Submission to the Productivity Commission's Workplace Relations Inquiry

Business Council of Australia

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OVERVIEW

Introduction

This is the Business Council of Australia's (the Business Council) submission to the Productivity Commission inquiry into the performance of the workplace relations framework.

The Business Council includes member companies across all key sectors of the economy. Collectively, Business Council members directly employ more than a million people across the entire country, of all ages and backgrounds and at all skill levels.

This inquiry is a rare opportunity to reframe Australia's workplace relations arrangements to achieve the twin objectives of tackling the weaknesses of the current system and designing a system fit for a modern economy.

The starting point for this has to be a shift in mindset to view the workplace relations system as part of the environment and culture that will create national wealth and the jobs of the future.

This requires a regulatory model that supports Australia becoming an innovative and knowledge-driven economy by unlocking the potential of people and workplaces.

We also need a shift in mindset from the presumption that the workplace relations system should be focused on conflict and dispute resolution between enterprises and workers, rather than on mutual respect and common interest in the success of the enterprise.

Australia's economy, demography and workplaces are in transition

The Productivity Commission inquiry comes at a time of significant economic, technological and social transition.

Australia is facing risks and opportunities arising from a more competitive global economy and a shift in global economic power. However our starting point is poor with our global competitiveness declining and our productivity stagnant.

The forces of technology and digitisation will make more and more sectors of the economy tradeable and subject to competition.

- These forces will dramatically change the nature of work and workplaces as more tasks become automated and supply chains become more fragmented.
- Enterprises large and small will need to change their business models and practices to stay competitive.
- Global competition for labour will change the power dynamic on which historic workplace regulations were founded.

Our demography is undergoing the most significant change since World War II.

- To remain prosperous Australia will need to drive greater participation from women and older Australians. We will need to remove barriers for young people and disadvantaged job seekers.

Our existing workplace relations systems could hold us back

The Business Council believes the existing workplace relations system is not fit for purpose to meet the opportunities and challenges of a modern economy.

It is important to stress that this impacts on some sectors of the economy more than others. Enterprises which are most affected by the weaknesses of the current system are often those operating in sectors at greatest risk from the global forces of change, such as manufacturing, transport, mining and retail.

The weaknesses of the current system can be characterised as follows:

The system's scope is too wide.

- It goes beyond a safety net and core employment conditions.
- This has brought the workplace relations system into what are fundamentally business and managerial decisions. This creates an opening for dispute and conflict about how enterprises are run.
- It also adds cost, time and risk to enterprises attempting major business model or business process change to remain competitive.

The system is too rigid.

- The existence of 122 specific awards creates rigidities in the labour market.
  - The awards have specified matters such as what pay a worker should receive for temporarily taking on higher duties and the way in which a 38-hour week should be worked, into minimum standards, when they should be matters for negotiation.
  - The number of awards narrows the nature of jobs and work. The more awards we have, the smaller the number of workers they cover and the narrower the definition of a role becomes.
- The nature of work is changing. More and more work is being deconstructed from a 'job' to a set of 'tasks'. Enterprises need the flexibility to construct the workforce around tasks rather than traditional occupational categories.

The system is complex and hard to use.

- The Fair Work Ombudsman has found that only 12 Modern Awards are clear about when overtime applies. This means 85 per cent are unclear.
- It also found that only 5 of the 122 Modern Awards were clear about the penalty rates for all employees covered under the award.
- The Federal Court has only recently determined that annual leave loading is payable on termination. Some awards and agreements state that annual leave loading is not payable on termination, which mean they are in direct contradiction of the Fair Work Act.

A more balanced approach will support a more competitive economy and job creation

The Business Council has not proposed a series of detailed amendments to the current legislation in this submission.

Instead, we have put forward a strategic framework for the workplace relations system which will:

- Clarify safety net provisions.
- Simplify the system and remove rigidities by collapsing the number of awards from 122 to one for each industry group.
- Strike a better balance between minimum standards which are contained in awards, and matters which are subject to negotiation. Our approach limits the matters for negotiation in agreement making to the employment relationship. These would include matters such as allowances, employment categories, leave arrangements, notifications, remuneration and limited rostering issues.
- Limit matters for negotiation to the employment relationship. This means that matters focused on business and managerial decision making are not subject to negotiation and are removed from regulation.
- Improve the governance, administration and accountability of the Fair Work Commission.

The Business Council proposes that within the architecture of the existing Fair Work Act the system be redesigned around three tiers:

1. **Safety net provisions, including industrial protections.** This is the foundation of the workplace relations system and includes mandated minimum rights that are *not subject to negotiation*.
2. **Agreements**. These are matters relevant to the employment relationship and are *subject to negotiation*.
3. **Business and management decisions.** These issues sit outside regulation and are *not subject to negotiation*.

Building common ground to create a durable system

The Business Council recognises that there are many factors which influence the productivity and competitiveness of the economy. These include a high-performing education, skills and training system, strong managerial competence and the capability of enterprises to effectively negotiate with third parties.

But the task of the Productivity Commission in this inquiry ultimately comes down to designing an effective workplace regulatory framework for the long term.

The Business Council believes the Commission should set out incremental and manageable regulatory changes to build community confidence. There should be extensive consultation with key stakeholders and the broader community.

The test of a durable regulatory model will be to avoid the failings of the last decade of industrial relations reforms which have seen ideology prevail over evidence-based, well thought through improvements that are in the nation's interests.

This has seen a once stable and predictable system that underpinned the economic reforms of the 1980s and early '90s subjected to a series of damaging policy reversals.

While all regulation should be subject to continuous improvement, all too regular major reversals do not support job creation or more competitive industries.

Business stands ready to work collaboratively with all stakeholders to build a system that restores the trust of workers and employers. A system that positions Australia for another 30 years of economic growth and the broader prosperity that flows from it.

EXECUTIVE SUMMARY

The Business Council's submission to the Productivity Commission's inquiry into workplace relations has been developed in conjunction with Business Council members across multiple sectors.

The submission attempts to take a strategic view of workplace relations, and the role of the workplace relations system in contributing to job creation, competitiveness, productivity and participation.

The submission focuses on the fundamental constraints of the system, and prioritises recommendations that will remove impediments to flexibility for workers and enterprises.

The submission has four parts:

Part 1 outlines the case for change, focusing on the performance of the workplace relations system.

Part 2 outlines the context for change, focusing on the nature of work and the working environment.

Part 3 proposes a workplace relations framework for the future.

Part 4 proposes a practical pathway for change and transitional arrangements.

The Business Council proposes a workplace relations framework for the future

The Business Council's proposed framework (see Figure 1) is built on the current architecture of the Fair Work Act. It defines the purpose of a workplace relations framework and identifies six key principles to underpin it.

The foundation of the proposed framework is a safety net that requires enterprises to provide economy-wide minimum pay, standards and protections for all workers.

It provides simplicity and removes rigidities by reducing the number of Modern Awards and limiting the issues that may be included in awards to industry-specific matters.

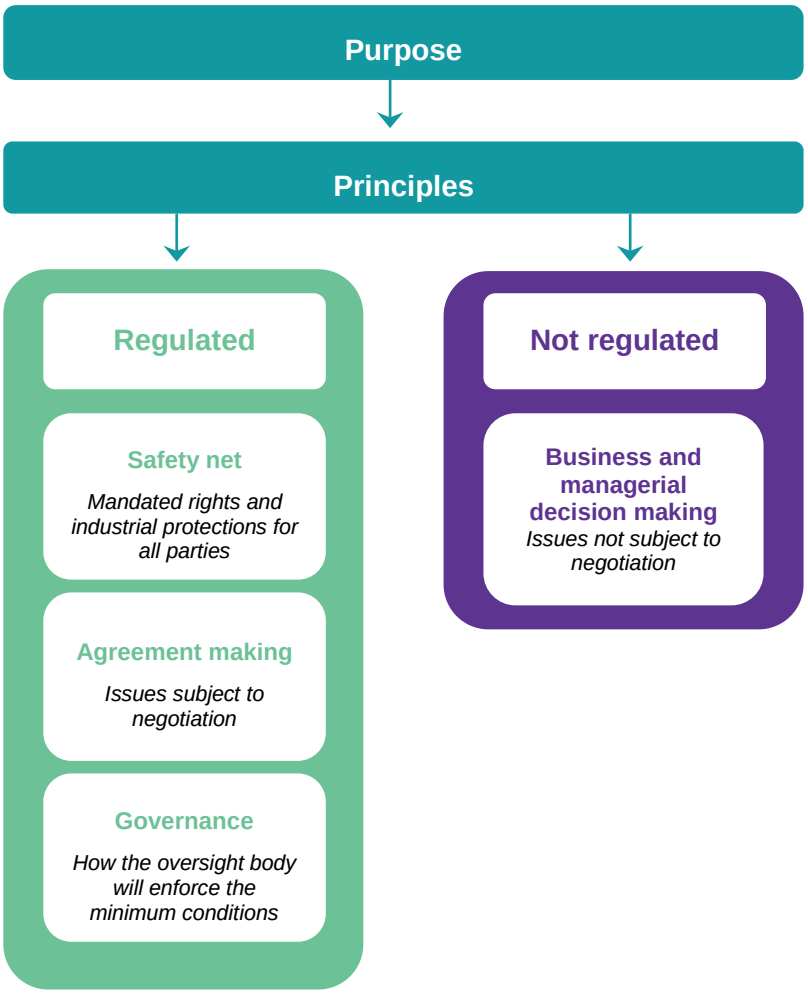
It centres negotiations between workers and enterprises on the employment relationship by specifying which issues are subject to negotiation for agreement-making purposes.

It maintains the ongoing roles of the Fair Work Commission and Fair Work Ombudsman, but proposes governance changes to ensure ongoing confidence in the workplace relations framework.

We recommend that all these elements be specified in the Fair Work Act.

The framework proposes that other matters, except for those that are covered in other legislation such as Occupational Health and Safety and Superannuation, sit outside the legislative framework and not be subject to negotiation or the jurisdiction of the Fair Work Commission.

Figure 1: A workplace relations framework for the future



Source: BCA.

Common ground is needed to deliver a workplace relations system for the future

Regulation is central to our workplace relations framework. It has an important role to play in upholding critical rights and providing legitimate safeguards, but to be effective regulation must be properly thought through and applied sensibly.

Industrial relations regulations have a rightful role to play in addressing legitimate community concerns about workers' basic rights. But equally they have to preserve the ability of businesses to engage effectively with their employees to change work arrangements in response to commercial imperatives, and achieve improvements in competitiveness that are critical to the sustainability of companies and their workforces.

In developing this framework, the Business Council has endeavoured to identify why the government intervenes in the labour market and the outcomes it hopes to achieve by doing so. We proposes three imperatives that should create common ground on which to build a new framework:

1. Meet the needs of workers and enterprises
2. Establish a safety net of minimum pay, conditions and protections
3. Create an environment where enterprises can adjust and stay competitive in a global economy, create jobs and flourish, thereby contributing to economic growth.

To meet these imperatives, the Business Council believes that clarity is needed on what matters are subject to regulation and what matters are not subject to regulation.

Six key principles of a workplace relations framework for the future

1. Regulation specifies a minimum set of enforceable rights and responsibilities (Safety Net provisions) of the three parties in the labour market (workers, enterprises and representatives).
2. Workplace regulation is limited to the employment relationship between workers and an enterprise.
3. Workers and enterprises have a shared interest in the success of the enterprise. Relationships, and negotiations within the relationships, are collaborative rather than adversarial.
4. Matters related to the employment relationship not specified in the minimum set of rights and responsibilities are subject to negotiation, singularly or collectively, between a worker(s) and their enterprise. Business and managerial decisions are not subject to negotiation.
5. Where needed, workers, enterprises and their representatives have access to determinations by a third party which is independent, impartial and timely in its processes.
6. Regulation is transparent, easy to understand and use by workers, enterprises and representatives; predictable; and enforceable, with the option of sanctions.

The Business Council is recommending three tiers to guide regulation of the labour market:

1. **A Safety Net of minimum pay, conditions and protections** – mandated rights and industrial protections for all parties, and sits *within regulation*. This includes minimum standards of particular industries as expressed in awards.
2. **Agreements** – issues subject to negotiation and sits *within regulation*.
3. **Business and Managerial Decisions** – issues not subject to negotiation and sits *outside regulation*.

Establishing three tiers to guide regulation makes the workplace relations framework much easier to understand and navigate for all parties.

A safety net is the foundation of a workplace relations framework for the future

To establish common ground and build a workplace relations framework that is durable, the Business Council proposes a safety net as its foundation.

Safety net provisions would include:

- The Minimum Wage Order, including rates for casual, overtime, penalties and shiftwork
- The National Employment Standards
- Industry Awards
- Industrial Protections.

