Australian Federation of Employers and Industries (AFEI) Submission to Productivity Commission Inquiry into the Workplace Relations Framework

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The Australian Federation of Employers and Industries (AFEI), formed in 1904, is one of the oldest and most respected independent business advisory organisations in Australia. AFEI has been a peak council for employers in NSW and has consistently represented employers in matters of workplace regulation since its inception. Our membership extends across employers of all sizes and a wide diversity of industries.

AFEI provides advice and information on employment law and workplace regulation, human resources management, occupational health and safety and workers compensation. AFEI is a key participant in developing employer policy at national and state (NSW) levels and is actively involved in all workplace relations issues affecting Australian businesses.

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SECTION 1: REGULATORY FRAMEWORK—OVERVIEW

1.1 The Fair Work Act

1. The introduction of the *Fair Work Act 2009* (FWA) brought about a return to a more centralised system of setting wages and awards, the primacy of the Fair Work Commission (FWC), the dominance of a collective, one size fits all approach to wages and conditions, reduced flexibility at the enterprise level, a reduced incentive to bargain and capacity for employers and workers to make agreements of mutual benefit. In direct contrast to the individualist character of the contemporary private sector workforce, individual agreements were prohibited. The FWA and its implementation by the FWC has bought an ever increasing third party intervention and review of employers' decision making.

2. The legislation was not accompanied by a regulatory impact statement (RIS); an exemption having been provided for this by the then Prime Minister. The Office of Best Practice Regulation requires that a RIS consider all of the costs and benefits of policy proposals and the impact on business. A major legislative initiative with profound impact on employment practices and the performance of the economy as a whole was consequently introduced with no assessment of its costs or benefits.

3. The experience of the past six years of working with our members on issues arising from the FWA has demonstrated to us that it has increased costs and regulatory complexity for employers, placed additional constraints on their workplace flexibility, required additional resources to manage their legislative obligations and undermined the possibility of bargaining for meaningful change and productive outcomes in the workplace. It has contributed to lower workplace productivity and higher levels of workplace conflict with enhanced access for employee complaint.

4. The provisions of the FWA do not assist employers in the efficient management of their workplaces. It is unbalanced legislation which is primarily concerned with the protection and advancement of union and worker interests. It has not encouraged more harmonious workplaces where employers and employees are able to work co-operatively and effectively together. Instead it has fostered third party intervention and the greater intervention of the FWC in the management of businesses. The provisions of the legislation and the complex processes involved have forced employers to expend considerable additional resources to understand their obligations, to take measures in attempting to comply with these obligations and to defend themselves in matters before the FWC or the Federal Court. In particular it has not enabled employers to manage underperforming employees or hire new employees with any confidence.

5. While purportedly providing only minimum safety net provisions the FWA was deliberately structured to install more beneficial provisions for employees which have been expanded over the past six years and will no doubt continually be the target of further expansion. This can be seen in the central role of awards which have had significant increases in wages and conditions through the process of so called "modernisation" and the built in process of continual award review; the extension of right to request and flexibility provisions with little offsetting benefit for employers, union demands in the modern awards review for new restrictions on the use of casual and part time employment, mandatory 'family friendly' work arrangements, campaigns for portable long service leave and accident pay and new forms of leave, such as domestic violence leave. The result has been that the "minimum safety net provisions" decided by the FWC have become the actual paid rates and entitlements; a return to the paid rates award era.

6. Employers became exposed to the far greater likelihood of an unfair dismissal and general protections "adverse action" claim being made against them with greater defences and accessibility for employee redress provided within the FWA. The reach of the FWC into micro management of the workplace was extended further with the advent of the bullying jurisdiction in 2014.

7. The general protections provisions in the FWA are very wide, offer employees a multiplicity of avenues to seek remedies (which include uncapped compensation) and expose employers to a heightened risk of claims and litigation, with inconsistent outcomes in the courts. The burden of proof is imposed on the employer who confronts a complex general protections regime designed to give all manner of defences to employees against management actions taken in an attempt, in most cases, to do no more than manage their business in a reasonable manner. These defences are concurrent with the defences at work in other legislative schemes including anti discrimination and work health safety laws in different jurisdictions. General protection claims are escalating in number and this trend is set to continue given the ease with which such claims can be made and the attractive remedies on offer.

8. Increasingly because of the significant cost and the enormous time commitment in defending a claim and the unreasonable basis on which matters can be decided against employers, employers are devoting their attention to avoiding litigation and taking a defensive position in relation to employee behaviour and management; time and effort which is removed from running their businesses.

9. The Small Business Fair Dismissal Code has not operated to protect employers with less than 15 employees from the FWA requirements faced by larger employers. Many unfair dismissal and general protections claims are speculative with employers having to pay "go away" money to settle unmeritorious claims.

10. Significantly a central tenet of the FWA is the promotion of the role and rights of unions in the workplace; in particular in dispute resolution procedures and in enterprise bargaining. Yet 88 per cent of employees in the private sector are not union members.[1] Unions eligible to represent an employee have access to any worksite for recruiting purposes in addition to expanded rights of entry under work health safety laws.

11. The dominance of enterprise bargaining and demise of other forms of agreements under the FWA have produced an outcome where the vast majority of agreements do not promote productivity or even require productivity offsets for benefits provided to employees. Employers and employees should not be compelled to bargain collectively. Reform is needed to remove the FWA emphasis on collective agreements and prohibition of statutory individual employment agreements.[2] Employers and employees at the enterprise level should not confront impediments to choosing the form of agreement or other contractual arrangement best suited to their circumstances, including the preference of many employers and employees to use common law contracts.

12. Regulation of the labour market is an important component of how well it performs. Numbers employed and hours worked are primarily determined by demand conditions in the economy. However, regulation of the labour market, particularly the operation of minimum wages, awards, bargaining and employment protection regulation also affects how many are employed, where they are employed and how they are employed. How individual employers react to regulation and the adjustments they make in response to compliance requirements is vital in assessing the impact of the FWA. What happens at individual workplaces matters. It is the adjustments made in the workplace to accommodate legislative requirements which affect business performance and competitiveness and ultimately, that of the economy.

13. The FWA is but one part of a raft of legislation and regulation which must be addressed by employers in managing their workplaces. There has been a continual expansion of regulatory reach into the workplace and much of this regulation has been subject to significant change in recent years. In addition to dealing with the introduction of the FWA and modern awards, employers have confronted changes, or are facing changes, in work health safety, workers compensation, paid parental leave, superannuation, privacy, gender equity and discrimination laws.

[1] ABS 6310.0 - Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013

[2] FWA s3 (c); s3 (f)

14. Each of these legislative schemes interacts with the operation of the FWA in the workplace. For example, employers must be cognisant of differing right of entry requirements under the work health safety legislation and the FWA; the exercise of a workplace right under a workplace law; the interaction of unfair dismissal or adverse action claims with workers compensation or discrimination claims. The collective weight of these and many other areas of regulation, especially as they reflect over regulation or poorly conceived regulation, has a negative impact on the ability to innovate, expand and produce jobs. This is demonstrated on a daily basis with employers seeking advice and representation on a multitude of compliance, regulatory and strategic issues and how to manage compliance requirements. It is also demonstrated in findings of international comparative performance surveys such as the World Economic Forum which recently rated Australia with poor scores on labour market flexibility, cooperation, flexibility in wage determination, pay and productivity and hiring and firing practices. In this analysis, labour market efficiency was our lowest scoring indicator.[3]

15. The workplace regulation framework is in need of replacement. Amendments to the current legislative scheme are unlikely to cure its fundamental shortcomings or the interventionist and unbalanced operation of the FWC. This now includes FWC involvement in the minute details of individual workplace human resource management. This is causing an unsustainable level of friction in Australian business. We have to get to the point where managing the business including managing workplace complaint and dispute is done by the business itself, not by a third party. Unless it is clear that rewriting of the FWC powers and roles can move us back to this fundamental reality about the appropriate way to run a business and deal with its internal domestic issues, there would seem to be no other avenue available than to dismantle the current framework. Any new legislative scheme should focus on the need for Australian employers to be efficient and competitive and not intended as an instrument primarily for embedding and expanding employee rights and entitlements or as a vehicle for social reform. It is time to depart from regulation which is the product of the past century and has at its core the concepts of collectivism, third party intervention in workplace relations and compulsory arbitration.

16. Part of getting to this outcome is by ensuring that the powers of workplace regulation will be exercised impartially, objectively and sensibly and to protect its operation from political influence to the greatest extent possible.

[3] *The Global Competitiveness Report 2014-2015 http://reports.weforum.org/global-competitiveness-report-2014-2015/economies/#indexId=GCI&economy=CAN*

17. This submission addresses specific features of the FWA and the operation of the FWC which have emerged from our daily work with employers and demonstrate the need for complete reform of workplace regulation. The issues raised in this submission illustrate the complex and unproductive workplace regulation to which employers must currently adhere in managing their workplaces. It is difficult, costly and in large part, unnecessary.

1.2 The Fair Work Commission

18. The FWC is the institution at the centre of the existing workplace relations framework. When it was introduced it was described as a "one-stop-shop" for workplace relations issues. But has the "one-stop-shop" been effective? In our experience the answer is no. This is due to the legislative framework in which it operates but is also due to the significant failure of Australian Governments and industrial tribunals to see the potential for awards, agreements and legislation as a means of providing business with the capacity to respond effectively to their market circumstances and competitive pressures. On the contrary, the more recent changes to the workplace laws have deliberately taken the opposite approach. The past five years have demonstrated to us that the system is in need of reform and departure from the current adversarial and politicised institution. There will always be a tension between the needs of employers and the demands of unions, however, there needs to be a regulatory environment which allows business to flourish rather than continually struggling to adjust its operations to comply with unsupportive regulations and regulator decisions.

19. Whilst we do consider the current composition of the FWC in itself presents challenges, the bigger issue we have is with the nature and breadth of the functions that are exercised by the FWC.

20. Section 576 of the FWA sets out the functions conferred on the FWC. It includes all of these functions relating to:

a) the National Employment Standards (Part 2-2);
b) modern awards (Part 2-3);
c) enterprise agreements (Part 2-4);
d) workplace determinations (Part 2-5);
e) minimum wages (Part 2-6);
f) equal remuneration (Part 2-7);
g) transfer of business (Part 2-8);
h) general protections (Part 3-1);
i) unfair dismissal (Part 3-2);
j) industrial action (Part 3-3);
k) right of entry (Part 3-4);

l) stand down (Part 3-5);
m) other rights and responsibilities (Part 3-6);
n) the extension of the National Employment Standards entitlements (Part 6-3);
(na) transfer of business from a State public sector employer (Part 6-3A);
o) unlawful termination protections (Part 6-4);
p) special provisions about TCF outworkers (Part 6-4A);
q) workers bullied at work (Part 6-4B).

21. The work of the FWC is clearly broad and wide ranging with significant powers to affect the management of virtually every aspect of the workplace and running of a business.

22. All of the above functions were deliberately drafted to enable the FWC to embed itself further into the day to day running of businesses thus preventing business from making the thousands of decisions big and small which are an inherent part of trying to be productive, competitive and profitable. What is more, once the FWC has intervened and hamstrung the business there is no effective or cost effective appeal mechanism.

23. In the past few years the FWC has expanded its work into a further role as seen in its Futures Direction strategy and program. This is apparently intended to "*develop and implement a strategy for the promotion of cooperative and productive workplace relations that facilitate change and foster innovation*". It has adopted a workplace engagement strategy with the object "*to encourage more productive workplaces by promoting harmonious and cooperative workplace relations. The development of a more cooperative workplace culture that facilitates change and fosters innovation will be at the heart of the Commission's engagement strategy*". It will "*explore ways it can provide better services to small business*". It is concerned with "*improving services to the community*".[4]

24. Some aspects of these proposals might be laudable, but the FWC is not the appropriate body to pursue or deliver them. These are things employers pursue themselves but they are almost terminally hampered by the content of the FWA, awards and agreements and the way the FWC sees and executes its role. Employers cannot achieve competitive and profitable outcomes and create and sustain jobs against that backdrop.

[4] FWC Futures Directions website. See for example:
https://www.fwc.gov.au/documents/documents/media/fd2-continuing-change-program.pdf
https://www.fwc.gov.au/documents/documents/resources/FD-BreakingDownBarriers-May-2013.pdf

25. In one piece of recent research commissioned by the FWC to obtain views on the usability of exemplar modern awards – *Citizen Co design with Small Business Owners* we are told that *Citizen co-design is a process of engaging directly and meaningfully with citizens in the development of public services with which they will have a direct exchange. It is based on the premise that citizens who are the recipients of public services know what their needs are/will be and should therefore have involvement in determining the satisfactory delivery of those services.*[5]

26. The "*citizens who are the recipients of public services*" in this case are small employers. However they are not recipients of public services; they are national system employers who are bound by the provisions of the FWA and subject to its obligations. Modern awards are not a public service, they are orders made by the FWC which must be adhered to by employers.

27. In this new "*customer responsive*" mode, parties to FWC proceedings are being invited to participate in customer satisfaction surveys as "clients". It is entirely inappropriate for representatives of employees and employers who are present before the tribunal in dispute or other proceedings to be asked to complete surveys of their level of satisfaction with the conciliation proceedings (or other matter) they are participating in.

28. These examples of the FWC new approach to marketing itself and its services to those subject to its regulation and required to be involved in its processes demonstrates the need for reform of the workplace regulatory system. It illustrates the overreach of the FWC into the management of Australian business and the presenting of itself as a resource to be used in improving business performance. Rather than promoting greater education, workshops, etc. about the FWC and its processes and procedures, reform is needed in the role and reach of the workplace regulator and the extent to which business must be involved with the regulator.

29. Small business in particular should not have to spend its time and resources becoming familiar with unfair dismissal practice notes, mock hearings or the practicalities of agreement making. If the relevant powers of the FWC were cast more reasonably and exercised and decided with more balance the reduction in such cases would be massive; employers would more easily understand the logic of the system and the expected outcomes. Therefore, create a system that is reasonably, logical and predictable rather than presuming to educate employers in how to understand and cope with the existing system.

[5] Sweeny Research A Qualitative Research Report on: CITIZEN CO-DESIGN WITH SMALL BUSINESS OWNERS Ref No. 24210 13 August 2014

30. From the perspective of Australian employers the FWC expertise does not lie in the disciplines relevant to running a business and does not welcome the prospect of its greater involvement in this area.

31. The FWC already broad role is made even more ambiguous and all-encompassing by its own perception that its "*clients and stakeholders*" incorporate a diversity of interest groups extending to the entire community.[6] The FWC now contemplates advancing itself as a resource to be available to serve the community, a distinctly broader group than employers and workers.

32. We need to return to the position where managing the business, including managing workplace domestic complaints and disputes is done by the business itself, not by a third party. Unless it is clear that a rewriting of the FWC powers and roles can move us back to this fundamental point about the appropriate way to run a business and deal with its internal domestic issues, there would seem to be no other avenue available than to dismantle the current framework; depart from an institution which is the product of the past century and has at its core the concepts of collectivism, third party intervention in workplace relations and compulsory arbitration.

1.3 The Road Safety Remuneration Tribunal

33. The *Road Safety Remuneration Act* should be repealed and the Road Safety Remuneration Tribunal (RSRT) abolished. The legislation and the tribunal are prime examples of excessive and unnecessary regulation introduced to meet political objectives — in this case in response to demands by the Transport Workers Union. The legislation and the tribunal operate to overlap and complicate legislation expressly intended to improve road safety, in particular the Heavy Vehicle National Law (HVNL) and attendant state legislation. Further replication of legislation arises given the obligations placed on persons in control of business and undertakings and other duty holders in work health safety legislation, including obligations throughout the supply chain. The effect is to produce an unworkable compliance burden for businesses of all sizes but particularly for any small transport provider.

[6] FWC Annual Report 2013-14 page 13: "*OUR CLIENTS AND STAKEHOLDERS The Commission has a diverse group of clients and stakeholders as our work affects a large number of Australia's employees and employers. The Commission has jurisdiction over a national system which covers all employees of private businesses (with the exception of some businesses in Western Australia) and public sector and local government employment in some states and territories.* ***Our clients and stakeholders include: ¡ employees and employers ¡ unions and employer organisations ¡ the public ¡ legal practitioners, human resources professionals and other workplace relations advisors ¡ federal, state, territory and local governments, and ¡ international organisations***"

34. In addition to the detailed and comprehensive regulation provided by the HVNL and work health safety legislation, transport companies must also comply with the obligations imposed by:

- The FWA
- The *Road Transport and Distribution Award 2010* and any other awards applying in their workplace;
- The Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014. This is the first order – others are to follow.

35. Key obligations imposed by the RSR Order 2014 are:

- Employers must not take 'adverse conduct' against a road transport driver because they have a workplace entitlement under the RSR Order 2014;
- An employer must provide road transport drivers with a written employment contract containing the information listed in the RSR Order;
- An employer must 'take all reasonable measures to ensure a road transport driver employed or engaged by them is trained in work health and safety systems and procedures relevant to the road transport service to be provided'; and
- An employer 'must prepare and implement a written drug and alcohol policy covering a road transport driver employed or engaged by them'.

36. These are matters which were already comprehensively regulated by the FWA, work health safety legislation and the HVNL.

37. The Road Safety Remuneration Act should be repealed and the Road Safety Remuneration Tribunal abolished.

1.4 The Australian Building and Construction Commission

38. Unlike the RSRT, which is duplicating and extending current regulation through its arbitral powers, the Australian Building and Construction Commission which is concerned with compliance and enforcement should be re-established, with the full remit of the powers available to it under the *Building Construction Industry Improvement Act 2005*.

1.5 Other Matters: Independent Contractors

39. Unions continue their long held opposition to contractors, linking it with their various campaigns on "precarious" or "insecure" work and the diminished quality of working life with uncertain hours, income and work conditions.[7] They have worked assiduously to have enterprise agreement clauses which limit or prohibit the use of contractors at a work site (and labour hire). This artificial block to a legitimate form of employment should itself be prohibited.

