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# Workplace Relations Framework

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## Productivity Commission

**22 September 2015**

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### Acknowledgement

The Law Council acknowledges contributions from the Industrial Law Committee of the Federal Litigation and Dispute Resolution Section, the SME Business Law Committee of the Business Law Section (both in the Law Council), the Law Society of New South Wales, the Law Society of Queensland, the Law Society of South Australia and the Law Institute of Victoria.

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## Executive Summary

The Law Council of Australia welcomes the opportunity to comment on the Productivity Commission's Draft Report released 4 August 2015 for the inquiry into Australia's Workplace Relations Framework (the Draft Report).

The Draft Report assesses the performance of the workplace relations framework, including the *Fair Work Act 2009* (Cth) and the Independent Contractors Act 2006 at a time of structural adjustments and changes in the global economy.

The review was asked to recommend how the laws could be improved to maximise beneficial outcomes for Australian employers, employees and the economy, bearing in mind the need to reduce unnecessary and excessive regulation, and based on a cost-benefits analysis.

Policies adopted by the Law Council's Directors that were considered in this response include:

- [Justice Impacts Assessments](#) (2013);
- [Rule of Law Principles](#) (2011); and
- the [Law Council Policy on Alternative Dispute Resolution](#) (1989, affirmed 2008).

Recommendations in the Draft Report that the Law Council suggests be reconsidered include:

- that members of the Tribunal Division be appointed for a limited five-year term and be subject to a performance review during their term; and
- that a legal qualification is unnecessary for persons being appointed members of the Minimum Standards Division.

The Law Council also recommends that the Productivity Commission:

- review the operation of [s 596](#) of the Fair Work Act and support the removal of the requirement for lawyers to have leave to appear at the Fair Work Commission;
- reconsider proposed changes to the penalty regime in unfair dismissal cases;
- reconsider recommendation 5.1 concerning merit focussed conciliation;
- review the case law supporting draft recommendation 5.2 that is contrary to the suggestion in the Draft Report that reinstatement of dismissed employees tends to follow if procedural errors by the employer are established;
- reconsider draft recommendation 5.4 because the Small Business Fair Dismissal Code well serves its purpose, and small business would suffer detriment in unfair dismissal dealings should the (partial) reliance on the Code within the Fair Work Act be removed;
- reconsider draft recommendation 6.1 that the Fair Work Act be amended to align discovery processes in general protections cases with those provided in the Federal Court Rules and Practice Note CM5;
- reconsider draft recommendation 6.2 to focus on requiring that "workplace right" complaints relate directly to employment, and not set the limit of how tenuous the link should be to affecting the employment;

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- reconsider draft recommendations 3.5 and 6.5 concerning reporting outcomes reached in private conciliation proceedings which usually are intended to be confidential;
  - obtain substantive data regarding the prevalence of unpaid work by admitted lawyers within the legal profession and unpaid work in other industries.

The Law Council has some concerns with the proposed introduction of enterprise contracts. The concept appears to be introducing a second enterprise bargaining system which would run parallel to the existing enterprise bargaining system, but without many of the safeguards of the current system such as the requirement of approval by employees or the Fair Work Commission.

The Law Council considers that the problem that the new enterprise contract regime is seeking to overcome, the complexities of bargaining and enterprise agreement, could more appropriately be overcome by streamlining the enterprise bargaining system, or making modern awards more flexible.

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## Introduction

1. This submission, prepared by the Industrial Law Committee in the Federal Litigation and Dispute Resolution Section, includes contributions from the Law Society of New South Wales, the Law Society of Queensland, the Law Society of South Australia and the Law Institute of Victoria. The SME Business Law Committee in the Business Law Section has also contributed to this submission.
2. The Law Council of Australia is the peak national representative body of the Australian legal profession and represents some 60,000 legal practitioners nationwide. [Attachment A](#) outlines further details in this regard.
3. This submission provides comment on selected aspects of the report only as indicated in the headings following.

## Chapter 3: Institutions

### Structure and membership of the Fair Work Commission

4. Draft recommendation 3.1 of the Report provides:

*The Australian Government should amend the Fair Work Act 2009 (Cth) to establish a Minimum Standards Division as part of the Fair Work Commission. This Division would have responsibility for minimum wages and modern awards. All other functions of the Fair Work Commission should remain in a Tribunal Division.<sup>1</sup>*

5. Draft recommendation 3.4 provides:

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

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

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

*A requirement for the Panel and the Minister for Employment respectively is that they be satisfied that a person recommended for appointment would be widely seen as having an unbiased and credible framework for reaching conclusions and determinations in relation to workplace relation matters or other relevant areas.<sup>2</sup>*

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<sup>1</sup> Australian Government, Productivity Commission, [Workplace Relations Framework: Draft Report](#), 45.

<sup>2</sup> Ibid 46.