Safety net provisions are designed to define the common ground that workers, enterprises, representative bodies and the community can agree on as the starting point for all employment relationships.

A high minimum wage is part of Australia's workplace relations landscape

While Australia has the highest minimum wage in the OECD, the Business Council is not advocating it be reduced. Nor are we suggesting that the role of the Fair Work Commission in establishing the minimum wage be changed.

There has been ongoing debate about the need to change the way the minimum wage is established, including the value of a statistical index. On balance, we believe the current method is a better approach. Using an index, without providing the freedom to take account of current economic circumstances would be riskier than the current approach. The Business Council therefore does not support the use of a statistical index to establish the minimum wage.

Sustained higher real wages ultimately result from higher productivity growth. Administrative decisions to increase minimum wages which are not cognisant of labour market conditions can have undesirable consequences and are a blunt way of targeting a social safety net for low skilled workers.

While not advocating changes in the minimum wage setting process or a reduction in the current minimum wage, the Business Council suggests the Productivity Commission considers if the current criteria used to set the minimum wage take an adequate account of economic circumstances, and the need to protect against wage inflation.

Loadings on wages need to be reviewed

There are 122 Modern Awards and most of these awards include rates for casual, overtime, penalties and shiftwork. The purpose of penalty rates is to compensate workers for working unsociable hours.

The rates within the awards are confusing and can be difficult for enterprises to interpret. Many enterprises employ workers across a range of awards, making it even more difficult to determine appropriate pay rates.

The Business Council acknowledges the need for alternate rates that are loaded on top of the base minimum wage. But we believe there needs to be more scrutiny of what should be a minimum rate and more scrutiny about what constitutes unsociable hours on an industry by industry basis.

Rates currently vary across industries. For example, the Sunday rate for Aged Care is 175 per cent, but it is 200 per cent in General Retail, and ranges from 125 to 150 per cent in the Restaurant Industry.

There is no consistency or logic about how these rates are set, nor a rationale for why the rates differ.

Although they are currently set by the Fair Work Commission, they are set as part of the awards process and not as part of the Minimum Wage Order.

These rates contribute to the overall cost of labour. When an enterprise develops a costing model for their operations, they need to factor all of these premium rates into their models.

Despite this role in determining wage costs, the rates are not subject to the same scrutiny as the minimum wage. Additionally, because they sit in awards, the objects of the Fair Work Act that the Commission must take into account are different.

For example, the first objective of the minimum wage that the Commission must take into account is: 'The FWC must establish and maintain a safety net of fair minimum wages including the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation, and employment growth.'

The first object of the award that the Commission must take into account is 'The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account: relative living standards and the needs of the low paid.'

Wages can impact on the performance and competitiveness of the economy. Premium rates are part of wages and need to be combined with minimum wages to establish the true cost of labour.

The Business Council proposes a more transparent and simpler approach

The Business Council proposes that wages and terms and conditions are in separate instruments: wages should sit in the Minimum Wage Order, and terms and conditions in the awards or the National Employment Standards.

Awards should be confined to specifying ordinary hours of work for different industries. Premium rates should be economy-wide minimums that are set by the Fair Work Commission as part of the Minimum Wage Order and subject to the same scrutiny and objectives as the minimum wage.

We also propose the Fair Work Commission reviews the ordinary span of hours for each industry to ensure they are aligned to a 24/7 economy.

For example, a review may show that the ordinary hours for retail have shifted to a seven-day week and now may be 8am – 8pm Monday to Sunday, in line with the community's expectations of when they are able to shop. The same review may show that the ordinary hours for nurses have not changed.

In reviewing the ordinary hours for each industry, the Fair Work Commission would effectively be setting a new definition of unsociable hours for each industry, as all other hours would be unsociable and eligible for a premium rate.

To be eligible for any of these rates, the relevant award would need to include a clause saying premium rates apply.

If workers and enterprises wish to negotiate different arrangements or higher rates, this would be part of the Agreement making process.

Although the Fair Work Commission already sets all the premium rates as part of the awards process, there is a danger that the approach proposed could lead to the adoption of the highest rates currently in awards, creating unnecessary wage inflation.

It will be important for the Fair Work Commission to remember that the approach is about identifying the *minimum* wages and conditions for the economy, not to adopt higher ones. It will also be important to ensure the objectives related to the minimum r wage, particularly the economic impact of changes, are applied to this process.

National Employment Standards should remain largely unchanged

A set of national minimum standards were introduced in 2006 and expanded in 2010 to establish the National Employment Standards.

The Business Council believes the National Employment Standards reflect Australians' expectations of their employers. For example, they provide for four weeks' annual leave, a maximum normal working week of 38 hours, 12 months of unpaid parental leave and so forth.

The Business Council supports the continuation of these standards. We propose that where other economy-wide standards are listed in Modern Awards or the Fair Work Act, they are moved to the National Employment Standards. This will allow workers and enterprises to have a clear understanding of minimum employment standards.

For example, 'transfer to lower duties' is an economy-wide standard that should be removed from awards and added to the National Employment Standards.

While the Business Council supports the National Employment Standards, some provisions such as long service leave, have state-specific provisions. The harmonisation of such provisions is long overdue and should occur as part of this review.

While the rights of workers are articulated, the complementary rights for enterprises are not always specified. The Business Council proposes these be added to the National Employment Standards.

The Business Council also proposes that the legislation be updated to use the commonly accepted 'reasonable person' test.

Modern Awards need to be reduced in scope and easier to understand

Australia is the only country in the world with an awards system. While awards are unique, the Business Council recognises the role they play in providing "a fair and relevant minimum safety net of terms and conditions".[1]

However, it is important that the role of awards is limited to this. The Business Council believes the scope and terms of awards have gone beyond a minimum safety net.

Allowing the inclusion in awards of prescriptions beyond minimum standards creates rigidities in the employment relationship that undermine the capacity of an enterprise and its workers to negotiate a balance that meets each of their needs. Anything beyond minimum standards should be negotiated as part of agreements or in a common law contract.

The Australian labour market is moving away from narrowly-based occupational roles. Enterprises need workers with a broad set of skills who can adapt to changing environments and not be siloed into narrow occupational categories.

Having 122 Modern Awards, including occupationally specific ones, works against this. It creates rigidities across the labour market and can effectively dictate to an enterprise how it manages its workforce.

The Business Council proposes reducing the terms that can be included in awards and

Clauses to be included in awards

The Business Council proposes awards be limited to:

1. accident pay
2. agreement in writing to pattern of hours of work (part-time workers)
3. allowances for travel costs/times and transport
4. apprenticeship requirements
5. employment categories, including definition of a shiftworker
6. industry specific redundancy schemes
7. national training wage, and allocation of traineeships to wage levels
8. ordinary hours of work
9. rostering issues, limited to maximum days of work, maximum hours per day, meal breaks, minimum break between times worked and minimum engagement
10. wage classifications (up to a maximum of 5 categories per award).

The Business Council welcomes debate on whether this list of clauses is the appropriate one for inclusion in awards.

starting a process to move from 122 Modern Awards to a single award per industry.

The first step in this process would be to remove non-minimum standards from awards and then identify the differences remaining. The removal of non-minimum standards should result in less differentiation and a natural alignment between awards within an industry.

The second step would be to examine the differing minimum wage rates that are included in awards to reflect different roles and seniority. Awards with similar rates should be grouped.

Protections for workers should be grouped together and easy to understand, but there needs to be a better balance between workers and enterprises

There is a range of protections (including general protections) primarily for workers, spread across the legislation. For ease of use for all parties, the Business Council proposes all protections are grouped together into one section of the Fair Work Act and classified as ‘industrial protections’.

While the Business Council supports protections for workers, the operations of some of the current protections are causing significant business issues for enterprises, such as adverse action, right of entry and transfer of business.

The Business Council proposes amendments to some of these protections (see box below) to reduce the impact on the operations of enterprises, while maintaining protections for workers.

Industrial protections to be included in the Fair Work Act

The Business Council proposes the list below for inclusion in the industrial protections category, including amendments.

No change

- Anti-bullying
- Dispute resolution
- Freedom of association
- Good faith bargaining
- Notification
- Representation

Amendments proposed

- Adverse action (to be amended to place the onus of proof on party making an allegation and introduce the dominant purpose test)
- Bargaining (require workers to provide written notification of representative; extend good faith bargaining to new projects)
- Better off overall test (to be replaced with the No-Disadvantage Test introduced in 1993)
- Protected action ballot (Require that majority support determinations be obtained before protection action ballot orders can be obtained. Specify that establishing majority support, must be by means of a secret ballot)
- Protected industrial action (Enable the Fair Work Commission to suspend the capacity to take all protected industrial action for a period of up to 90 days in circumstances where a bargaining representative is found capriciously or unreasonably to have notified and withdrawn notice of protected industrial action)
- Right of entry (limited to sites where representative has a member; and representatives are permitted in communal areas, including lunch rooms, only when the enterprise has failed to offer an alternate venue, or agreed to communal area access)
- Transfer of business (replace with business and managerial decision consequence protection).

Agreement making should be about the employment relationship between workers and enterprises

The second of the Business Council's three tiers to guide regulation is Agreements. We propose that agreements should cover the employment relationship, be subject to negotiation and sit within regulation.

Enterprise Agreements have proven a useful tool for both workers and enterprises in Australia and the Business Council proposes they remain central to the framework.

However, in a number of cases, clauses that have been included in agreements go well beyond the employment relationship. The Toyota enterprise agreement is a prime example of this. Determining a shutdown period is a clear management decision. It is not about the employment relationship, but rather the operations of the business. However, the Toyota enterprise agreement included a clause that the factory would shut down 21 days over the Christmas period.[2]

Including such clauses in agreements expands the regulatory framework and the jurisdiction of the Fair Work Commission well beyond the rationale for government intervention.

Such clauses go to the heart of how a business is managed and should sit outside the regulatory framework. The Business Council proposes that agreements are limited to clauses specific to the employment relationship.

In addition to limiting the clauses in agreements, the Business Council proposes amendments to greenfields agreements, including renaming them New Project Agreements.

Under the current arrangements, progress on new projects can be held up, with enterprises unable to commence work as a result of delays in negotiating agreements with unions.

To counteract this, the Business Council proposes the introduction of good faith bargaining for new project agreements, and providing enterprises with the option of having

Clauses to be included in agreements

The Business Council proposes the employment relationship and clauses in agreements should be limited to:

1. Allowances
2. Employment categories
3. Leave arrangements
4. Notifications
5. Ordinary hours
6. Remuneration
7. Rostering issues, limited to maximum days of work, maximum hours per day, meal breaks, minimum break between times worker and minimum daily engagement.

The Business Council welcomes debate on whether or not this is the appropriate list of clauses for inclusion in agreements.

[2] Clause 68.1, Toyota Motor Corporation Australia Limited (AG2011/13594) TOYOTA MOTOR CORPORATION AUSTRALIA (TMCA) WORKPLACE AGREEMENT (ALTONA) 2011

an agreement certified after a specified period.

All other workplace relations matters sit outside the regulatory framework

The third tier of the Business Council's proposed framework to guide regulation of the labour market is Business and Managerial Decisions. These are workplace relations matters that are not mandated nor subject to negotiation. They therefore sit outside regulation and the jurisdiction of the Fair Work Commission.

The creation of this proposed tier infers that all workplace relations matters not specified in a safety net or agreements are beyond the scope of the employment relationship and therefore outside the scope of regulation.

While the legislation will not specify the matters that sit outside regulation, examples of such matters include hiring practices, organisational design, re-engineering workflows, changing the mix of worker categories, and so forth.

Although these decisions would be beyond the scope of regulation, workers would still be protected if decisions led to specific negative consequences. The Business Council has proposed the creation of a new industrial protection whereby if a business or managerial decision results in a loss of conditions, wages or a position, the affected worker will be entitled to a choice between a role under the new conditions, or departure from the enterprise with compensation.

Governance reform is also need to build confidence in the system

The Fair Work Commission, including its members and operations, is essential in building confidence in the system.

The appointment process, and building confidence that the appointment process is based on merit and transparent, will establish a foundation of trust in the Fair Work Commission.

To make the process more transparent the Business Council proposes a skills matrix is applied to the appointment process and appointment processes are subject to public accountability.

We also propose, that consistent with other independent offices and good corporate governance, the appointment term for a Commissioner should be time-limited.

The Business Council's proposed framework seeks to find balance

In proposing to reduce the scope of what is contained within awards and agreements, the Business Council recognises there may be concerns in the community that protections for workers will be diminished.

Accordingly, the foundation of our proposal is a strong safety net that guarantees workers minimum wages, employment conditions and a range of industrial protections.

