maximum compensation that can be awarded in any unfair dismissal matter is therefore \$66,500.

However, in other OECD countries, there is either no cap on compensation or the amount of compensation that can be awarded in unfair dismissal claims is greater than in Australia.

There is no statutory cap on compensation ordered in Canada⁷⁴ or New Zealand.⁷⁵

⁷³ FW Act ss 392(5) and 392(6).

In Sweden, employees are entitled to both economic and punitive damages.⁷⁶ Damages are capped at 6 months' pay for less than 6 months employment; 16 months' pay for less than five years of employment; 24 months' pay for at least five years but less than ten years employment; and 32 months' pay for ten or more years of employment.⁷⁷

In our view, the compensation cap for unfair dismissal claims under the FW Act should be removed.

It is unreasonable to limit the amount of damages that an employee can receive for unfair dismissal to 6 months wages or \$66,500, particularly where an employee has worked for an employer for a long period of time, has been dismissed in particularly harsh circumstances, and the employee has been unable to obtain other work since the dismissal despite his or her best efforts.

This should not expose employers to excessive liability because the onus will still be on the employee to prove what his or her loss has been as a result of the dismissal. Additionally, FWC always has discretion to determine what amount of compensation to award in the circumstances.

RECOMMENDATION 21. That there be no cap on the amount of compensation that may be awarded in unfair dismissal matters.

9.5 *What are the effects of unfair dismissal arrangements on firm costs, productivity, recruitment processes, employment, and employment structures?*

We submit that the effects of unfair dismissal arrangements on firm costs are generally low, for the reasons set out in detail below at 9.7. Current unfair dismissal arrangements are employer friendly, with much of the current Australian workforce ineligible to bring an unfair dismissal claim.

9.6 *What are the impacts on the employees of unfair dismissal, both personally and in terms of altered behaviours in workplaces?*

9.6.1 Personal impacts of unfair dismissal

ELC surveyed a cross-section of clients who had contacted us between January and June 2014 to identify the impact that their work issue (including unfair dismissal) had had on them. A total of 90 clients were surveyed. Of those 90 clients, ELC surveyed 55 clients who considered that they had been unfairly dismissed.

ELC asked clients about the impacts of their work issue on their finances, health, family life, social life and community participation. We have set out below the results in relation to those clients who contacted us about unfair dismissal specifically. The results of the survey clearly demonstrate the significant impact work issues had on the majority of our clients.

⁷⁴ *Canada Labour Code*, RSC 1985, c L-2, s242(4).

⁷⁵ *Employment Relations Act 2000* (NZ) s123.

⁷⁶ *Employment Protection Act* (1982:80) s38.

⁷⁷ *Employment Protection Act* (1982:80) s39.

Financial impacts

66.67% of respondents⁷⁸ indicated that the dismissal had made it hard or very hard for them to pay for **groceries, electricity or gas, petrol or transport and their rent or mortgage**.

Similarly, 66.04% of respondents said that the dismissal had made it hard or very hard for them to pay for **essential household items** (such as clothing, cleaning items, toiletries and so forth).

63.06% of respondents said that it was hard or very hard to pay for **healthcare or health insurance**, as a result of the dismissal.

48.15% of respondents indicated that the unfair dismissal had made it hard or very hard for them to pay for **education** (school, university or a short course), while 46.15% said that it had made it hard or very hard to pay for **childcare**. Note that these figures will reflect that a percentage of respondents interviewed did not have education or childcare costs.

The respondents surveyed indicated not only that these financial impacts were hard or very hard to deal with in themselves, but they also had flow-on effects into other areas of their lives – such as their family life, their social life and their community participation, as indicated in the comments below.

Health impacts

72.73% of respondents said that the dismissal affected their health.

Clients reported a range of health impacts, including stress, depression and other serious mental health issues, including thoughts of suicide:

- “I became very stressed, depressive and suffered a loss of confidence”.
- “I became stressed and had to seek help as I contemplated suicide”.
- “I became very stressed, suffered weight loss and had to go on blood pressure pills”.
- “It affected my health... I experienced a lot of stress and felt I became quite unsafe”.
- “I suffered from low self-confidence because I wasn’t able to get a job and my employer wasn’t being honest to future employers”.
- “I stayed home in bed because of my depression and physical issues”.

Impacts on family life

64.81% of respondents indicated that their family life had been affected by the dismissal.

Clients commented that the dismissal impacted on their family life in the following ways:

- “The stress of it put a strain on our relationship”.
- “It had an impact on my marriage and uprooted my children”.

⁷⁸ Note that the term “respondents” in this section refers to the numbers of clients who felt they had been unfairly dismissed, who answered that particular question when surveyed. In some cases, the number of people who answered the question was slightly lower than 55. For example, 54 out of 55 people who felt they had been unfairly dismissed answered the questions about the impacts of the dismissal on being able to pay for groceries electricity or gas, petrol or transport and their rent or mortgage.

- “I wasn’t able to take my children out and suffered from low self-esteem”.
- “It affected my family life as my family members took on the stress as well”.
- “It affected my family life because I experienced mood swings”.
- “I wasn’t the same bubbly person. I cried a lot and there was lots of arguing”.
- “It had a huge impact. The kids had to leave their schools and I now live with my parents, 1.5 hours away from where I was”.

Impacts on social life

58.18% of respondents felt that their social life had been affected by having been unfairly dismissed.

Clients made the following comments about the impacts on their social life:

- “My friends thought there was something wrong with me, or that I was just lazy”.
- “It affected my social life because I live in a small country town where everyone knows everyone”.
- “I didn’t want people to know what had happened or how I was affected”.
- “My finances were limited and I did not feel like socialising”.
- “I had no money to enjoy a social life”.
- “It was traumatic. I isolated myself and chose not to be social”.

Impacts on community participation

50% of respondents indicated that the dismissal had affected their participation in community activities.

Clients reported the following impacts on community participation:

- “I stopped playing volleyball and doing my university studies”.
- “I usually did yoga but wasn’t able to because I didn’t have any money to pay for it”.
- “I had to cancel my gym membership”.
- “I had to stop studying as I wasn’t able to pay for books”.

9.7 What are the main sources of costs (including indirect costs), and how could these be reduced without undermining the fundamental goals of unfair dismissal legislation?

ELC assumes that this question is directed at costs incurred by employers. ELC refers to section 9.6, in addition to the paragraphs below, in respect of costs incurred by employees.

ELC submits that costs to employers associated with unfair dismissal claims are generally low, because:

- unfair dismissal claims are currently only available to a limited range of employees (as discussed elsewhere in this submission);

- where they are available, the vast majority of unfair dismissal claims (79% in the 2013-14 financial year)⁷⁹ are resolved quickly and informally through conciliation rather than a hearing;
- approximately a quarter of unfair dismissal claims are resolved without the payment of a settlement sum to the employee;⁸⁰
- where a settlement sum is paid to the employee, it is generally a fairly small amount of money – in about half of cases, it is less than \$4,000;⁸¹
- in the limited number of cases where a matter is resolved at hearing, the amount of compensation that can be awarded to an employee is capped at the lesser of 26 weeks' remuneration and half of the high income threshold,⁸² and it is rare for the maximum to be awarded;
- there are no filing fees in FWC for employers;
- legal costs are generally low because unfair dismissal claims are designed so that both employees and employers can represent themselves, without the need for legal representation;
- the amount of time required to respond to an unfair dismissal claim is low because FWC is required to perform its functions in a quick and informal manner;⁸³
- the amount of time required to attend an unfair dismissal conciliation specifically is generally very low as most conciliations are conducted via phone and last approximately 90 minutes;⁸⁴ and
- unfair dismissal claims can be avoided to a large extent by adhering to the requirements under the FW Act – i.e. dismissing an employee for a valid reason and using a fair process.