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## Need for Members' independence

6. Draft recommendation 3.3 provides:

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

*an independent expert appointment panel should be established by the Australian Government and state and territory governments members of the appointment panel should not have had previous direct roles in industrial representation or advocacy*

*the panel should make a shortlist of suitable candidates for Members of the Fair Work Commission against the criteria in draft recommendation 3.4*

*the Commonwealth Minister for Employment should select Members of the Fair Work Commission from the panel's shortlist, with appointments then made by the Governor General.*

7. Draft recommendations 3.2 provides for performance reviews of Members during their terms.
8. The Draft Report suggests that some inconsistencies in decisions have arisen because governments have chosen to appoint persons with a strong commitment to one side or the other of industrial relations debates.<sup>3</sup>
9. In draft recommendation 3.4 the Productivity Commission identifies various industry backgrounds as providing relevant experience for appointees to the Fair Work Commission, rather than focusing on the ability of a member to execute the functions of what is essentially a judicial office with appropriate independence and application of high quality analytical skills.
10. The Draft Report suggests that while the Fair Work Commission performs many of its functions well, a "legalistic approach" to Award determination involves a "backwards-looking perspective"<sup>4</sup> which gives "too much weight to history, precedent and judgments on the merits of cases put to it by partisan lobbyists".<sup>5</sup>
11. As to the suggestion of a 'performance review', the Draft Report does not grapple with the difficult question of who would conduct such a review, nor what criteria would be applied, nor whether such a 'review' could be seen as compromising the independence and integrity of those who are appointed. It is unlikely that the criteria could examine anything beyond statistical matters such as the numbers of matters dealt with within certain time periods and amount of time taken to hand down decisions. More important matters, such as quality of decision making, which is difficult (if not inappropriate) to examine, would accordingly be down-graded as matters relevant to reappointment.
12. The Law Council is concerned about the suggestion that the functions of the Minimum Standards Division should only be exercised by non-lawyers. The Draft Report contains no examples of past decisions of the Commission in which inappropriate or

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<sup>3</sup> Ibid 129, 152.

<sup>4</sup> Ibid 11, 125.

<sup>5</sup> Ibid 3.

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incorrect decisions were reached by reason of the involvement of those with legal training.

13. The Commission is required, when exercising its award-making powers, to interpret statutory provisions in order to ensure that it acts within the powers conferred upon it and to ensure that, in performing its functions, it has regard to those matters it is required by statute to consider, and equally that it does not have regard to irrelevant matters. Members with legal training are well placed to meet these requirements, and many highly experienced industrial law practitioners ought to be regarded as highly suitable for appointment. Further, if the recommendation to not appoint members with legal training were to be adopted, it would rule out from appointment and continued service many highly experienced industrial practitioners.
14. Nor is there a proper basis to conclude that non-lawyers are better at resolving issues or determining disputes which depend upon an understanding of economic factors. Every day in courts, legal practitioners and judges are required to present, interpret, analyse, consider and rule upon expert evidence, including technical, economic and statistical material. Lawyers by experience, training and temperament are well suited to analysing complex economic material and to determining the relative merits of competing positions. Furthermore, they are trained and required to avoid bringing biases or preconceptions to their analysis of such material.
15. The traditional adherence to precedent, which is a hallmark of our common law system, is recognized as promoting efficiency, certainty and finality for litigants. If, every time it came to consider an award or the resolution of new minimum standards, the Commission were required to close its eyes to past determinations and statements of principle emanating from the Commission and was forced to commence with “a blank piece of paper”, arbitrations would be rendered *ad hoc* (in terms of the approach applied in each instance) and uncertain of outcome. This would tend only to encourage, rather than discourage, a multitude of claims and would likely increase the length of proceedings. It would be difficult for parties to make any reasonable predictions in relation to the matters which would be relevant and ultimately determinative of the arbitration. It would become impossible for the business community, governments and unions to predict with any certainty the likely outcome of any application or dispute.
16. The approach taken by the Commission of needing to be persuaded of a case to introduce a change is appropriate. It is an approach that provides business with certainty. Employees and Government similarly benefit from having knowledge of the likely outcome of cases based on past decisions.
17. Finally, the Draft Report appears to criticise the Fair Work Commission’s approach of determining the merits of a matter based on evidence presented by those who appear before it, as against (presumably) determining for itself what are the issues and what it will take into account in determining those issues. The adversarial system has many advantages, not least that the Commission is informed by the parties (who know their own business, industry or workforce better than anyone) who gather relevant evidence and put submissions to assist the Commission to determine how best to exercise its powers. In any event, the present system does not prevent the Commission from commissioning its own research (as in fact occurs, as noted above) but it does ensure that evidentiary material and submissions are tested in cross-

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examination and during submissions, which increases the likelihood that the outcome will be robust and ultimately defensible.

#### Short-term appointments

18. Five-year, short term appointments are likely to exacerbate the problem of inconsistent decisions. There is a risk that the quality of the candidates willing to be appointed may be lower if appointments are made only for a short term, and will increase the potential for those appearing before the Commission to view it as being made of persons who reflect the views of the government of the day.
19. The quasi-judicial nature of a tribunal like this also makes the suggestions of a five-year term and a performance review inappropriate.
20. In conclusion the Law Council does not support those suggested changes in Chapter 3 which are summarised in paragraph 6 above.