40. The fundamental reason for union opposition to contractors (particularly in the building industry) is because they want to deny employers access to more flexible means of engagement and because they believe that the availability of contractors reduces union bargaining power. The allegations of precariousness and insecurity are strategic elements of their opposition to contractors.

41. The fact is that it is the preference of independent contractors to be self employed, run their own businesses and have the freedom to contract for their services. They are a vital and important feature of the labour market and in encouraging entrepreneurship. They should not be subject to additional constraints on their ability to do so. They have rights and obligations within business and workplace regulatory regimes. The FWA already provides adequate protections against sham contracting.

42. There is no basis for creating a statutory definition of an independent contractor. The definitions arrived at in the past have all been about deeming contractors to be employees or trying to make them as much like employees as possible with all the inherent restrictions that this entails. AFEI has been involved in exercises of this nature in the past, notably within the NSW Workers Compensation jurisdiction. The exercise would carry a very high risk of additional, complex and impractical regulation of the workplace and place further restrictions on use of contractors.

43. The vital role that contractors play in the economy should be protected and encouraged and not defined out of existence.

[7] For example, the Independent inquiry into insecure work in Australia

1.6 Other Matters: Transmission of Business

44. The transfer of business laws in the FWA are unbalanced. Under the rubric of 'protecting employee entitlements', the laws actually preserve inefficiencies, discourage investment and hamper the creation of employment opportunities.

45. The current law is one sided. The transfer of business laws should considerably revised.

46. The object of Part 2-8 of the Act where there is a transfer of business from one employer to another employer is to provide a balance between:

- the protection of employees' terms and conditions of employment under enterprise agreements, certain modern awards and certain other instruments; and
- the interests of employers in running their enterprises efficiently.

47. The balancing of employee and employer interests is sought to be achieved through:

- creating a definition of transfer of business (thus designating the situations that are affected by the laws);
- compulsory transfer of instruments when the definition of transfer of business is met (including enterprise agreements and agreement based transitional instruments); and
- the grant of powers to the FWC to order that an instrument will not transfer.

48. On any reading of the content of the provisions in Part 2-8 they do not assist employers. Firstly, the definition of what constitutes a transfer of business is too broad and this results in unreasonable circumstances being labelled a transfer of business.

49. For example, a transfer of business can occur when outsourcing or insourcing occurs. It can also occur when former public sector employees take up employment in the private sector in conjunction with the privatisation of State owned enterprises or where there is a transfer of governmental services to the private sector.

50. When an instrument compulsorily transfers in the above situations the result is often the preservation of inefficiencies that made outsourcing/insourcing or a transfer from the public to private sectors a viable option to begin with.

51. In addition, the laws do not just cover business restructures or sale/purchase of business. The laws can apply to employees transferring between associated entities, even in circumstances where the termination and re-employment is sought out by the transferring employee.

52. Not only is this illogical, but it is career limiting too. It can have the effect of making a transfer of employment between associated entities too difficult for employers to pursue thus limiting the options open to its employees to seek out new opportunities.

53. Secondly, once a transfer of business has occurred and an instrument has transferred, there is no viable option for employers to avoid the consequences of the transfer until the instrument has passed its nominal expiry date. Unlike the *Workplace Relations Act 1996* (as amended by WorkChoices) a transferrable instrument does not cease to apply at the end of a transmission period. Accordingly, a new employer may be required to comply with an enterprise agreement "made" by a different employer for up to 4 years.

54. The period of time that transferable instruments remain relevant is bad for business. It creates administrative difficulties (for example, if multiple instruments apply) and it can affect how a business operates. For example, if an agreement has prohibitive shift penalties or overtime provisions it can make ideal patterns of work too costly.

55. In addition, the period of time that transferrable instruments remain relevant can actually discourage business from investing in ailing sectors. In many cases (for example, in parts of manufacturing) it is inappropriate enterprise agreement provisions, often inserted through several rounds of bargaining, that has caused the sector to be uncompetitive. By essentially forcing business to retain those uncompetitive terms the FWA discourages investment and innovation in those sectors.

56. Thirdly, whilst Part 2-8 grants power to the FWC to order than an instrument will not transfer, it is our experience that pursuing such an order can be costly and it can be in vain if the Commission believes that employees would be disadvantaged by the order.

57. With the laws as they currently stand there is no viable way to avoid the transfer of an instrument when a transfer of business occurs. It is our experience that for many businesses, the only realistic option is therefore not to employ the potential transferring employees or to withhold offers of employment until after the three month (transfer period) has expired.

58. Not only does the above reality mean negotiations for sale of business can be hindered by issues concerning the re-employment of staff and the consequences of the transfer of an unproductive agreement on the sale price – it is fundamentally bad for employment. Our workplace relations framework should not operate in this way.

59. **As a minimum, transfer of business laws should:**

- **not apply to voluntary transfers between associated entities;**
- **not apply to outsourcing and insourcing arrangements;**
- **not apply to transfer of employment from the public to the private sector;**
- **not have a transfer period of longer than two months;**
- **reinstate a maximum period of time during which transferable instruments can apply (no longer than 12 months);**
- **contain a presumption that, upon application to the relevant tribunal, orders be made to stop an instrument transferring unless it can be demonstrated that the transferable instrument will have no demonstrable impact on productivity.**

SECTION 2: THE SAFETY NETS

2.1 National Employment Standards (NES)

60. The reach of the National Employment Standards (NES) and their interaction with modern awards have proven to be problematic for employers, and are in need of review to remove their more restrictive provisions and to reduce compliance uncertainty. The extension of minimum standards under the FWA is an example of regulatory over reach which, in addition, extended those standards.

61. An inherent problem is that the NES may be extended depending on what may be provided in awards and agreements – the NES is just the start point. This uncertainty, compounded by the Fair Work Ombudsman and Federal Court interpretation of what constitutes compliance, has created a costly risk area for employers.

62. For example, the meaning of s.90(2) of the FWA became the subject of contention with the FWC making a number of modern awards which specifically provided that the annual leave loading is not payable on termination of employment. The conflicting provisions of awards and the NES have resulted in dispute and litigation.[8] The cost implications for employers are significant and include having to revisit calculations for past and present employees. This example of a seemingly minor entitlement illustrates the extension of employee benefits via the introduction of the NES; the uncertainty faced by employers with the FWC making award provisions which it later rules are inconsistent with the NES and the complex litigious environment in deciphering minimum standards.

63. Similarly the NES provision concerning the taking and accruing of annual leave when on workers compensation has been the subject of litigation in the Federal court[9] and requires employers to consider state legislation on this matter despite the widely held standard of non accrual of leave during this period.

64. Although the NES provides for eight public holidays, the FWA allows State/Territory governments to declare additional public holidays or substitute the day prescribed as the public holiday for another day. The Victorian Government has also introduced a public holiday on Easter Sunday and intends to introduce Grand Final Friday providing 13 public holidays.

[8] *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining & Energy Union* (No. 2) [2015] FCA 136

[9] *NSW Nurses and Midwives Association v Anglican Care [2014] FCCA 2580*

65. The interaction between the NES, modern awards and enterprise agreements and the ability for a State and Territory Government prescribing or declaring different days for the same public holiday, or providing additional public holidays that do not apply on a national basis is an issue for employers who have to deal with the complexities of correct payment for substitute days, additional days and related issues. Further, while the NES provides for payment of public holidays at the base rate of pay for ordinary hours, s.139(1)(e) of the FWA allows modern awards to include terms about penalty rates for employees working on weekends or public holidays.

66. At the minimum entitlement level, the following example provides an indication of the impact of leave entitlements (even without other “flexibilities”, rostered days off, etc) on available work hours which can be accessed by an employee in any year:

- A full-time employee is paid for 10 of the 12 public holidays per year in NSW (13 in Victoria).
- The employee has carer's responsibilities and uses their accumulated paid personal/carer's leave entitlement (10 days per annum with unlimited accumulation).
- The employee’s family member becomes ill so the employee takes 2 days compassionate leave. A week later the relative dies. The employee again accesses 2 days compassionate leave.
- Over the Christmas period the employee accesses their annual leave entitlement (20 days per annum with unlimited accumulation).
- The leave taken by this employee in a 12 month period is 44 paid days.

67. There are 261 possible working days per annum of which the employee has worked 217 days. The employer has to recover the cost of these leave days plus the equivalent on costs which form part of the wages bill.

68. S.62 (2) of the FWA entitles an employee to refuse to work unreasonable additional hours. The wide scope of s.62(3) in determining whether additional hours are reasonable invites argument and disputation. The dividing line between "reasonable" and "unreasonable" is made impossible to set in any particular situation because of the contradictory mix of criteria required to be considered. Where contentious, employers typically avoid the issue by cutting back on hours offered, not doing the work (or doing it themselves), employing “stop gap” casuals or attempting to rely on averaging provisions where they are available in awards or agreements.

69. The continued preoccupation with long or "excessive" working hours among unions and academics, underpinning the FWA reasonable hours provisions, is surprising given the overall fall in hours worked and the very high level of underemployment in the economy. Working hours had been declining for decades before the advent of the FWA with ABS data indicating that around 66 per cent of the workforce is working 40 hours or less. Average hours worked across all industries in November 1984 were 35.6; average hours in November 2014 were 33.3.[10] The proportion of employees who are working fifty or more hours increased until about 1995, remained steady until 2000 and has been declining since then.

70. Many employers use averaging of hours because of seasonal factors and cycles of activity. Many industries can only function on this basis and it is inefficient to have to manufacture enterprise level arrangements to comply with a restrictive maximum hours regime. There are no averaging provisions in the NES for workers covered by modern awards. The NES provides that the terms of a modern award or enterprise agreement may provide for averaging of weekly hours, subject to the reasonableness test under s.62(1), however this is not provided in some awards.

71. The NES provides for the averaging of weekly hours for award/agreement free employees. The averaging arrangement must be over a specified period of not more than 26 weeks – a further restriction.

72. At the request of the Fair Work Ombudsman, the FWC is currently undertaking an exercise within the four year review of modern awards to identify "inconsistencies" between modern award provisions and the NES. This in itself demonstrates the complexity of a minimum standards scheme where employers have to be cognizant of the interaction of the NES, awards and agreements and be able to accurately interpret the meaning of their provisions.

73. The statutory minimum in the NES may be altered or extended by union claims in the FWC, as evidenced by current claims made in the four- yearly modern award review.

[10] Australian Bureau of Statistics 6291.0.55.001 Labour Force, Australia, Detailed - Electronic Delivery December 2014

Requests for flexible working arrangements

74. Chapter 2, part 2-2, Division 4 of the FWA: Requests for flexible working arrangements provides another example of excessive regulation of the workplace. Every day at workplaces across Australia employers and workers make arrangements to suit their individual needs and those of the workplace and the provisions of Division 4 are not needed or used.

75. The need for flexible working arrangements in the current legislation is testimony to the rigidity and inflexibility in modern awards. The provisions allegedly intended to allow for greater flexibility have effectively been overridden by the current legislative framework.

76. The inadequacy of these provisions was amply demonstrated in FWA's 2011 survey encompassing consideration of the right to request under the NES.[11] This found that only 3.8 per cent of employers surveyed had considered a right to request flexible working arrangements to care for a child and that 0.9 per cent of employees surveyed had made such a request. Of the employer respondents, 81 per cent that had received one such request granted it without variation, 8.4 per cent granted the request with variation and 10.8 per cent refused the request.

77. The right to request provisions also duplicate employer obligations arising under other legislation and illustrate the complexity of the interaction of multiple pieces of legislation and FWA obligations. A request may be made without relying on any specific right such as that provided by s.65 and the employee right to request is protected by a range of remedies.

78. Recent union proposals seek to make it more difficult for an employer to refuse a request yet it is evident that the bulk of employers do what they can to accommodate employee requests. It is not reasonable to remove the discretion from employers who are compelled by their operational needs to give precedence to the requirements of their business.

79. If an employer refuses a request by an employee to change their working arrangements, the employee has the option of making a number of claims against the employer:

- A claim relying on breach of the award, enterprise agreement or employment contract;
- Indirect discrimination in contravention of the *Sex Discrimination Act 1984* (Cth) or equivalent State discrimination legislation. Claims may be made under the discrimination statutes or section 351 of the FWA;

[11] 1 FWA, 2011 Surveys of individual flexibility arrangements (IFAs) and provisions under the National Employment Standards (NES).

- If an employee resigns because the employer refused a request, the employee may bring an unfair dismissal claim, relying on the extended definition of 'dismissed' under section 386(1);
- An 'adverse action' claim under the general protections provisions of the FWA.

80. **To create a new minimum platform, the current NES should be reviewed with the objective of producing genuine minimum standards for a limited number of key employment conditions, decoupled from awards and award review processes, more flexible and less prescriptive and capable of being varied to suit the differing labour markets across States and regions. For the latter purpose, consideration should also be given to the particularities of a no disadvantage or BOOT type test which also considers the impact on the employer.**

Long Service Leave

81. There should be no national minimum standard for long service leave which was introduced into the NES with the expansion of minimum standards from five to ten.

82. It is a form of leave unique to Australia and New Zealand. The concept of reward for long service (greater than ten years) has become anachronistic in a workforce where 75 per cent of workers have not been in the same job for more than ten years.[12] Further, employers are confronted with union claims for portable long service leave, flowing through a costly bargained outcome in the building industry to all industries.

83. The process of amalgamation of existing employment provisions, either through awards or legislation has resulted in the "highest common denominator" outcome which is likely to be replicated in the formulation of any national long service leave standard. This unwarranted cost impost on employers is to be avoided.

[12] Australian Bureau of Statistics (ABS) Labour Mobility http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6209.0February%202013?OpenDocument

2.2 FWA and Minimum Wages

The minimum wage as a social safety net

84. The minimum wage and the legislation underpinning the formulation of the minimum wage needs reform. The vast expansion of Australia's social security system and the role it plays in supporting low income earners and low income households makes the social safety net functions ascribed to the minimum wage redundant. Given that the relative living standards and the needs of the low paid will depend on a wide range of determinants there are significant limitations to using the minimum wage as a means of social support; it is a 'blunt instrument' as a vehicle for setting relative living standards for low wage earners and alleviating poverty.[13]

85. Social security measures are targeted and asset tested. In contrast the actual coverage of Australia's minimum wage recipients (which would appear to be something significantly less than 10 per cent of the workforce; Bray's estimation is 4.1 per cent to 9.1 per cent with a high proportion of young workers) [14] and its contribution to meeting their needs remains a matter of contention.[15] Further, low paid workers are not concentrated in low paid households.[16] Typically, low paid households receive only a small proportion of their total income from wages.[17]

86. The Australian tax and transfer systems are clearly relevant to considerations of relative living standards and the needs of the low paid. However, these are not considerations employers (nor the FWC as constituted) are expert in and should not be expected to argue in the formulation of a minimum wage. The FWC and its Minimum Wage Panel should not be a social welfare forum which has the function of assessing the impact of the multiplicity of factors involved, including employment patterns of the low paid, skill levels and education factors; health and childcare rebates and family allowances; other forms of social assistance provided by government and family and household circumstances.

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[13] [2013] FWCFB 4000 at para 57.

[14] Bray, R. 2013, Reflections on the Evolution of the Minimum Wage in Australia: Options for the Future, Research School of Economics, Australian National University page 18

[15] Productivity Commission Inquiry into Workplace Regulation Issues Paper 2 pages 2- 3

[16] [2013] FWCFB 4000 at para 57; Bray op cit pages 33,35

[17] Hahn, M. and Wilkins, R. 2008, A multidimensional approach to investigation of living standards of the low-paid: Income, wealth, financial stress and consumption, Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, November 2008 Report commissioned by the Australian Fair Pay Commission, 2008 Research Report No. 5/09; Social Policy Research Centre at the University of New South Wales Poverty in Australia 2012 found that in 2010 5.2% of households whose main source of income was wages were below the poverty benchmark measured as 50% of median income; 8.8% when measured against 60% of median income.

87. The concept of earnings inequality as measured by reference to average or median earnings will always produce a proportion of "low" paid. The FWA and FWC concern with "earning inequality" by reference to award rates and growth in overall rates of pay assumes there must be some ideal or natural order which determines levels of earnings "equality". There will be continual shift and change in earnings levels with changing demand, job structure and developments (both positive and negative) within the economy.

88. In terms of the ratio of the minimum to average or median wage levels there should be no determinative formula which is held to be the ideal norm. The past decade has demonstrated the impact of the high level of demand and wages growth in the resources sector relative to other sectors in the economy – those sectors that did not have the capacity to match such increases – and the broad shift in the economy toward higher skilled jobs. Wider or narrower spreads of earnings are not necessarily indicators of equity in the labour market.

89. As noted in a Productivity Commission Staff Working Paper research paper:

> *Variation in incomes is a feature of all economies. At any point in time, some individuals and households earn relatively less, while others earn relatively more, resulting in a distribution of different incomes. Differences in individual incomes occur for a variety of reasons including personal choices and innate characteristics (such as age, intelligence and choices made over work life balance) as well as opportunities and inheritances. These individual differences combine with broader economic forces and policy settings to influence the distribution of income over time.*[18]

90. There is an inappropriate comparative wage justice assumption underlying the notion of minimum wage rates and increasing minimum award rates to "even things up" for the impact of the myriad other forces at work in over award wages growth, relative overall income distribution or equivalent household disposable income. The distribution of disposable household income is determined by employment levels, income from assets, taxes, social welfare payments, household composition and so on.

[18] Greenville, J., Pobke, C. and Rogers, N. 2013, Trends in the Distribution of Income in Australia, Productivity Commission Staff Working Paper, Canberra.