These factors are discussed in further detail below.

In our view, costs to employers associated with unfair dismissal should not be further reduced without undermining the fundamental goals of unfair dismissal legislation. Such costs should not be reduced at the expense of the protection of employees.

9.7.1 Main sources of costs

The main sources of unfair dismissal costs to employers would presumably include compensation, FWC fees, legal costs, and costs associated with spending time and resources responding to unfair dismissal claims. Each of these main sources of costs is discussed further below.

⁷⁹ FWC, *Annual Report 2013-14* (15 October 2014) 41.

⁸⁰ Ibid, p. 124.

⁸¹ FWC, *Results and outcomes* (13 February 2015) <<https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/results-outcomes>>.

⁸² FW Act ss 392(5) and 392(6).

⁸³ FW Act s 577.

⁸⁴ FWC, *Resolving issues at the Commission* (19 August 2014) <<https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/resolving-issues-at-the>>.

Compensation

Compensation where the matter is settled at conciliation

As noted above, in practice, most unfair dismissal claims are settled at conciliation. In the 2013-14 financial year, 79% of unfair dismissal claims were settled at conciliation.⁸⁵

In many of these cases, no amount was paid to the employee at all – of the 8659 matters settled at conciliation in 2013-14, 23.7% did not involve the payment of a settlement sum.⁸⁶

Where the employee is paid a sum as part of a settlement agreement, it is generally a low amount, informed by the limited maximum compensation awards recoverable under the FW Act.

In the 2012-13 financial year, of settlements involving a payment:⁸⁷

- 22% were settled for less than \$2,000;
- 49% were settled for less than \$4,000; and
- 79% were settled for less than \$8,000.

Compensation where the matter goes to a hearing

In the limited number of cases where an unfair dismissal matter proceeds to hearing, employers' costs in respect of compensation awards are limited by statute.

As noted above, there is a cap on the amount of compensation that can be awarded. An employer's potential liability under this section is capped at the lesser of 26 weeks' remuneration and half of the high income threshold,⁸⁸ which is currently \$66,500. It is rare for the maximum amount of compensation to be awarded.

In determining the amount of compensation, FWC is bound to take into account all circumstances of the case, including the effect of the order on the viability of the employer's enterprise.⁸⁹

The compensation cap and the range of factors that FWC is required to take into account together ensure that any compensation costs to employers are strictly limited.

FWC fees

The filing fee to lodge an unfair dismissal claim is \$67.20. This fee is payable by employee applicants. The filing fee may be waived if its payment would cause serious hardship to the applicant.⁹⁰ In ELC's experience, the waiver has been granted in appropriate circumstances.

It is important to ensure that unfair dismissal filing fees are low, to ensure that unfair dismissal claims are accessible to the low paid employees who are eligible to bring such claims.

Note that employers are not required to pay fees in responding to the application or at any other stage in unfair dismissal proceedings.

⁸⁵ FWC, *Annual Report 2013-14* (15 October 2014) 41.

⁸⁶ Ibid, p. 124.

⁸⁷ FWC, *Results and outcomes* (13 February 2015) <<https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/results-outcomes>>.

⁸⁸ FW Act ss 392(5) and 392(6).

⁸⁹ FW Act s 392(2).

⁹⁰ *Fair Work Regulations 2009* (Cth) r 3.07(7).

Legal costs

Generally the legal costs associated with making and responding to an unfair dismissal claim are low in comparison to other litigious proceedings because FWC procedures are intended to be informal and accessible to allow parties to be self-represented.⁹¹ A party can generally only have legal representation if permission is granted by FWC.⁹²

As such, unfair dismissal applications often do not involve legal representation and are conducted by the parties themselves. Rules of evidence are less stringent in FWC than in other judicial forums, and disclosure and interlocutory processes are likely to be significantly less onerous. Legal costs are thus likely to be low.

Other costs associated with preventing and responding to unfair dismissal claims – e.g. business time and resources

As with any other legal action, an unfair dismissal application may require attendance at mediations, conciliations and hearings, as FWC directs. However, the FWC has a mandate to be quick and informal⁹³ and most conciliations are conducted via phone link-up and generally last approximately 90 minutes.⁹⁴

Further, as noted above, the overwhelming majority of unfair dismissal matters are resolved at conciliation. In the 2013-2014 financial year, 79% of unfair dismissal applications were settled at conciliation. This greatly reduces the time and cost of resolving unfair dismissal claims.

ELC acknowledges that there are costs for employers associated with performance management and dismissal – for example, time spent identifying and informing an underperforming employee of what he or she needs to do to improve, and then giving that employee a chance to improve. However, these costs will always exist to a large extent regardless of the legal framework for unfair dismissal.

Further, there are many other benefits associated with implementing fair and appropriate procedures for performance management and dismissal, in addition to avoiding unfair dismissal claims. Treating staff fairly is likely to improve staff retention and staff morale, thereby improving productivity, reducing staff turnover and reducing the costs associated with recruitment.

9.8 Under current or previous arrangements, what evidence is there of the practice of “go away money”? Have recent changes, such as those that provide the FWC with expanded powers in relation to costs orders and dismissing applications based on unreasonable behaviour, improved matters?

We understand “go away money” to mean settlement sums paid by employers to former employees to settle an unfair dismissal claim.

Any decision to pay money to settle a claim is an entirely commercial decision made by the employer, taking into account the perceived merits of the claim, the costs of obtaining legal advice and time-costs involved.

It may be attractive for employers to pay “go away” money where an employee has a strong claim, to avoid the cost of dealing with that claim. Where an employee’s claim is perceived

⁹¹ FW Act ss 577 and 591.

⁹² FW Act s 596.

⁹³ FW Act s 577.

⁹⁴ FWC, *Resolving issues at the Commission* (19 August 2014) <<https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/resolving-issues-at-the>>.

to have less merit, the same factors will impact on the employer's decision whether to defend or settle the claim.

We note that in ELC's experience, it is uncommon for employees to bring claims that are frivolous, vexatious or without merit. We provide advice and information to approximately 4,000 callers each year and are aware of very few instances where a client has proceeded with a weak claim. Where a client does not appear to have a good claim, we discourage them from making a claim.

We have found that clients are generally very receptive to any legal advice they receive suggesting that they discontinue their claims – even if they are disappointed to discover that they are not eligible to make an unfair dismissal claim, they will, in almost all cases, take our advice to discontinue their claim.

Any concerns about employees making unfair dismissal claims without merit can be addressed to a large extent by ensuring that employees have access to legal advice at any early stage. This supports the case for the funding and expansion of employee advice services such as ELC.

One strong deterrent against employees making claims with no merit is that FWC has the power to order costs in relation to unfair dismissal claims that are frivolous, vexatious or have no reasonable prospects of success.⁹⁵

Further, as identified by the Productivity Commission, the FWC's powers to order costs were expanded in 2013 so that FWC can also order costs that were incurred as a result of any unreasonable act or omission of a party and can order costs against lawyers or paid agents.

In our experience, clients take the possibility that costs may be awarded against them very seriously, and this is enough of a disincentive in itself for clients not to proceed with unsuitable claims.