#### Legal Representation

21. The Law Council notes that the Draft Report has not considered the rules regulating legal representation in the Fair Work Commission despite submissions being received on this issue. The Law Council has a long held policy concern regarding restrictions on legal representation before the Fair Work Commission.<sup>6</sup>
22. The effect of [s 596](#) of the Fair Work Act is that it is not possible for a party to be legally represented before the Commission without the Commission's permission.
23. [Section 596](#) gives rise to two significant anomalies:
  - first, it is possible for an in-house lawyer to represent a party: [s 596\(4\)\(a\)](#). This enables larger corporations and organisations to avoid the requirements of s 596. This creates an inconsistency as smaller businesses who do not have their own in-house legal team must seek leave to be represented, which may be refused; and
  - second, the effect of [s 596\(4\)\(b\)](#) is that lawyers who work for trade unions or similar organisations, or industrial advocates who are employed by such organisations, may represent an employee whilst the employer is not automatically entitled to such representation. Creating an automatic right of audience would remove the potential for such unfairness.

#### *Disadvantages arising from lack of legal representation*

24. Currently, the proper administration of justice is jeopardised by the procedural requirements placed on parties seeking legal representation. Clients, whether they be claimants or respondents, employers or employees, incur additional costs where lawyers have to prepare briefing notes in advance for their clients to assist in the event that representation is denied and clients are required to present their own case before a Commissioner. It is also counterproductive to the aims of the Commission as matters will not necessarily run as efficiently and expeditiously as possible.

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<sup>6</sup> Law Council of Australia, [Submission: Law Council response to Productivity Commission's Draft Report on Access to Justice Arrangements](#) (2014) 40–41; Law Council of Australia, [Rule of Law Principles](#) (2011).



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25. The Law Council is advised by experienced practitioners that self-represented parties, if they have not sought legal advice before the hearing, tend to arrive at the Commission underprepared, overwhelmed and without any clear sense of the issues to be determined, and the manner in which those issues will be determined. This results in many hearings before the Commission taking longer and being conducted less efficiently than would otherwise be the case. This is caused by the following factors:

- Increased time spent at hearings discussing irrelevant matters and a less targeted approach to the actual issues to be determined;
- more adjournments and other delays in pre-trial procedures;
- extra expense having to be incurred by the opposing party due to the above matters, and the more general difficulties caused by an unrepresented party, such as difficulties corresponding with that party and responding to poorly drafted pleadings and statements;
- a self-represented litigant's general lack of experience can impede settlement discussions due to a self-represented party not understanding or appreciating the respective strengths of each party's case and the costs and burden of a contested hearing;
- the failure, in some instances, for a self-represented party not to be able to identify and address relevant matters; and
- the inability, in some instances, of a self-represented party to identify a relevant complex issue which, if identified, could result under the current provision, in an order allowing legal representation.

*Advantages of legal representation*

26. Ensuring that parties have representation, where they desire it, can assist at hearings and the conduct of the case more generally by:

- ensuring that relevant matters and only relevant matters are raised at the hearing;
- facilitating more effective witness statements and examination in chief and cross-examination that reduces hearing time; and
- generating higher quality legal submissions that aid the Commission and may assist the relevant Commissioner in coming to a decision and drafting reasons.

27. Much of the perceived unfairness of one party being represented and the other party not, can be remedied by the Commissioner giving due allowance to the fact that one of the parties is unrepresented. Having at least one practitioner appearing at the hearing can greatly assist in ensuring that the hearing maintains direction and that relevant issues are identified and properly explored.

28. The paramount ethical duties of a solicitor are to the Court, which incorporates the administration of justice, and to the client. A solicitor must not engage in conduct which is likely to be prejudicial to, or diminish the public confidence in, the administration of justice. Having regard to this, and the role the Court will play in ensuring a fair and efficient hearing, should provide comfort that an unrepresented litigant will not be unfairly treated or taken advantage of.

29. In order to ensure an effective hearing, it is often the case that a lawyer will assist an unrepresented party by clarifying matters for the unrepresented party. For

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example, it is not uncommon that where an unrepresented party is having difficulty navigating their way through the documents before the Commission, a practitioner will refer them to relevant documents or parts of documents to ensure that they can follow the proceedings.

30. Certain ethical obligations imposed on practitioners can operate to aid unrepresented parties. For example a practitioner's obligation to bring all relevant authorities to the attention of the Commission, whether those authorities be adverse or supportive of that practitioner's case, ensures that the self-represented party is also aware of the relevant authorities.
31. The Law Council supports removing the requirement for lawyers to have to obtain permission to appear. The Law Council considers that legal practitioners ought to have an automatic right of audience in the Commission. In the alternative, any restriction on representation should be limited to circumstances where there is a finding that in circumstances of only one party seeking representation the unrepresented party would be severely prejudiced in the conduct of proceedings.
32. The Law Council submits that legal representation should be allowed as of right; that it streamlines the process; provides efficiency; and ensures the Commission can work effectively and with informed input on behalf of parties.
33. The Law Council considers that this matter should be examined by the Commission.