The changes we propose in reducing the scope of awards and agreements will provide enterprises the flexibility to adjust quickly and focus on the issues that will allow them to continue to create jobs and prosper.

Recommendations

Recommendation 1 – purpose for the workplace relations framework

Establish a purpose for the workplace relations framework based on three imperatives:

- Meet the needs of workers and enterprises
- Establish a safety net of minimum pay, conditions and protections
- Create an environment where enterprises can adjust and stay competitive in a global economy, create jobs, and flourish, thereby contributing to economic growth.

Recommendation 2 – principles of a workplace relations framework

Adopt six key principles for the workplace relations framework that would form the basis of the objects of the legislation underpinning the workplace relations system:

- Regulation specifies a minimum set of enforceable rights and reciprocal responsibilities (Safety Net provisions) of the three parties in the labour market:
  - workers
  - enterprises
  - representatives.
- Workplace regulation is limited to the employment relationship between workers and an enterprise.
- Workers and enterprises have a shared interest in the success of the enterprise. Relationships, and negotiations within the relationships, are collaborative rather than adversarial.
- Matters related to the employment relationship not specified in the minimum set of rights and responsibilities are subject to negotiation, singularly or collectively, between a worker(s) and their enterprise. Managerial decisions are not subject to negotiation.
- Where needed, workers, enterprises and their representatives have access to determinations by a third party which is independent, impartial and timely in its processes.
- Regulation is transparent, easy to understand and use by workers, enterprises and representatives; predictable; and enforceable, with the option of sanctions.

Recommendations continued

Recommendation 3 – three tiers to guide regulation

Establish a three-tiered system to guide regulation of workplace relations:

1. The Safety Net provisions, including industrial protections – mandated rights and industrial protections for all parties

2. Agreements – issues subject to negotiation

3. Business and Managerial Decisions – issues not subject to negotiation.

Recommendation 4 – Minimum Wage Order

- Retain the minimum wage and the role of the Fair Work Commission.
- Establish economy-wide minimum rates for casual, overtime, penalty and shiftwork and move them from awards to the Minimum Wage Order.
- As part of this process, request the Fair Work Commission review penalty rates and establish a definition of unsociable hours for each industry in a 24/7 economy.
- The Productivity Commission considers if the current criteria used to set the minimum wage takes an adequate account of economic circumstances, and the need to protect against wage inflation.

Recommendation 5 – National Employment Standards

- Move all economy-wide rights that currently sit in awards or other parts of the Fair Work Act, to the National Employment Standards (e.g. 'transfer to lower paid duties').
- Include enterprise rights in the National Employment Standards and the reciprocal responsibility of workers and enterprises.
- Use more commonly accepted language in the Fair Work Act, including adopting the 'reasonable person' test.

Recommendation 6 – Awards

- Streamline the 122 Modern Awards into Industry Awards (one per industry)

  Refocus Industry Awards and limit them to:

1. accident pay
2. agreement in writing to pattern of hours of work (part-time workers)
3. allowances for travel costs/times and transport
4. apprenticeship requirements
5. employment categories, including definition of a shiftworker
6. industry specific redundancy schemes
7. national training wage, and allocation of traineeships to wage levels
8. ordinary hours of work
9. rostering issues, limited to maximum days of work, maximum hours per day, meal breaks, minimum break between times worked and minimum engagement
10. wage classifications (up to a maximum of 5 categories per award).

Recommendations continued

- Consider moving to a Universal Award when there are no longer industry-specific issues.

Recommendation 7 – Industrial Protections

- Reverse the onus of proof for adverse action onto the party making the allegation and introduce the dominant purpose test.
- Require workers to specify in writing their bargaining representative.
- Extend good faith bargaining to new project agreements (greenfields).
- Allow enterprises to request the Fair Work Commission ratify a new project agreement after a proscribed period of time, where negotiations have broken down.
- Replace the Better Off Overall Test (BOOT) with a no-disadvantage test.
- Create a new protection that where a business and managerial decision (and therefore outside the scope of regulation) results in a loss of conditions, wages, or a position, the affected worker will be entitled to a choice between a role under new conditions, or departure with compensation (also replaces transfer of business protections).
- Only allow right of entry on a worksite when a representative has a member.
- Representatives are permitted to enter communal spaces, including lunch rooms, following agreement from the enterprise, or where an enterprise refuses to offer an alternate room.

Recommendation 8 – Agreement making

- Clauses to be included in agreements are limited to the employment relationship. Only clauses specified in the legislation can be negotiated. These include:
  - allowances
  - employment categories
  - leave arrangements
  - notifications
  - ordinary hours
  - remuneration
  - rostering issues, limited to maximum days of work, maximum hours per day, meal breaks, minimum break between times worked and minimum daily engagement.
- Individual Agreements are introduced into the workplace relations framework. Safety Net provisions or an Enterprise Agreement are the base for an Individual Agreement and a no-disadvantage test is applied.
- High-income workers can trade off their safety net rights in negotiating Individual Agreements, and are not subject to a no-disadvantage test.
- Extend good faith bargaining to new project agreements (greenfields).

Recommendations continued

- Enterprises can request a new project agreement be certified by the independent workplace relations body after a prescribed period if negotiations have reached an impasse. The agreement would be subject to a no-disadvantage test against the relevant award.

Recommendation 9 – Business and managerial decision making

- All workplace relations matters not specified in Safety Net provisions or Agreements, are beyond the scope of the employment relationship and therefore outside the scope of regulation.

Recommendation 10

- Develop a skills matrix for Commissioners and require all Commissioners to demonstrate a minimum set of skills, and collectively demonstrate the breadth of skills and experience.
- Review the terms of appointments, making them time-limited with the option for Commissioners to nominate for re-appointment.
- Ensure appointment processes and the ongoing performance of Commissioners are subject to public accountability.

Practical pathways for change and transitional arrangements

The Business Council recognises its proposed new framework constitutes significant change, and will require widespread consultation and discussion within the community before some of these changes can be implemented. Other changes however, could be implemented within the next year.

Horizon 1: Immediate action needed in 2015–2016

- Prioritise reforms of Bills currently in parliament and previous proposals from the Business Council (see Part 4 for further details).
- Prioritise some specific amendments proposed in this submission that should not require extensive consultation including:
  - Reverse the onus of proof for adverse action onto the party making the allegation and introduce the dominant purpose test (Recommendation 7).
  - Require workers to specify in writing their bargaining representative (Recommendation 7).
  - Extend good faith bargaining to new project agreements (Recommendation 7).
  - Allow enterprises to request the Fair Work Commission ratify a new project agreement after a proscribed period of time where negotiations have broken down (Recommendation 7).
  - Only allow right of entry on a worksite when a representative has a member (Recommendation 7).
  - Representatives are permitted to enter communal spaces, including lunch rooms, following agreement from the enterprise, or where an enterprise refuses to offer an alternate room (Recommendation 7).
  - Create a time-limited appeals panel for the Fair Work Commission with judicial appointments (Recommendation 10)

Horizon 2: Medium term 2016–2017

Adopt the proposed framework for the workplace relations system.

Run a national consultation process involving all parties, including the community, to reach agreement on what should be contained in each of the following categories of the framework:

- Purpose (Recommendation 1)
- Principles (Recommendation 2)
- Three tiers of regulation (Recommendation 3)
- Minimum Wage Order (Recommendation 4)
- National Employment Standards (Recommendation 5)
- Awards (Recommendation 6)
- Industrial Protections (Recommendation 7)
- Agreement making (Recommendation 8)
- Business and managerial decision making (Recommendation 9)

Horizon 3: Longer term 2018–2020

- Based on the feedback received in the consultative process conducted across 2016–2017 draft legislation for a new workplace relations framework. Use the Plain English Foundation, or an equivalent organisation, to assist in drafting the new framework and legislation so it is easy for an average worker or enterprise to understand and navigate (2018).
- Consult on and develop a transition plan (2018).
- Introduce legislation to implement the new framework (2019).
- Implement the new legislation and framework in stages consistent with the transition plan (2020).

PART 1: THE CASE FOR CHANGE – THE PERFORMANCE OF THE WORKPLACE RELATIONS SYSTEM

We need to get workplace relations right

The Business Council of Australia (the Business Council) believes this review provides an opportunity for the Productivity Commission to assist governments to develop a strategic direction for a modern workplace relations framework.

Successful enterprises are vital to Australia's enduring prosperity. Successful enterprises create jobs and drive productivity growth. It is the combination of growth in total hours worked across the labour force, with growth in labour productivity, that drives overall economic growth.

People, coupled with technology, are the key to unlocking our innovation and competitiveness and creating successful enterprises. Workplace relations can facilitate this objective or work against it.

Workplace relations (i.e. the relationship between a worker and their enterprise) is shaped by two elements: regulation, and business decision making and operational management. If workplace relations are to contribute to Australia achieving enduring prosperity, both aspects need change and improvement.

Productive workplaces are not guaranteed by a regulatory system. Nor is a workplace relations system fully responsible for the competitiveness of enterprises. But a regulatory system can restrict the capacity of people to create productive and high-quality workplaces by imposing excessive and inappropriate restrictions on business conduct that are out of proportion with the risk to be managed.

Australia's workplace relations framework should allow all Australians to fully exercise their potential and skills, so they can both contribute to and benefit from innovation, productivity and growth. Workers and enterprises share a common interest in facilitating the ongoing success of the enterprise.

The Business Council encourages the Productivity Commission to develop a roadmap for reform for implementation over the next five years to deliver enduring legislative change. This should facilitate the creation of workplaces that are collaborative and creative, support people to realise their potential, and allow enterprises to adjust and stay competitive in a global economy.

At the same time, enterprises will need to have a stronger focus on improving business decision making and operational management, so that Australian workplaces become models of high performance.

The workplace relations system is not working as well as it should

The Business Council represents key sectors of the economy, and we believe the operation of the current workplace relations framework is no longer fit for purpose.

Australian enterprises and industries are operating in a global marketplace. Australia is a high-wage economy, so enterprises are competing with countries with lower wage costs and greater flexibility in managing their operations and their workforces.

Australia has been a high-wage economy since before federation: "...it was sometimes called a 'worker's paradise' because of the high level of production and high wages earned by workers compared to other countries."[3]

The Business Council supports high real wages. However, if enterprises are to compete in a global marketplace where Australian wages are high, our workplace relations system needs to be flexible enough to allow enterprises to deliver productivity gains that can underpin high remuneration.

The architecture of our workplace relations system is sound, but its scope is too broad

Regulation has an important role to play in upholding critical rights and providing legitimate safeguards, but to be effective, regulation must be properly thought through and applied sensibly.

Industrial relations regulations have a rightful role to play in addressing legitimate community concerns about workers' basic rights. But equally they have to preserve the ability of businesses to engage effectively with their employees to change work arrangements in response to commercial imperatives and achieve improvements in competitiveness that are critical to the sustainability of companies and their workforces.

The two main instruments that regulate the employment relationship are Modern Awards and agreements. Both awards and agreements have expanded their scope beyond the employment relationship.

Agreements should be about negotiating terms and conditions of the employment relationship. They should not be about how an enterprise manages its operations. While collective agreements are varied in their content, a number of clauses that have been included in agreements go well beyond the employment relationship.

Some agreements seek to control how enterprises are managed

The Toyota enterprise agreement is a prime example of this (see excerpt from agreement in Toyota Case Study).[4] Included in this agreement was a clause specifying a 21-day shutdown period over Christmas. At the time this shutdown became a public issue, Toyota was manufacturing cars in 28 other countries where the longest shutdown was 10 days.[5] Combined with Australia's high wages, these kinds of rigidities create unnecessary barriers to enterprises being competitive in a global marketplace.

[3] Waltzing Matilda and the Sunshine Harvester Factory, Fair Work Australia.

[4] Toyota Motor Corporation Australia Limited (AG2011/13594) TOYOTA MOTOR CORPORATION AUSTRALIA (TMCA) WORKPLACE AGREEMENT (ALTONA) 2011.

[5] Lucas C. and Hall S., 'Toyota's Altona Plant to start 21-day shutdown amid survival fears', *The Age*, 17 December 2013

Determining when and for how long to shut down operations is a clear management decision. It is not part of the employment relationship, and including clauses such as this in enterprise agreements creates rigidities and is an over-reach of a collective agreement.

Including such clauses in agreements has expanded the regulatory framework, and the jurisdiction of the Fair Work Commission, well beyond the employment relationship. Such clauses go to the heart of how a business is managed and should be outside the scope of regulation.