Another feature of the FW Act that prevents unfair dismissal claims with no merit from proceeding is that FWC has the power to *dismiss* unfair dismissal claims that are frivolous, vexatious or have no reasonable prospects of success.⁹⁶

Further, from 2013 onwards, FWC has had the power to dismiss an application where the applicant fails to attend a conference or a hearing, fails to comply with a direction by FWC, or fails to discontinue an application after a settlement has been agreed.⁹⁷

To the extent that despite these deterrents, there is a practice of “go away money” being paid to settle employee claims, we submit that, as stated above, any decision to pay money to settle a claim is a commercial decision made by the employer, reflecting a balancing of the merits of the claim and the time and costs involving in defending the claim.

9.8.1 Avoiding incurring costs

As discussed above, ELC submits that the costs to employers of unfair dismissal claims outlined in section 9.7.1 are already low and should not be further reduced at the expense of protecting employees from unfair conduct.

In addition, many of these costs could be avoided to a large extent by employer by following the proper process required under the FW Act to dismiss an employee and by ensuring that a dismissal is conducted fairly.

⁹⁵ FW Act s 611(2).

⁹⁶ FW Act s 587.

⁹⁷ FW Act s 399A.

9.9 Do unfair dismissal actions disproportionately affect any particular group of employees (for example, by gender, ethnicity, geographical location, industry, union affiliation, occupation or business size)?

In our experience, unfair dismissal actions disproportionately affect particular groups of employees, such as:

- employees on low incomes;
- older employees (those over 55 years of age);
- young employees (those under 21 years of age);
- employees from non-English speaking backgrounds;
- employees with disabilities; and
- employees from rural, regional or remote areas.

ELC's statistics provide some insight into the prevalence of unfair dismissal issues amongst vulnerable employees in Western Australia.

In the 2014 calendar year, ELC received 1,569 calls in relation to unfair dismissal claims under the FW Act.

Of those 1,569 callers:

- 938 callers earned less than \$50,000;
- 226 callers (14.4%) were over the age of 56;
- 162 callers (10.3%) were under the age of 21;
- 261 callers were from a non-English speaking background;
- 267 callers (17.0%) had a disability; and
- 395 callers (25.2%) lived in a rural, regional or remote area.

While ELC's statistics are necessarily impacted by the eligibility criteria for receiving ELC advice, these statistics do show that there are significant numbers of employees from the above groups who are affected by unfair dismissal.

Impacts of unfair dismissal are potentially greater

Further, the *impacts* of unfair dismissal are greater, in relative terms, on vulnerable employees.

For example, many vulnerable employees work in low-skilled roles which do not require a specific qualification.⁹⁸ If they are dismissed, it is often much harder for them to get another job. According to the Department of Employment's Vacancy Report, the lowest number of job vacancies is among sales workers, machinery operators and drivers, and labourers.⁹⁹

⁹⁸ Natalie James, Fair Work Ombudsman, 'Risk, Reputation and Responsibility' (Speech delivered at the ALERA 2014 National Conference on 29 August 2014).

⁹⁹ Department of Employment, *Vacancy Report January 2015* (2015) 2.

Similarly, employees in a rural, regional or remote area will likely have significantly fewer alternative job opportunities if they are dismissed, due to the lack of available work in these areas. The dismissal may also be more likely to have magnified impacts on these employees' social and family lives because the termination of their employment is likely to be publicly known in their local community.

Mature aged employees are also disproportionately affected by unfair dismissals. Such employees are likely to have greater difficulties in finding alternative employment. People of mature age often face significant barriers when seeking new employment, such as discrimination by potential employers and a perception that such persons are more difficult to train and retrain.¹⁰⁰ The average duration of unemployment for a person above the age of 55 years is twice that of a person between the ages of 15 and 54.¹⁰¹

The financial impacts of unfair dismissal on low income employees are likely to be amplified, for example if such employees are less likely to have substantial savings to draw from in any subsequent period of unemployment.

As noted in section 9.6.1, these financial impacts will likely have other flow-on effects, such as impacts on family life, social life, and community participation.

9.10 What are the main grounds on which people assert unfair dismissal, and what types of claims are most likely to succeed?

Based on ELC's research, the main grounds on which people assert unfair dismissal broadly reflect the criteria for unfair dismissal in section 387 of the FW Act – being that:

- there was no valid reason for the dismissal; and
- the employer did not follow a fair process in carrying out the dismissal, in:
 - failing to give the employee a reason for the dismissal;
 - failing to give the employee an opportunity to respond to any reasons given for dismissal;
 - refusing to allow the employee a support person at any dismissal meeting; and
 - failing to give the employee warnings prior to dismissal.

It is apparent that the types of claims that are most likely to succeed are those made by more sophisticated employees who are alert to the 21 day limitation period and who have access to legal advice.

Conversely, employees who are not aware of the applicable limitation period and do not have legal assistance are less likely to succeed in their claims.

¹⁰⁰ Labour Market Research & Analysis Branch, Labour Market Strategy Group, *Australian Government, Workforce Aging* (June 2012) 10, 15.

¹⁰¹ *Ibid.*

9.11 How does Australia compare internationally with regard to the unfair dismissal protections? Are there elements of overseas approaches and frameworks that could usefully be applied to Australia?

Relative to other comparable jurisdictions, Australia's unfair dismissal regime is employer friendly. Some key issues that demonstrate this are qualifying periods, the treatment of fixed term employees, limitation periods, written reasons and compensation.

9.11.1 Eligibility – qualifying periods

As noted above, employees in Australia can only make an unfair dismissal claim under the FW Act where they have worked for their employer for at least 6 months, or for at least 12 months (where the employer has less than 15 employees).

Under Western Australian employment laws, there is no such qualifying period; the WAIRC will simply take into account the fact that an employee has worked for less than 3 months when deciding whether a dismissal was unfair.¹⁰²

Other OECD countries also have shorter qualifying periods than those applicable in Australia under the FW Act.

In New Zealand, for instance, employees who are engaged for a trial period of up to 90 days who are dismissed within this trial period may not bring a personal grievance or legal proceedings against the employer.¹⁰³

However, this 90 day trial period is only effective if there is a written provision in the employee's employment contract stating that there is a trial period and that the employee is not entitled to bring a personal grievance or legal proceedings against the employer if they are dismissed within this period.¹⁰⁴

As set out in Recommendation 11, ELC submits that there should be no qualifying period to make an unfair dismissal claim under the FW Act.

Instead, FWC should take into account the employee's length of service in awarding compensation and determining whether the dismissal was harsh, unjust or unreasonable, as set out in Recommendation 12.

9.11.2 Eligibility – fixed term employees

As discussed above, employees on fixed term contracts in the UK are protected against unfair dismissal in the same way as other employees. Refer to section 9.2.3 for more detail.

ELC submits that Australian employees on fixed term contracts should also be protected from unfair dismissal, as set out in Recommendation 18.

9.11.3 Limitation periods

The UK, Canada and New Zealand all provide for approximately 90-day limitation periods for unfair dismissal claims,¹⁰⁵ while the limitation period in Australia is currently 21 days. Refer to section 9.1.1 for more detail.

¹⁰² Refer to section 9.1.3 above.

¹⁰³ *Employment Relations Act 2000* (NZ) ss 67A and 67B.

¹⁰⁴ *Employment Relations Act 2000* (NZ) s 67A.