91. Minimum wage increases which cannot be sustained by business output and revenue are unlikely to improve the situation of those on lower pay, especially for those at the bottom of income distribution. An increase in the minimum wage is only effective in improving their living standard if these lower paid workers receive them by having sustainable jobs.[19]

92. The minimum wage should be sufficiently low to encourage employers to recruit employees of low educational attainment, low skill levels and low employability but high enough to encourage participation in the labour market and out of the welfare system, even if only partially. The objective of a minimum wage scheme should be to provide incentives to make the employee as self sufficient as possible at wage rates which are sustainable for employers in that labour and product market and which are dissociated from award rates – which are also in need of reform (see below). This would also have the advantage of removing social welfare considerations from wage setting which should be focussed on the value of the work, demand levels and other economic conditions rather than the maintenance of minimum living standards and social welfare concerns.

93. A new approach to minimum wages is needed because setting a high safety net intended to meet the needs of the low paid and the maintenance of relative living standards objectives has the effect of increasing minimum rates for all workers across the award spectrum, regardless of income levels. It provides a prime example of the centralising effect of minimum wage setting under the FWA. Australia does not have one minimum wage, this is just the start point. There is not a single minimum but a series of minimums moving up through award pay scales. Modern awards now cover more occupations and higher grades through their expanded coverage and reach produced by award modernisation. These minimum wages are subject to the same penalties and loadings as apply to lower wage employees in the same awards.

94. There are currently a number of awards that provide wage rates approaching or in excess of $100,000 per annum. For example, the minimum wage decision will apply to an award wage earner earning in excess of $158,000 in the *Air Pilots Award 2010*. In the private sector *Health Professionals and Support Services Award 2010* the decision will apply to a Level 4 employee on an award rate of over $94,000. The minimum rates in the *Social, Community, Home Care and Disability Services Industry Award 2010* were increased by the Equal Remuneration Order (ERO) for that industry. Rates for higher classifications in this award are projected to increase to over $110,000 in today's terms when the ERO instalments are completed in 2020.

[19] See Australian Chamber of Commerce & Industry submission to the Fair Work Commission – 2013 Annual Wage Review paragraph 261- 273. https://www.fwc.gov.au/documents/sites/wagereview2013/submissions/ACCI_sub_awr1213.pdf

95. In terms of providing a social safety net, a "living wage" to all award workers including those on incomes at these levels, the FWC minimum wage adjustments have moved well beyond safety net level.

96. These minimum rates are subject to the penalties and allowances payable under the award which compound the impact of increases flowing from the annual wage review. As a consequence rates for entry level casual shop assistants now exceed $50.00 per hour on public holidays and $37.00 per hour on Sundays. Such rates are unsustainable for business.

97. The Australian Bureau of Statistics (ABS) data indicates that employees paid by award-only cover 18.8 per cent of the workforce in 2014, up from 15.2 per cent in 2010. This data indicates employees paid by award-only made up 21.0 per cent of all employees in the private sector compared to 9.5 per cent of all employees in the public sector.[20] FWC commissioned research indicates around 36 per cent of the private sector workforce pay setting is based on award rates.[21]

98. The minimum wage and minimum award wage rate feed into over-award payments as the baseline for all wage adjustments. The minimum wage also has an impact on bargaining as it raises the wage level from which the negotiations start.

99. Any "headline" increase awarded in the minimum wage decision reflects the baseline costs only. For employers, additional costs are incurred in on-costs, penalty rates, allowances, loadings, workers compensation premiums, payroll tax, superannuation and associated administrative costs.

100. Wages rose 2.6 per cent (private sector 2.5 per cent) through the year to the September quarter 2014, following the same level of growth in 2012-13 which was the smallest rise since the Wage Price Index commenced in 1997.[22] The slowed growth in wages also points to a closer relationship between minimum rate increases and overall wages growth. The ABS noted "*A national minimum wage increase of 3.0% with effect from 1 July 2014 was granted by the Fair Work Commission in June 2014. This increase in minimum wage rates impacted on the Wage Price Index in September quarter 2014.*"

101. While the FWA presents minimum award rates as a minimum rates safety net, increasingly these award rates have taken the place of paid or market rates as employers cannot afford to pay more than award rates. Along with the increasing numbers of award rate dependent employees noted above, employers have long argued the minimum wage increase has a pervasive effect on above award rates.

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[20] ABS 6306.0, Employee Earnings and Hours, May 2014; ABS Cat No 6306.0, Employee Earnings and Hours, May 2010.

[21] Australian Workplace Relations Study First Findings report Pay Equity Unit, Fair Work Commission 29 January, 2015 page 37

[22] ABS 6345.0 - Wage Price Index, Australia, September 2014

102. The Australian Government does not consider the "spillover" effect of the minimum wage to be large or pervasive, estimating on the assumption that employees paid up to 20 per cent above the minimum rate, that only around 5 per cent of all employees would receive the increase.[23] This is counter to our experience with our members who, if not paying the actual increase, rely on the minimum wage decision in their budgets as a prime determinant of wage increases and labour costs in their organisations.

103. AFEI consultations with our members in February 2015 indicated that just over 28 per cent pay exactly the award rate; 26 per cent pay just above the award (up to 10 per cent higher) and 17 per cent pay above the award rate (by 11 to 20 per cent higher). Only 11 per cent paid well above the award rate (greater than 20 per cent above). This, and the fact that less than 5 per cent did not reference award rates in setting pay rates demonstrates a high degree of reliance on award rates of pay.

104. This finding was reinforced by the fact that over 40 per cent reported that they primarily increased wages by the FWC annual minimum wage adjustment and a further 24 per cent through an annual or other periodic review taking into account the minimum wage adjustment.

105. The FWC-commissioned research on this issue also indicates a significant proportion of award dependent workers. This research initially found:

- 52 per cent of all surveyed organisations reported using awards in some way to set pay or guide pay decisions;
- 36 per cent of surveyed organisations which were not award reliant referred to pay rates in awards even if workers are paid above the award;
- 30 per cent of non award reliant organisations passed on most the recent annual wage review (2011-12) to their over award employees;
- 40 per cent of employees in the surveyed sample had their pay based on awards in some way; 19 per cent employees had their pay set at exactly the award rate.[24]

106. Subsequently, the FWC commissioned Australian Workplace Relations Study found that

- 65 per cent of enterprises surveyed reported using awards to set wages for at least one employee;
- over half (51 per cent) used awards to set wages for the majority of their workforce;

[23] Australian Government Submission Australian Government Submission to the FWC Annual Wage Review 2013-14 page 28

[24] Fair Work Commission Research Reports 6/2013 and 7/20139

- paying exactly the applicable award rate was the main method of setting pay for one-quarter of enterprises and a further one-quarter referenced the award to set pay rates.[25]

107. The findings reflect the fact that Australia's wage fixing system remains centralised and that minimum award rates are a major determinant of overall wage levels. The reach and expanded coverage of modern awards has ensured that the annual wage review and the so called safety net minimum rates set the standard for other wage setting arrangements.

108. It has also produced a high minimum wage relative to our competitors.

109. On a Purchasing Power Parity basis Australia's minimum wage ranks third in OECD economies after Luxembourg and Belgium.[26]

110. Australia's minimum wage levels are comparatively close to average wages at 44 per cent of the average wage for a full time employee as measured for comparative purposes by the OECD. Australia's National Audit Commission reported that in 2013 minimum wages were 56 per cent of overall average wages.[27] Relative to average wages Australia has the fourth highest minimum wage, below France, New Zealand and Slovenia which have minimum wage levels closer to average wage levels. For the OECD overall, the minimum wage is 38 per cent of the average wage for a full time employee; Australia's minimum wages are closer to average wages than the majority of OECD countries.[28]

111. Employment growth in 2014-15 has substantially slowed to a rate of 1.3 per cent in the year to February 2015 with the numbers unemployed moving up by 8.3 per cent in trend terms over the year to reach a rate of 6.3 per cent (trend terms). This figure which would undoubtedly have been higher had not the participation rate remained unchanged over the year in response to the slower jobs growth.[29] Part-time employment continued to increase as a share of the workforce, reaching a high of 30.8 per cent in February. Of the additional 363,000 employed since February 2012, 69 per cent (249,400 jobs) have been in part-time employment.

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[25] Australian Workplace Relations Study First Findings Report https://www.fwc.gov.au/first-findings-report/about-report. page 57. It should be noted that both these surveys are based on small sample sizes and low response rates.

[26] OECD.StatExtracts Real Minimum Wages constant prices at 2013 USD PPPs

[27] Towards Responsible Government The Report of the National Commission of Audit Phase 1 Feb 2014 9.11 Unemployment benefits and the minimum wage.

[28] OECD.StatExtracts Minimum relative to average wages of full time workers

[29] ABS 6202.0 - Labour Force, Australia, Feb 2015

112. The Department of Employment's Monthly Leading Indicator of Employment has fallen for the fifth consecutive month in February 2015 and has now fallen for 11 of the last 13 months. It reports:

> *'while just short of the six consecutive monthly falls in the Indicator needed for confirmation of a turning point, it is possible that employment may fall below its long-term trend growth rate of 1.2 per cent in coming months. All five components of the Indicator fell over the month to February 2015. Cyclical employment has risen for the last three months.'*[30]

113. Apart from the decline in employment in manufacturing, job loss has been most pronounced amongst the low skilled – those most likely to be paid at or near minimum wages. The manufacturing sector which faces greater competition from lower production costs overseas lost 65,000 jobs over 2010-2014. Employment in agriculture declined by 23,000, wholesale trade by 12,000 and administrative and support services by 9,000.[31] Labourers make up a higher proportion of workers in administrative and support services than in any other industry (41.5 per cent compared with the all industries average of 9.9 per cent). Employment growth in retail trade increased by less than 4 per cent; accommodation and food services increased by 7 per cent. In contrast the numbers employed in the largely publicly funded health and welfare sector jobs increased strongly by 10 per cent up to 2013; dropping back to 9 per cent in 2014.[32]

114. As is acknowledged by research undertaken by the FWC and earlier reviews undertaken for the Australian Fair Pay Commission, the workers who are most directly affected by minimum wage increases are the award reliant workers in predominantly low skilled jobs:

> *"Employed persons who are less skilled are more likely to be employed in lower paid occupations and be more reliant on awards."*[33]

115. It is further accepted that the less skilled, and by implication, closer to the minimum wage employees, have higher rates of unemployment. They have a declining share of total employment, with unskilled jobs comprising less than 17 per cent of total employment share.[34]

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[30] https://employment.gov.au/department-employment-s-leading-indicator-employment-latest-release

[31] ABS, *Labour Force, Detailed, Quarterly, Nov 2011,* Catalogue 6291.0.55.003.

[32] http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6291.0.55.003Nov%202014?OpenDocument

[33] Fair Work Australia Research Report 1/2010 *An overview of compositional change in the Australian labour market and award reliance* page 65

[34] ABS 4102.0, Australian Social Trends, Data Cube – Work Table 2; ABS 2011 Census data: Occupation http://www.abs.gov.au/websitedbs/censushome.nsf/home/CO-65#labour

116. Where wages are set at a level beyond the productive capacity of the worker and extra revenue generated for the employer, the likely impact will be a reduction in jobs for these workers and a reduction in opportunities for them to improve their position in the labour market. This effect is reflected in the slower (or negative) growth in jobs, and particularly for low skilled workers and younger workers.[35]

117. The labour force underutilisation rate (unemployed and underemployed) is currently estimated to be 15.1 per cent (trend terms).[36] The underemployment rate is currently estimated to be 8.7 per cent or around 1,072,800 persons who want more hours of work in addition to the 778,700 currently unemployed.[37]

118. The long term unemployment ratio continues to hover around 21 per cent. Government data shows that in January 2010, there were 592,737 recipients of the unemployment benefit (Newstart) of which 52.6 per cent had been receiving the benefit for more than 12 months. By July 2014, there were 734,817 recipients overall, 67.5 per cent were long-term.[38] In addition there are a proportion of the over 700,000 people on disability pensions who can be considered potential members of the workforce.

119. The fact that this group of well over one million people in Australia remain unemployed is a clear indication that the costs and risks of employment for employers are too high.

120. Of particular concern is the entrenched high youth (15-19 years) unemployment rate which has risen from 16.5 per cent in December 2013 to 20.1 per cent in February 2015 (trend data). The unemployment rate for 15-24 years moved from 12.5 per cent in December 2013 to 14.0 per cent in January 2015. At this time there were 293,200 aged between 15–24 years who were unemployed, over 37,500 more than a year ago.[39]

[35] Wheatley, T. 2009, Labour market outcomes for low-skilled people in Australia, in Changes in the Australian Labour Market over the Economic Cycle, Report Commissioned by the Australian Fair Pay Commission, Research Report No. 9/09, June 2009, p.45

[36] ABS 6202.0 - Labour Force, Australia, FEB 2015

[37] ABS ibid

[38] DSS Labour Markets and Related Payments August 2014

[39] ABS 6202.0 - Labour Force, Australia, Jan 2015 Table 13 and Time Series Spreadsheet Table 17 Trend data

121. The FWC minimum wage Panel has decided in determining the minimum wage that modest minimum wage adjustments lead to a zero or small effect on employment.[40] Similarly, FWC research has been concerned to show that the relationship between employment, productivity, business viability and the minimum wage is uncertain:

> *"Research into the effects of minimum wages on employment, mostly from overseas, has yielded diverse results".*[41]
>
> and
>
> *Nonetheless, a review of the literature suggests that the relationship between minimum wages and productivity for Australia is ambiguous because it is not clear whether increased training or the substitution of low-skilled labour for high-skilled labour is driving the results. Furthermore, while theory suggests that minimum wages adversely affect profitability and firm survival, the evidence appears to be inconclusive.*[42]

122. While there may be disagreement in the research literature there is consensus that if the minimum wage is set too high, employment for minimum wage workers and those near the minimum wage will be reduced:

> *"Despite intensive research, there exists, in fact, little agreement, either in theory or in the empirical literature, about the net employment effects of minimum wages. There is a broad consensus, however, that employment is likely to be reduced if minimum wages are set "too high". Excessively high wage floors act as employment barriers for low-productivity workers in particular, with young people being a group of particular concern."*[43]

123. Employers deal with higher labour costs by substituting low skilled workers with capital investment, higher skilled workers, higher prices and fewer workers or hours worked. FWC research does show enterprise level responses to include cutting hours, reducing worker numbers, and minimizing work with penalties attached.[44]

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[40] FWC Annual wage review 2012-13 at para 464; FWC Annual wage review 2013-14 [2014] FWCFB 3500 at para 426.

[41] Fair Work Australia Research Report 2/2010 Literature review on social inclusion and its relationship to minimum wages and workforce participation L Nelms and C Tsingas pages 32 – 34

[42] Fair Work Australia Research Report 1/2011 An overview of productivity, business competitiveness and viability page 26

[43] Immervoll H (2007), Minimum wages, minimum labour costs and the tax treatment of low-wage employment, OECD Social, Employment and Migration Working Paper No. 46 page 6

[44] Fair Work Australia Research Report 7/2010. Enterprise case studies: Effects of minimum wage-setting at an enterprise level

124. In addition, high minimum wages particularly affect small firms[45] because they are most likely to be affected by minimum wage changes and because of a generally narrow range of wages paid within small firms.[46] FWC research challenges the view that minimum wage (award dependent) workers in small business are more affected than those in larger businesses. The research report was unable to determine the impact, if any, of award wage adjustments on small businesses.[47] Our first-hand experience in advising both large and small employers is that small employers are much more restricted in the adjustments they can make to compensate for minimum wage increases. Businesses that can afford to pay more do so. Those who cannot cut back on hours, numbers employed, product or services.

NEED FOR REFORM IN DETERMINATION OF MINIMUM AND AWARD RATES OF PAY

125. The minimum wage decisions handed down by the FWC Minimum Wage Panel have generated unsustainably high outcomes. The rate of increase in minimum wages has remained high in the face of slower growth, higher unemployment and lower inflation. The Panel and its approach to wage fixation are in need of replacement.

126. The means by which minimum wages and award rates are determined requires reform. The adversarial system of competing interests arguing their case before a tribunal which makes a decision based on the requirements of its governing legislation (which varies depending on the political regime) is no longer appropriate given the global competitive environment in which Australia must operate.

127. Beyond the minimum wage level a system which is market driven, enables employers to respond to changes in their circumstances and in labour markets, is required. Employers and employees need the best information available about wage rates in their labour markets to make decisions which are viable and sustainable for both parties. This information should be provided by a neutral, disinterested source.

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[45] Australian Fair Pay Commission Research Report 2/2007 Characteristics of Minimum Wage Employees Melbourne Institute of Applied Economic and Social Research

[46] See for example J Butler 2006 *Minimum Wage Laws and Wage Regulation* UNSW Law Journal 29 (1) p192; FWA Research Report 1/2011 An overview of productivity, business competitiveness and viability.

[47] Fair Work Australia Research Report 1/2012 *Award-reliant small businesses.*
This is despite finding that wages and profit growth for small business was low relative to other employing businesses; experienced higher entry and exit rates and lower survival rates; a qualified finding that less likely to exhibit increased productivity and profitability; and that workers in small firms received lower hourly wages on average than workers in larger firms.

128. The notion of an independent umpire in an adversarial system, given political reality, is a theoretical construct. Experience shows us any instrument or body tasked with setting wages will inevitably be subject to political influence or pressure from dominant participants.

129. The central concern in any wage setting framework is that minimum rates should not determine actual rates of pay at the market level. Where minimum rates are set high in the market range the less account is taken of the variable economic circumstances of individual employers and increases their vulnerability to downward fluctuations in demand and market performance. It also has the effect of pricing the most marginal in the labour market out of a job.

130. Industrial tribunals have made numerous mistakes in the setting of wages and employment conditions and the adverse results have been significant. The deliberate move away from "paid rates" awards was a response to the dangers of removing almost all the flexibility from market rates. However it appears that for a range of industries and occupations (eg accommodation and food services, retail trade, administrative and support services, health care and social assistance) there is a significant level of payment at award rates, indicating an effective shift to a paid rates minimum wage structure.[48]

[48] FWA Statistical Report Annual Wage Review 2014-15 Table 7.1

131.