TOYOTA CASE STUDY

TOYOTA MOTOR CORPORATION AUSTRALIA (TMCA) WORKPLACE AGREEMENT (ALTONA) 2011

67. OPERATIONAL SHUTDOWNS

The Parties acknowledge that in order for TMCA to remain competitive in an increasingly competitive global market, and to accommodate potential fluctuations in production demands, there is a need to introduce 'smarter' work practices during the life of this Agreement that provide for greater flexibility in production days.

Any proposed change to the agreed Plant Operating Days calendar will be subject to consultation and agreement with the local representatives (excluding ROO/Flexibility Clause 40).

With respect to the need to maximise production days during periods of high production demand, TMCA confirms the preference to decrease the annual 21 day shutdown period. In doing so, allowing Employees greater flexibility to roster Annual Leave at other times during the year.

Where TMCA experiences an increase in customer demand requiring an increase to the Plant Operating Days Calendar by decreasing the 21 day Christmas shutdown, TMCA will:

1. Make clear what arrangements over the shutdown period are required. Preferred operational condition is for two (2) shifts (am & pm).

2. Ask Employees to vote on changing the shutdown period and acceptance will be based on 50% + 1 majority.

3. In the event that a majority of Employees do not vote in favour of the revised shutdown period, TMCA will call for volunteers to run a combined shift (am and pm) appropriately supported by shops, group and process for the additional days: a) TMCA will confirm the combined shift arrangement including whether enough employees with the skills required have volunteered b) Where insufficient numbers of Employees have volunteered to ensure coverage of required processes, TMCA will request TFT employees to work through the revised shutdown. c) Where insufficient numbers of Employees to ensure coverage of required processes continues a selection criteria will be jointly developed and agreed by TMCA and the Union to assist in determining which employees will be requested to work the combined shift arrangement Final decision to proceed with the revised arrangements will rest with TMCA.

Source: Toyota Motor Corporation Australia Limited (AG2011/13594).

Additionally, a system that has a broad set of conditions built into it before the two main parties in the system, enterprises and their workers, have a chance to sit down and negotiate how they can most effectively work together, establishes the relationship on an adversarial footing. This is not conducive to building productive workplaces.

Our current system has too many rigidities

While our current system has some elements of flexibility, including the use of part-time workers (see box on flexibility), it also has rigidities built into it that limit flexibility.

Some of the system rigidities were introduced in the last phase of reform of workplace relations, taking the system backwards. For example, individual agreements that could specify terms and conditions for employment were available in the workplace relations system from 1996.[6] Under the current system, the objects of the Act explicitly exclude such agreements '... can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system.'[7]

The proposition that individual agreements cannot be fair is unreasonable. Enterprises and workers should have a choice about how to structure their employment relationship. They should not be constrained by the workplace relations system in agreeing on the terms of an employment contract that best suits both their needs.

Modern Awards contribute to rigidities and need to be refocused

Modern Awards are created by the Fair Work Commission and are meant to 'provide a fair and relevant minimum safety net of terms and conditions'.

There are 122 Modern Awards and the conditions in the awards are mandated and not subject to negotiation.

Nineteen per cent of Australian workers get their employment conditions from an award. Awards are also the starting point for negotiations for a collective agreement. Forty-one per cent of Australia's workforce get their employment conditions from a collective agreement. This means that awards underpin employment arrangements for 60 per cent of Australian workers.[8]

While Australia is the only country in the world to operate an awards system, the Business Council is not proposing its abolition. We recognise and support the role awards play in contributing to a safety net for workers. However the terms and conditions in modern awards have gone beyond a minimum standard.

[6] Fair Work Act Review Panel, 'Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation', Australian Government, Canberra 2012.

[7] Fair Work Act 2009, Object of this Act, Division 2, Section 3.

[8] ABS Employee Earnings and Hours, ABS cat. No. 6306.3, May 2014

The scope and content of awards need to be reviewed and refocused to their core purpose

Take rostering as an example. An award could specify minimum standards for rostering. These might include the maximum number of hours a worker is required to work in a day or the minimum break time between shifts. But an award should not go into the detail of how a roster is constructed.

What is flexibility?

Flexibility in the economy

Flexibility in the economy means that factors of production are able to respond to market developments – both positive and negative. Flexibility requires flexible prices that signal where labour and capital are needed, as well as the ability of factors of production to respond to these price signals as seamlessly as possible. Flexibility in labour markets broadly means there is capacity for wages to adjust to reflect different labour market conditions, flexible employment arrangements and low barriers to labour mobility.

Flexibility is particularly important in difficult economic periods to minimise unemployment.

During the GFC, the rise in Australia's unemployment rate was contained, and workforce participation continued to rise. Other countries did not fare so well and continue to feel the negative effects today.

There are many reasons why Australia survived the GFC relatively unscathed. One of these is the scope for part-time and casual working arrangements. In Australia, 15 per cent of employees work part-time and almost 25 per cent are casual. Australia has one of the highest shares of part-time employment across the OECD based on common definitions.

This meant that during the shock, employers and employees could agree to reduce the number of hours people worked instead of terminating their jobs. This helped to keep people attached to the labour market until conditions improved.

Greater wage flexibility has also helped maintain employment during the economy's transition to lower terms of trade and the end of the mining investment boom. While the unemployment rate has risen to 6.3 per cent, aggregate wages growth has also slowed, reflecting weaker economic conditions, thus moderating the extent of increases in the unemployment rate.

Without flexibility in wages, working arrangements and labour mobility, unemployment would inevitably bear the brunt of the current weak economic conditions and structural adjustment process and of any future economic downturns, imposing unnecessarily high economic and social costs.

Source: ABS, Australian Labour Market Statistics, cat. no. 6105.0, July 2014 and OECD.StatExtracts Incidence of FTPT employment – common definition.

Another example is meal breaks. The minimum number of meal breaks that a worker is entitled to could be specified in the award, but when and how they are taken should not be specified.

Not only do awards go beyond determining minimum employment conditions, they delve into roles and occupations. As a result, we have 122 Modern Awards operating across the Australian economy. Allowing the inclusion in awards of prescriptions beyond minimum standards creates rigidities in the employment relationship that undermine the capacity of an enterprise and its workers to negotiate a balance that meets each of their needs.

Having 122 Modern Awards, including occupationally specific ones, creates rigidities across the labour market and can effectively dictate to an enterprise how it manages its workforce.

The Australian labour market is moving away from narrowly-based occupational roles. Enterprises need workers with a broad set of skills who can adapt to changing environments and not be siloed into narrow occupational categories.

As a European Commission Roundtable noted: 'More and more of work is being deconstructed from a 'job' to 'tasks.' Employers outsource by thinking more about tasks and less about jobs. Individuals are doing more project work for primary or secondary income. Perhaps more than any other topic at the Roundtable there was consensus on this – the framework for measuring, researching, and decision-making about the labour market has to be built more around tasks and skills than jobs and occupations.[9]

Having 122 Modern Awards, including occupationally specific ones, works against this as it means more specificity in the award. The more awards you have, the smaller the number of workers they cover and the narrower the definition of a role becomes. If the specificity is around occupations it narrows the functions that a worker could be expected to perform. This creates rigidities across the labour market and can effectively dictate to an enterprise how it manages its workforce.

The workplace relations system is complex and difficult to use

It is doubtful that any party to the workplace relations system would argue it is clear, transparent and easy to navigate.

The Fair Work Ombudsman has found that:

- only 12 Modern Awards clearly state hours for which overtime is payable, which means 85 per cent of awards are unclear in this regard
- only five Modern Awards were found to clearly state the application of penalty rates for all employees covered under the award, which means 85 per cent of awards were not clear
- only 32 Modern Awards clearly state whether casuals are entitled to overtime

[9] Mordos L. and Barrington L., *European Commission Roundatable on information technologies and labour market disruptions: A cross-atlantic dialogue*, summary report, Cornell University 2014.

- only 20 Modern Awards clearly state how penalty rates for casuals are calculated.[10]

This creates uncertainty for enterprises when trying to determine the rates that apply and reduces the ability of workers to understand their basic entitlements.

The Federal Court has only recently determined that annual leave loading is payable on termination. The confusion arose because the Fair Work Act 2009 states that on termination, an employee is entitled to be paid out any remaining annual leave at the rate they would have received had they taken leave. This would suggest they would also receive an annual leave loading, which compensates workers for penalties that they would have otherwise received if working. However, some awards and Agreements state that annual leave is not payable on termination, a direct contradiction of the Fair Work Act. Until this determination there has likely been inconsistent application of these clauses, with some employees receiving the higher payment and others not.

Source: de Flamingh J. and Peterson K., 'Federal Court resolves long-running uncertainty over annual leave payments on termination', Corrs Chambers Westgarth, 10 March 2015 , accessed 13 March 2015.

The Fair Work Ombudsman has also identified a number of scenarios where the coverage of the award is uncertain. For instance, a retail shop with a cafe component could be covered by the General Retail Industry Award 2010, except that this award excludes cafes as does the Restaurant Industry Award 2010 and the Fast Food Award 2010.[11]

Many enterprises rely on legal counsel to help them interpret the legislation to avoid exposure to complaints and legal challenge. Individual workers and small businesses have even fewer legal resources but should not need them to understand their basic responsibilities and entitlements.

The reliance on third parties undermines the development of direct and collaborative relationships which is fundamental to productive workplaces. As drafted, the legislation and instruments are not meeting the needs of workers and enterprises.

Decisions stemming from the legislation are not predictable

An effective workplaces relations system is one where all parties in the labour market (workers, enterprises and representatives) have a clear understanding of the rules that govern the relationships, and can anticipate the decisions that will be made if a dispute arises. This allows enterprises, in particular, to construct their operations and make business decisions within the rules.

Unpredictability and inconsistent application of the rules stifles innovation and inhibits the enterprise's capacity to be agile in response to changing circumstances.

10 Fair Work Ombudsman, 'FWO Research for Modern Award Review on base rates of pay, overtime and penalties', Australian Government, April 2014, p.3 and 4. Note that six awards do not contain overtime provisions and 13 awards do not contain penalty rate provisions.

11. Fair Work Ombudsman, 'Coverage Clauses in Modern Awards', Australian Government, May 2014, Appendix A.

It necessitates enterprises seeking legal opinion before making key decisions, and even independent third parties cannot guarantee consistent interpretation and advice.

Member companies have reported they face additional challenges where third party decisions related to disputes are disregarded, or action on the decision is slow. If sanctions are rarely enforced, there is an incentive to disregard decisions of the independent body.

Changing operational practices or workplace structures is too hard

Arguments have been made that there is sufficient flexibility in the current workplace relations framework for enterprises to effectively manage their workforce, including in times of transition. Specific enterprises are often pointed to as exemplars of this.

Conversely, enterprises have consistently raised concerns that the workplace relations system inhibits their ability to effectively manage their business. This is particularly significant for enterprises operating in industries most challenged by the emergence of a global economy, such as manufacturing, transport and mining.

These enterprises need the freedom to make business decisions that allow them to transition, including decisions which may have a negative impact on their workforce. Enterprises might do this by revising their organisational structure, changing their production methods, changing their product mix or developing new marketing and distribution channels.

Where the workplace relations system is not an obstacle for enterprises who need to change their business model, unnecessary complexity can mean that enterprises become risk adverse. Enterprises need to take risks to compete. Excessive complexity can make productivity gains harder to get.

While the workplace relations framework should provide certain protections for workers, these protections should not be extended to the point that enterprises are constrained in how they structure their businesses to stay competitive.

The Business Council is not suggesting that the workplace relations framework prevents enterprises from making necessary business decisions. Nor are we saying that there are no remedies enterprises can access, including specific sanctions.

However, the Business Council does maintain that the time and cost involved in accessing these remedies make it unnecessarily difficult and costly for enterprises to effectively manage their businesses in the context of a challenging, vastly more competitive global economic environment.

If Australia is to achieve enduring prosperity, the workplace relations system must work in harmony with this objective, not work against it.

A new framework based on common ground is needed

There is not widespread support or confidence in the workplace relations system

While workers and enterprises have a shared interest in businesses' ongoing competitiveness, they have different priorities and needs. No workplace relations system can satisfy the wants of all the parties. But an effective workplace relations system must have general support from workers, enterprises and the community more broadly.

It needs to be founded on the significant common ground between the parties. They need to have confidence in the system, which means they cannot feel that it is stacked against them.

Neither the current workplace relations system, nor the one that preceded it, have had sufficient support or confidence from all the parties in the labour market. If workers and enterprises are to move beyond regulation and focus on improving productivity and innovating, the workplace relations debate needs to stop being reignited every time there is a change of government.

Deregulation of the labour market and the removal of rigidities began three decades ago

Deregulation began in the 1980s when the Australian economy was opened up to the world and exposed to global competition — the mutually reinforcing 'twin' pillars of industry protection and centralised wage fixing were unwound.