¹⁰⁵ *Employment Rights Act 1996* (UK) c 18, s 111(2); *Canada Labour Code*, RSC 1985, c L-2, s 240(2); *Employment Relations Act 2000* (NZ) s 114.

ELC submits that Australia should adopt a 90 day limitation period for unfair dismissal claims under the FW Act, as set out in Recommendation 9.

9.11.4 Written reasons for dismissal

Canada¹⁰⁶, New Zealand¹⁰⁷, the UK¹⁰⁸ and Sweden¹⁰⁹ all impose an obligation on the employer, upon request, to provide the employee with a written reason for the termination of the employment.

In ELC's experience many clients feel aggrieved by their employer because they have not been provided with any reason for dismissal, and certainly nothing in writing. We submit that this obligation will mitigate the sense of injustice that many employees experience following a dismissal and potentially reduce the number of unfair dismissal claims commenced.

In Sweden termination notice must also specify the procedures available to the employee should they wish to challenge the termination and claim damages.¹¹⁰

ELC submits that the FW Act should contain a provision requiring employers to provide written reasons for a dismissal upon request.

RECOMMENDATION 22. That the FW Act be amended to require employers to provide employees who have been dismissed with written reasons, upon request.

9.11.5 Compensation

Compensation for non-financial loss

As stated in sections 9.1.4 and 9.4, compensation in other jurisdictions can include compensation for humiliation, distress and injury to feelings.¹¹¹

As noted in Recommendation 13, in our view, FWC should be required, or at least permitted, to consider shock, distress, humiliation and hurt in awarding compensation for unfair dismissal under the FW Act.

Compensation cap

As discussed above, compensation for unfair dismissal in other OECD countries is either uncapped¹¹², or is capped at a higher level than the current cap of 6 months' wages under the s392(5) of the FW Act.¹¹³

In our view, the compensation cap for unfair dismissal matters under the FW Act should be removed, as set out in Recommendation 21.

¹⁰⁶ *Canada Labour Code*, RSC 1985, c L-2, s241(1).

¹⁰⁷ *Employment Relations Act 2000* (NZ) s120.

¹⁰⁸ *Employment Rights Act 1996* (UK) s92.

¹⁰⁹ *Employment Protection Act* (Sweden) SFS 1982:80, s9.

¹¹⁰ *Employment Protection Act* (Sweden) SFS 1982:80, ss 8,19.

¹¹¹ *Employment Relations Act 2000* (NZ) s123(1)(c)(i).

¹¹² *Canada Labour Code*, RSC 1985, c L-2, s242(4); *Employment Relations Act 2000* (NZ) s123.

¹¹³ *Employment Protection Act* (Sweden) SFS 1982:80, s39

10. Anti-bullying laws

10.1 *What are the likely utilisation rates of the anti-bullying provisions, and what factors are most likely to affect these rates?*

The anti-bullying provisions in the FW Act have been relied upon significantly less than anticipated.

In the 2014 calendar year, 701 applications for a stop bullying order were made.¹¹⁴ Of these, only 64 applications were finalised by a decision and just 1 application was successful.¹¹⁵

Our clients have cited the following factors which have discouraged them from using the anti-bullying provisions:

- *Limited eligibility criteria* – many clients were barred from making claims as they had already resigned following workplace bullying, in many cases to escape bullying. Others were ineligible to make an anti-bullying claim because the bullying they experienced was one-off and not a repeated behaviour, or because they were not employed by a constitutional corporation;¹¹⁶
- *Limited range of available remedies* – some clients experienced physical or psychological problems as a result of workplace bullying but were unable to seek compensation under the FW Act as orders for pecuniary payments are specifically excluded from the orders the FWC may make in relation to bullying;¹¹⁷
- *Low awareness* – few clients were aware of their potential right to bring an anti-bullying action and by the time they contacted ELC and were made aware of such action, they had already resigned and were thus ineligible to bring an action;
- *Complexity* – clients generally found the FWC process to bring such actions overly complex and difficult to access.

Despite these factors, ELC considers that the anti-bullying jurisdiction of FWC is a necessary avenue for employees of constitutional corporations, for the reasons set out below.

10.2 *What are the impacts, disadvantages and advantages of the anti-bullying provisions of the FW Act for employers and workers?*

10.2.1 Impacts

As noted above, the anti-bullying provisions have been used much less than was anticipated. Thus, the impacts in terms of costs to employers and possible disruption to businesses appear to have been low.

In ELC's view, the impacts of the anti-bullying provisions of the FW Act for workers have generally been positive, for the reasons outlined below under section 10.2.2.

¹¹⁴ FWC, *Quarterly report* "Anti-bullying report Jan – Mar 2014"; FWC, *Quarterly report* "Anti-bullying report Apr – Jun 2014"; FWC, *Quarterly report* "Anti-bullying report Jul – Sep 2014"; FWC, *Quarterly report* "Anti-bullying report Oct – Dec 2014".

¹¹⁵ Ibid.

¹¹⁶ FW Act s 789FD.

¹¹⁷ FW Act s 789FF(1).

10.2.2 Advantages

The anti-bullying provisions provide another avenue for workers to address bullying, by seeking a stop bullying order aimed at preventing further instances of bullying. This is an improvement from the employee's position prior to the introduction of these provisions. Previously, a Western Australian employee could only have complained to WorkSafe WA which then had discretion whether to investigate, make recommendations to, issue improvement notices to and/or prosecute the employer.

While the *Occupational Safety and Health Act 1984* (WA) (**OSH Act**) provides some protection against bullying, in our view, it is inadequate. To our knowledge, there has only ever been one bullying prosecution by the regulator in Western Australia since the introduction of the OSH Act in 1984.

The anti-bullying provisions in the FW Act set out a reasonably clear process by which employees who are subject to workplace bullying can personally commence an application for a stop bullying order against their employers. The possibility of such applications may encourage employers to take steps to identify instances of bullying and to implement policies to improve the health and safety of their employees.

Another positive aspect of the anti-bullying provisions is that they cover a range of workers, including contractors, apprentices, trainees and volunteers.¹¹⁸ It is important that these types of workers be afforded the same protection as employees in the workplace.

10.2.3 Disadvantages

Eligibility

The FWC may only issue a stop bullying order where a worker has been bullied and there is a risk that the bullying will continue.¹¹⁹ This means that a worker who has been dismissed or has resigned following bullying cannot seek a stop bullying order.

Also, only workers who work in a constitutional corporation are eligible to apply for a stop bullying order.¹²⁰ Other workers (such as those employed by a sole trader or a partnership where the partners are individuals) do not receive the anti-bullying protections of the FW Act.

Limited remedies

The anti-bullying provisions do not contain a civil penalty provision. Even though the FWC is empowered to make any order it considers appropriate in an application for a stop bullying order, it is expressly prohibited from making orders requiring payment.¹²¹ This means that aggrieved workers cannot be compensated for bullying that has occurred.

Bullying can have grave long-term effects on the mental health of the person bullied. As noted in the recent House of Representatives inquiry into workplace bullying, bullying is a very serious workplace issue that can have disastrous personal consequences for individual workers and which costs the economy somewhere between \$6 billion and \$36 billion annually.¹²²

¹¹⁸ FW Act s 789FC(2).

¹¹⁹ FW Act 789FD(2).