- **The minimum wage concept, the method of its determination and the setting of minimum award rates should be the subject of an in depth review with the objective of removing the automatic link between changes in the minimum wage and award rates, and focussing on actual conditions at the industry and firm level (which may differ across regions and within industries) when setting award rates.**
- **In the following section we provide examples of the reasons why the entire cumbersome award framework should be examined with a view to its removal and the introduction of a simpler, flexible and more certain scheme if the requirements of paragraph 15 above cannot be achieved.**
- **We do not support award amalgamation driven by the objectives of fewer awards and greater uniformity of conditions for employees for its own sake (no doubt set at the highest common denominator). Employers need a great deal more independence and ability to set wages which meet their specific circumstances than the current system allows.**
- **A complete review of minimum wage and modern award concepts and provisions is required to ensure they meet the objectives of providing a minimum safety net (which would require identifying from the considerably expanded award entitlements just what are genuine minimum safety net provisions);**
- **In section 2.4 of this submission we also argue for the removal of the two additional forms of minimum wage adjustment available via the FWA provisions for equal remuneration orders and low paid bargaining orders.**

2.3 Modern Awards

132. The considerable costs incurred by industry with the introduction of modern awards and the difficulties associated with their implementation particularly during the four year transitional phase are an important issue for this inquiry.

133. The award modernisation process and its outcome has demonstrated that the modern award objectives have not been met.[49] The Explanatory Memorandum claimed modern awards would provide a simple, easy to understand, stable and sustainable safety net, designed to promote flexible modern work practices having paid due regard to, inter alia, employment growth, employment costs and productivity.[50] This has not been the outcome.

134. Instead the move to modern awards has been a complex and frequently highly uncertain exercise for employers, and has added significantly to compliance risks and costs. Employers have had to grapple with complex transitional arrangements and the concurrent operation of pre existing entitlements with the provisions of the modern awards.

135. The creation of modern awards sprang in large part from the desire to reduce the number of awards. Some larger employers were bound by numerous awards, separate awards with different provisions for design, stores, manufacturing, maintenance, laboratory, warehousing, distribution, transport, sales, administration, etc. and different unions for each.

136. Rationalisation of this mess was obviously necessary. Part of the fix came from outsourcing various functions and subcontracting others. Multi union agreements or lead agreements which flowed to others were in widespread use. The era of the "no disadvantage" and "better off overall" tests impeded rational company wide agreement negotiation atop multiple awards.

137. Significant award rationalisation in this context seemed to make substantial sense to some observers. Others, including AFEI, argued that rationalisation was not the end in itself.[51] If there were to be new awards they had to be awards that were appropriate, relevant and reasonable to the business they covered. They had to facilitate the effective operation of the business or the business would not be competitive and profitable and so the investment and jobs they provided would not exist.

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[49] FWA s 134

[50] Explanatory Memorandum

[51] AFEI submission to the Australian Industrial Relations Commission Award Modernisation Preliminary Consultation Initial Issues AM 2008/1 June 2008

138. Many smaller employers were exposed to only a few awards, perhaps just one operational award and maybe one or two for sales and administration. Rationalisation was not so significant for them. Nevertheless "less is more" often swamped common sense when numerous awards applying to different industries in different industry sectors with different markets, different skills different customer needs, etc. were boiled down to a single modern award which hardly catered for the peculiarities or needs of many of these industries or sectors now swept into their coverage.

139. This was not always the case. Some pre existing awards came through the modernisation process much more intact and with significant support from their main historical sponsoring parties. This support on the employer side tended to reflect the extent to which their award catered for the realities of their market.

140. Indeed that should have been the test for awards and agreements but many aspects of modern awards fail in this regard. Unions put their orders in for improvements on what they had and what they could ever reasonably have expected. In return for their agreement to embrace the modern award process, including some realignment of demarcations, modern awards and amendments to the FWA rewrote the history of entitlements.

141. So fewer awards was the mantra but the outcome contained many flaws. AFEI did not support the notion of fewer awards for its own sake. If awards are to exist at all they need to reflect the practical needs, the markets and economic circumstances of their industries. If modern awards are merely vehicles for satisfying trade union demands and if the FWC is prepared to accommodate those demands then there is no viable place for most awards.

142. As modern awards are used either directly or through "no disadvantage" rules, indirectly, to prevent many changes which need to be made in workplaces to usher in greater flexibility, greater productivity, greater competitiveness, it is arguable that many have outlived their usefulness.

143. For many employers, award modernisation has not reduced the number of awards applying in their workplaces and the compliance burden the majority of them face in dealing with modern awards and the FWA is still too great. For example, in the words of one of our members:

> *"I run a simple business – a nursing agency. I find it a real challenge to deal with a multitude of different awards. All have the same approach but each one is different in detail. Awards I have to be across are: Nurses Award 2010, Clerks Private Sector Award 2010, Social Community Home Care and Disability Services Industry Award 2010, Health Professionals and Support Services Award 2010.*

Details such as minimum shift times, standby, overtime provisions are different. Why not have a general award for small business to manage their employees? If we are really serious about simplifying the system something like this needs to be considered."

144. The process of making modern awards may have been expedient given the time frames imposed however what it produced amounted to rationalisation and standardisation, not modernisation. In making modern awards where whole sectors were subsumed into 'one size fits all' awards, provisions previously negotiated or arbitrated to meet the specific circumstances of a particular industry were applied to industries and enterprises where this award history was of no relevance. Casual loadings were standardised at 25 per cent despite lower loadings in Queensland (23 per cent) and many NSW, SA and WA awards at 20 per cent. Minimum engagement times were increased, restrictions placed on part time work, overtime and annual leave loading payable on termination were introduced into sectors via the "critical mass" approach adopted by the FWC.

145. The FWC "critical mass" approach, in theory based on the bulk of provisions in pre modern awards but in reality frequently adopting federal system awards applying in Victoria, failed to permit proper consideration of what penalties were most appropriate for 2010 onwards. For example, the NSW Sunday penalty rate case[52] was ignored, as were previous industrial instruments in NSW which recognised the need for:

- viable penalty rates for Sunday trading in the retail sector;
- the importance of casual work at sustainable penalty rates on weekend and public holidays in industries such as amusements and leisure;
- recognition of early morning work in various industry sectors such as private sector commuter ferries, milk vendors, baking and fish marketing.

146. Prevailing industry specific award provisions were often ignored in the award modernisation process with the result that hours, classifications and penalties were no longer appropriate for many employers. However, the ability to seek variations to awards has been constrained by the tests imposed by the FWC in its application of s.157 and s.134 of the FWA. The result has been that too many modern award provisions represent a great leap backwards into more restrictive, less flexible and more costly arrangements.

[52] Full Bench of the New South Wales Industrial Relations Commission regarding the Shop Employees (State) Award (No. 1682 of 1984)

147. In the award modernisation process the simultaneous review of numerous awards within limited time frames did not allow for proper consideration of the most appropriate benchmarks and outcomes of the changes proposed. The primary objective was standardisation (often to inappropriate standards for large sectors of an industry) with enterprise bargaining theoretically intended to set up enterprise specific arrangements.

148. The outcome was to raise the floor for bargaining to the extent that for many employers an enterprise agreement could be no more cost effective than the modern award and there was little incentive to bargain. In other cases the main incentive to bargain was to manage the diversity, and inappropriateness, of modern award provisions applying at a workplace.

149. Employers initially made many unsuccessful applications to vary modern awards in an attempt to rectify costly and inappropriate provisions.[53] However, the FWC quickly established that change would not be forthcoming except in "exceptional circumstances". There is a high level of frustration among employers with this outcome, especially as there does not seem to be a wide understanding or concern from many members of FWC of the damage inflicted by the creation of modern awards.

150. The two year modern award review did not provide an opportunity to correct some of the costly deficiencies in modern awards. Instead the FWC took the approach that the review was to be narrow in its scope and that parties should await the four year review process to argue for significant change. In the two year review, some 296 applications to vary modern awards were made. Some of these sought significant and necessary changes for a reduction in penalty rates in various industries. The FWC, however, took the view that it would only make variations in 'exceptional circumstances" The vast majority of applications were consequently dismissed as being 'beyond the scope' of the review.

151. Despite this limitation on the scope of the review the FWC allowed the trade unions' test case on apprentice wages, awarding significant increases to first and second year rates in many awards. This was an extraordinary case and decision where the FWC decided there was no need for and indeed no consideration of work value. The FWA provides that any changes to award wage rates either through the 4 yearly award reviews or through applications outside the 4 yearly reviews only if

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[53] For example the Productivity Commission observed that:

***Since the commencement of the national workplace relations system on 1 January 2010, there have been 20 applications made to vary the Retail Award. These applications have included concerns about issues such as minimum engagement periods, alterations of ordinary hours, or to otherwise remove ambiguity or uncertainty in particular clauses in the award. However, none of the applications specifically address the issue of penalty rates*. [Economic Structure and Performance of the Australian Retail Industry 9 December 2011 page 338]**

This ignored the fact that applications to specifically vary penalty rates were earlier considered by the Full Bench and rejected.

the FWC is satisfied that the variation of the award minimum rates are justified by work value grounds (FWA s 156(3) and 157 (2)).

152. In this particular case however the FWC awarded massive increases in certain apprenticeship wage rates in the first and second years, amounts larger than any increases applied throughout the entire award modernisation process. In some awards the increases for junior apprentices were more than $100 per week at the first year rate and more than $60 per week at the second year rate. In some awards ***the increases*** for adult apprentices were more than $280 per week at the first year, more than $270 per week at the second year and more than $140 per week at the third year rate. [54]

153. Since the advent of modern awards, there has only been one substantial award revision of benefit to employers – the reduction in penalty rates for casuals in the *Restaurant Industry Award 2010*. [55] This FWC decision, on appeal, reduced penalty rates albeit only at Grades 1 and 2 – from 75 per cent (including the casual loading) to 50 per cent.

154. The imbalance in the legislation is further illustrated by 2013 Labor Government changes to the modern awards objective in s.134 of the FWA, to include the following provisions:

> s.134(1)……..
> (da) the need to provide additional remuneration for:
> (i) employees working overtime; or
> (ii) employees working unsocial, irregular or unpredictable hours; or
> (iii) employees working on weekends or public holidays; or
> (iv) employees working shifts; …….

155. This was done with the deliberate intent of making employers' attempts to reduce penalty rates in the FWC even less likely to succeed.

156. There is little optimism amongst employers about the utility of the four year award review currently in progress. Modern award reviews have shown themselves to be a complex and unwieldy exercise in which employers are exposed to further demands from unions adding further costs and imposing more restrictions and inflexibilities. In the current four year review union claims include:

- family and domestic violence leave including in addition 10 days paid leave and additional periods of unpaid leave;

[54] See for example Electrical, Electronic and communication Contract Award 2010 (Adult Apprentices).

[55] [2014] FWCFB 1996

- restrictions on casual employment and part time including the requirement to ask existing employees if they want more hours before hiring additional workers;
- four hour minimum engagement for casuals and part timers;
- new obligations to provide family friendly work arrangements including the right to work part time;
- accident pay provisions in awards which will supplement and override and potentially destroy provisions of state workers compensation schemes.

157. As a merely stop gap measure, given the continual uncertainty for employers generated by s.156 – four yearly reviews of modern awards in the FWA should be removed by repealing its provisions. The expanded content of modern awards and the kinds of employment conditions which unions could bargain for at an enterprise level are now pursued with utmost vigour as award test cases with provisions to apply as minimum safety net entitlements decided by the FWC. In effect this has returned us to the centralised, arbitrated wage fixing of a bygone era.

158. The modern award process also widened the matters regulated by awards, extending the range of allowable matters. A prime example of this can be seen in the addition of universal award prescribed employer superannuation obligations.

159. Superannuation is the subject of extensive legislation including the *Superannuation Guarantee (Administration) Act 1992* (Cth), the *Superannuation Guarantee Charge Act 1992* (Cth), the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Superannuation (Resolution of Complaints) Act 1993* (Cth) with heavy non compliance penalties for employers. Modern award obligations have created a second penalty regime in which employers are subject to the complexities of the award superannuation and the default fund arrangements. Where awards provide a more beneficial outcome its superannuation provisions will prevail over the Australian Tax Office superannuation guarantee rulings. Given the detailed and onerous superannuation legislative scheme, which now includes the very specific SuperStream requirements, superannuation should never have been an allowable award matter. It was introduced as an elaborate exercise to get employers to nominate the industry funds via the default fund provisions and, regardless of the industry fund performance and limits to competition. The assessment and choice of superannuation funds for awards or any superannuation matter should not be within the purview of the FWC.

160. The extent of allowable award matters should be reduced and provisions such as employer superannuation obligations should be removed.

161. Flexibilities for employers are virtually non existent in modern awards. The use of their flexibility provisions is very constrained and as the FWC reports and research demonstrate, are not widely utilised.[56] However, as is discussed more fully in Section 4.4: (*Disputes in relation to a term of an award, agreement or the NES*) of this submission, modern awards are replete with opportunities for employees to access the dispute resolution clause and seek the assistance of conciliation in the FWC, even without complying with the processes set out in the award dispute resolution clause. Again this reflects union demands.

162. The award classification structure introduces a further layer of complexity and inflexibility with awards having numerous classification levels (for example the 14 level benchmark classification structure). Other awards may have fewer classification levels but a range of pay points within these levels. Progression through these is mostly automatic, through time worked or through qualifications attained. As a consequence once an employee works for a specified period of time and/or reaches a particular skill level or has a specific qualification they must be paid and employed commensurately, regardless of the actual scope of the jobs they have been employed to perform. A recent example of this is provided in an industrial magistrate decision relating to the *Amusement Events Award 2010* which ruled that employees performing work at grade 4 were to be paid at grade 8 merely because they possessed qualifications applying at that level and despite the fact that they were employed and working as grade 4 employees.

163. The absurd level of regulation introduced by award classification structures is amply demonstrated by their extension into areas which should not be subject to award regulation. For example a Health Professional – Level 4 in the *Health Professionals and Support Services Award 2010* may be directly responsible to the organisation's senior management and is charged with the following:

> *A health professional at this level applies a high level of professional judgment and knowledge when performing a wide range of novel, complex, and critical tasks, specific to their discipline.*
>
> *An employee at this level: has a proven record of achievement at a senior level; has the capacity to allocate resources, set priorities and ensure budgets are met within a large and complex organisation; may be responsible to the executive for providing effective services and ensuring budget/strategic targets are met; supervises staff where required; and is expected to develop/implement and deliver strategic business plans which increase the level of care to customers within a budget framework.*

[56] FWA, 2011 Surveys of individual flexibility arrangements (IFAs) and provisions under the National Employment Standards (NES).; Australian Workplace Relations Study First Findings Report https://www.fwc.gov.au/first-findings-report/about-report

164. The Health Professional – Level 4 moves by virtue of the passage of time over 3 years through 4 pay points ranging from $1,407.70 to $1,803.50 – an equivalent annual salary of almost $94,000. Yet this classification of employee is entitled to the same loadings and penalties including overtime as entry level employees. By any test this could not be considered a 'safety net'.

165. Minimum 'safety net' rates apply by awards to such employees and so they receive minimum wage increases. This and similar classifications illustrate both the extent to which award coverage extends well beyond the safety net level, and the automatic progression over time through award pay points, ensuring that the employee receives both a minimum rate increase and a pay point increase, until the maximum payable amount is reached.

166. The experience of many employers has been that modern awards are difficult to interpret and apply. At times there is difficulty in identifying coverage. For example an employer outside the manufacturing industry would not logically expect to find coverage of its laboratory technicians in the *Manufacturing & Associated Industries and Occupations Award 2010*. Employers generally have expressed dismay at the complexity and cost of working with modern awards and with the complex task over the first four years of applying the transitional arrangements.

167. As the FWC own research demonstrates, many employers do not understand awards, are fearful of non compliance issues, pay what they hope will meet their obligations and attempt to stay under the radar of the FWO:

> *A key implication of the current modern award information architecture is that low expectations and poor experiences were acting as barriers to using the modern awards for the participants. At the same time, participants were acutely aware of needing to adhere to and follow the modern awards.*
>
> *To manage this apprehension, most participants reported simply paying a little above modern award pay rates as a form of insurance, so they didn't get caught out. They also reported providing basic holiday and leave entitlements but relied on reaching some understanding with employees about many of the other provisions around breaks and penalties. Some participants were changing their employment practises in order to avoid dealing with the modern awards, i.e. not hiring or moving toward contract labour.*[57]

168. The complexity of modern awards is amply demonstrated by the FWC decision to publish an annotated version of awards, in an attempt to make the meaning of their

[57] Sweeny Research A Qualitative Research Report on: CITIZEN CO-DESIGN WITH SMALL BUSINESS OWNERS Ref No. 24210 13 August 2014

provisions clearer. It is highly unlikely that having awards reconfigured with clearer headings, worked examples, look up tables and so on will solve the problems employers confront in interpreting award complexity and detail. Regulation which is difficult to understand or apply is poor regulation.

169. **These examples provide some of the reasons why the entire cumbersome award framework should be examined to determine whether from technical, practical and political perspectives it is capable of fundamental restructuring and rewriting to deliver the outcomes we argue are essential. If that is not a clear likely outcome then we need to go back to basics and remove current modern awards and the legislative framework underpinning them and define a new system. This should be simpler, more certain with a limited number of genuine minimum employment standards which take proper account of our economic and market circumstances and allow common law contracts. We do not support award amalgamation for its own sake driven by the objectives of fewer awards and greater uniformity of conditions for employees (set no doubt at the highest common denominator).**

170. **The Productivity Commission should consider if these outcomes are possible even in an award based system which has undergone further review and reform. If awards are to be retained a complete rethink of modern awards is required. In contrast to the previous modern awards review , this should ensure that they genuinely meet the objective of providing minimum safety net provisions (which would require identifying from the current considerably expanded award entitlements just what are genuine minimum safety net provisions and do not reflect market rates of pay); are simpler to apply with less prescription and restrictions and enable individual employees and employers to have compliant work arrangements which suit their needs without the need for regulated flexibility arrangements.**

171. **If this is an unlikely outcome then we should move to a scheme which is based a single minimum wage a limited number of legislated employment standards and common law contracts.**

172. **What we have to deliver is a framework in which there are competitive businesses. This requires the delivery of workplace mechanisms that allow businesses to structure their operations so that they respond flexibly to varying market circumstances ie the circumstances of their particular industry, product, customers etc. Awards and agreements seldom provide such mechanisms. Even where some modern awards better respond to the markets or particular industries there is now risk of those awards being removed by the FWC.**

173. **The flexible working arrangements to which only lip service has been given does not work in practice. Enterprise agreements generally do not deliver the flexibility. In short the modern award system has almost no chance of engendering the flexible and competitive workplace culture we need.**

2.4 A Two Tier Safety Net—Equal Remuneration Orders and Low Paid Bargaining Orders

174. The need for reform in the FWA is further demonstrated by the operation of its provisions for low paid bargaining and equal remuneration orders (EROs).