The changes were designed to help enterprises and workers to adapt, innovate and be more productive. Although the first waves of reform were difficult, they were negotiated and generally accepted by all parties in the labour market.

Changes over the last decade have not had the same level of acceptance. They have created concerns across the community and created unnecessary divisions between many workers and enterprises. There have been perceptions on both sides (workers and their representatives, and enterprises) that the workplace relations system has been designed in favour of the other party.

While the reforms that were introduced in the early 1990s were significant changes for both workers and enterprises, the changes were not driven by ideology. They were driven by the need for Australia to become more competitive and productive.

The lack of ideology, and the case for reform, helped all parties to accept the reforms. The reforms introduced in the last ten years have been far more ideologically driven. Ideology is divisive and rarely leads to good public policy design or community acceptance of the reforms.

The ideological drive behind the reforms of the last ten years has also created confusion and misinformation about the progress our workplace relations system made in the 1990s.

For example, it was under the 1993 reforms that a No-Disadvantage Test was introduced when considering the content of an enterprise agreement against the content of an award. This test was removed in the 2005 reforms, but the one re-instated in the 2009 reforms

was broader than the one introduced in 1993. Rather than requiring workers to not be disadvantaged, the 2009 test required workers ‘be better off overall’.

We cannot be driven by ideology when we consider the workplace relations system Australia needs for the future. We need to find common ground between all parties and design a system that supports productive workers and high-performing workplaces.

The Business Council seeks to find this common ground by proposing a new workplace relations framework that recognises the rights of all parties and can be adapted with changing economic and social developments, allowing the system to be more enduring.

PART 2: THE CONTEXT FOR CHANGE: THE NATURE OF WORK AND THE WORKING ENVIRONMENT

Australia's economic growth challenges require productivity improvements

Real net national disposable income per person has fallen over the past two years.

This reflects an economy adjusting to the largest fall in the terms of trade in 50 years and the end of the mining investment boom.

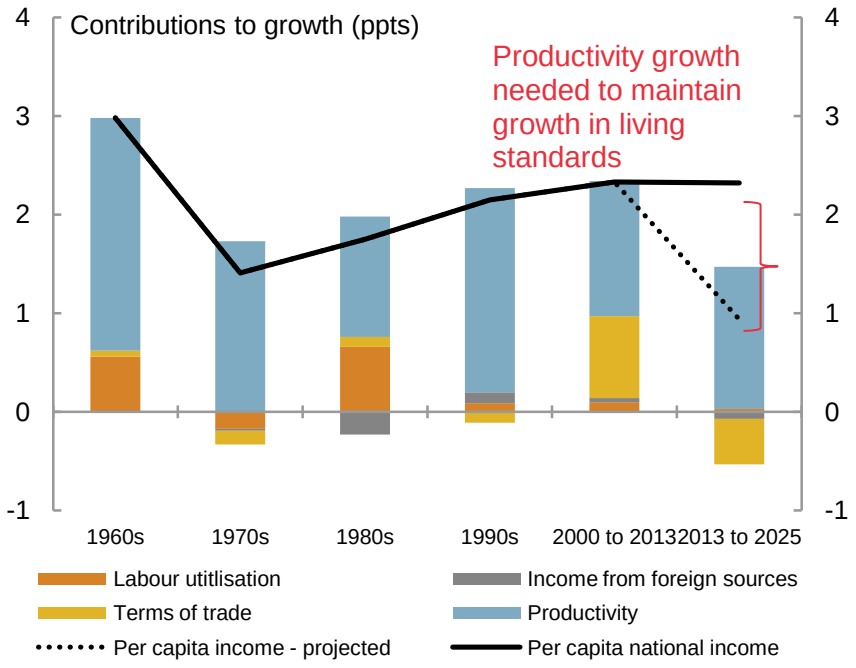
The currency has depreciated significantly against the $US and most major currencies. Depreciation will facilitate required structural adjustment by improving the competitiveness of exporters and import competing enterprises. This adjustment process will need expansion in non-mining tradeable sectors of the economy including agriculture, manufacturing and traded services such as education and tourism.

But the process takes time and is not painless. Rising unemployment is symptomatic of this. Importantly depreciation will need to flow through as real reductions in costs – a real depreciation – to lift competiveness and growth.

Real GDP growth of 2.7 per cent in the year to September 2014 remained below trend. Declining terms of trade have seen nominal GDP growth fall to historically low levels. The unemployment rate has risen to 6.3 per cent, its highest level since the early 2000s.

This brings into sharp focus the reality that future income growth will depend primarily on achieving higher labour productivity.

Figure 2: Productivity is needed to maintain growth in living standards



Source: 2014-15 Budget

The economic perspective

Australia's future income growth will depend primarily on achieving higher productivity and creating jobs. Increasing productivity does not mean working harder for less – indeed, it means the opposite. Increasing labour productivity is about increasing output for a given level of labour input through adding capital, or adopting new technologies and innovating. Higher productivity thus enables higher real wages. If Australia is to achieve enduring prosperity, the workplace relations system must work in harmony with achieving job creation and higher productivity, not work against it.

Working in harmony means a workplace relations framework that allows all Australians to fully exercise their potential and skills so they can both contribute to and benefit from innovation, productivity and growth.

Create jobs, encourage participation

Australia is also experiencing domestic structural change

Demographic change will profoundly affect labour market supply and economic output

Australia's population is growing but it is also ageing. While the overall size of the labour market will continue to grow, the aggregate labour participation rate is expected to fall from 65 per cent in 2012 to 64.6 per cent in 2014-15 to 62.5 per cent by 2055, meaning that overall labour supply will contract.[12]

Australia's participation rates, particularly for women, still lag behind other OECD countries.[13]

Given these demographic changes and the reduction in labour supply, increasing participation rates become even more important. The workplace relations system is one of a number of factors that influence workforce participation.

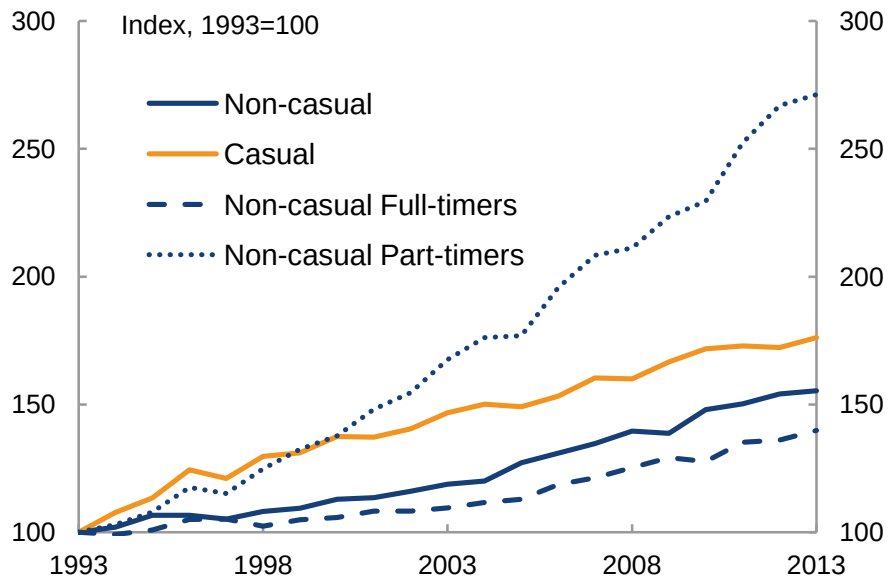
We need a system that facilitates the creation of employment relationships that allow an ageing workforce to continue in the labour market, as well as encouraging labour market participation for groups with traditionally low participation rates.

Australia also needs a workplace relations system that does not present barriers to entry for young people wanting to transition from part-time and casual work into 'career' roles. While Australia's youth unemployment rate is lower than many of our counterparts, it remains consistently higher than the headline unemployment rates. We need to ensure there are no structural barriers facing these young people in transitioning into the labour market.

[12] Australian Government, 'Intergenerational Report 2015: Australia in 2055', Commonwealth of Australia, 2015.

[13] OECD, StatExtracts LFS by sex and age – indicators: Labour force participation rate.

Figure 3: Part-time and casual work is increasing



Source: ABS, Labour Market Statistics, cat. no. 6105.0

Australian workers, enterprises and industries are not homogenous

A single workplace in Australia can now employ a broad spectrum of the labour market.

A large enterprise may have young people who are still in school and working on the weekend; students who are supporting themselves while they gain their tertiary qualification; full-time workers who may or may not have a tertiary qualification; part-time workers who combine paid work and caring duties; casual workers who may work for more than one employer; and older workers who want to maintain a presence in the labour market but reduce their commitment.

Smaller enterprises are unlikely to have workers from each of these categories, but they will certainly have a cross-section.

Workers have different needs, expectations and motivations

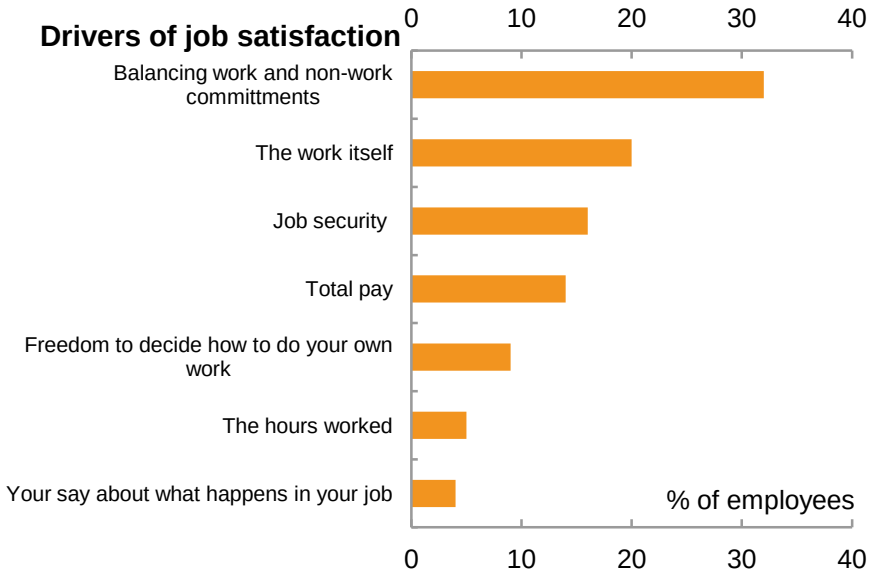
Young people are rarely available to work during teaching time, which generally takes place during traditional business hours. Part-time workers often have caring responsibilities and will want to construct their working hours around those responsibilities. Casual workers will want the freedom to specify the hours they can work and will not want to be constrained in how many enterprises they work for.

They will also have different motivations and ambitions. Two young graduates who are starting their career after completing the same qualification may start work in the one organisation and have completely different motivations and ambitions. These motivations and ambitions will also differ from those of a worker in the middle of their career or one who is transitioning out of the labour market.

As depicted in Figure 4, workers value flexibility and the ability to create a balance between their work and personal commitments. This balance is unique to an individual's

circumstances and is not static. As personal circumstances change, so do the needs of the worker.

Figure 4: Work-life balance is the most important contributor to job satisfaction



Source: Fair Work Commission, Australian Workplace Relations Study Employee Survey, 2014.

To be successful, enterprises need flexibility to manage diversity

Effective managers recognise that supporting workers in achieving this balance is a key to their productivity, as well as making the enterprise an employer of choice. It is in the interests of a manager and an enterprise to provide workers with the flexibility that allows them to make choices and fully utilise their potential and skills.

The worker perspective

Workers value flexibility and the ability to create a balance between their work and personal commitments.

High skilled workers are more empowered and want to construct their own unique arrangements.

Vulnerable workers will continue to expect government to assure a minimum level of pay and conditions that are consistent with societal norms.

Flexibility to balance work with lifestyle, a safety net to protect vulnerable workers

Creating that balance generally comes at a cost to the enterprise. Most enterprises will factor that cost into their business model, but need the option to make a choice that suits the needs of the enterprise.

If enterprises do not have the necessary freedom to make choices, they will struggle to be successful. An enterprise can only create jobs and have a workforce, if it is successful.

Enterprises need flexibility to juggle and find a balance between meeting the different needs and expectations of their workforce, and achieving business imperatives.

There are two pre-requisites to creating such a work environment.

The first is that the worker and enterprise have a direct relationship, and sufficient trust and opportunity to negotiate. Collaborative, rather than adversarial, relationships are the key.

Our negotiation processes do not facilitate this collaboration. The inclusion of so many clauses in awards and agreements suggest to workers that unless a clause is included in a legislative instrument, their enterprises will not make provisions for their individual circumstances. This leads to mistrust and adversarial engagements.

The second pre-requisite is that the enterprise has the flexibility to negotiate both with the individual and across their workforce.