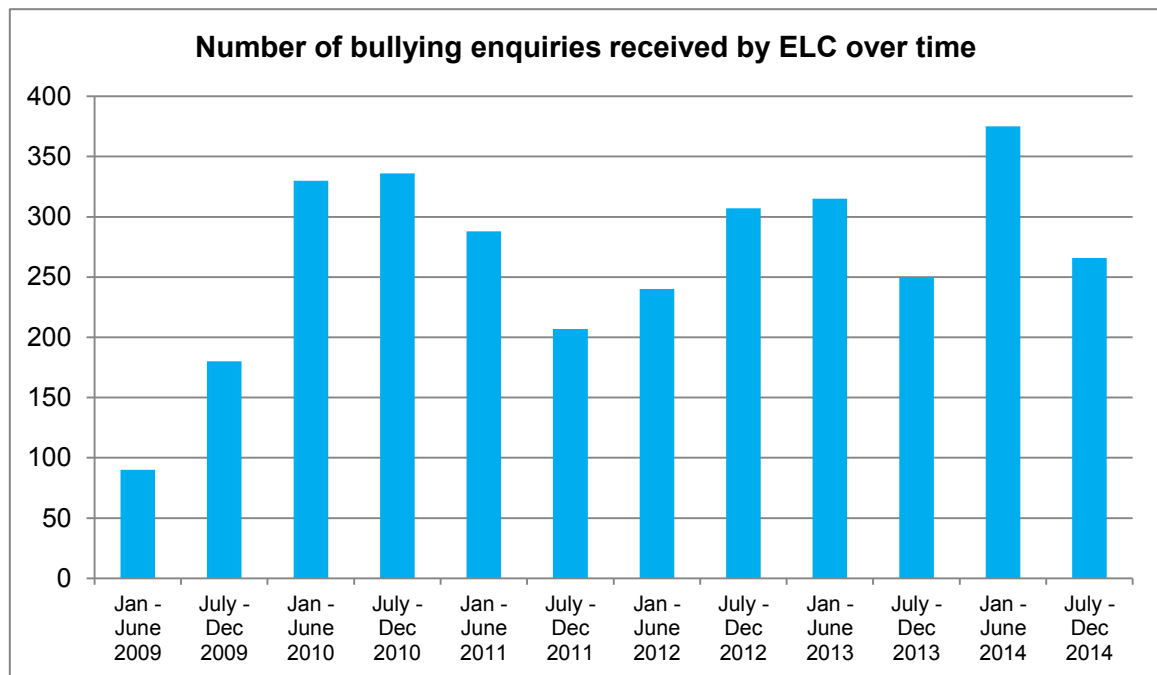
¹²⁰ FW Act 789FD.

¹²¹ FW Act s 789FF(1).

¹²² House of Representatives Standing Committee on Education and Employment, Parliament of Australia, *Workplace Bullying: We just want it to stop*, 26 November 2012, ix.

ELC clients have reported various effects of bullying including high levels of stress, anxiety, depression, loss of self-esteem, loss of the ability to perform work, ill health and, in extreme cases, suicidal tendencies.

ELC has consistently received large numbers of calls about workplace bullying in recent years, as demonstrated in the graph below.



However, many of ELC's clients have been unable to make claims under anti-bullying provisions because they resigned from their employment as a result of the bullying.

Among those who were eligible to apply, few pursued the action, given the limited available remedies, the time and resources required and the complexity of the process. With serious financial consequences for employers, such as penalties, the anti-bullying provisions would be considerably more effective.

While the anti-bullying provisions are an improvement on the situation pre-2014, in our view, it is necessary to broaden the application of the provisions to workers who have since resigned, and to provide the FWC with expanded powers to deal with bullying. Though it is important to prevent bullying from continuing, it is also appropriate for the FWC to be able to make orders imposing civil penalties or compensating victims of bullying in appropriate circumstances. This is especially so since by the time an employee refers a bullying matter to the FWC, it is quite likely that serious harm will have already been suffered.

RECOMMENDATION 23. That the anti-bullying provisions be broadened to apply to employees who have resigned or been dismissed from a workplace in which they experienced bullying.

RECOMMENDATION 24. That FWC's powers to deal with bullying be extended to allow the FWC to impose civil penalties and to make orders compensating the victim for bullying that has occurred.

10.3 To what extent are the anti-bullying provisions of the FW Act substitutes for, or complements to, state and federal WHS laws and other provisions of the FW Act? What implications do overlaps have for the current arrangements?

10.3.1 Complement not substitute

The anti-bullying provisions of the FW Act are not substitutes for WHS laws relevant to bullying.

Federal and Western Australian WHS laws do provide *some* protection against bullying. Employers have a responsibility to provide a safe workplace and to ensure that workers are not exposed to hazards.¹²³ Bullying is a workplace risk which employers have a duty to control and manage. However, in our view, this is not enough. It does not allow aggrieved workers to bring an action in respect of bullying. The regulator or inspector has discretion to decide whether to investigate, to take enforcement action and to prosecute employers. The anti-bullying provisions of the FW Act enable employees to take action in respect of workplace bullying. This is necessary and desirable.

WHS laws are only a complement to the anti-bullying provisions to the extent that workers who are ineligible to apply for a stop bullying order under the FW Act may raise breaches of WHS laws in seeking some improvement in respect of bullying in their workplace.

10.3.2 Implications of overlaps

To the extent that there is some overlap between Federal and State WHS laws and the anti-bullying provisions in the FW Act, this is unproblematic.

The FW Act expressly deals with the overlap by providing that the FW Act does not apply to the exclusion of all state or territory industrial law related to occupational health and safety.¹²⁴

10.4 What, if any changes, should occur to the anti-bullying provisions of the FW Act or in the processes used to address claims and to communicate with businesses and employees about the measures?

Refer to section 10.2.3 above and to Recommendations 22 and 23.

¹²³ *Work Health and Safety Act 2011* (Cth) s 19; *Occupational Safety and Health Act 1984* (WA) s 19.

¹²⁴ FW Act ss 26 and 27.

11. General protections and adverse action

11.1 *Do the general protections within the FW Act, and particularly the “adverse actions” protections, afford adequate protections while also providing certainty and clarity to all parties?*

The general protections in the FW Act do provide necessary protections to employees, and provide a large degree of certainty to all parties. As for clarity, in ELC’s view, there is some room for improvement in this area, as discussed below.

11.1.1 Certainty

The general protections claims process often results in a prompt resolution of claims, and in this respect provides certainty to the parties involved.

According to FWC’s Annual Report or 2013-2014, general protections matters were resolved in the following time-frames:

Time-frames between lodgment and first conciliation

- 50% of matters had a median time of 46 days or less between lodgment and first conciliation;¹²⁵
- 90% of matters had a median time of 61 days or less between lodgment and first conciliation;¹²⁶

Time-frames between lodgment and finalisation

- 50% of matters had a median time of 51 days or less between lodgment and finalisation;¹²⁷
- 90% of matters had a median time of 146 days or less between lodgment and finalisation.¹²⁸

11.1.2 Clarity

The general protections provisions contained in Part 3-1 of the FW Act are lengthy and difficult for self-represented litigants to understand. It would greatly assist litigants, especially those who are from non-English speaking backgrounds or have limited education, if the provisions were redrafted in a more succinct manner and in a logical order which would make sense to a litigant of a non-legal background.

The FWC website is informative and provides several guides which direct parties through each step of the process. However, navigating through and between these webpages and guides would be challenging for many of our more vulnerable clients.

Many of our clients have found the FWC forms complicated and have had trouble completing the forms without assistance. As the forms are intended to be able to be completed by self-represented litigants without legal assistance, we submit that the FWC forms should be simplified.