175. The FWA provided for the installation of a 'safety net' of minimum rates in modern awards which are subject to minimum wage reviews. However, additional avenues to create another layer in the safety net — arbitrated conditions above the safety net — are also available. Modern award rates can be overlaid with low paid bargaining and EROs, creating a two tier safety net. The outcome has been the generation of "safety net" minimum rates which when the full ERO is payable in 2020 (plus annual minimum wage reviews of around 3 per cent based on FWC Panel decisions) will result in wage rates in excess of $110,000 for the highest classification in the *Social, Community, Home Care and Disability Services Award 2010* and $57,000 at Level 2 (few are employed at Level 1). In addition to these base rates the usual award penalties, allowances and loadings are payable at all classification levels.

176. EROs and the low paid bargaining stream have the effect of reintroducing compulsory arbitration, adding a further layer of arbitrated employment conditions above the safety net and undermining enterprise bargaining in the sectors where they apply.[58]

177. The Equal Remuneration Case clearly demonstrated how the FWA created a new avenue for industry wide comparative wage 'justice' claims.

178. Unions launched the ERO claim in an industry – social and community services — which has little capacity to fund significant pay increases and which is largely government funded. The then Federal government's funding mechanisms were central to the politics and outcomes of this case; unions made the application to increase rates to match (in fact, exceed) Queensland public sector enterprise agreement rates on the understanding that the increased rates would be met with government funding.

179. The FWC's February 2012 decision in the Equal Remuneration Case introduced impossibly high wages based on the inflated Queensland public sector rates but as minimum wages for the private social and community services sector through arbitration.[59] The decision set rates in that sector above those of many public

[58] *'Unless there is a compelling reason for your organisation to make a new employment agreement this year, it is the ASU's recommendation that you DO NOT bargain'*. ASU SACS NEWS Vol 2, Issue 1 2010. See also AFEI submission to the Equal Remuneration Case 28 March 2011 pages 35-40

[59] Equal Remuneration Case [2012] FWAFB 1000 (1 February 2012)

sector employees in most states. This outcome was dictated by the politicians of the day, however, promises by the then Labor Government that additional funding would be provided to pay for the increased operating costs did not eventuate. It could never have been afforded but the ruse served its purpose at the time.

180. The case was not decided on the tests required by the FWA.[60] The comparison of private and public sector wage rates was simply a comparison of those rates. The applicant unions' evidence did not establish the extent of gender-based undervaluation in the SACS sector.

181. The concerns raised by this case are reflected in the dissenting decision of Watson VP:

> ***[84]*** *The case is unprecedented by reference to international equal pay cases. It does not seek equal pay for men and women in a single business, or in an industry. Rather, it seeks to establish a large minimum overaward payment for all men and women in the entire SACS industry to a level approaching public sector wage levels. It has more in common with a case based on comparative wage justice than equal pay. In my view the applicants have failed to establish key ingredients of their claim. In particular, it has not been established that:*
>
> - *the public sector is an appropriate equal remuneration comparator,*
> - *the wage gap between the not-for-profit SACS industry and the public sector is primarily due to gender-based undervaluation, and*
> - *it is appropriate to effectively extract the entire SACS industry from the enterprise bargaining framework of the Act for the foreseeable future.*
>
> *For these reasons the claim should be rejected.*[61]

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[60] Part 2-7 of the FW Act further requires an assessment of "comparable worth. "There was no evidence before FWA, which would assist the Tribunal in making an assessment of 'comparable worth." The words used in Part 2-7 of the FW Act, "*equal or comparable value*" (emphasis added) invokes a requirement for the work to be of equal or comparable worth.

That an evaluation of equal or comparable worth is required in Part 2-7 is further reflected in the Explanatory Memorandum, which accompanied the FW Act:

The principle of equal remuneration for men and women workers for work of equal or comparable value requires there to be (at a minimum) equal remuneration for men and women workers for the same work carried out in the same conditions. However, the principle is intentionally broader than this, and also requires equal remuneration for work of comparable value. This allows comparisons to be carried out between different but comparable work for the purposes of this Part. Evaluating comparable worth (for instance between the work of an executive administrative assistant and a research officer) relies on job and skill evaluation techniques.[Explanatory Memorandum, *Fair Work Bill 2009* (Cth), at paragraph 1191.]

The evidence did not support the applicants' claims as to the comparability of the work and its value or worth. The comparators were notable for their lack of any meaningful work value assessment.

The evidence showed that remuneration for public sector employees is almost without exception set by bargained rates in enterprise agreements or consent awards in non-minimum rates jurisdictions. In the overwhelming majority of cases, the rates were not assessed by any tribunal on work value considerations, and in no cases, by FWA or its predecessor, the Australian Industrial Relations Commission ("AIRC").

Public sector rates vary widely from state to state, for apparently similar occupations, as was shown in the evidence. The applicants selected rates (generally Queensland but with some significant enhancements) that are substantially higher than public sector rates in most other States.

[61] **Equal Remuneration** Case [2012] FWAFB 1000 (1 February 2012) [84]

182. Following on from the first ERO decision, unions in the childcare industry made applications for an ERO in 2013.[62] This case has clear parallels with the ERO made by the FWC in the social and community services sector with very large wage increases sought ranging from 40 per cent to 80 per cent. Childcare sector members were already reporting considerable levels of financial stress arising from the changed staffing ratios and other requirements of the National Quality Framework, in addition to their operating costs arising from modern award provisions and attendant on-costs (including workers compensation claims).

183. Again, the union claims were made in the expectation that the (then) Federal Government would provide funding to match the increases claimed via the Early Years Quality Fund. The unions ran a strong campaign in the sector to have their members obtain enterprise agreements. This campaign in itself is illustrative of how FWA enterprise bargaining provisions may be utilised with no gain for employers. Employers were told no funding would be forthcoming unless they had signed up to union's enterprise agreement and accounts for the "spike" in enterprise agreements in this sector in the September quarter 2013.[63] Offsets or productivity gains for employers were minimal or non existent (for example, annual leave could be taken in single days). Ultimately the funding was not forthcoming with fewer than 40 services obtaining any funding increases. The case has not progressed in the FWC since mid-2014.

184. The efficacy of equal remuneration order provisions in the FWA in addressing gender wage imbalance is highly dubious. For award only wage earners, the gender gap is minimal or non existent.[64] Any exercise in unravelling differences in overaward pay within the FWC are likely to be fraught with the inconsistency, uncertainty and flawed analysis apparent in this case and its decision. Rather than subject other employers to further proceedings based on faulty analysis of the reasons for pay differences that are unrelated to gender, the equal remuneration order provisions in the FWA should be removed from workplace regulation. This is consistent with our view that workplace regulation should not extend beyond minimum safety net standards.

[62] FWA C2013/5139 and C2013/6333

[63] Big Steps In Early Childhood Education United Voice campaign; Trends In Federal Enterprise Bargaining December Quarter 2013

[64] FWA Research Report 3/2012 Award reliance and differences in earnings by gender; J Healy, M Kidd S Richardson Gender pay differentials *in the low-paid labour market* National Institute of Labour Studies Flinders University, Adelaide

Low paid bargaining orders

185. In the first case to test the FWA low paid bargaining provisions unions succeeded in obtaining an order in the aged care sector that approximately half of the named employers in their application (around 150 employers) that did not currently have an enterprise agreement must start 'good faith' bargaining.[65]

186. The FWC accepted the unions' arguments, which were strongly opposed by employers, that the workers were low paid, that they did not have access to enterprise bargaining or faced substantial difficulty in bargaining at the enterprise level. The FWA doesn't define 'low paid', which the tribunal took as meaning paid at or around the award rate of pay and at the lower award classification levels.

187. This is despite the fact that the economic circumstances of the employer, particularly in funded sectors such as aged care and community services, results in bargained wages remaining at or near the level of the award safety net.

188. Further the evidence did not identify which employees had difficulty bargaining or their actual earnings. Instead unions referred to a speculative annual income for the aged care sector based on 2008 data calculated on 48 weeks of pay instead of 52 weeks of pay and aggregated data based on age, tenure and education. The legislation does not require that proving that employees are low paid requires specific evidence.

189. There was no evidence that low paid employees in aged care did not have access to collective bargaining, which is a threshold requirement for granting an authorisation.[66] In South Australia, the Australian Capital Territory, the Northern Territory, Queensland and Western Australia there was no evidence of difficulty in bargaining and the use of enterprise agreements is widespread.

190. The significance of a low paid authorisation is that it allows a union to seek bargaining orders from the FWC. It also enables the FWC to provide 'assistance' in relation to the bargaining process such as using its general powers to conduct compulsory conciliation or mediation, or to make recommendations to the parties.

191. There is also a specific power in the Act for the FWC to act on its own initiative to 'facilitate' bargaining, or to provide other assistance to the parties, which could include requiring the attendance at a conference of any person who has a degree of control over the employment conditions of the employees to be covered by the agreement. Finally, it allows the FWC to resolve a bargaining dispute by making a

[65] United Voice, The Australian Workers' Union of Employees, Queensland [2011] FWAFB 2633

[66] FWA 243(2) (a)

low paid workplace determination, i.e. an arbitrated decision. This means arbitrating actual rates of pay and therefore removing another element of flexibility from the labour market in the industry.

192.	**The low paid bargaining provisions are another feature in the FWA taking us back to a centralised system of industry wide bargaining and multi employer wage arbitration. They should not form part of any workplace regulatory framework or so called minimum safety net.**

SECTION 3: ENTERPRISE BARGAINING

3.1 The Bargaining Framework

193. A major policy objective for the then government in implementing the FWA was the removal of individual agreements from the industrial relations system and installation of collective agreements as the dominant form of agreement permitted under the legislation. The FWA provided for a significantly enhanced role for the FWC in this process. The FWA was intended to provide:

> *…an enterprise-level collective bargaining system focused on promoting productivity;*[67]
>
> *…productivity and fairness through enterprise agreements that are tailored to suit the needs of businesses and the needs of employees.*[68]

194. The ABS estimates that 30.4 per cent of the private sector workforce have their pay set by collective agreement with the most common method for setting pay for employees being by individual arrangement (44.4 per cent). The estimated proportion of private sector employees covered by collective agreement remains unchanged since 2012.[69] In contrast almost nine in ten (87.2 per cent) employees in the public sector are paid by collective agreement. The FWC commissioned AWRS First Findings report estimates 36.5 per cent of all employees (private and public) have pay set by an enterprise agreement with a relatively small proportion (14 per cent) of enterprises it surveyed reported that they used enterprise agreements to set wages for at least one employee.[70] Enterprise bargaining remains concentrated in the more highly unionised industries of mining, construction, manufacturing, education, health care and transport and within the public sector.

195. The FWA is not concerned with enterprise bargaining per se – its focus is on union rights and procedural matters. Rather than empowering businesses to bargain effectively, the legislation promotes union involvement, claims of not bargaining in good faith or protected action (or other forms of pressure on the business). These can be initiated from the outset, and do not require that the parties have actually engaged in any meaningful hard bargaining before protected action is taken or threatened or they are off to the FWC for a good faith bargaining decision.

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[67] FWA Explanatory Memorandum page iv

[68] FWA Explanatory Memorandum page ii

[69] ABS 6306.0 - Employee Earnings and Hours, Australia, May 2014; May 2012

[70] *AWRS First Findings report: consolidated content from online publication Pay Equity Unit, Fair Work Commission 29 January, 2015 pages 35 & 37*

196. In our experience the majority of agreements do not promote productivity or even require productivity offsets for benefits provided to employees. In the main they are a response to the requirements of the legislation, union pressure to have an agreement and the constraints or shortcomings of modern awards at the workplace.

197. For many employers the provisions of the NES and the modern awards are set so high that departure is unaffordable. There are many sectors where bargaining is virtually non existent as is readily apparent in the FWC's records of agreement approval for each of the calendar years 2010-2014. [71]

198. Yet the provisions of the FWA allow employers to be forced into bargaining against their wishes regardless of whether they have a valid reason as to why they don't wish to bargain.

199. The main incentive for employers now is not productivity improvement, but rather the need to consolidate disparate employee entitlements across a series of awards or to reconcile past workplace arrangements with new requirements under the FWA. The reality is that offsets are difficult to obtain. Employers may be forced through industrial circumstances — or because they believe they have no choice and the legislation provides them with no effective option but to settle on wage increases and benefits which are higher than can be afforded without price increases or reduced profit margin. Any increase given without a corresponding cost offset will produce this reduced efficiency outcome. Many agreements are made with annual wage increases which compound this effect — continuous increases in labour costs with no offsetting benefit to the business. The employer's ability to compete in the domestic and global market is adversely affected.

200. The restrictions on bargaining imposed by the lack of ability to genuinely offset award provisions is exacerbated by the FWA expansion of union bargaining rights, the limitation of employer flexibility, and the extension of agreement terms to contractors.

201. In addition there has been the re-emergence of union template agreements. The prohibition of industry wide template bargaining would assist in producing agreements at the enterprise level with meaningful gains for employers and employees and prevent the inevitable cost and price pressures which flow from pattern bargaining.

[71] FWA Current agreements from 2014 https://www.fwc.gov.au/documents/agreements/download/agreements2014.pdf

202. The re-introduction by the FWA of bargaining about matters other than those 'pertaining to the employment relationship' is fundamentally counter to a policy setting designed to promote productivity. The terms that are to be included in an enterprise agreement should be restricted to terms relating to genuine employment relationship matters.

203. The following comments summarise AFEI's operational experience working with employers undertaking enterprise bargaining under the FWA:

- More than 90 per cent of agreements made do not contain any productivity offsets (including ostensible but not actual offsets) against wage increases as part of the negotiated packages
- Many businesses are unable to increase prices and as a consequence the number of employers taking a minimalist, preventative approach to enterprise bargaining has increased. They are looking to renew existing agreements, with little or no change, at the lowest possible cost. If the only change is in the cost of labour then a corresponding increase in costs and drop in productivity will occur.
- Enterprise bargaining tends to be a response to wage claims or an attempt to rationalise the complexity of awards rather than a mechanism to enhance productivity or expand the business. Employers were more proactive and prepared to be more innovative under the Workplace Relations Act when they were able to negotiate directly with employees. The use of incentive schemes and bonus schemes were more evident.
- Those agreements which do include features that may improve efficiency and therefore potentially increase productivity rarely provide any real measure of labour productivity (output per unit of labour input). These features, such as additional training, skill enhancement, consultation, added recreational time, family friendly work arrangements come at a cost and may not deliver any real savings / efficiencies.
- Many agreements tend to replicate the awards. Unions are not prepared to give up conditions already in awards and yet expect to get additional conditions through enterprise bargaining. Therefore enterprise agreements are not streamlining terms and conditions of employment. It is a standard approach for some unions such as the AMWU and NUW to insist on incorporating the terms of the award in enterprise agreements to counter the possibility of any award changes that might benefit employers.

- The increased consultation requirements regarding changes in hours of work and rosters have substantially reduced flexibility. The loss of employer ability to change hours of work with given notice has been removed from awards and enterprise agreements and now tends to be only by "agreement" of the parties. The requirement to pay part time employees overtime for hours under 38 hours in many awards is insisted on by some FWC members in agreements.
- Flexibility in the workforce has deteriorated under the FWA. The Individual Flexibility Arrangements (IFAs) are substantially modified in enterprise agreements as certain unions restrict their application to a point where they are of no value to either employers or employees. For example IFAs that can only deal with when an employee may take a single day of annual leave.
- Approval by the FWC involves only an examination for purposes of the BOOT and has no concern with productivity or efficiency gains.

204. We have seen first hand the damaging and unsustainable outcomes of enterprise agreements which over time become embedded with increasingly generous entitlements (with no offsets) and inflexible provisions. It is an incremental process, where rates and conditions negotiated previously become the base for the new round. These are built on through successive bargains until their complex and unwieldy provisions (sometimes running to over 130 pages) bear no resemblance to meeting the operating needs of the business. Ultimately the profitability of the business is brought into question and major change required such as downsizing, restructuring or relocating.

205. It is unsurprising that the number of agreements made, and the number of workers covered appears to be declining.[72] In 2013-14 applications made to FWC to approve enterprise agreements declined by 4.7 per cent. This was a second year of decline following a fall of 17.3 per cent in 2012-13.[73]

206. **Legislative reform is required to introduce a bargaining framework which supports employers and employees having genuine choice as to their preferred employment arrangements; being able to negotiate agreements, both enterprise and individual, or have contracts of employment, without third party involvement. In any legislative framework regulating bargaining, the central focus must be the productivity and efficient operation of the enterprise. In particular, it should not be the role or function of the FWC to decide what is a productivity gain or in the best interests of the enterprise. This should always remain the decision of the employer.**

[72] Trends in Enterprise Bargaining September Quarter 2014 Department of Employment https://docs.employment.gov.au/system/files/doc/other/trends_s14.pdf

73 FWC Annual Report 2013-14 page 57

3.2 Bargaining representatives

207. In our experience unions with limited members in particular workplaces have been given and have exercised disproportionate rights during the bargaining process, including obtaining FWC intervention, despite the bargaining process being at an advanced stage with substantial employee approval. Typical examples include unions obtaining a protected action ballot order, or seeking bargaining orders, despite objections from the employers that substantial employee agreement had been reached and that the proposed agreement was due to proceed to a formal ballot. Despite this union disruption the formal ballots typically vindicated the position of the employers.