Our current system does not allow for individual agreements, and does not facilitate direct negotiation between enterprises and workers. The requirement to apply a 'better off overall test' does not allow enterprises to negotiate arrangements that best suit the needs of their workers and themselves. If the two parties agree on arrangements that suit them, there should not be a third party to override that agreement and remove the flexibility both parties desire.

Globalisation and digitisation are changing the world of work

We are now operating in a global marketplace for tasks and jobs

The process of producing goods and services is not confined to a supplier's local market. Production increasingly takes place wherever the necessary skills and materials are available at a competitive cost and quality.

Enterprises selling to a domestic market are not protected. Enterprises across the globe can and do compete for markets outside their regions.

Fewer jobs are drawn solely from the domestic labour market. While offshoring has traditionally happened where low-cost labour can be used to replace more highly paid local workers employed on low skilled tasks, workers of all skill levels are now competing on a global stage.

The enterprise perspective

Enterprises need the freedom to make business and managerial decisions, including the ability to source the most cost-effective products, labour and capital.

Enterprises need flexibility to juggle and find a balance between meeting the different needs and expectations of their workforce, and achieving business imperatives.

Flexibility and freedom to make business decisions to compete in the global market

As educational attainment spreads across developing nations, medium and high skilled tasks are increasingly being outsourced as developing nations have the skills necessary and can deliver the work at a lower cost. Technology means that for many roles, a worker's geographical location is not a constraint.

These changes present both an opportunity and a threat for enterprises and workers.

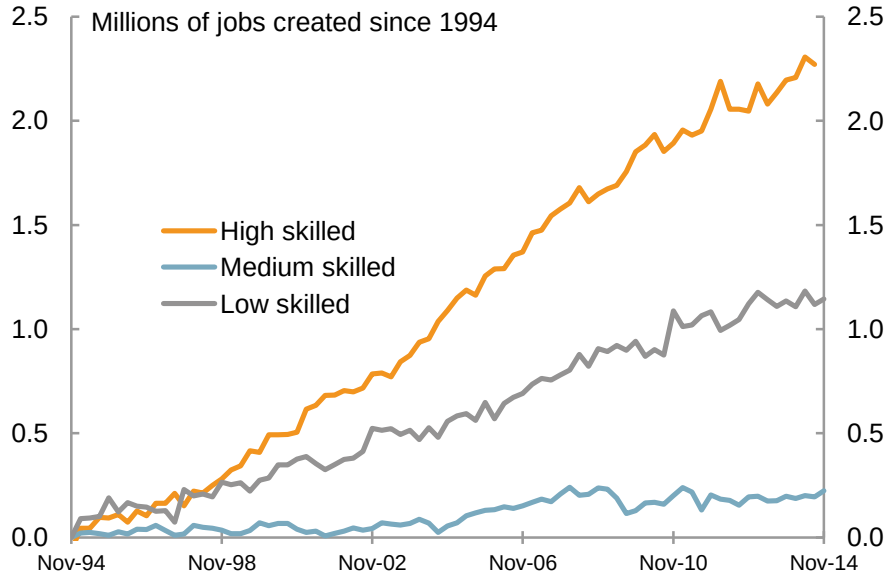
The opportunity is the ability to compete to meet demand, no matter where demand is located, while the threat is that competition can come at an enterprise from anywhere in the world. We are no longer operating in an economy where tasks are relocated offshore. We are operating in an economy where the labour market is global. Digital technology will forever alter the nature of work and the labour market

Over the last few decades, technology has seen routine tasks automated. Until recently, non-routine tasks were not seen to be at risk of automation. However a recent US study found that 47 per cent of total employment in the United States is at high risk of computerisation and could be automated over the next decade or two.[14]

The availability of big data means artificial intelligence is playing a larger role. A wide range of non-routine cognitive tasks are becoming computerised, including tasks in high skilled professions such as law and medicine[15]. As recently as five years ago, this fundamental change would have been unimaginable by most of us.

Automation will slowly replace many medium-skilled roles in the labour market. This will polarise the type of work in demand in the labour market.[16]

Figure 5: There has been an increase in demand for high-skilled workers



Source: ABS, Labour Force Australia, cat no. 6291.0.55.003 and BCA.

[14] Frey, C. And Osborne, M., 'The future of employment: how susceptible are jobs to computerisation?', 2013, accessed October 2014

[15] Ibid

[16] Autor D. 'Polanyi's paradox and the shape of employment growth', 2014, accessed October 2014

There will be increased demand for higher skilled workers with higher levels of reasoning, judgement, creativity and a range of soft skills to complement their technical skills. Successful workers will be those who can use technology to complement their work, rather than having technology replace their labour.[17]

There will also be demand for workers who cannot be quickly replaced by technology, primarily carers and servers. While these are traditionally considered 'low skilled' roles, these workers will be required to have a broader skill set than previously was the case, including communication, technology, and problem solving skills.

Enterprises will need to have the flexibility to retrain workers into completely new functions, and continue to train people throughout their careers to stay abreast of technological changes.

Regulation of the labour market should not inhibit companies from doing this but nor should retraining be mandated.

Our workplace relations system must facilitate, rather than constrain the ability of enterprises and workers to compete in the global digital marketplace

The global marketplace for tasks and jobs means the singular relationship of worker and enterprise is unlikely to remain across the labour market.

High skilled workers will be more empowered and want to construct their own unique arrangements. They may wish to become independent agents who work for many employers and expect to have the freedom to do this. A fit for purpose workplace relations system will support workers to negotiate individual arrangements that suit their needs, without government intervention or a third party.

At the same time, low skilled workers will continue to expect government to assure a minimum level of pay and conditions that are consistent with societal norms.

Enterprises must also be able to structure themselves so they can respond quickly to changing demands and competition. Firms might do this by revising their organisational structure, changing their production methods, changing their product mix or developing new marketing and distribution channels.

To succeed in the modern, global economy, enterprises need the freedom to make business and managerial decisions, including the ability to source the most cost-effective products, labour and capital. They need the flexibility to quickly re-engineer their business processes and working arrangements to grasp opportunities from new technology and to respond to emerging global trends.

Australia's current workplace relations system provides for minimum levels of pay and conditions, but it does not support these other requirements of today's workers and enterprises.

[17] Ibid.

PART 3: A WORKPLACE RELATIONS FRAMEWORK FOR THE FUTURE

The Business Council's proposed workplace relations framework for the future attempts to find much needed common ground in this contested policy space to enable the creation of enduring change to the workplace relations system.

The framework is based on the current architecture of the Fair Work Act, the Fair Work Commission and the Fair Work Ombudsman and has four components:

1. Purpose
2. Principles
3. Three tiers to guide regulation of workplace relations:
   - 3.1 Safety Net provisions, including Industrial Protections
   - 3.2 Agreements
   - 3.3 Business and Managerial Decisions
4. Governance and Administration

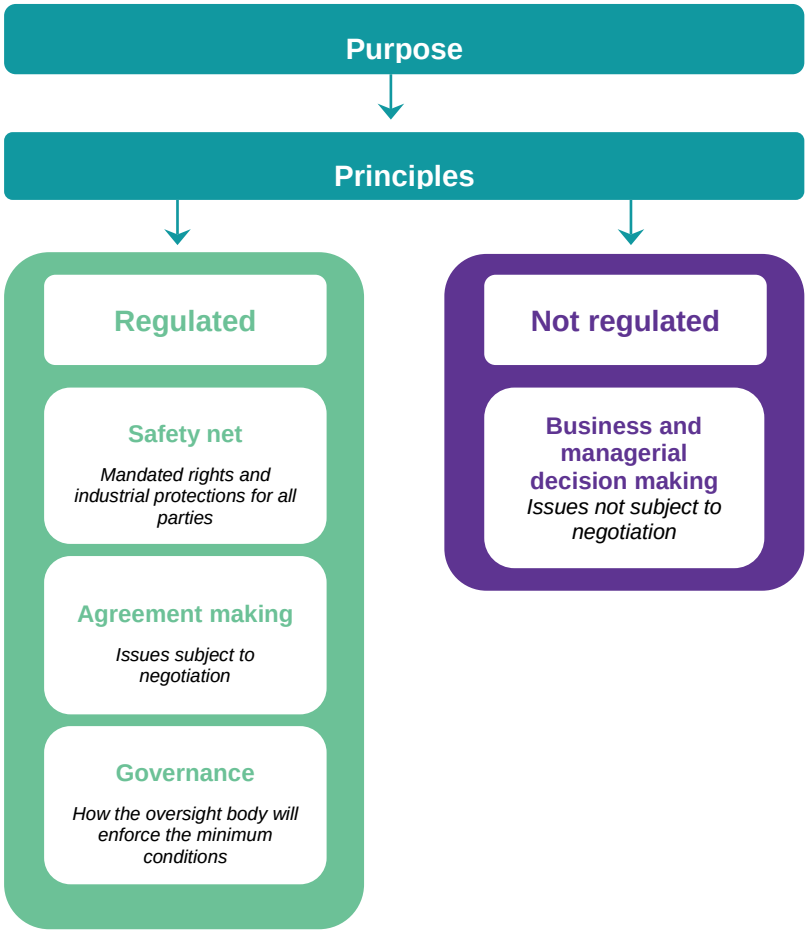


Figure 6: A workplace relations framework for the future

Source: BCA.

1. Purpose of a workplace relations framework

Recommendation 1

Establish a purpose for the workplace relations framework based on three imperatives:

- **Meet the needs of workers and enterprises**
- **Establish a safety net of minimum pay, conditions and protections**
- **Create an environment where enterprises can adjust and stay competitive in a global economy, create jobs, and flourish, thereby contributing to economic growth.**

The labour market is unique

The current system does not articulate why government would intervene in the labour market or the purpose of having a regulated workplace relations system.

Regulation has an important role to play in upholding critical rights and providing legitimate safeguards, but to be effective regulation must be properly thought through and applied sensibly.

Industrial relations regulations have a rightful role to play in addressing legitimate community concerns about workers' basic rights. But equally they have to preserve the ability of businesses to engage effectively with their employees to change work arrangements in response to commercial imperatives and achieve improvements in competitiveness that are critical to the sustainability of companies and their workforces.

Work is a fundamentally important part of people's lives. People spend more of their waking hours at work than in any other part of their life. Workplace relations impacts individuals, enterprises, society and the economy.

A dysfunctional labour market can prevent enterprises from creating jobs if the system is so rigid or unpredictable that it creates untenable business risk. It can also keep people out of the labour market because the times or type of work available to them are not suitable to their needs.

Our workplace relations system should contribute to social imperatives but this must be balanced against economic and demographic imperatives. Ultimately it is not in the interests of any of the parties for economic imperatives to suffer.

The Business Council thinks that a key to finding common ground is agreeing on the purpose of the workplace relations system. This purpose should be enduring and guide further changes to the system.

The Business Council proposes that government intervention in Australia's labour market should be based on three imperatives. These three imperatives focus on workers, enterprises and the economy more broadly. The imperatives proposed are:

1. Meet the needs of workers and enterprises

2. Establish a safety net of minimum pay, conditions and protections

3. Create an environment where enterprises can adjust and stay competitive in a global economy, create jobs, and flourish, thereby contributing to economic growth.

It should meet these imperatives by intervening in the labour market to the minimal extent needed, to ensure workplaces are consistent with the community's expectations so workers and enterprises can focus on their common purpose.

2. Principles of a workplace relations framework

Recommendation 2

Adopt six key principles for the workplace relations system that would form the basis of the objects of the legislation underpinning the workplace relations system:

1. **Regulation specifies a minimum set of enforceable rights and reciprocal responsibilities (Safety Net provisions) of the three parties in the labour market:**

   1.1 workers

   1.2 enterprises

   1.3 representatives.

2. **Workplace regulation is limited to the employment relationship between workers and an enterprise.**

3. **Workers and enterprises have a shared interest in the success of the enterprise. Relationships, and negotiations within the relationships, are collaborative rather than adversarial.**

4. **Matters related to the employment relationship not specified in the minimum set of rights and responsibilities are subject to negotiation, singularly or collectively, between a worker(s) and their enterprise. Managerial decisions are not subject to negotiation.**

5. **Where needed, workers, enterprises and their representatives have access to determinations by a third party which is independent, impartial and timely in its processes.**

6. **Regulation is transparent, easy to understand and use by workers, enterprises and representatives; predictable; and enforceable, with the option of sanctions.**

An Act is designed to be interpreted to give effect to its purpose or object. Therefore it is essential the objects are direct and not open to interpretation.

The current objects of the Fair Work Act are open to interpretation. For example, the meaning of 'fair' is different according to the perspective of the reader.