¹²⁵ FWC, *Annual Report 2013-14* (15 October 2014) 43.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

RECOMMENDATION 25. That Part 3-1 of the FW Act be redrafted in plain English and in a more succinct manner.

RECOMMENDATION 26. That FWC forms be revised and simplified.

11.1.3 Adequacy of protections

The general protections afford necessary protections to employees. In particular, the reversal of the onus in proving the employer's intent in or reason for taking adverse action recognises that it would often be extremely difficult, if not impossible, for an employee to prove an employer's decision making process and establish that a person acted for an unlawful reason.

The reverse onus of proof enables employees who may otherwise be deterred from pursuing an action by evidentiary difficulties, to bring an action against their employer.

RECOMMENDATION 27. That the reverse onus of proof provisions in general protections claims be maintained.

The level of protection provided in the general protections provisions of the FW Act could be improved as discussed below.

11.1.4 Limitation period for claims involving a dismissal

On 1 January 2013, the limitation period within which to lodge a general protections application was reduced from 60 days to 21 days after the dismissal took effect, or such further period allowed by the FWC.¹²⁹

The reduction of the limitation period has prevented many employees who have been the dismissed unlawfully from seeking redress.

As noted above, ELC's statistics indicate that large numbers of employees who seek advice on a dismissal do so more than 21 days after the dismissal.

In the 2014 calendar year alone, at least 135 callers contacted ELC for advice more than 21 days after they had been dismissed.

Further, as noted above, many employees are unaware of their rights or how to enforce them, or are still in shock about what happened in the workplace, making it very difficult for them to seek advice, or inform themselves of their rights, then prepare and lodge a claim within 21 days of the dismissal. These problems are exacerbated in many cases, where, for instance, the employee in question is geographically isolated, does not have internet access, does not speak English as a first language, or has a disability, for instance.

General protections claims involve serious breaches of the FW Act – not only is the employer's behaviour considered unfair, it is also unlawful. The general protections provisions deal with the situation, for example, where an employee is dismissed because of his or her race, ethnicity, sex or pregnancy, or is dismissed because he or she took sick leave.

¹²⁹ FWA s 366(1); *Fair Work Amendment Act 2012* (Cth) sch 5, item 1.

It is highly undesirable that employees who are the subject to such conduct should be prevented from making a claim by the short limitation period.

The limitation period for unfair dismissal claims and general protections claims involving dismissal should be 90 days, to bring Australia in line with other comparable jurisdictions.

RECOMMENDATION 28. That the limitation period for general protections claims involving a dismissal be increased to 90 days (in line with our recommendation above that the limitation period for unfair dismissal claims be increased to 90 days).

11.1.5 Out of time applications

General protections claims made outside the 21 day limitation period may only be accepted if there are “exceptional circumstances”.¹³⁰

In practice, very few claims are accepted outside the limitation period. Since 1 January 2013 (when the limitation period for general protections claims changed from 60 days to 21 days), we have only been able to find 10 cases where a general protections claim was accepted out of time.¹³¹

As noted above in relation to unfair dismissal, in many instances, the short limitation period, together with the strict application of the “exceptional circumstances” test, has had the effect of denying legal protection to persons with a disability, who are of a non-English speaking background, who are in rural or remote areas, and/or who have taken alternative steps to dispute their dismissal.

The “exceptional circumstances” threshold has proven to be high. In other legislation, the test for allowing claims outside the usual limitation period is far less strict and the decision-maker has far more discretion to allow a late claim in appropriate circumstances.

For example, in Western Australia, the WAIRC may accept an employee’s unfair dismissal claim out of time if the WAIRC considers that “it would be unfair not to do so”.¹³² Similarly, the WA Equal Opportunity Commissioner may accept a discrimination complaint out of time “on good cause being shown”.¹³³

ELC submits that, rather than relying on the ‘exceptional circumstances’ test, it would be preferable for the FWC to have discretion to allow out of time applications in appropriate circumstances, taking into account the factors set out in section 366(2) of the FW Act. The test in the Western Australian legislation provides a suitable example.

RECOMMENDATION 29. That there be no reference to ‘exceptional circumstances’ in section 366 of the FW Act and that FWC instead be allowed to accept a general protections claim outside the limitation period if the FWC considers it would be unfair not to do so.

¹³⁰ FW Act s 366.

¹³¹ Case-law research on FWC website, www.fwc.gov.au/cases-decisions-and-orders/decisions-keywords, accessed 10 March 2015.

¹³² *Industrial Relations Act 1979* (WA) s 29(3).

¹³³ *Equal Opportunity Act 1984* (WA) s 83(5).

11.1.6 Definition of “workplace right” and “workplace instrument”

In order for an employee to be protected under the general protection provisions, there must be a “workplace right”, as defined in the FW Act. In order to satisfy the definition of a “workplace right”, the employee must have a right under a “workplace law”, “workplace instrument”, or be able to make a complaint or inquiry in relation to his or her employment.

The phrase “workplace instrument” is defined quite narrowly in section 12 of the FW Act. It has been interpreted not to include common law contracts.¹³⁴ Similarly, it is unlikely that “workplace instrument” includes workplace policies.

This means that where an employer takes adverse action against an employee because he or she has exercised a right under a common law contract or workplace policy (as opposed to an enterprise agreement or an award, for instance), that employee will not be protected under the FW Act.

For instance, where an employee is dismissed for asserting a contractual right to overtime or maternity leave, he or she would not be protected by the general protections provisions of the FW Act. Further, if this employee falls short of the unfair dismissal qualifying period (for instance, because the employee has only worked for 11 months for a small business employer), the employee will be unable to seek in respect for the dismissal. Such an employee should have the benefit of the protections against dismissal afforded by the FW Act.

The definition of “workplace instrument” should be broadened to include a common law contract and a workplace policy. It is important that the general protections provisions offer adequate protection to employees, particularly if no amendments are made to the existing provisions on unfair dismissal, given the extensive exclusions for unfair dismissal.

RECOMMENDATION 30. That the definition of ‘workplace instrument’ in section 12 of the FW Act be extended to include common law contracts and workplace policies.

11.1.7 Filing fees

Generally the filing fees for general protections claims are reasonable. Currently the filing fee to lodge a general protections claim with the FWC is \$67.20. If the claim proceeds to the Federal Magistrates Court, the applicant must pay another \$67.20 if the general protections claim involves dismissal or discrimination.

However, if the general protections claim does not involve a dismissal or discrimination – for example, some other type of adverse action has been taken against the applicant because he or she exercised a workplace right – then the filing fee to lodge the claim with the Federal Magistrates Court is currently \$545. This is unaffordable for many employees. While some applicants may apply to have the fee waived in certain circumstances, there is no reason for the filing fee to be so much higher based on this type of general protections claim.

The filing fee for general protections claims should be the same regardless of the basis of the claim. The filing fee for lodgment in the Federal Magistrates Court is inordinately high and should be reduced.

¹³⁴ See *Barnett v Territory Insurance Office* [2011] FCA 968

RECOMMENDATION 31. That the filing fee for general protections claims not involving dismissal or discrimination be reduced so that the same fee applies to all general protections claims.

11.2 *Is there scope or argument for consolidating or clearly separating the mechanisms by which employees can seek redress for unfair conduct by others in the workplace?*

There is scope for consolidating the mechanisms by which employees can seek redress for unfair conduct in the workplace to some extent – particularly around unfair dismissal and general protections.