#### Evidence-gathering

34. The Productivity Commission's Draft Report suggests that when determining awards, the Fair Work Commission should collect evidence proactively, particularly of an economic, statistical or social nature, so as to overcome submissions from "partisan lobbyists".<sup>7</sup> It says:

*The FWC should not just impartially hear evidence from parties, but also seek out and engage with parties that do not typically make submissions, and proactively undertake data collection and systematic high-quality empirical research as a key basis for its decisions.*

35. At present, the Fair Work Commission considers, when determining wages as part of minimum wage determinations:
  - economic and social data prepared by independent researchers retained by the Fair Work Commission;<sup>8</sup>
  - economic and social data prepared by the Australian Bureau of Statistics;<sup>9</sup>
  - a variety of publicly available economic indicators;<sup>10</sup>
  - a variety of publicly available social indicators;<sup>11</sup> and

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<sup>7</sup> Productivity Commission, above n 1, 3, 11.

<sup>8</sup> Fair Work Commission, *Annual Wage Review 2014–15 – Decision* [2015] FWCFB 3500, 2 June 2015, at [45].

<sup>9</sup> Ibid 391–397.

<sup>10</sup> Fair Work Commission, *Annual Wage Review 2013–14 – Decision*, [2014] FWCFB 3500, 4 June 2014 at [22]–[31].

<sup>11</sup> Fair Work Commission, above n 8 [32]–[43].

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- submissions and evidence from a range of persons, including employers and employer bodies, employees and unions, as well as governments<sup>12</sup> and non-industrial bodies (such as the Australian Council of Social Service and the Institute of Public Affairs).<sup>13</sup>
36. The Draft Report does not identify the grounds for its implied criticism that the evidence relied upon by the Fair Work Commission in award determinations currently is inadequate or partial, nor does it refer to examples justifying such implied criticisms. The Law Council submits there is not a proper basis for a conclusion that there needs to be any change in the Fair Work Commission's evidence-gathering practices.

## Chapter 5 – Unfair Dismissal

37. The Productivity Commission has made the following draft recommendations concerning unfair dismissal:

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

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

- *an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct*
- *procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or financial penalties.*

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

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

38. The Productivity Commission's Draft Report suggests that the Fair Work Commission sometimes places too much weight on procedures and too little weight on substance, including in its decisions relating to unfair dismissals.<sup>14</sup> The Productivity Commission did not refer to a variety of decisions of the Fair Work Commission which held that a

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<sup>12</sup> Fair Work Commission, above n 8 [115]–[119].

<sup>13</sup> Ibid [120], [124].

<sup>14</sup> Productivity Commission, above n 1, 3, 27–28, 48.

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dismissal was not unfair where there was a valid reason for dismissal despite full procedural fairness not being afforded.<sup>15</sup>

39. The Law Council questions the relevance of the suggestion in draft recommendation 5.3 of removing the emphasis on reinstatement in unfair dismissal applications. The cases in which reinstatement is ordered are extremely rare. In the vast majority of cases reinstatement is not the appropriate remedy.<sup>16</sup>
40. The Draft Report expresses a concern that the Fair Work Commission in unfair dismissal matters is inclined to grant compensation on the grounds of a failure to provide procedural fairness, even when there was not just a valid reason, but also a substantial reason for dismissal. On a review of the authorities, however, the Commission usually proceeds on the basis that procedural fairness is relevant but ultimately a failure to grant procedural fairness will not render a dismissal harsh, unjust or unreasonable if the employer can establish there was misconduct of sufficient seriousness to warrant dismissal and the dismissal was not harsh in all the circumstances.<sup>17</sup> Often where a finding of procedural unfairness is relied upon, it is in circumstances where the Commission is not satisfied that the misconduct in fact occurred and concludes, in effect, that the employer would not have come to the same view had the employer taken a procedurally fair approach and properly investigated the matter before dismissing the employee.<sup>18</sup>
41. The Law Council therefore requests that draft recommendation 5.2 be reconsidered.

#### Hearing procedures in unfair dismissal applications

42. Draft recommendation 5.1 provides:

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

43. The Law Council considers that the Commission ought to have the capacity to adopt less formal procedures for straightforward unfair dismissal matters (adopting procedures more akin to those adopted in small claims tribunals). This could involve, for example, not requiring filing of written statements of evidence and submissions in advance of a hearing, whilst retaining the flexibility to retain more formal steps for those cases where the parties are represented and such steps are seen as more efficient.
44. Current pressure on procedure can at times unnecessarily inflate costs and disadvantage self-represented litigants who lack experience in negotiating more formal procedures and have no certainty regarding legal representation.

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<sup>15</sup> See for example *Norton v Quad Services Pty Limited* [2013] FWC 3709 [131]–[132] (Richards SDP); *Monteith v Brandon Electrical Pty Limited* [2013] FWC 4348 [39] (Gooley C); *Ferris v Water-It Queensland Pty Limited* [2013] FWC 7158 [77]–[78] (Richards SDP); *Harvey v Egis Roads Operations Pty Limited* [2015] FWC 2306 [136], [146] (Richards SDP).