The Objects of an Act should also take into account what is being regulated, and should be principles that all parties can agree to. The suggestion in the current objects that 'statutory individual employment agreements... can never be part of a fair workplace relations system' would not be agreed by all parties.

As currently drafted, the Objects of the Fair Work Act assume that workplace relationships are adversarial. The objects should recognise the common interest all parties in the labour market have, and not establish an unnecessarily adversarial context.

The Business Council proposes the workplace relations system is based on six key principles that form the basis of the objects of the legislation underpinning the workplace relations system.

Principle 1: Regulation specifies a minimum set of enforceable rights and reciprocal responsibilities (Safety Net provisions) of the three parties in the labour market:

- **workers**
- **enterprises**
- **representatives**

There are three parties to the employment relationship and these parties should be acknowledged as a foundation of the system.

Consistent with regulation ensuring workplaces operate in line with the community's expectations, the system should articulate the rights of each of the parties. This would provide clear guidance from government on safety net provisions guaranteed to workers, as well as the rights of the other two parties.

The rights of one party generally result in a reciprocal responsibility of another party, and articulating these responsibilities should provide clarity and guide the relationships between the parties.

Principle 2: Workplace regulation is limited to the employment relationship between workers and an enterprise.

Workplace relations encompasses two components: regulation, and business and managerial decision making. Regulation should be designed to ensure the way workplaces operate is consistent with the community's expectations, but should not cross into business and managerial decision making. Regulation needs to be limited to the employment relationship.

Principle 3: Workers and enterprises have a shared interest in the success of the enterprise, and relationships and negotiations within the relationships are collaborative, rather than adversarial.

Workers and enterprises need each other. Without enterprises, job creation would be limited to government services and sole traders. Without workers, enterprises would fail. Although their motivations and needs are different, workers and enterprises have a

symbiotic relationship and a common interest of success. The two parties should negotiate with each other to reach a compromise that meets both of their needs.

A collaborative, rather than adversarial approach should result in constructive negotiations and build a strong foundation for an effective working relationship.

Principle 4: Matters related to the employment relationship not specified in the minimum set of rights and responsibilities are subject to negotiation, singularly or collectively, between a worker(s) and their enterprise. Business and managerial decisions are not subject to negotiation.

A set of minimum standards related to the employment relationship will be articulated in the Act. While these can form the basis of the employment relationship, most workers and enterprises will want to build on this and reach agreement on other aspects of the employment relationship.

Workers and enterprises will need to negotiate these additional aspects. Workers should have the freedom to negotiate singularly, so they can form the employment relationship most suitable for them, or as a collective.

Enterprises need to make decisions every day. While these everyday decisions may impact the workforce, they are beyond the employment relationship. As such, these decisions should not be subject to negotiation or included in employment agreements.

It is important to have clarity that government intervention or regulation is limited to establishing minimum standards and regulating the employment relationship. Government intervention may establish a minimum standard for responsibilities of enterprises in making business decisions, but the decision making itself should not be subject to government regulation or intervention.

Principle 5: Where needed, workers, enterprises and their representatives have access to determinations by a third party which is independent, impartial and timely in its processes.

While relationships should be collaborative rather than adversarial, there will be occasions where the parties may need an independent body to become involved.

In these cases all parties to the labour market (workers, enterprises and representatives) must have confidence in the independence and impartiality of the third party. The third party must ensure issues are resolved efficiently, effectively and in a timely way.

Principle 6: Regulation is transparent, easy to understand and use by workers, enterprises and representatives; predictable; and enforceable, with the option of sanctions.

The workplace relations system governs relationships between workers and enterprises. As a starting point, the legislation and regulations that govern this relationship should be easily comprehended by the parties it regulates. Workers and enterprises should not need outside assistance to navigate the system that regulates their relationship.

Given the importance of labour to many enterprises, it is important the rules governing the labour relationship are predictable so enterprises can make business decisions that are consistent with the rules, and without concern they will face industrial action or sanction.

If the rules of a system are not enforced, there will be elements in all parties of the labour market that will take advantage of this and challenge the system. Confidence in the system requires enforcement and appropriate sanctions to be applied consistently.

3. Three tiers to guide regulation of workplace relations

Recommendation 3

Establish a three-tiered system to guide regulation of workplace relations:

1. ***Safety Net provisions, including Industrial Protections*** **– mandated rights and industrial protections for all parties**
2. ***Agreements*** **– issues subject to negotiation**
3. ***Business and Managerial Decisions*** **– issues not subject to negotiation.**

Using the principles as the starting point, the Business Council proposes a three-tiered system to guide regulation of the labour market in Australia:

1. **Safety Net provisions, including Industrial Protections** – mandated rights and industrial protections for all parties
2. **Agreements** – issues subject to negotiation
3. **Business and Managerial Decisions** – issues not subject to negotiation.

The three tiers establish a safety net and protections for workers, enterprises and representatives. They also provide for flexible arrangements between workers and enterprises.

Built into the tiers is a recognition that the rights of one party in the employment relationship generally create a reciprocal responsibility for another party in the relationship.

It also recognises that while enterprises should have the freedom to make business and managerial decisions, in certain circumstances workers will have to be compensated where they are disadvantaged.

The establishment of three tiers of regulation makes the framework much easier to understand and navigate for all parties it regulates.

All parties can look to the Safety Net to understand their rights, and the responsibilities of the other parties. It also clarifies which issues are subject to negotiation, and provides the opportunity for workers to negotiate singularly or collectively.

Tier 1: Safety Net provisions, including Industrial Protections (mandated rights and protections)

The framework mandates minimum wages and conditions by establishing Safety Net provisions, including Industrial Protections, for all workers that includes the:

1. Minimum Wage Order
2. National Employment Standards
3. Industry Awards
4. Industrial Protections.

The purpose of mandating a specific Safety Net is to allow all parties to move beyond debates about the protection of workers, particularly low-paid workers. A Safety Net is consistent with the community's expectations of employers and the Business Council proposes mandating Safety Net provisions to create that common ground between all parties of the labour market.

Safety Net provisions also specify the rights and reciprocal responsibilities of each party of the labour market across the components of the Safety Net.

The Minimum Wage Order

Recommendation 4

- **Retain the minimum wage and the role of the Fair Work Commission.**
- **Establish economy-wide minimum rates for casual, overtime, penalty and shiftwork and remove them from awards to the Minimum Wage Order.**
- **As part of this process, request the Fair Work Commission review penalty rates and establish a definition of unsociable hours for each industry for a 24/7 economy.**
- **The Productivity Commission considers if the current criteria used to set the minimum wage take an adequate account of economic circumstances, and the need to protect against wage inflation.**

The Minimum Wage

The minimum wage has existed in Australia since 1908.

While Australia has the highest minimum wage in the OECD, the Business Council does not propose any reduction in it. It provides a minimum protection for vulnerable workers in particular, and should therefore continue to be part of a workplace relations system of the future.

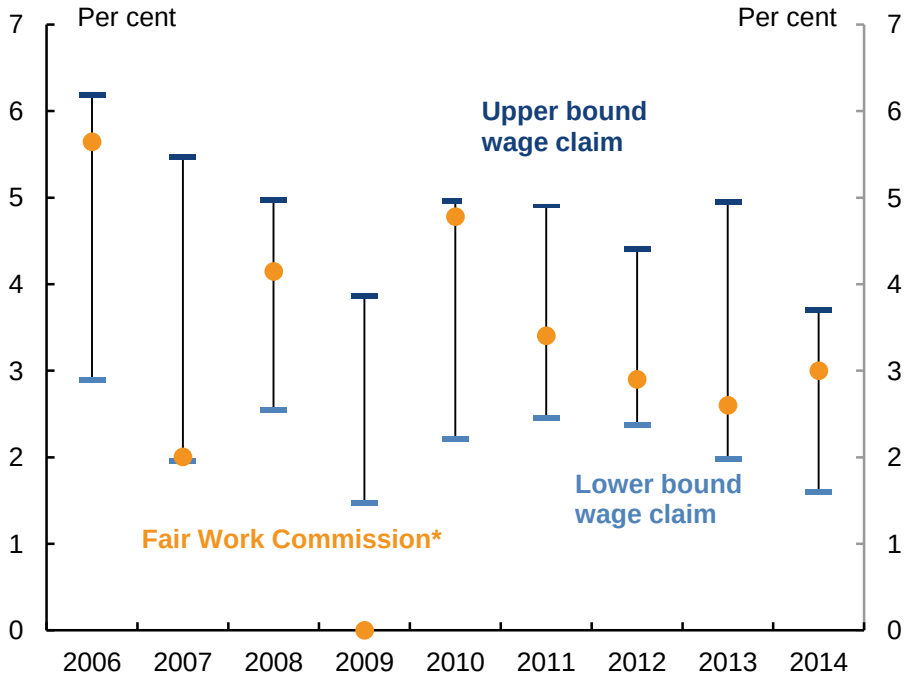
Throughout its history the minimum wage has been set by an independent body and the Business Council supports an independent body continuing to set the minimum wage.

The methodology for varying the minimum wage has changed over time. There has been considerable debate about the need to change the way the minimum wage is established, including the value of a statistical index being used.

Introducing a statistical index removes the possibility for subjective decision making. However, the risk of using a statistical index is that you establish firm rules that cannot be deviated from, regardless of the economic circumstances. For example, if stagflation were to occur, a CPI growth rate would lead to wage inflation at a time of higher unemployment.

The current process, which could be described as subjective, has not led to any discernible pattern of opting for the upper or lower end of claims (see Figure 7).

Figure 7: Annual increases to the minimum wage by the Fair Work Commission



Note: From 2006 to 2009 the Australian Fair Pay Commission set the minimum wage, and from 2010 to 2013 the Fair Work Australia set the minimum wage. FWA was then renamed the Fair Work Commission.

Source: ACTU and Ai Group submissions to Annual Minimum Wage Review and related media, Fair Work Commission, Workplace Info 'History of national increases', accessed March 2015.

On balance, the Business Council believes the current method is a better approach than a statistical index. Using an index, without providing the freedom to take into account contemporary economic circumstances, would be riskier than continuing with the current approach. The Business Council therefore does not support the use of a statistical index to establish the minimum wage.

The Business Council notes that sustained higher *real* wages ultimately result from higher productivity growth. Administrative decisions to increase minimum wages which are not cognisant of labour market conditions can have undesirable consequences and are a blunt way of targeting a social safety net for low skilled workers.

While not advocating changes in the minimum wage setting process or a reduction in the current minimum wage, the Business Council suggests the Productivity Commission considers if the current criteria used to set the minimum wage takes an adequate account of economic circumstances, and the need to protect against wage inflation.

Other wages and penalties

There are 122 Modern Awards and most of these awards include rates for casual, overtime, penalties and shiftwork. The purpose of penalty rates is to compensate workers for working unsociable hours.

The rates within the awards are confusing and can be difficult for enterprises to interpret. Many enterprises employ workers across a range of awards, making it even more difficult to determine appropriate pay rates.

The Business Council acknowledges the need for alternate rates that are loaded on top of the base minimum wage. But we believe there needs to be more scrutiny of what should be a minimum rate and more scrutiny about what constitutes unsociable hours on an industry by industry basis.

Rates currently vary across industries. For example, the Sunday rate for Aged Care is 175 per cent, but it is 200 per cent in General Retail, and ranges from 125 to 150 per cent in the Restaurant Industry.

There is no consistency or logic about how these rates are set, nor a rationale for why the rates differ.

Although they are currently set by the Fair Work Commission, they are set as part of the awards process and not as part of the Minimum Wage Order.

These rates contribute to the overall cost of labour. When an enterprise develops a costing model for their operations, they need to factor all of these premium rates into their models.

Despite this role in determining wage costs, the rates are not subject to the same scrutiny as the minimum wage. Additionally, because they sit in awards, the objects of the Fair Work Act that the Commission must take into account are different.

For example, the first objective of the minimum wage that the Commission must take into account is: ‘The FWC must establish and maintain a safety net of fair minimum wages including the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation, and employment growth.’

The first object of the award that the Commission must take into account is ‘The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account: relative living standards and the needs of the low paid.’

Wages can impact on the performance and competitiveness of the economy. Premium rates are part of wages and need to be combined with minimum wages to establish the true cost of labour.

The Business Council proposes a more transparent and simpler approach

The Business Council proposes that wages and terms and conditions are in separate instruments: wages should sit in the Minimum Wage Order, and terms and conditions in the awards or the National Employment Standards.

Awards should be confined to specifying ordinary hours of work for different industries. Premium rates should be economy-wide minimums that are set by the Fair Work Commission as part of the Minimum Wage Order and subject to the same scrutiny and objectives as the minimum wage.

We also propose the Fair Work Commission reviews the ordinary span of hours for each industry to ensure they are aligned to a 24/7 economy.