Many employees are eligible to make both unfair dismissal claims and general protections claims based on the same set of facts.¹³⁵

However, under the FW Act, employees who are eligible to make an unfair dismissal claim and a general protections claim cannot make both claims; they must choose which claim to make.¹³⁶

The general protections provisions are notoriously difficult to understand, and clients are often confused about the differences between unfair dismissal and general protections claims.

Many employees in this situation do not have the opportunity to seek legal advice before making a claim due to the short limitation period and might not be able to assess which claim was more appropriate in the circumstances.

In our view, employees should not have to choose between an unfair dismissal claim and a general protections claim. They should be able to plead them in the alternative, particularly where they have not received legal advice.

We consider that it would be preferable if there were only one form for both unfair dismissal and general protections claims, where it is possible to argue a breach of both in the alternative.

This would require unfair dismissal and general protections claims to be subject to the same process. In this regard, ELC submits that general protections claims would be more streamlined and accessible if they were dealt with by FWC after conciliation (rather than proceeding to the Federal Magistrates Court or the Federal Court).

RECOMMENDATION 32. That employees be able to lodge one claim form with FWC, setting out breaches of the general protections provisions and the unfair dismissal provisions in the alternative.

¹³⁵ For example, where a pregnant employee is dismissed on the spot with no notice, she might suspect that she was dismissed because of her pregnancy, which would amount to a breach of the general protections provisions. She might also consider that it was unfair to dismiss her in those circumstances because no one had ever told her that her performance was not up to scratch and she had received no prior warnings or any opportunity to improve her performance. This would also potentially amount to an unfair dismissal.

¹³⁶ FW Act ss 725, 727-729.

RECOMMENDATION 33. That general protections claims always be dealt with in FWC after conciliation (rather than proceeding to the Federal Magistrates Court or the Federal Court if conciliation is unsuccessful).

11.3 Are the discrimination provisions within the general protections effective, and are they consistent with other anti-discrimination regulations that currently apply in Australia?

The discrimination provisions within the general protections generally are effective and are largely consistent with the other anti-discrimination laws that currently apply in Australia.

However, there are some key gaps in the provisions in the FW Act, when compared with other anti-discrimination laws.¹³⁷

11.3.1 Protected characteristics

For instance, the following characteristics are protected under other anti-discrimination laws but not under the FW Act:

- **Breastfeeding** - section 7AA of the *Sex Discrimination Act 1984* (Cth) and section 10A of the *Equal Opportunity Act 1984* (WA) include breastfeeding as a protected characteristic.
- **Family status** – section 35A of the *Equal Opportunity Act 1984* (WA) includes family status (i.e. the status of being a particular relative or being a relative of a particular person) as a protected characteristic.
- **Gender history or intersex status** – section 5C of the *Sex Discrimination Act 1984* (Cth) and section 35AB of the *Equal Opportunity Act 1984* (WA) include intersex status and gender history respectively as protected characteristics.
- **Gender identity** – section 5B of the *Sex Discrimination Act 1984* (Cth) includes gender identity as a protected characteristic.
- **Criminal record or spent conviction** – regulation 4 of the *Australian Human Rights Commission Regulations 1989* (Cth) includes any distinction, exclusion or preference made on the grounds of criminal record in the definition of discrimination under section 3(1) of the *Australian Human Rights Commission Act 1986* (Cth).

Section 18 of the *Spent Convictions Act 1988* (WA) makes it unlawful for an employer to discriminate against an employee or prospective employee on the basis of a spent conviction.

11.3.2 Imputed characteristics

Another gap in the anti-discrimination provisions in the FW Act is that they do not expressly apply to discrimination based on “imputed” characteristics. For example, they would not appear to apply in the situation where an employer discriminates against someone on the basis of a *perceived* disability or the employee’s *perceived* sexual orientation (if the employee did not actually have that disability or that sexual orientation).

¹³⁷ Note that we have compared the FW Act with other federal anti-discrimination legislation and with Western Australian legislation, but not with legislation in any other States and Territories (since we only advise Western Australian employees).

On the other hand, discrimination based on imputed characteristics is expressly covered under both Western Australian¹³⁸ and federal anti-discrimination legislation.¹³⁹

11.3.3 Indirect discrimination

There is also doubt as to whether indirect discrimination is covered by the FW Act.

Indirect discrimination occurs where the employer requires the employee to comply with a requirement or condition with which the employee cannot comply because of a relevant protected characteristic, and which is unreasonable in the circumstances.¹⁴⁰

Indirect discrimination is covered under Western Australian¹⁴¹ and federal anti-discrimination legislation.¹⁴²

The FW Act does not appear to contain any express reference to indirect discrimination. Further, section 351 requires the employee to prove that the employer took adverse action against him or her “because of” a protected characteristic. On this basis, it is doubtful whether this provision applies to indirect discrimination.

11.4 *In regard to the dismissal-related general protections, to what extent do the current arrangements for the awarding of costs and convening of conferences produce outcomes that are problematic?*

The current arrangements for the awarding of costs and convening of conferences do not produce problematic outcomes – they are entirely appropriate.

Costs may be awarded in general protections matters where a claim was commenced or responded to vexatiously or without reasonable cause or with no reasonable prospect of success.¹⁴³ Further, costs can be awarded if the Commission or Court is satisfied that the costs were incurred as a result of an unreasonable act or omission of the other party.¹⁴⁴

In relation to convening a conference, the FW Act provides that the FWC may, except as provided by the Act, inform itself in relation to any matter before it in such manner as it considers appropriate, such as by conducting a conference or by holding a hearing.¹⁴⁵

Any conference conducted by FWC in a general protections matter must be held in private.¹⁴⁶

These provisions of the FW Act are reasonable and appropriate.

11.5 *To what extent has the recent harmonisation of the time limits for lodgements of general protection dismissal disputes and unfair dismissal claims increased certainty for all parties involved and reduced the “gaming” of such processes?*

We understand that the Productivity Commission is using the term “gaming” here to suggest that there was a practice of employees improperly making general protections claims rather than unfair dismissal claims because they were out of time to make an unfair dismissal claim.

¹³⁸ *Equal Opportunity Act 1986* (WA) s 4 (see definitions of “impairment” and “sexual orientation”).

¹³⁹ See e.g. *Disability Discrimination Act 1992* (Cth) s 4 (see definition of “disability”).

¹⁴⁰ See e.g. *Equal Opportunity Act 1986* (WA) s 8(2).

¹⁴¹ See e.g. *Equal Opportunity Act 1986* (WA) s 8(2).

¹⁴² See e.g. *Disability Discrimination Act 1992* (Cth) s 6.

¹⁴³ FW Act s 611(2).

¹⁴⁴ FW Act s 375B(1).

¹⁴⁵ FW Act s 590.

¹⁴⁶ FW Act s 368(2).

The suggestion appears to be that employees who did not have valid general protections claims pursued such claims instead of unfair dismissal claims because the limitation period for general protections claims was longer (60 days), while it was 14 and then 21 days for unfair dismissal claims.

ELC participated in a general protections pilot program in partnership with FWC from July 2012 to April 2013 in which we advised clients on the merits of their general protections claims and either assisted clients to continue with their claims or recommended that they discontinue their claims.

As part of this pilot program, we identified some clients who had lodged general protections claims who had reasonable grievances against their employers but whose employers did not appear to be in breach of the general protections provisions of the FW Act. In some instances, we found that some clients should have made unfair dismissal claims or unpaid entitlements claims instead.