208. In the childcare sector, unions have adopted the practice of distributing a union enterprise agreement template to centre directors (union members) and centre staff, negotiating agreements through the centre directors who are also to be covered by the agreement. This strategy is to avoid negotiating with the management committees made up of parents in childcare centres, who unions claim have less understanding of these things than centre directors.

209. More than 88 per cent of employees in the private sector are not union members. Despite this, FWA enables unions with a single member at the workplace to effectively unionise negotiations for an agreement. This ease of union access is compounded by the significant legislated status of bargaining representatives including their ability to seek majority support determinations, scope orders, low-paid authorisations, bargaining orders and workplace determinations.

210. A new bargaining regulatory framework is required which does not encourage automatic third party intervention from unions and the FWC and does not set union representation as the default employee bargaining representative in control of the bargaining process. Unions should not be able to initiate bargaining where this is counter to the wishes of non union employees. Employers should not be forced to bargain where they have no interest in doing so. Employers should have more choice in who they are to bargain with, as appropriate for their circumstances.

3.3 Protected Action

211. The Federal government said it would be tough on industrial and strike action when it was promoting the FWA. In decisions such as JJ Richards it has become clear that the legislation operates in a manner which is willing to permit bans, boycotts and picketing — or the threat of them — in circumstances where bargaining has not even commenced.[74] It is now a commonly used union tactic to obtain a protected action ballot very early in the negotiation process or even before negotiations have commenced. The test for such an order should be far more stringent than those applied by the FWC and must include the requirement that a union obtain the majority support of workers before seeking a ballot order.

212. Negotiations must precede an order for a protected action ballot and the principle that industrial action (or threat of) should be a last resort should be paramount in reforming the current legislation.

3.4 Right of Entry

213. The FWA-amended right of entry provisions have allowed, for a greater number of unions, access to more workplaces with the consequent additional time and resources required by management to attend to their requirements.

214. The FWA expanded the right of union access by enabling unions with no members on site to enter workplaces where the union is merely eligible to represent the industrial interests of some of the employees. Apart from the increased complexity this presented for employers, the legislative change has meant that they faced overlap in union representation and the re emergence of demarcation disputes. Further unions have no obligation to identify members or that the member is eligible to be a member of that union.

215. As a consequence the opportunity for unions to gain access to worksites was significantly enhanced under the FWA. Unions should not have a legislative right to visit workplaces where they have no members. At a bare minimum the right of entry provisions in the *Fair Work Amendment Bill 2014* repealing amendments made by the *Fair Work Amendment Act 2013* relating to the default location of union interviews and discussions and reinstating pre-existing rules should be re-introduced. However, considerable reform is needed in this area to have greater balance in the regulation (and a workable means of employer redress) on proof that a union actually has eligible members, permit holder eligibility, notice of visits and their specific purpose, authorised activities, union use and disclosure of information.

[74] *J.J. Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2011] FWAFB 3377

3.5 Individual Flexibility Agreements

216. Individual Flexibility Agreements (IFAs) cannot be described as working to enhance workplace flexibility and productivity. There is general consensus among our members that IFAs are largely irrelevant. Despite their apparent purpose as set out in the Explanatory Memorandum, the provisions in the FWA were drafted with the intention of constraining their use and to ensure they could be readily challenged.

217. There is a high degree of uncertainty about the possibility that IFAs may be deemed non compliant, with potential back pay and penalty payments incurred. FWC decisions on IFAs in agreements show them to be readily constrained by the BOOT.[75]

218. The inability to utilise an IFA at the pre employment stage is an additional limitation on their use for employers.

219. Finally, where unions are involved, the entrenched union opposition to their use frequently comes into play. Unions view IFAs as a vehicle used by employers to alter supposedly sacrosanct minimum conditions including penalty rates, public holiday pay, and annual leave and have worked to prevent their widespread or meaningful use. [76] The terms of an IFA must be decided when the enterprise agreement is being negotiated. Consequently, unions have been able to restrict the scope and application of IFAs as part of enterprise bargaining. It is the employee who is most disadvantaged as the limitations imposed on IFAs do not allow the employer to accommodate employee requests for different arrangements to the employer's usual work schedule and operations.

220. The union approach has not been one of individual flexibility, regarding IFAs as something **to be collectively negotiated and enforced, a "pattern bargaining" approach to so called** flexibility.

221. Balanced and reasonable workplace regulation would have no need for a mechanism such as individual flexibility arrangements. The regulation itself should enable, not constrain, flexibility. Nor should legislation impose an automatic right for employees to be granted flexibility. The term 'flexibility' implies flexibility for the employer when, in practice , it is concerned with giving employees greater choice in hours worked, time off and other work arrangements which can be disruptive for the efficient running of the business. In the current scheme minimum terms and conditions are set so high that there is little capacity to depart from them in a way that would make commercial sense. Further, the limitations on matters which may be contained in an IFA (set by awards and agreements) constrain their use even more.

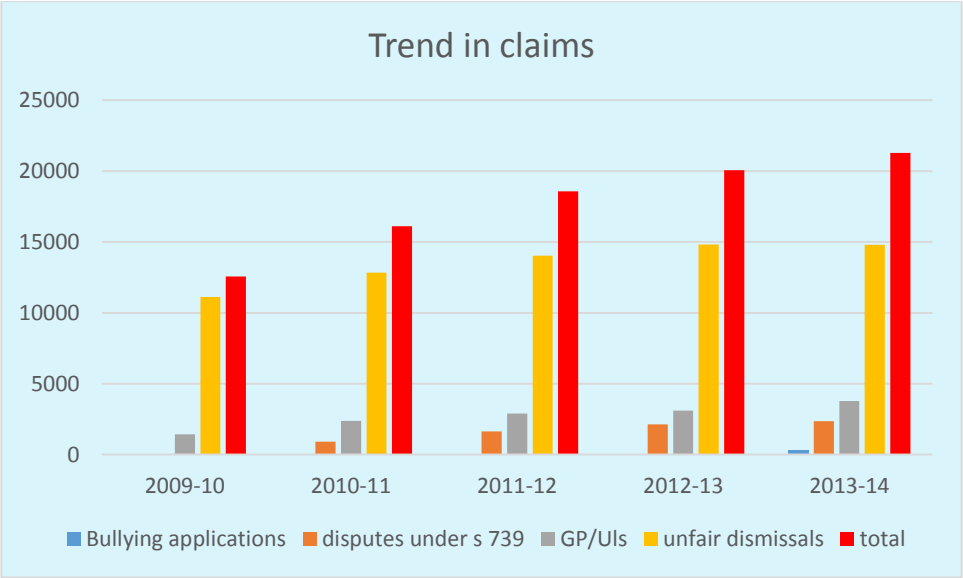
[75] For example http://www.fwa.gov.au/fullbench/2010fwafb2762.htm . The examples provided in the EM do not appear to meet the tests as applied by Fair Work Australia.

[76] ACTU Factsheet August 2010;ACTU The Fair Work Act Two Years On July 2011

SECTION 4: EMPLOYEE PROTECTIONS

4.1 Escalation in Employee Claims

222. Since the introduction of the FWA the industrial landscape has experienced unprecedented growth in the number of employee applications being made for disputes under s.739, general protections/unlawful terminations, unfair dismissal and lately, bullying:.



	2009-10	2010-11	2011-12	2012-13	2013-14
Bullying applications					343
Disputes under s 739		902	1,643	2124	2,366
GP/UD	1,442	2,375	2,901	3,112	3,788
Unfair dismissals	11,116	12,840	14,027	14,818	14,797
Total	12,558	16,117	18,571	20,054	21,294

Source FWA Annual Reports

223. This acceleration in the rate of employee claims is directly related to the increased avenues for disputation provided for under the FWA. Whilst in employment, an individual employee can make the following claims:

a. Application for an order to stop the bullying;

b. Application for the FWC to deal with a general protections dispute on any one of the following grounds the employer or a co-worker has taken or proposes to take adverse action against the person in contravention of ss.340, 323. 344 – 346, 348 – 355, 357 – 359; and

c. Application for the FWC to deal with a dispute in accordance with a dispute settlement procedure contained in a modern award or enterprise agreement about a term of the modern award or the NES.

224. A person who has made an application for the FWC to deal with a general protections dispute is not prevented from making an application for an order to stop bullying. This double jeopardy risk should be removed.

225. Post employment an employee can make:

a. Application for an unfair dismissal remedy; or

b. Application for the FWC to deal with a general protections dispute on any one of the following grounds the employer or a co-worker took take adverse action (usually in the form of termination of employment) for a prohibited reason.

226. The breadth of operational decisions and managerial actions that an employee may challenge, during or post employment, is almost unconstrained by the FWA. Day-to-day decision-making and risk analysis for employers has become extremely difficult because almost any adverse implications flowing from a managerial decision could result in the employer being challenged formally in the Federal Court system or being required to justify their decision to a member of the FWC. As a consequence, Australian businesses cannot adapt or respond quickly to changing market conditions without considerable industrial risk.

4.2 General Protections Disputes

227. The FWA has widened the concept of workplace rights and employee protections for 'lawful industrial activities' to an unbalanced and unreasonable extent. The purpose of this Part of the Act as expressed in the *Fair Work Bill 2009 Explanatory Memorandum* is to 'prohibit a person taking adverse action (defined in 342) against another person in relation to that person's workplace rights'.[77] The breadth of employer actions identified under s.342(1) as adverse or prejudicial to an employee's actual or future employment is excessive, the nature of a 'workplace complaint' is all encompassing. This is compounded by the reversal of the onus of proof, the susceptibility of this Part to abuse by vexatious employees and the additional protections afforded to unions and union members. In short, this is unfair and unbalanced workplace regulation.

228. The operation of this Part stifles effective management in legitimate instances particularly where an employee anticipates management may take disciplinary action for legitimate reasons.

[77] Explanatory Memorandum

4.3 The Nature of a Workplace Complaint

229. The legislative scope of a 'workplace right' under s.341 has significantly widened the protected rights of employees. While s.659(2)(e) of the *Workplace Relations Act 1996* protected employee rights where they would '*have recourse to a competent administrative authority*', employees now have a protected workplace right to make a complaint or inquiry '*in relation to his/her employment*'. Mere questions relating to a person's employment have the potential to found applications by a discontented former employee. Potential for abuse in instances where an employee is legitimately and fairly dismissed is all too great especially where an employee need only recall an inquiry or minor complaint made in the past and manufacture a causal nexus between that 'complaint' and termination. Compounding the grievances of employers is the reverse onus presumption in s.361 of the FWA that the action was taken for that reason or with that intent unless the employer proves otherwise.

230. In an extremely concerning judicial development in December 2014, a Full Court of the Federal Court in *Shea v EnergyAustralia Services Pty Ltd*[78] cautioned against adopting an interpretation of s.341 that would:

> 'inhibit an employee's ability to freely exercise the important statutory right to make a "*complaint*". To too readily imply into the language of ss 340 and 341 the necessity for a complaint to be a "*genuine*" complaint, necessarily would be productive of argument about whether a "*complaint*" is bona fide and may serve to discourage those who may well have mixed motives for making a complaint.'[79]

231. Accordingly, there is no need for an employee to themselves genuinely believe in the truth of the matter communicated in the grievance for the employee to be protected by s.340 from any employer response action. In practice, this means that disciplining an employee for knowingly making a false, misleading or vexatious application is practically prohibited by s.340 and it may attract civil penalties. This leaves employers almost impotent in effectively responding to opportunistic and litigious employees.

232. The FWC is inadequately empowered under this Part of the FWA to deal with frivolous and vexatious applications or applications lacking in substance. There is no legislative empowerment for the FWC to dismiss applications. Whilst s. 370 of the FWA imposes an obligation on the FWC to advise the parties where, based on the material before it, it appears one party has no reasonable prospects of success, in our experience the FWC has never advised an applicant in accordance with this section. On one occasion, despite glaring deficiencies in an applicant's case, a

[78] [2014] FCAFC 167

[79] Ibid, 12.

member of the FWC advised a respondent employer to resolve the matter by payment of a significant sum of money based on the '***vibe***' of the matter.

233. There is no legislative power conferred on the FWC to dismiss general protections applications. This means that such applications can progress to the Federal Court or the Federal Magistrates Court; a costly and time consuming process to have such applications dismissed. While costs can be awarded, in practice they rarely are.

234. The inefficiency stemming from such legislative impotence is ultimately highly prejudicial, costly and unfair for employers who are the object of unmeritorious applications.

Interaction with Unfair Dismissal

235. The looming potential for an Application under Part 3-1 has the capacity to undermine a legitimate and procedurally fair performance management process that has taken into account the matter raised in s.387 *Criteria for Considering Harshness*, Part 3-2. Terminating an employee's employment for underperformance has become a highly involved and uncertain exercise for employers. The performance management process itself and the managers responsible for implementing it are vulnerable to complaints by the employee who is subject to a performance management process.

236. The inherent problem with the legislative framework (Part 3-1 and Part 3-2) stems from the ability of an employee or former employee to link performance management and/or the resulting termination with a complaint or inquiry they may or may not have made during their employment. Even if the performance management process was procedurally and substantively fair, it is all too easy for an employee to claim that the employer instigated or continued the process for a prohibited reason. Yet again, the reverse onus of proof in s.361 compounds the legislatively preserved bias within the FWA in favour of employees.

4.4 Disputes in relation to a term of an award, agreement or the NES

237. The FWA provides that modern awards and enterprise agreements must include a term providing a procedure for settling disputes about matters arising under a modern award or enterprise agreement and in relation to the NES.[80]

238. S.739 of the FWA sets out what the FWC can and cannot do when dealing with disputes under a term of a modern award, enterprise agreement or contract of employment. S.739 (3) provides that the FWC must not exercise any powers limited by the term of the dispute resolution clause.

239. S.146 and s.186 of the FWA contain clear parameters for the types of disputes that can be submitted to compulsory conciliation before the FWC. According to these sections a dispute must be in relation to the term of a modern award or enterprise agreement or in relation to the NES.

240. The practical effect of these FWA provisions has been the expansion of the means by which unions and workers can bring matters before a member of the FWC almost without limitation. Unions frequently lodge disputes without even notifying the employer of the matter under contention or observing their obligations under the FWA or the award. Further they bring matters, which are accepted by the tribunal although precluded by the legislation.

241. Employment matters such as disciplinary measures have been notified to the FWC as disputes about matters arising under a modern award. This has resulted in costly conciliation conferences as part of the FWA dispute resolution procedures about matters which are beyond the jurisdiction of the FWC. This process fails to meet the FWA Objects to provide laws that are '*flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity*'.

242. AFEI's experiences have included compulsory conciliation conferences where the employer is made to defend applications by employees:

- claiming to be unfairly treated during a disciplinary investigation;
- having been given a warning;
- seeking to have the contract of employment varied to accommodate a graduated return to work from a non compensable injury;
- seeking to obtain the FWC's advice on the reasonableness of terms offered in a deed of release.

[80] FWA s 146 and s 186

243. More recently employers are served with notices to participate in conciliation procedures instigated by employees or their representatives with no examination of the merit or even jurisdictional issues before the FWC proceeds to conciliate. Employers are given no opportunity or mechanism to challenge the application; they are simply directed into conciliation and the onus is on them, not the applicant, to argue jurisdictional or merit grounds.

244. Applicants do not have to define the dispute and, frequently, there is no consideration of the powers of the FWC to make a recommendation or issue an order before doing so. Indeed there is no longer any opportunity for a respondent to provide a written reply to an Application for the Commission to Deal with a Dispute Settlement Procedure[81] with the FWC removing the requirement for a respondent to file a response via the implementation of Fair Work Commission Rules 2013.

245. The FWC member facilitates s.739 disputes without any information from the respondent as to the facts of the matter. Rather than adopting a conciliatory approach, employers are more often confronted by Commissioners attempting to analyse facts and circumstances on the day, providing advice on their own views about 'best practice' and encouraging parties to accept their recommendations.

246. If unable to resolve the dispute at conciliation, the Commissioner encourages parties to attend further conciliations rather than addressing the threshold jurisdictional issue. (A respondent raising an issue of jurisdiction with the FWC in writing prior to the conference was chastised for providing a written submission outside of directions).

247. Respondents in such situations have been pressured to agree to arrangements in these disputes that are unsuitable from a managerial or business perspective.

248. A similar situation has arisen in the intersection of obligations under work health safety laws and the FWA. An employee subject to performance management and an investigation successfully relied on a provision in the enterprise agreement to provide a "safe and healthy workplace" to bring the dispute before the FWC.[82] The worker alleged that she was harassed by her supervisor and this and the performance management led to her becoming ill and taking time off work. The FWC held that, because the employee had needed to take sick leave, that justified the claim being made in relation to the clause in the agreement, which stated the employer's commitment to maintain a safe workplace. The FWC held this resulted in an obligation on all employees to ensure that their behaviour does not endanger the safety or wellbeing of other employees. Hence the dispute was said to be within the domain of the agreement and therefore within jurisdiction.

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[81] Form F10.

[82] Coralynn Brewer v Suncorp Staff Pty Limited [2011] FWA 7334, (22 December 2011)

249. Employers are generally extremely cautious when undertaking performance management given the high probability of a costly workers compensation claim being made for "stress" (now generally described as an anxiety disorder), a claim for harassment or an adverse action claim. With these multiple avenues of redress, effective workplace management of problem employees is severely constrained.

250. The general protections provisions applying in Australian workplaces are unbalanced and are in need of review and significant reform. They have encouraged speculative claims and forum shopping as employee (and applicant lawyer) awareness of these provisions widens. The definition of "workplace right" is sufficiently broad to encompass any action taken by an employer in relation to an employee. Employers bear the onus of discharging the reverse onus of proof and bear the substantial costs of investigation and litigation. In addition to the productivity loss caused by such claims, there is productivity loss arising from defensive measures of the part of employers to avoid or minimise claims arising.