<sup>16</sup> See eg *Nicholson v Heaven & Earth Gallery Pty Ltd* (1994) 57 IR 50; *Cox v South Australia Meat Corp* (1995) 60 IR 293; *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186; *Sikora v Sleeppeeze Bedding Australia Pty Ltd* [2015] FWC 6115; see also <https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/results-outcomes>

<sup>17</sup> *De Silva v ExxonMobil Chemical Australia Pty Ltd* (unreported, AIRC, Lacy SDP, 9 January 2000) PR910623.

<sup>18</sup> See for example: *Crockett v Vondoo Hair t/a Vondoo Hair* [2012] FWA 8300.

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45. A power to dismiss an application without proceeding to a hearing should be exercised cautiously (as it currently is). This is important where applicants are unrepresented. Applicants may incorrectly complete an application or fail to emphasise salient facts.
46. The Fair Work Commission currently has jurisdiction to deal with matters without holding a hearing. A fundamental principle of procedural fairness and access to justice includes an individual's right to participate effectively in the legal system, including access to courts, tribunals and formal alternative dispute resolution. In many cases, unfair dismissal applications are made by self-represented litigants. These applicants often experience difficulty in putting together their claims on paper without assistance and without the opportunity to explain their claims further.

#### Conciliation processes

47. Draft recommendation 5.1 refers to "more merit focused conciliation processes".
48. In general, any proposal that would assist the parties to resolve matters by conciliation is to be encouraged. Currently conciliation processes invariably focus on the merits of the application. Conciliators will hear from the parties as to their respective positions and assertions. During the exchange of views (and earlier when considering the written material supplied by the parties) each party has the opportunity to consider the strengths and weaknesses of their respective case.
49. The purpose of conciliation is for the parties to reach a mutually satisfactory outcome, often on a commercial basis, which is not necessarily "merit focused". Effective conciliation occurs where parties consider not just the merits of their position but also the commercial and practical realities of the matter. If a party wishes to advance a merit-based approach, that option is open to them by pursuing the matter to arbitration. The Law Council is concerned that encouraging merit-based conciliation would encourage conciliators to take on an arbitral role, which is a role they are not qualified to perform.

#### Submission from the SME Business Law Committee: Draft Recommendation 5.4

50. Draft Recommendation 5.4 provides:

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

51. The SME Business Law Committee of the Business Law Section of the Law Council of Australia has as its primary focus the consideration of legal and commercial issues affecting small businesses and medium enterprises (SMEs) in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SMEs.
52. The discussion in the Overview Section 4 Protecting Employees, Unfair Dismissal states:

*The above reforms, complemented by further targeted provision of information and regulator engagement with small business, will deal with many of the current issues experienced by small businesses. Subject to implementation of these reforms, the Small Business Fair*

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*Dismissal Code should be removed. The basic premise of assisting small business to navigate the complexities of unfair dismissal legislation is reasonable, but the Code does not achieve that outcome and provides a false sense of security.*<sup>19</sup>

53. The SME Business Law Committee does not agree that the Australian Government should remove the (partial) reliance on the Small Business Fair Dismissal Code within the Fair Work Act as recommended in draft recommendation 5.4 (quoted above).
54. The SME Business Law Committee's view would not change even if the other recommended changes to the unfair dismissal system as set out in the Draft Report were implemented.
55. The Small Business Fair Dismissal Code within the Fair Work Act provides clear process guidance for small businesses to assess their position with regard to their potential success in defending an unfair dismissal claim by an employee and provides an opportunity for small businesses to efficiently and fairly deal with unfair dismissal claims.
56. From the experience and understanding of Committee members, the Code achieves its objective of being a valuable support tool to assist small business to navigate the complexities of unfair dismissal legislation. It reduces the resources required for small business to access the Fair Work Commission and other forums that deal with unfair dismissal, and helps to ensure that unfair dismissal issues in the small business area are dealt with in a fair and practical manner. The Code can provide important guidance to small businesses who are considering termination of employees. If a small business properly considers and engages with the Code and checklist it will not provide a "false sense of security" but instead will provide useful guidance on the criteria and process to be followed in considering the termination of employees.
57. The SME Business Law Committee considers that the Small Business Fair Dismissal Code well serves its purpose and small business would not benefit, and would in fact suffer detriment in unfair dismissal dealings should the (partial) reliance on the Code within the Fair Work Act be removed. The Law Society of New South Wales agrees.
58. The Law Council also notes that the Draft Report envisages the provision of further targeted information and regulator engagement with small business before this recommendation is implemented.

## **Chapter 6 – General Protections**

### Draft recommendation 6.1 – Discovery

59. The Productivity Commission has identified that in general protections matters the reverse onus of proof leads to orders for discovery that allow "a union or court to sift through potentially hundreds of thousands of documents in search of intent (and this has occurred)".<sup>20</sup>
60. The Commission suggests at recommendation 6.1 that the Fair Work Act be amended "to formally align the discovery processes used in general protections cases

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<sup>19</sup> Productivity Commission, above n 1, 28 dot point 6.

<sup>20</sup> Productivity Commission, above n 1, 29.



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with those provided in the [Federal Court's Rules and Practice Note 5 CM5 – Discovery](#).