In the limited instances where clients had made general protections claims which did not seem appropriate, our instructions were that they had made such claims not because of limitation period issues, but because they did not understand general protections claims. Clients were not “gaming” the processes; they were just confused about which claim to bring.

This demonstrates the importance of ensuring that employees have access to legal advice. This would save employers, their representatives and FWC time and costs associated with responding to claims that have been incorrectly made.

ELC submits that the limitation period for both unfair dismissal claims and general protections claims should be increased to 90 days to bring Australia into line with other OECD countries and to enable employees to obtain legal advice and to have more time to consider the most appropriate claim, if any, to make, as set out in Recommendation 9.

Further, as discussed above, FWC should have greater discretion to accept out of time applications for both unfair dismissal and general protections claims, as set out in Recommendations 10 and 28.

12. Compliance costs

12.1 *What are the main compliance costs faced by parties in the WR system (management time, costs of paying for expertise, delays in making decisions)? How big are they (in dollars or share of management time)?*

Please refer to section 9.7.

13. Alternative forms of employment – independent contractors

13.1 *Are there any general concerns about the WR system as it applies to independent contractors?*

In ELC's experience, it not uncommon for employers to attempt to characterise what is actually an employment relationship as an independent contracting arrangement as a way of avoiding their obligations to pay certain minimum rates of pay and other minimum conditions of employment.

To address this, the existing provisions of the FW Act dealing with sham contracting are important and should be retained.

ELC is of the view that the existing sham contracting provisions of the FW Act strike an appropriate balance between allowing employers the flexibility to use independent contractors and protecting workers who are in fact employees.

14. Alternative forms of employment – labour hire

14.1 *Are there any general concerns about the treatment of labour hire workers under the FW Act?*

Labour hire arrangements have become more prevalent in the workforce in recent years. Labour hire workers receive a lower level of protection than other employees under the FW Act.

In a labour hire arrangement, a labour hire agency engages a worker (typically as a casual employee or as an independent contractor) and enters into a contract with another entity – the "host business" – to provide that worker's services to the host business. There is usually no contract between the worker and the host business. The worker is generally not regarded as an employee of the host business.

Where a host business informs a worker that it no longer requires his or her services, this may not necessarily be viewed as a termination of the worker's employment, particularly if he or she appears to remain an employee of the labour hire agency and it is a term of his or her employment with the labour hire agency that he or she can be assigned to different host businesses.

This is a potentially significant limitation on the rights of labour hire workers to make claims such as unfair dismissal claims under the FW Act, even where they have been treated unfairly by the host business.

In ELC's view, employment protections such as unfair dismissal to labour hire workers.

RECOMMENDATION 34. That employment protections such as unfair dismissal be extended to labour hire workers.

15. Scope of the Inquiry and consultation

ELC wishes to make a few comments about the scope of the Inquiry and the way in which consultation has been conducted.

15.1 Scope of the Inquiry

15.1.1 Terms of reference lack balance

First, it is disappointing that the terms of reference that the Government released for the Inquiry focus on issues affecting employers, with comparatively little consideration of issues affecting employees.

Of the 11 terms of reference, arguably only one is directed at employees, namely “fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net”. The other terms of reference focus on issues such as flexibility for employers, compliance costs for employers, days lost due to industrial action, job creation, and impacts on small business.

It is difficult for this Inquiry to be perceived as a balanced inquiry when employee protections have received so little attention.

Given that one of the main objects of workplace relations laws is to regulate the relationship between employers *and* employees, it is unsatisfactory only to focus on employer issues. This will inevitably affect the results of the Inquiry.

15.1.2 Issues papers lack balance

Similarly, it is disappointing that the Productivity Commission, in its five issues papers, also appears to have focused primarily on issues affecting employers.

In our view, the Productivity Commission could have conducted the Inquiry in a more balanced manner.

It is concerning that the Productivity Commission has chosen to examine issues such as the minimum wage and penalty rates, which were not expressly mentioned in the terms of reference, and which have been a fundamental feature of the workplace relations framework in Australia from as early as 1896.¹⁴⁷

It is also alarming that the Productivity Commission appears to be questioning the very basis for a minimum wage in Australia, (amongst other things) with questions such as “What is the rationale for the minimum wage in contemporary Australia?”¹⁴⁸ and “To what extent should an earned income tax credit or some other in-work payment serve as a complement or substitute for minimum wages?”¹⁴⁹

Further, it appears from the wording of some of the questions in the issues papers that the Productivity Commission has already drawn some conclusions about matters in the Inquiry.

¹⁴⁷ *Factories and Shops Act 1896* (Vic) s 16; *Ex Parte HV McKay* (1907) 2 CAR 1 (*‘Harvester Decision’*). See also J Rob Bray, ‘Reflections on the Evolution of The Minimum Wage in Australia: Options for the Future’ (Working Paper No 01/2013, HC Coombs Policy Forum, Crawford School of Public Policy, The Australian National University, 2013) 3.

¹⁴⁸ Productivity Commission, *Workplace Relations Framework, Issues Paper 2: Safety Nets*, January 2015, p. 6.

¹⁴⁹ *Ibid*, p. 8.

For example, in the issues paper on safety nets, the Productivity Commission asks “What would be the best process for setting minimum wage, and how (and why) does this vary from the decision-making processes used by the minimum wage Expert Panel of the Fair Work Commission?”¹⁵⁰

The wording of this question suggests that the Productivity Commission has already concluded that the existing process for setting the minimum wage is not satisfactory. The Productivity Commission does not provide any basis for this assertion and does not set out the evidence or analysis on which it is based.

It is problematic that the Productivity Commission already appears to have drawn conclusions such as these, given that the first publicly advertised opportunity for consultation was to lodge written submissions by 13 March 2015.

15.2 Consultation

ELC is also concerned about the way in which consultation in respect of the Inquiry has been conducted.

15.2.1 Insufficient time provided for consultation

One of our concerns is the limited amount of time allocated to stakeholders to provide input, given the breadth of the Inquiry.

The Inquiry covers the entire workplace relations framework nationally and examines a wide range of issues such as the minimum wage, awards, penalty rates, unfair dismissal, anti-bullying and general protections, some of which are fundamental to our workplace relations framework.

Further, the issues papers contain more than 130 individual questions posed by the Productivity Commission to which stakeholders were asked to respond. The issues papers also emphasise that stakeholders must provide “evidence-based submissions”.

In these circumstances, it would be reasonable to expect that public consultation would be extensive and that a significant period of time would be provided for public input.

However, the issues papers were only released on 22 January 2015, and stakeholders were required to provide their initial submissions by 13 March 2015 – i.e. they were given just over 7 weeks to respond. This is a very limited amount of time in which to provide a comprehensive, evidence-based submission on such a broad range of issues.

We are concerned that providing such limited time for submissions seriously compromises the consultation process and therefore potentially compromises the results of the Inquiry overall.

15.2.2 Reliance on non-public “initial consultation”

Another concern is that the Productivity Commission refers in several places in its issues papers to “initial consultation”. However, as far as ELC is aware, the first publicly advertised opportunity to participate in consultation was to provide submissions by the 13 March 2015 deadline.

It is concerning that the Productivity Commission has conducted initial consultation but this was not advertised. We query what “initial consultation” was done, which stakeholders were consulted and why it was not advertised. The lack of transparency in relation to the initial consultation casts doubt on the quality and integrity of the Inquiry overall.

¹⁵⁰ Ibid, p. 6.