4.5 Unfair Dismissal

251. Increasingly employer confidence in the FWA has declined as the management and decisions in cases throw up increasing problems and inconsistencies. They do not view its operations as neutral or impartial. A cursory examination of the FWC website demonstrates the extensive information and assistance available to employees including information on all available avenues through which they may seek redress for their complaint.

252. The process is being de-formalised to the extent that claims are made with little or no information at all concerning the applicant's version of the dismissal and the reasons for the application. In our experience employers are often left with an obligation to provide a written response, according to the FWA's rules, to an application devoid of meaningful information. Despite the paucity of information frequently provided the FWC is able to proceed with the matter. The continual increase in unfair dismissal applications since the commencement of the FWA is not surprising given the extent to which the process is promoted by the FWC.

253. Our members report significant difficulties with FWA dismissal procedures. Our extensive consultation with members in February 2015 revealed that:

Table 1: Employer views on unfair dismissal under the FWA

	Strongly Agree	Agree	Neither Agree nor Disagree	Disagree	Strongly Disagree
We can't dismiss unsatisfactory employees and hire those better suited to our organisation because of the unfair dismissal laws.	27%	33%	14%	18%	8%
The required processes for performance management and disciplinary procedures to avoid unfair dismissal claims are resource intensive, time consuming and almost impossible to get right.	35%	41%	8%	12%	4%
Managing a poorly performing employee involves a significant loss of our organisation's productive time.	38%	44%	10%	4%	4%
The Small Business Fair Dismissal code is not easy to comply with.	12%	29%	49%	10%	0%

254. The problems with the unfair dismissal regime include the time, burden and cost for the employer, the minimal disincentive for employees making a claim, the interaction with workers compensation, the interaction with adverse action and bullying jurisdictions, discrimination laws, and the widespread belief that the balance of employment law has shifted too far in favour of the employee. Apart from diverting management resources away from running the business, members report that these claims adversely affect other employees and protect poor performers. These problems require substantial changes to the law and its application by the FWC.

255. According to the Explanatory Memorandum, the current legislative provisions were to balance the rights of employees to be protected from unfair dismissal with the need for employers, particularly small business, to fairly and efficiently manage their workforce.[83]

256. Small businesses were to receive some protection under the new legislation, acknowledging that small businesses do not have human resources departments and other resources to deal with employment matters.[84]

257. The regulatory impact of the law was anticipated to reduce the number of unfair dismissals – that the presence of the law would provide an incentive for employers not to unfairly dismiss workers because of the legal consequences of doing so.[85] Further, the FWA provisions were intended to reflect Labor's policy there would be no 'go away money'.[86]

[83] Explanatory Memorandum *Fair Work Bill 2008 page 5*

[84] Explanatory Memorandum *Fair Work Bill 2008*, r225, pxlvii

[85] Explanatory Memorandum *Fair Work Bill 2008*, r230, page xlviii

[86] ALP Forward With Fairness Policy Implementation Plan page 18

258. The legislation has not operated as to produce these outcomes or those anticipated in the explanatory memorandum accompanying its introduction:

> *While the 6,707 figure [lodgement of claims concerning termination 2005] was at a time prior to the expansion of the federal system under Work Choices, the department expects this figure to remain relatively stable due to the introduction of the Small Business Fair Dismissal Code and the reduction of the time limit to lodge an unfair dismissal claim from 21 days to 7 days which will contract the window of opportunity for dismissed employees to lodge a claim.*[87]

259. By 2011-12 unfair dismissal claims exceeded 14,000; by 2013-14 they were fast approaching 15,000 per annum.[88] The 7 day restriction on applications had been extended to 21 days.[89] An applicant has merely to notify the FWC by telephone that they intend to lodge an unfair dismissal application. They then have a further 14 days to provide the necessary paperwork, which need provide only the most rudimentary detail. The FWC has the power to extend the period for lodging an application in exceptional circumstances and frequently does so, though one may wonder how exceptional "exceptional" circumstances are. [90]

260. Supporters of fewer restrictions on the ability to make unfair dismissal claims point to the small proportion of the workforce who are claimants.[91] This is not an indicator or measure of where the burden of unfair dismissal proof and cost lie. Further, defenders of making unfair dismissal more "accessible" point to the number of conciliated (usually by telephone) claims that are settled for relatively low amounts of money under the FWA as a measure of the low cost of unfair dismissal and hence the successful operation of the FWA unfair dismissal provisions. From our experience of unfair dismissal cases, the increased number of claims is a reflection of the return to a legislative scheme and tribunal procedures and practices which have encouraged these "go away money" payments. From the employer's perspective the cost of defending the claim and the massive time commitment by company management will weigh heavily in the decision to settle. Simple economics dictates that this will be the outcome of most conciliations. In 2012-14, 80 per cent of claims were settled via the conciliation process, with 60 per cent involving monetary compensation. Reinstatement was the outcome in less than 0.3 per cent of cases.

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[87] Explanatory Memorandum *Fair Work Bill 2008, r.251* page lii

[88] FWA Annual Report 2013-14

[89] Fair Work Amendment Act 2012

[90] BananaCoast Credit Union Limited v C and others [2012] FWAFB 10165 (4 December 2012); [2015] FWCFB 521 Ms Sarina Galati v Veneto Club (C2014/8162); Denny v Fulton Hogan [2015]; FWC 672;Bradlet Van Moolenbroek v Hastings Deering Australia Lts (C2015/1519)

[91] Australian Council of Trade Unions *The Fair Work Act two years on, A review of Labour's changes to workplace laws*, 2011, p22

Table 2: Conciliation outcomes for 1 July 2013 to 30 June 2014 [92]

Result type	Year to date total	Year to date %
Settlements involving money	6,607	100
$0–$999	460	7
$1,000–$,1999	1,010	15
$2,000–$3,999	1,786	27
$4,000–$5,999	1,275	19
$6,000–$7,999	741	11
$8,000–$9,999	406	6
$10,000–$14,999	556	8
$15,000–$19,999	172	3
$20,000–$29,999	141	2
$30,000–$39,999	43	1
$40,000–maximum amount	14	0
>maximum amount	3	0

261. Of the 20 per cent of claims which proceed to arbitration (1,200 of 14,797 initial applications) 70 per cent are dismissed. Of the 175 arbitrated cases where the application was granted and compensation paid, only 14 claims were awarded $40,000 up to the maximum amount. [93] Considered together these statistics provide an insight into the operation of the FWA unfair dismissal system. They demonstrate that the many claims by employees would not be successful if they proceeded to arbitration. Claimants appear to be aware of this as FWC research shows around 44 per cent believe that they would not be successful if their claim went beyond conciliation.[94]

262. The research also indicated that settling the matter quickly to avoid any future costs was a large consideration for the majority of respondents as well as applicants.[95]

263. In our experience the majority of conciliations are settled for less than four weeks wages as one of the biggest considerations for employers was to get the matter finalised in the most cost effective way and get back to running the business despite having valid reasons for termination. Unsurprisingly the FWC research shows a high level of respondent satisfaction with the conciliation process as it allows the matter to be expedited quickly.[96] The real issue is that in many cases the FWC has not operated to properly prevent claims without jurisdiction or merit being conciliated, or even moving beyond conciliation to arbitration.

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[92] *FWC Conciliation results for 1 July 2013 to 30 June 2014* https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/results-outcomes

[93] FWA Annual Reports 2012- 2014 table K9- K11

[94] *Fair Work Australia Unfair Dismissal Conciliation Research Survey Results,* November 2010

[95] FWA op cit

[96] *Fair Work Australia Unfair Dismissal Conciliation Research Survey Results,* November 2010

264. Our members have been confronted with “offers to settle” even before termination of employment has occurred. Where workers are undergoing performance management or are facing disciplinary action and dismissal is a likely outcome, requests are made to pay out the worker with additional amounts to “compensate” for an unfair dismissal claim not being made.

265. The legislation does not provide adequate protection for businesses from spurious claims. There is no screening process and many applications do not have a sound basis for proceeding. The FWC does not adequately protect employers against frivolous and vexatious claims which cost them money and time away from their business.

266. Employers are subject to all manner of pressures in running their businesses. This means they need to be able to safely dismiss employees, especially underperforming employees without having to go through a long drawn out process which does further harm to the business.

267. These matters represent a considerable drain on the efficient running of the organisation and high opportunity costs. In small businesses where the owner usually does much of the administrative work, spending time obtaining advice, preparing for, attending conciliation and the post clean-up can take weeks out of time which would have been spent running the business.

268. In larger businesses effort will have been expended by more specialist staff who will have been required to undertake the process of performance management, including counselling, warning, retraining and additional supervision and so on. Investigations and evidence have to be gathered and records maintained.

269. In accepting a headline figure of compensation at conciliation as the measure of the cost of unfair dismissal, no account is taken of the allocation of resources to manage the dismissal process, the disruption to business, engagement of outside advisers or consultants and the costly process of re engaging a new worker.

270. A typical example of “go away” costs is a case with a conciliated settlement of $1,000, the actual costs to the employer exceeding $7,000 which included payment of an external consultant to assist with the matter, the cost of one of the directors taking out around 50 hours of their time including the paperwork, meetings and subsequent attempts to get the employee to sign the deed of release to which they had agreed at the conciliation.

271. Member comments on Unfair Dismissal

- *The unfair dismissal process is highly weighted towards the employee. Even if the employee's claim of unfair dismissal can be refuted by/via the employer's response, the employer is often left with the choice of throwing money at the employee to make the matter go away or spending even more money in legal fees to continue to fight the matter.*
- *The Conciliator does not appear to have the power to dismiss the matter; it comes down to a matter of telling the employer to come to an 'agreement' with the employee. Employees soon learn that they have nothing to lose in lodging an unfair dismissal application (other than the application fee) and may come out of it with several week's pay. This is often a costly and time consuming exercise.*
- *Unfair dismissal decisions made by the Tribunal are inconsistent and it is quite clear some members are pro-worker no matter what. As a result, decisions, from the employers perspective, as to whether to proceed to a hearing are based on managing risks and costs and are not based on consideration of the validity of the case.*
- *The primary difficulty with the Fair Work Act is that it's only fair to the non-performing worker. Whenever we attempt to discipline or even terminate poorly performing employees Fair Work sides with the worker.*

  Once a worker has made a claim with Fair Work (Unfair Dismissal, Adverse Action or Bullying) they don't need any evidence. In fact they don't need anything to support their claim. They can simply lie, or imply that things occurred and regardless of their performance or unacceptable behaviour towards other workers they have all the rights and we as the employer and their workmates have none.

  Furthermore, were there damages awarded for vexatious or frivolous claims in all matters then there would be a significant reduction in claims as there is absolutely no recourse for employers in these matters. We are expected to expend resources and funds to defend ourselves yet there is no cost to the applicants.

  My preference would be for a review panel when claims are made to decide the merits (on evidence) and likelihood of success. Once that was established then the claim could go forward. In addition, there needs to be some sort of financial recourse for employers to recover the cost of their defence as well as censure of applicants who make vexatious and frivolous claims as I'm sure there are many that are regular users of the Fair Work system.
- *Businesses/Employers don't dismiss people for the sake of it. They dismiss people because they have not proven themselves to be suitable for the type of work they were employed to carry out. Remove these restrictions.*
- *We also find that poor performing staff will hide behind a bullying allegation when being performance managed and/or make a complaint regarding a pay rate or award interpretation so as to use this as the reason for termination and make a claim of unfair dismissal. We are currently in the middle of a FWC claim that has been ongoing for six months with several staff making a multitude of different claims regarding the interpretation of the award, currently no claim has been successful as each have been dismissed by the Commissioner. We have had to defend each one with submissions and counter submissions including interviews with staff which is very time consuming.*

Valid reason but dismissal was harsh, unjust or unreasonable

272. The FWA unfair dismissal provisions have operated to afford a wider range of avenues of redress for workers who have been dismissed because of circumstances which are beyond the control of the employer. Employers are found to have a valid reason for dismissal and to have been procedurally fair but the dismissal is harsh. Reliance on s 387 (h) is increasingly evident.[97] The outcome is that employers are compelled to retain (or compensate) unsatisfactory and unsuitable workers for reasons which have little or no connection with their operations or are unrelated to measures which an employer could take to improve the performance and productivity of the worker. This level of intervention over employment practices in workplaces acts as a disincentive to employ and restricts hiring of workers who are better suited to the needs of the business.

273. According to the government at the time of their introduction the FWA unfair dismissal laws were designed to "*enable employers to manage underperforming employees with fairness and confidence*".[98]

274. It is evident that the laws have not achieved this objective. Employers cannot diligently manage underperforming staff with any confidence that they will not be subject to claims for unfair dismissal, adverse action, workers compensation a dispute notification or a bullying claim. They are constrained in the extent to which they can take measures to enforce compliance with other legislated obligations such as work health and safety and discrimination.[99] An example of the standard to be met is provided in *Ms A v The Commonwealth of Australia, represented by Centrelink*[100] in which the employer went to exhaustive lengths to properly performance manage the employee over an extended period of time. The measures taken and the time involved for the employer in this case are simply not feasible for the vast majority of businesses. Yet business have to afford extensive procedural fairness to poorly performing or problem employees, at considerable cost to the organisation and other employees.[101]

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[97] *Richards v Regional Express Holdings Ltd t/a REX Airlines* [2010] FWA 4230
Black v Commonwealth of Australia (Department of Defence) [2011] FWA 293
Murphy v Patrick Stevedores Holdings P/L [2011] FWA 6458; *Notman v Neway Transport* [2011] FWA 5162 ;*Daley v GWA Group Ltd t/a Dux Hot Water* [2011] FWA 6993
Quinlivan v Norske Skog Paper Mills (Australia) [2010] FWA 883; [2014] FWC 9309 Harley SchofieldvBroadmeadow Mine Services Pty Ltd(U2014/1271)Mark Winterton v Broadmeadow Mine Services Pty Ltd (U2014/1272); [2014] FWC 7597 *Anthony Davey v JR Bulk Liquid Transport T/A BLU Logistics Solutions (U2014/7673); [2014] FWC 6924 Todd Smythe (U2014/10027) Daniel Massey (U2014/10198)v Hansen Yuncken Pty Ltd; [2014] FWC 2277 Mr Nejat (Paul) Agas v BlueScope Steel Limited (U2013/2656); [2014] FWC 5894 Lance Camilleri v IBM Australia Limited (U2014/5954);* Harley Schofield v Broadmeadow Mine Services Pty Ltd; Mark Winterton v Broadmeadow Mine Services Pty Ltd [2014] FWC 9309 (24 December 2014); Cannan and Fuller v Nyrstar Hobart Pty Ltd [2014] FWC 5072 (19 September 2014); Farmer v KDR Victoria Pty Ltd T/A Yarra Trams [2014] FWC 6539 (22 September 2014)

[98] Second reading speech Hansard 11193

[99] *Stutsel v Linfox Australia Pty Ltd [2011] FWA 844; IGAdistribution (VIC)Pty Ltd vcong Nguyen [2011] FWAFB4070; Glennon v Collins Food Group Ltd t/Sizzler Cairs [2011] FWA 6043*

[100] *[2011] FWA 3532*

[101] Egerton v Australian Laboratory Services P/L t/a ALS *[2014] FWC 5994 (1 September 2014);* Crowley v Qantas Airways Limited [2014] FWC 5587 (21 August 2014); Jurisic v ABB Australia P/L [2014] FWC 4018 (25 July 2014); Punitam v The Salvation Army South Australia Property Trust t/a Salvos Stores[2014] FWC 4929 (24 July 2014)

275. The procedural fairness requirements are routinely used to reinstate or compensate workers in cases where a valid reason for termination was established.[102] It appears that irrespective of the size of the organisation and the level of risk, damage and cost to the employing organisation, these will be outweighed by the virtues of procedural fairness.

Interaction of FWA with remedies in other jurisdictions

276. A number of state laws and subject matters are specifically excluded from the operation of the FWA.[103] This includes workers compensation and occupational (work) health and safety legislation. As a consequence workers may access remedies in other jurisdictions. For example the Industrial Court of NSW has rejected an employer's attempt to stop an ex employee seeking reinstatement under state workers compensation law. The worker had already unsuccessfully applied for unfair dismissal and reinstatement two years earlier.[104] Similarly, the NSW Industrial Court ordered the reinstatement of a plant operator without payment for lost wages after he committed a serious safety breach by failing to follow an isolation procedure.[105] These cases demonstrate both the avenues provided by the FWA to forum shop for applicant remedy and the complex regulatory environment faced by employers.

4.6 The Small Business Code

277. Special arrangements for small business have been provided in the FWA in the form of a Small Business Code (the Code). Employer compliance with the Code does not prevent an employee from claiming unfair dismissal. If a claim is made against a small-business employer the FWC will then assess the employer's performance in achieving compliance with the Code. In practice the Code demands the same standard of compliance from small employers as large employers.

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[102] See for example *Francis v Kalgoorlie Consolidated Gold Mines P/L* [2010] FWA 5472; *Bolger v Shamrock Consultancy P/L t/a Allied Express* [2010] FWA 6723; *Richards v Regional Express Holdings Ltd t/a REX Airlines* [2010] FWA 4230; *Brown v KS Freighters P/L* [2010] FWA 1424;
Wilson v Nestle Australia Ltd t/a Uncle Tobys [2010] FWA 4744; *Nassis v Calstores P/L* [2011] FWA 2031; *Albert v Techni-clean Australia* [2011] FWA 2665;*Shannon Dawson v Railway Transport Services P/L t/a Cartage Australia [2011] FWA 4915*; *Miralles v Epic Security P/L t/a Epic Security* [2011] FWA 4838; *Blackford v Bamboo Direct P/L* [2011] FWA 7124; *Serafini v Holcim (Australia) P/L* [2011 FWA 4214; *Quinlivan v Norske Skog Paper Mills (Australia) Ltd* [2010] FWA 883

[103] FWA s 30A

[104] ACI Operations Pty Ltd v Field [2011] NSWIRComm 5 (workers compensation) Field v ACI Operations Pty Ltd [2008] AIRC 788 (unfair dismissal).