61. The amendment suggested seems unnecessary. If the amendment is in order to deal with the small number of matters that the Commission hears and determines by consent of the parties,<sup>21</sup> the Commission has existing broad powers to regulate these matters.<sup>22</sup> There is no need for prescription by statute.
62. Nor is it necessary for the balance of matters which are heard by the Courts. When general protections matters are heard in federal Courts, the Court rules governing discovery would apply.<sup>23</sup>
63. Indeed, adding prescription may hamper the exercise of the discretion of the Courts and Tribunal. It may require discovery in circumstances where the Court or Commission would otherwise not have permitted it, or not permitted it in those terms.
64. This appears to be an example of suggested legislative change that unnecessarily deals with matters of procedure and detail that can be appropriately left to the Court or Commission to address by exercising existing powers.
65. The Law Council does not support recommendation 6.1.

Draft recommendation 6.2 – Modify meaning and application of a workplace right

66. Draft recommendation 6.2 provides that the Australian Government should modify s. 341 of the *Fair Work Act 2009* (Cth), which deals with the meaning and application of a workplace right so as to more clearly define how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment. It also provides that complaints must be made in good faith; and that the Fair Work Commission decide this via a preliminary interview with the complainant before the action can proceed and prior to the convening of any conference involving both parties.
67. While the Law Council supports the requirement that complaints must have been made in good faith, the proposal that this issue could be determined by a preliminary interview before proceedings can proceed, would be very difficult to implement while affording parties procedural fairness. The term "good faith" is very difficult to define and relies on the context in which the complaint is made. Similar approaches have previously been tried with preliminary assessment by commissioners, such as whether there are reasonable prospects of success in relation to general protection claims under [s 370](#). For sensible reasons related to the nature of an informal hearing with untested allegations being made, the commissioners were almost never willing to state this and the certificate is invariably issued under [s 369](#).
68. The forms generated by the Fair Work Commission are user-friendly, intentionally short, and to the point. This is by design—the forms assist the respondent in any matter to address the allegations in a succinct manner without the assistance of a lawyer becoming necessary. It would be inappropriate for the Fair Work Commission to issue an adverse certificate in a matter simply because a party was not able to

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<sup>21</sup> In 2013–14, the Commission heard 8 applications for consent arbitration (see *Fair Work Commission Annual Report 2013–14*, 37).

<sup>22</sup> See *Fair Work Act 2009* [ss 589–591](#).

<sup>23</sup> Law Council, [Federal Court Case Management Handbook](#), Chapters 7 and 8.

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plead its case adequately on the papers and needed to be able to explain it within the conciliation.

69. The conference is already a means for the Fair Work Commission to let the parties know, in person, whether there may be a question about the validity of the claim. Given that a consequence of the conciliation is the issuance of an [s 368\(3\)](#) certificate there is little to be gained by implementing an additional filter. Any such additional step will, in practice, significantly increase the compliance burden for all parties and have a negative impact on the “productivity” of the process.
70. The Law Council notes that in *Shea v Energy Australia Services Pty Ltd* [2014] FCAFC 167 the Full Federal Court addressed the issue. It states:

*Considerable care needs to be exercised before implying into s 341 any constraint 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. The expression or drafting of a “complaint” should not require the sophistication or knowledge of an experienced industrial lawyer or legal advice regarding whether it should in fact be made. Care should also be taken before construing the term “right” in s 341 in a manner which may have more far-reaching implications for the meaning of that term when it is employed elsewhere in the Fair Work Act. When considering the construction of these provisions, there is an obvious need to balance the legitimate interests of both employees and employers in a manner consistent with the objects of the Act as a whole and the objects of Part 3-1. [12] (emphasis added)*

71. While there should be more clarity in relation to how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment, that approach would still leave significant ambiguity and uncertainty. In the Law Council's view, the clarity ought to focus on requiring that the complaint relate directly to the employment, and not try to set the limit of how tenuous the link should be to affecting the employment.

#### Draft recommendation 6.3 – Exclude claims that are frivolous or vexatious

72. In considering change in relation to frivolous or vexatious complaints, it should be borne in mind that respondents are currently entitled to obtain their costs if it is established that a claim was made vexatiously or without reasonable cause: ss [570\(2\)](#), [611\(2\)](#).
73. It is difficult for respondents to successfully rely on those provisions in respect of adverse action matters given the reverse onus of proof. However such orders are made where it can be established that the case had no reasonable prospects of success.<sup>24</sup>

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<sup>24</sup> *Walker v Mittagong* [2011] FCA 2225; *Eghlima v Winco Systems* [2013] FWA 2351; *Ryan v Primesafe* [2015] FCA 8; *Johnston v Trustee for MTGI Tuest* [2015] FWA 996; *George v ParkTrent Properties Group* [2014] FWC 935



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74. In an ideal world frivolous and vexatious claims would be excluded, but it is difficult to create a system that allows such claims to be identified at an early stage in a manner that both provides procedural fairness and does not create inappropriate additional costs. Given the existence of the reverse onus, the difficulty with this proposal is that to establish that a claim is indeed one that has no reasonable basis, the respondents must overcome the onus. One possibility would be to have the applicant bear the onus of establishing that the claim is not frivolous or vexatious and has been made in good faith. That however is likely to require some sort of hearing to meet the threshold requirement. The applicant may well have a right to require the respondent to produce material that will assist the applicant to establish that the respondent's motivation for adverse action was in fact the exercise of a workplace right. At that point it can be seen that what is being proposed will be, in effect, a mini-hearing with all the costs associated with that.
75. The better view is that this draft recommendation not be contained in the final report. Should the Productivity Commission however recommend such an approach be taken, then consideration should be given to empowering the Commission (if it will fall to the Commission to determine this threshold issue) to award costs against a respondent (noting it already has power to award costs against an applicant if it finds that the claim had been commenced vexatiously: [s 611](#)). That additional power would then be necessary lest respondents unnecessarily or inappropriately put applicants to proof in an attempt to prevent such claims proceeding.