[105] *Helmut Schuster v Australian Steel Mill Services Pty* [2011] NSWIRComm 1028

278. For small employers, assessment of their compliance with the Code will involve interpretation on what amounts to a 'reasonable opportunity to improve', the sufficiency of a verbal or written warning, and whether an employer had 'reasonable grounds' to decide that instant dismissal was warranted. If FWC finds the employer is non compliant, the claim is treated as any other unfair dismissal claim.

279. According to the Code, it is fair for an employer to dismiss an employee without notice or warning when the employer believes on "reasonable grounds" that the employee's conduct is sufficiently serious to justify immediate dismissal.

280. For a summary dismissal to be deemed fair it is expected that an allegation of theft, fraud or violence be reported to the police. The Code adds: "*Of course, the employer must have reasonable grounds for making the report.*"[106] However, to add to the uncertainty employers face, the test required under the Small Business Fair Dismissal Code does not appear to be that a formal complaint is made.[107]

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

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

283. The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to "rectify the problem", having regard to the employee's response.

284. "Rectifying the problem" according to the FWC might involve the employer providing measures such as additional training, supervision and ensuring the employee knows the employer's job expectations. These requirements are the same as for large employers.

285. In considering if the dismissal was harsh, unjust or unreasonable the small employer is subject to a detailed assessment of the criteria in the Code which is inherently similar to that set out in s.387 of the FWA.[108]

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[106] FWA Guide to Unfair Dismissal

[107] Narong Khammaneechan v Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Café [2010] FWA 7891; Kirsty Clavell v Kerries Snack Bar (U2014/4624) Mr Mark Coughlan v Mackay CC Pty Ltd T/A Trend Interiors Carpet Court(U2013/12999)

[108] See for example *Spencer v Local Blue Pages* [2010] FWA 2415; *Ramsay v AVA Systems P/L* [2010] FWA 7448; *Kune v South Eastern Group of Melbourne Legacy* [2011] FWA 1680; [2013] FWC 6702 Richard Barker v PMD Australia Pty Ltd T/A Production Machinery Development Australia;[2013] FWC 430 Juy Hepner v Fine Food Solutionz Pty Ltd; [2014] FWC 7849 Marcel Russig v Coletti Corp Pty Ltd as Trustee for the Coletti Family Trust T/A Coletti Refrigeration (U2014/12596); 2014] FWC 6779 Iris Curtis v Oxford Dental Practice(U2014/10725); 2014] FWC 6350 Mr Carlos Sotelo vCreative Events (Vic) Pty Ltd T/A Eltham Tea House; [2014] FWC 6041 Rodney Maclure v Stottys Pty Ltd T/A Victor Tyrepower

286. It is significant that small business employers are required to plead and satisfy a member of the FWC at a jurisdictional hearing that they have complied with the code in order to avoid defending an Unfair Dismissal Application. Whilst in theory a jurisdictional hearing addresses the jurisdictional questions only, demonstrating compliance with the Code in practice, amounts to pleading a defence to an unfair dismissal application by an employer of a 'large' business.

287. For small employers having to retrench workers means they must meet the requirements for determining whether a dismissal was a genuine redundancy contained in s.389 of the FWA.[109]

288. The Code does not provide any protection for employers against applications without merit or jurisdiction being made by employees.

289. There are numerous cases where the employee has not completed the minimum employment period and the FWC has dismissed the matter due to lack of jurisdiction.[110] The cost to small businesses have still been incurred by this point and although the matters are dismissed, the ability to recover the costs is almost non-existent.

290. The unfair dismissal regime is in need of major reform. At the very least, to remove its most time consuming and unproductive constraints on the employment relationship, the following measures need to be taken:

- **The unfair dismissal jurisdiction should be moved to a new, specialist workplace dispute body as part of the reform of the institutions regulating the workplace;**
- **This should be a no costs regime;**
- **The legislative scheme should provide that where there is a valid reason for dismissal no further tests are required;**
- **Effective rigorous screening of non meritorious claims and claims beyond jurisdiction should be a key feature with strict adherence to notification, provision of sufficient information and filing procedures and time restrictions on the part of the applicant must be required;**
- **Reinstatement should be awarded only where both parties consent.**

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[109] Powell v RV Bus Modifications P/L [2010] FWA 9505; *[2014] FWC 5713 Ms Yoon Jeong (known as Joanne) Ho v Double Trading Pty Ltd T/A Windmill Toys (U2014/753;* [*2014] FWC 5327Mr Glenn Campbell v Hindmarsh McDonald Pty Ltd - First Respondent Eastern Accounting Pty Ltd - Second Respondent)*

[110] See for example Small Business cases:
McGavin v Port Kennedy RSL and Services Social Club Inc [2010] FWA 2755
Adams v Condamine Catchment Natural Resource Management Corporation Ltd [2010] FWA 5374; *Ho v Horizon Iris P/L t/a Forbes Hotel* [2010] FWA 9329;
Swan v Innovative Hair Solutions [2011] FWA 328;*Mate v SSND P/L t/a Southern Sydney Newspapers Distribution* [2011] FWA 414;*Zabrdac v Tansclean Facilities P/L* [2011] FWA 4492;*Bedford v Innovative Hairloss Solutions* [2011] FWA 5625; *Walsh v Reol t/a Reol Central* [2011] FWA 8902;*Dogru v Peel Manor House* [2011] FWA 5120;*Tebble v Rizmas P/L* [2011] FWA 6853;*Lahoud v Ox Metal Fabrication P/L* [2011] FWA 6963;*Keyte v AMBD P/L t/a Local Blue Pages* [2011] FWA 8804;*Myburgh v Variety NSW the Childrens Charity* [2011] FWA 7925.
FWA 5787;*Westerink v Goldfields Baptist College* [2011] FWA 8093;*Harrison v Imperial Management Queensland P/L t/a Pacific Red Produce* [2011] FWA 8099;*Demiroz v Ashop Commerce P/L* [2011] FWA 6722;*Ryan v Kal Tyre (Australia) P/L* [2011] FWA 6336

4.7 The Bullying Jurisdiction

291. AFEI considers this Inquiry should pay close attention to the impact this jurisdiction is having on the efficient and effective management of workplaces. We see first-hand, on a daily basis, the time and resources management must expend in addressing allegations of workplace bullying. These have increased significantly over the past 15 months since the introduction of the FWA anti bullying provisions, which have also been accompanied by a raft of regulatory material published by work health safety regulators.

292. Those bullying claims made to FWC or in workers compensation schemes are the "tip of the iceberg" in terms of the extent of bullying allegations made in workplaces. Despite legislators attempting to confine the extent of allegations by having specific definitions of what constitutes bullying, workers are largely unaware of any such restrictions. Consequently, myriad claims are made, all of which must be properly addressed by the employer who must investigate the claim and attempt to take preventative measures to minimise its escalation. This involves gathering relevant information, interviewing the claimant and alleged perpetrators, frequently requiring the services of an independent investigator.

293. All this diverts managerial attention from the needs of the business as well as distracting workers from their usual duties. Regulators insist that employers can protect themselves by having anti bullying policies in place, training and educating workers and supervisors, ensuring that the workplace is properly resourced. In our experience, no employer, regardless of resources expended and policies and procedures in place is immune from a bullying claim. Usually the claimant makes a workers compensation claim for psychological injury at the same time. Both are expensive and time consuming, even without the involvement of the FWC.

294. Managing bullying claims is a common issue for our members. They consistently report that the complaint was found not to be bullying, instead the allegation was used by the employee to

- disrupt performance management
- disrupt disciplinary action
- object to a management decision about work
- deal with an interpersonal conflict or workplace discontent

295. Employers frequently confront the costly and difficult to manage situation where a workplace investigation into a bullying claim has been undertaken, the worker has been found not to have been bullied, yet the workers compensation claim for psychological injury caused by alleged bullying at work has been accepted by the

workers compensation scheme. These are expensive and usually lengthy claims, the costs of which are reflected in the employer's significantly increased premiums.

296. One member's comments on bullying claims typify our members' experiences in general:

> *"Workers compensation claims for psychological injury caused by bullying are accepted even where the workplace investigation found no bullying had occurred" – this occurred in our service. The evidence did not support bullying – in fact the employee was found by the investigator to have categorically and undeniably to have lied in his statements. However, as the employee "felt" bullied and this could not be disputed the claim by the employee was upheld. This caused serious distress to the innocent staff this employee accused of bullying"*

297. Claims for stop bullying orders in the FWC raise the effort and costs to be expended to an even higher level. Applications accepted by the FWC as requiring investigation and resolution are treated as disputes to be mediated/conciliated by members of the Commission, often with further investigation, with a view to the parties reaching written agreement. This may involve mediation, conciliation conferences, hearings and orders.

298. The FWC has set out the detailed procedures to be followed and provides the forms to be completed by applicants and those named in the application. The FWC can serve copies of applications and seek written responses from employers and all alleged perpetrators named in an application. It can also require the (at times, numerous) alleged perpetrators to provide their written responses to the applicant and every other party. Employers and any persons the applicant names as an alleged bully are required to prepare evidence as witness statements and submissions and attend any mediation, conference or hearing.

299. Under the FWC's procedures, the first an employer might hear of an allegation against the employer/manager or another employee or a customer of, or contractor to, the business of the employer, is a notification from the FWC containing details of the allegation. If there are multiple alleged perpetrators, each of them may receive such a notice. There are clear potential legal risks and other consequences for employers in managing the ramifications of these notifications in the workplace.

300. Irrespective of any consideration of guilt, the process itself destabilises the workplace. First the notice, containing the kind of detail that can fuel workplace conflict and cause further division. Then the debate about whether what has happened is bullying, an interpersonal disagreement, an unreasonable expectation by an employee, or the reasonable exercise of managerial discretion. All such issues are at large under this jurisdiction.

301. The FWC has released its third quarterly anti bullying report. When combined with earlier reports, the data indicates that in the first nine months of the bullying jurisdiction's operation 532 applications for stop bullying orders have been made by workers. Only one order has been issued.

302. The bulk of applications (173) were withdrawn early in the case management process or prior to proceedings commencing. A further 164 were withdrawn after a conference or hearing but before a decision. Of the 36 applications which were finalised by a decision, 35 were dismissed because they were found to have no reasonable prospect of success or were not made in accordance with the FWA. In many of these cases, proceedings went on for some months, tying up the business while the FWC affords the applicant every opportunity to make their case, only to finally dismiss the matter.[111]

303. We have no aggregate data on the terms of settlement of these claims in the case management process, however, we are aware that many employers are paying "go away money" (as in the unfair dismissal jurisdiction) to avoid costly and lengthy disputes and before they escalate to the FWC.

304. FWC stop bullying orders are not a replacement for penalties enforceable under WHS and criminal legislation which may be additionally sought and are not intended to preclude investigation and prosecutions under WHS and criminal law.

305. Further, making a bullying complaint to the FWC will constitute exercising a 'workplace right' by an employee for the purposes of the adverse action provisions of the FWA. An employee may make both an adverse action application and bullying application, in addition to seeking redress under other legislation. Workers are readily utilising these provisions in circumstances where bullying or harassment allegations are made.

306. An employee can lodge a claim with the FWC at the same time as informing employer that they consider they are subject to bullying. Any investigation, remedial measures, etc., instigated by the employer on their own initiative will be subject to the review and control of the FWC. The tribunal can require submissions, documents, records or other information; require a person to attend before it; take evidence under oath; conduct an inquiry; conduct a conference; or hold a hearing. Any employer actions will be subject to these proceedings, an outcome which cannot be described as focussed on "*resolving the matter and enabling normal working relationships to resume*".[112]

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[111] Olusegun Victor Obatoki v Mallee Track Health & Community Services and Others (AB2014/1169) Paul Hill v L E Stewart Investments Pty Ltd t/a Southern Highlands Taxis and Coaches; Laurie Stewart; Robert Carnachan; Nick Matinca [2014] FWC 4666 (25 July 2014)

[112] Fair Work Amendment Bill 2013, Explanatory Memorandum, p. 30.

307. The numbers of bullying applications are expected to continue to climb. The FWC case management processes afford applicants every opportunity to pursue their allegations. Employers and those workers subject to bullying allegations are compelled to respond to the allegations and provide the FWC with detailed information from the outset. Even in situations where the FWC is having difficulty maintaining contact with the applicant or obtaining information from them, employers are required to comply with FWC directions to provide responses, attend conferences and remain fully involved. This can tie up employers for months, including where it appears the applicant cannot be contacted, until the FWC finally dismisses the matter[113] (usually with the proviso that the applicant can take up the matter subsequently if their circumstances change and they consider they are again at risk of bullying).

308. The issue of costs is a further significant concern for employers in the bullying jurisdiction. Employers invariably must obtain legal advice and assistance in preparing their case and defending their position. All this has to be undertaken yet the majority of applications are dismissed and the employer has little or no likelihood of recovering their costs. Our first hand experience is that costs to employers to defend these claims, particularly where there is a multiplicity of alleged bullies in the workplace, can be well in excess of $50,000. In one case which was run over a period of several months where it was clear from the outset that there was no jurisdiction for the FWC because the employee had resigned costs were awarded against the employer.

309. The bullying jurisdiction should be removed from the workplace regulatory framework for the following reasons:

- **The very low level of meritorious claims relative to number of initial applications;**
- **The requirements for employers to respond to, investigate and address bullying complaints under work health safety legislation;**
- **The disproportionately high level of time and resources employers are required to devote to this issue relative to the level of actual bullying in workplaces and the significant adverse impact this has on workplace productivity;**
- **The ease with which claims made be made despite the adoption of a definition of bullying ostensibly to curtail claim numbers;**
- **The ease with which claims can be made concurrently with other general protections and workers compensation legislation.**
- **Bullying claims should not be able to be dealt with as part of a workplace dispute settling regime.**

[113] [2014] FWC 4666 Paul Hill v L E Stewart Investments Pty Ltd t/a Southern Highlands Taxis and Coaches; Laurie Stewart; Robert Carnachan; Nick Matinca

310. ## Examples of Member Comments on the FWA and awards:

- *The whole Fair Work Act is not employer friendly. One can see that the Act is union driven. There is nothing in the Act that protects the employer's ability to moderate his costs to meet the economics of the day.*
- *Business owners are too afraid of hiring people or growing their business to the next level because of unjust employment laws.*
- *Without businesses, there's no business owners, no work for people, no taxes to fix and help our country, no money to feed the family, no joy.*
- *The current system really does not envisage people working at home on a part time basis. I have to work every weekend from 5.30am to 10.30pm to take maybe 5 calls for the business. I cannot afford the penalty rates for this span of hours when my home based employees would actually work for say three hours over this period. I would have to pay for 17 hours coverage for say three hours actual work. The Clerks–Private Sector Award 2010 has no standby provision. The whole system needs a rethink for small business — the complexity encourages employers to operate outside the system which is an unintended consequence of the complexity.*
- *The Educational Services (Post-Secondary Education) Award 2010 does not suit the model of a private provider of higher education as it is based on a University model not suited to our organisation which hires industry professionals to teach not academics. The introduction of this award has resulted in staff, who want to pursue a creative career within their respective industry, subsidised by part time/casual employment, being forced to resign due to restraints in hiring this category of staff.*
- *It has become almost impossible to be fair to all employees and to run a small business on a sound footing. One of the most difficult areas of staff management has become sick/carers leave. This is abused by almost all staff. The employer has almost no way of proving the validity of a claim of sick leave.*
- *Penalty Rates should be dismissed. We are in an era where we work every day and around the clock. It is hypocritical and ruthless to have businesses pay for penalty rates when the public demand businesses to remain open after hours, weekends and public holidays.*
- *Flexible Working Requests are great, but small businesses, relying on a few people, makes this hard. At the end of the day, this is business not charity.*
- *Workplace claims: Must have in place rules, boundaries and limitations and abide by that business plan. However, businesses are not a place for psychiatric or counselling sessions. Businesses cannot charge for this and the employers are not social workers.*

- *Generally, the Employer and the Employee must and should agree terms in writing prior to commencing work. Any disputes between the parties should be resolved between them. Reason: Employers aim — to get on with business; Employees aim — to provide good work ethics (if this does not work – move on)*
- *We negotiated out of penalty rates and now pay a rate for all hours worked. Our single rate took into consideration the previous history of overtime and incorporated these overtime hours into the single time rate. This means that our top level tradesman wage rate is $29 per hour.*
- *Overtime should only be paid once 38 hours has been worked. Those that work only weekends or odd shifts should be on a single shift rate or a weekend rate not overtime. These rates to be negotiated.*
- *Our problem is redundancy costs when the company can least afford it and has to lay people off because of economic circumstances the payment for multiple weeks for years of service is unsupportable and financially ruinous. One week's notice should be standard practice. Usually this is paid out, rather than worked out, because of the fear that today, with electronic data availability, an upset employee can do great damage in a week. Severance pay of four weeks up to 16 weeks cannot be supported if the company is reducing its number of employees to stay alive and live another day for those that are left.*
- *We only receive flexible work requests from our female employees even though mostly it is a 4 day week and returning from parental leave issues. We support these requests even though it is very disruptive if the employee holds a senior position or responsibility such as Purchasing Officer, Administration Manager, etc. We support our women because we need more of them, not less, because of what they bring to the table.*
- *Current Enterprise Agreement has pre determined increases, future negotiated (2015) Enterprise Agreement may have management review based on minimum wage and CPI.*
- *In the past we automatically adjusted our wages based on the FWC adjustment even though we were paying over award wages. We no longer do this, although we still use the FWC adjustment rate as a base when we performance assess each employee when they have achieved our top rate of pay. What we do have is an incremental increase from what we call start rate Level 5 to Level 1 rate for a top experienced tradesman.*