Conciliation reporting (draft recommendation 3.5 of the Draft Report) and General protection reporting (draft recommendation 6.5 of the Draft Report)

76. The Law Council has some concern about the recommendations concerning reporting outcomes reached in private conciliation proceedings which usually are intended to be confidential. It is not clear what is intended by the suggestion that the "outcomes" of such proceedings be published. If that is no more than a reference to the percentage of matters that settle or are withdrawn, there is no concern. If, however, the intention is that it involve some statistical gathering and publishing of information of settlement outcomes, that would be of concern. Even if aggregated, the gathering of such information may discourage settlements from those who are concerned the outcome would not be confidential. Further there is a risk that such information would be used by the Commission and/or by parties to place pressure on other parties to settle by reference to settlements that others have obtained in allegedly similar fact situations.

## **Chapter 17 – Enterprise contracts**

77. The Productivity Commission has recommended that consideration be given to a new type of agreement which "spans individual and enterprise agreements".<sup>25</sup> The "enterprise contract" would be a statutory agreement that amounts to a "collective individual flexibility arrangement".<sup>26</sup> In summary, an employer could vary an award for a group of employees without the requirement to agree individually or make an enterprise bargaining agreement without holding a ballot of employees.

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<sup>25</sup> Productivity Commission, above n 1, 37.

<sup>26</sup> Ibid.

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78. Further, the terms of an enterprise contract could be offered as a condition of employment to prospective employees but existing employees would be offered the option of staying on their current terms and conditions.
79. There are potential benefits of enterprise contracts for small and medium sized businesses as the complexities of bargaining and enterprise agreement making are avoided and, while lodged with the Fair Work Commission, an enterprise contract would not require approval in order to apply.
80. The Productivity Commission states that an enterprise contract would be accompanied by a "*comprehensive suite of safeguards*"<sup>27</sup> but at this stage there is no detail about what they would be. This is a critical issue for two reasons.
- First, since employees do not get an opportunity to vote on an enterprise contract, and its terms can be offered on a take it or leave it basis to prospective employees, employees (particularly vulnerable employees) must be protected.
  - Second, depending on the extent and nature of the "*comprehensive suite of safeguards*" it may be that the goal of flexibility gains and desire to reduce complexity will not be achieved. Australian Workplace Agreements (AWAs), like the proposed Enterprise Contracts, came into immediate effect upon lodgement without being checked by a regulator. That meant:
    - in some cases they did not meet the safeguards to the detriment of employees; and
    - when a failure to meet a safeguard was identified, sometimes years later (for example as to how the document was executed) the employer would find that the AWAs had not had legal effect and that as a result the employer was liable to pay substantial penalties and back payments.
81. There are a number of other issues that require consideration, such as whether bargaining for an enterprise agreement can be commenced, and consequently protected action taken, during the life of an enterprise contract.
82. The Law Council has some concerns with the proposed introduction of enterprise contracts. The concept appears to be introducing a second enterprise bargaining system which would run parallel to the existing enterprise bargaining system, but without many of the safeguards of the current system such as the requirement of approval by employees or the Fair Work Commission.
83. Several other issues arise such as whether employees will have the right to representation in negotiations, or indeed if there is a requirement for negotiations to occur, and the right to take industrial action. It is also not clear what would apply at the conclusion of such arrangements or what would apply if there was a transfer of business.
84. The Law Council considers that the problem that the new enterprise contract regime is seeking to overcome, the complexities of bargaining and enterprise agreement, could more appropriately be overcome by streamlining the enterprise bargaining system or making modern awards more flexible.

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<sup>27</sup> Ibid 39.

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## Chapter 16: Individual Arrangements

85. With respect to draft recommendation 16.1, the Law Council supports a consistent approach with respect to the time period for the termination of an individual flexibility arrangement so that there is consistency across modern awards and enterprise agreements. The Law Council suggests that, consistent with the decision of the Fair Work Commission with respect to modern awards, the time period should be three months. This would require an amended to s 203(6) of the *Fair Work Act 2009* (Cth).

## Chapter 22 – Transfer of business.

86. In its earlier [submission](#) to this inquiry, the Law Council pointed out<sup>28</sup> that applications to the Fair Work Commission under Division 3 of Part 2–8 are unlikely to succeed without the support of the employees and/or the relevant union. The Productivity Commission acknowledges this<sup>29</sup> and has called for "more information on the ease (or otherwise) of obtaining exemptions from the transfer of business provisions and variations to transferable instruments".
87. We are not in a position to provide data that would substantiate or refute the claim of widespread job losses attributable to the *Fair Work Amendment (Transfer of Business) Act 2012*, which provided that when there was a transfer of business from a State system employer to a national system employer, transferring employees would retain their existing terms and conditions of employment. Whilst the Productivity Commission's commentary essentially excludes Victoria, the same issues arise even in Victoria, because a public sector outsourcing exercise is just as likely to involve the imposition of incompatible work practices on the private sector, as occurs in States where the transfer also involves a State system employer transferring business to a national system employer. It is not the question of whether the transferor and transferee are in different systems; it is a question of the incompatibility of public and private sector work conditions.
88. An issue which has been addressed by the Productivity Commission is the fact that the wording of [s 311](#) is sufficiently broad to cover situations where the employee makes the decision to switch jobs voluntarily. The Productivity Commission is correct in observing the disconnect between such a situation, and the objective of transfer of business provisions, being to protect the terms and conditions of employees when a business changes hands, or when insourcing or outsourcing occurs. In such situations, the provisions have an important role to play, given that employees may have little real choice when being "transferred".
89. It seems difficult to argue against the logic that in voluntary circumstances employees may be effectively prevented from switching jobs, even when they consider it to be in their best interests, because employers may refuse to facilitate a move that the employee would otherwise happily undertake if it would mean that the employee's previous conditions will be imposed upon the employer in those circumstances. The recommendation that employee-instigated transfers of employment should be exempt from transfer of business provisions is worthy of support, in order to ensure that the provisions retain their statutory purpose. This was a recommendation of the

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<sup>28</sup> Law Council of Australia, [Submission: Workplace Relations Framework](#), 27 March 2015, 11.

<sup>29</sup> Productivity Commission, above n 1, 756.

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McCallum Fair Work Review<sup>30</sup> which was not implemented by the Government of the day.

90. However if such a change is to be contemplated it would need to be made along with special provisions that provide appropriate protections to ensure that they only apply in situations which are truly voluntary, lest they provide a method by which employees are placed in a position where they are pressured to agree to 'volunteer' to transfer their employment.

## Chapter 20 – Alternative forms of employment

91. Recommendation 20.1 provides that terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the *Fair Work Act 2009* (Cth). If implemented, this may undermine enterprise agreements because employees would no longer be able to include terms in their enterprise agreement requiring their employer to offer commensurate conditions to labour hire employees.
92. The High Court has drawn a distinction between prohibiting the use of labour hire and regulating what labour hire employees must be paid.<sup>31</sup> That distinction should be maintained to protect the integrity of enterprise agreements.

## Information request

93. At page 739 of the Draft Report the Productivity Commission has invited feedback on the extent to which unpaid internships have become more commonplace across the economy, whether any growth in such arrangements has led to problems rather than opportunities, as well as the potential remedies to any specific issues.

### *Unpaid internships and jobs within the legal industry*

94. The Law Society of NSW Industrial Law Committee is aware that unpaid work exists in the legal services industry. The Committee understands that some young admitted lawyers have reported working for a number of months without pay, sometimes based on the promise of paid work at a point in the future, but often without that level of certainty. In some circumstances, the Committee is aware of reports that young admitted lawyers' unpaid work has also been billed to clients.
95. A recent examination of the College of Law online jobs noticeboard found that approximately 63% of the roles advertised were unpaid positions in private practice; 5% of the advertised positions were unpaid roles in community legal centres and 35% were paid positions.<sup>32</sup> In June 2015 it was reported that a legal services provider in South Australia advertised 'job' opportunities for junior lawyers who were required to

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<sup>30</sup> Australian Government, Fair Work Act Review Panel (Chair: Professor Emeritus Ron McCallum AO), [Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation](#), 2 August 2012.

<sup>31</sup> *R v Commonwealth Industrial Court; Ex Parte Cocks* (1968) 121 CLR 313.

<sup>32</sup> <https://www.collaw.edu.au/careers/> The College of Law is the school of professional practice for lawyers in Australia and New Zealand.

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pay up to \$22,000,<sup>33</sup> a business model that was abandoned after discussions with the Law Society of South Australia.

96. The Committee is aware that there are legitimate internships, which are educational and primarily involve observation. There are also requirements for College of Law students to undertake mandatory legal work (Practical Legal Training or PLT) as part of their curriculum and admission requirements. Students in these courses are required to undertake productive supervised legal work. It is important that this work stream is not put at risk.
97. The matter is complex. The Law Council is concerned that law graduates not be taken advantage of due to the shortage of opportunities in professional practice, and recommends that studies be conducted to obtain substantive data regarding the prevalence of unpaid work by admitted lawyers within the legal profession and unpaid work in other industries.

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<sup>33</sup> [Law firm Adlawgroup asking junior lawyers to pay \\$22,000 for job; Fair Work Ombudsman investigating](#), Bridget Brennan, ABC News, 24 June 2015.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents its constituent bodies consisting of 16 Australian State and Territory law societies and bar associations and the Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive as at 1 July 2015 are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Mr Morry Bailes, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