For example, a review may show that the ordinary hours for retail have shifted to a seven-day week and now may be 8am – 8pm Monday to Sunday, in line with the community's expectations of when they are able to shop. The same review may show that the ordinary hours for nurses have not changed.

In reviewing the ordinary hours for each industry, the Fair Work Commission would effectively be setting a new definition of unsociable hours for each industry, as all other hours would be unsociable and eligible for a premium rate.

To be eligible for any of these rates, the relevant award would need to include a clause saying premium rates apply.

If workers and enterprises wish to negotiate different arrangements or higher rates, this would be part of the Agreement making process.

Although the Fair Work Commission already sets all the premium rates as part of the awards process, there is a danger that the approach proposed could lead to the adoption of the highest rates currently in awards, creating unnecessary wage inflation.

It will be important for the Fair Work Commission to remember that the approach is about identifying the *minimum* wages and conditions for the economy, not to adopt higher ones. It will also be important to ensure the objectives related to the minimum wage, particularly the economic impact of changes, are applied to this process.

Figure 8: The proposed approach: Minimum Wage Order

Current system	The proposed framework
The national minimum wage	No change
Setting the minimum wage	No change
Other wages and penalties Additional to the Minimum Wage Order, there are many rates and penalties in Awards including different rates for: • juniors • apprentices • overtime • weekend work • shiftwork • overnight work • public holidays These differ by industry.	Retain casual, overtime, penalty and shift allowance and the independent decision of the Fair Work Commission about the rates. Move these rates out of Awards and into the Minimum Wage Order. The rates would be a consistent economy-wide minimum, but would only be triggered if rates were specified in an Award. As part of the consolidation process, ask the Fair Work Commission to review unsociable hours and define them for a 24/7 economy for each industry. Penalties and additional rates would not apply to high-income workers, however the minimum wage would apply.

National Employment Standards

Recommendation 5

- **Include all economy-wide rights that currently sit in awards or other parts of the Fair Work Act, in the National Employment Standards, such as 'transfer to lower paid duties'.**
- **Include enterprise rights in the National Employment Standards and the reciprocal responsibility of workers and enterprises.**
- **Use more commonly accepted language in the Fair Work Act, including adopting the 'reasonable person' test.**

Historically, awards have been the primary tool for establishing minimum standards. When a national system was introduced in 2006, a set of national minimum standards were introduced, and these were expanded in 2010.[18]

The Business Council believes the National Employment Standards reflect Australians' expectations of their employers. For example, they provide for four weeks' annual leave, a maximum working week of 38 hours, 12 months of unpaid parental leave and so forth.

The Business Council supports the continuation of these standards as they are fundamental to defining Safety Net provisions. Consistent with the current system, we support them being specified in legislation and enforceable by the Fair Work Commission.

If there are other economy-wide minimum standards built into Awards or across other parts of the legislation, they should be moved and included in the National Employment Standards, consistent with having a clearly mandated Safety Net.

For example, the provisions around 'transfer to lower paid duties' currently sit in Awards. Given the economy-wide nature of this issue, the Business Council proposes adding this provision to the National Employment Standards. There may be other provisions that should also be added.

The language used in parts of the National Employment Standards is open to interpretation, particularly around the issue of what is reasonable. The Business Council therefore proposes the 'reasonable person' test, which is commonly used in legislation, is introduced to replace language such as 'if they are unreasonable', to provide greater clarity.

The rights of enterprises are not always specified in the National Employment Standards. To provide clarity, the Business Council proposes the inclusion of their rights.

[18] Fair Work Act Review Panel, 'Towards more productive and equitable workplaces. An evaluation of the Fair Work legislation', Australian Government, Canberra, 2012.

Figure 9: The proposed approach: The National Employment Standards

Current system	The proposed framework
Maximum hours of work	Specify the reciprocal 'right' enterprises have for paying for 38 hours of work (i.e. productive attendance).
Flexible work arrangements	No change
12 months unpaid parental leave	No change
Four weeks annual leave per year	Add the enterprise right to direct workers to take annual leave (see Leave Entitlements box).
18 days paid personal/carer's leave per year and 2 days each of compassionate or child carer's leave.	No change
Paid community service leave	No change
State-based entitlement to long service leave.	Harmonise long service leave entitlements across states and territories.
Right to reasonably refuse to work on a public holiday and receive payment if part of usual hours.	No change
Written notice of termination and redundancy in line with length of service with the enterprise.	Add 'transfer to lower paid duties' clause found in many awards to this entitlement.
Enterprises must provide a new worker with an information statement outlining the above conditions.	No change

Leave entitlements

Under the Fair Work Act, full-time workers have an entitlement to four weeks' annual leave (pro-rata for part-time workers). Annual leave is important for work–life balance because it gives workers a paid break to spend time with their friends and family or engage in other leisure activities.

Annual leave accumulates from the first day of work and rolls over if unused. For example, if a worker does not use two of their annual leave weeks within their first year of employment, they can access it the following year.

Enterprises record annual leave on their balance sheet, which can be a liability if it is large. But an enterprise can make a worker take excessive annual leave only under some enterprise agreements and awards.

For instance, under the Fast Food Industry Award 2010 or the Hair and Beauty Industry Award 2010, a worker cannot be directed to take excess annual leave. Under the Hospitality Industry (General) Award 2010, an enterprise can direct a worker to take annual leave if they have accumulated more than 8 weeks of annual leave and are given 4 weeks' notice.

Enterprises should have the scope to manage their balance sheets through the ability to direct workers to take their annual leave, irrespective of the industrial instrument their workers are covered by. This will have the dual benefit of encouraging workers to balance their work commitments and use the entitlement as it was intended.

Industry Awards

Recommendation 6

- **Streamline the 122 Modern Awards into Industry Awards (one per industry)**

Refocus Industry Awards and limit them to:

1. **accident pay**
2. **agreement in writing to pattern of hours of work (part-time workers)**
3. **allowances for travel costs/times and transport**
4. **apprenticeship requirements**
5. **employment categories, including definition of a shiftworker**
6. **industry specific redundancy schemes**
7. **national training wage, and allocation of traineeships to wage levels**
8. **ordinary hours of work**

9. **rostering issues, limited to maximum days of work, maximum hours per day, meal breaks, minimum break between times worked and minimum engagement**

10. **wage classifications (up to a maximum of 5 categories per award).**

- **Consider moving to a Universal Award when there are no longer industry specific issues.**

Australia's awards system

The awards system is unique to Australian workplace relations. The Commonwealth Court of Conciliation and Arbitration made its first two awards in 1906–07 covering the maritime and shearing industries.

In the 1990s there was a concerted policy focus on shifting away from collective industry bargaining to enterprise bargaining. Despite this the awards system remains.

Since 2009 there has been a process of streamlining awards. While this process has consumed significant time of both employer groups and unions and significantly reduced the number of awards, there are still 122 awards across the Australian labour market.

Given the breadth of the National Employment Standards, which have only emerged as a strong safety net in the last decade, and the uniqueness of awards to Australia, some would question the need for an award system.

The Business Council recognises some matters are industry-wide, such as the normal hours worked, and that establishing an award containing these issues gives enterprises, particularly small enterprises, the opportunity to use the awards as their employment base, rather than negotiate an enterprise agreement. The Business Council also recognises that awards act as a component of a Safety Net for vulnerable workers.

The content of some Modern Awards goes beyond minimum standards

For example, some Modern Awards include clauses specifying:

- how to remunerate a worker when they temporarily take on higher duties
- which fund and how superannuation should be paid (this is governed by specific superannuation legislation also)
- the specific ways in which a 38-hour week can be worked.

The Business Council proposes to streamline, rather than abolish, Modern Awards

However, it is important to remember that Modern Awards form part of Safety Net provisions and should therefore be designed to establish minimum standards. It is also important to remember that a Modern Award is the starting point for the employment arrangements of 60 per cent of Australia's workforce.[19]

[19] ABS, Employee Earnings and Hours, ABS cat. No. 6306.0, May 2014.

Modern Awards should not create rigidities in the employment relationship or the labour market. Having 122 Modern Awards detailing specific conditions, including occupations, creates rigidities.

The scope and content of awards must be reviewed and returned to their core purpose of establishing minimum standards.

The Business Council therefore proposes reducing the terms that can be included in awards and starting a process to move from 122 Modern Awards to a single award per industry.

Clauses to be included in awards

The Business Council proposes awards be limited to:

1. accident pay
2. agreement in writing to pattern of hours of work (part-time workers)
3. allowances for travel costs/times and transport
4. apprenticeship requirements
5. employment categories, including definition of a shiftworker
6. industry specific redundancy schemes
7. national training wage, and allocation of traineeships to wage levels
8. ordinary hours of work
9. rostering issues, limited to maximum days of work, maximum hours per day, meal breaks, minimum break between times worked and minimum engagement
10. wage classifications (up to a maximum of 5 categories per award).

There are likely to be different views about what constitutes minimum standards for an industry. The Business Council is proposing this list as a starting point, and welcomes debate on which clauses should be included.

The first step in the reduction process would be to remove non-minimum standards from awards and then identify the differences remaining. The removal of non-minimum standards should result in less differentiation and a natural alignment between awards within an industry.

The second step would be to examine the differing minimum wage rates that are included in awards to reflect different roles and seniority. Ones with similar rates should be grouped.

Awards should also be easy to interpret and use

In addition to prescribing terms that exceed appropriate minimum conditions, Modern Awards are difficult to interpret and use. Workers should be able to understand their rights and entitlements. Enterprises, particularly small businesses that often do not have resources to employ lawyers and HR specialists, should be able to administer them.

For example, language around which rates apply over the weekend or overtime varies significantly between awards. Multiple clauses appearing in different sections of the award often need to be read in conjunction to determine who these rates apply to and when. Making language consistent across industry awards should be a second major step in streamlining Modern Awards.

There may be a time when we no longer need multiple awards

While there are currently issues that are industry-specific, as globalisation and digitisation continue to impact our economy, it is likely these differences will reduce.

Let's take ordinary hours of work as an example. People who work in hospitality expect to work evenings and weekends. People who work in office jobs generally expect that the ordinary hours of operation for their enterprise would span 8am to 6pm.

In our current economy, this would be an industry-specific difference. However, as office workers increasingly start to service international clients or work with divisions in other time zones, this span of hours will change so workers can engage with clients in the US, Europe, the Middle East or Asia.

Over time, as standards across industries become more aligned, the number of awards we will need to reflect industry differentiation will reduce. As this occurs, awards should be merged with the objective of having a single Universal Award which would continue to provide safety net protections for workers.

Figure 10: The proposed approach: The Awards system

Current system	The proposed framework
Modern Awards are the mandated minimum industry standards created by Fair Work Australia.	No change
122 Modern Awards based on industries and occupations.	One award per industry – Industry Awards. As the economy changes, merge awards where there are no differences and adopt a single Universal Award.
Award content includes industry-specific and non-industry specific terms on top of the NES. Some current terms go beyond minimum standards, placing unnecessary terms on workers and enterprises. In addition, the language used in some clauses, such as penalties and overtime, are not clear and vary significantly between awards.	Limit award clauses to: - accident pay - agreement in writing to pattern of hours of work (part-time workers) - allowances for travel costs/times and transport - apprenticeship requirements - employment categories, including definition of a shiftworker - industry specific redundancy schemes - national training wage, and allocation of traineeships to wage levels - ordinary hours of work - rostering issues, limited to maximum days of work, maximum hours per day, meal breaks, minimum break between times worked and minimum engagement - wage classifications (up to a maximum of 5 categories per award). Ensure awards are transparent, predictable and easy to use.

Industrial Protections

Recommendation 7

- **Reverse the onus of proof for adverse action onto the party making the allegation and introduce the dominant purpose test.**
- **Require that majority support determinations be obtained before protection action ballot orders can be obtained. Specify that establishing majority support, for the purposes of making a majority support determination under Section 237 of the Fair Work Act, must be by means of a secret ballot.**
- **Enable the Fair Work Commission to suspend the capacity to take all protected industrial action for a period of up to 90 days in circumstances where a bargaining representative is found capriciously or unreasonably to have notified and withdrawn notice of protected industrial action.**
- **Require workers to specify in writing their bargaining representative.**
- **Extend good faith bargaining to new project agreements (greenfields).**
- **Allow enterprises to request the Fair Work Commission ratify a new project agreement after a proscribed period of time, where negotiations have broken down.**
- **Replace the Better Off Overall Test (BOOT) with a no-disadvantage test.**
- **Create a new protection that where a business and managerial decision (and therefore outside the scope of regulation) results in a loss of conditions, wages, or a position, the affected worker will be entitled to a choice between a role under new conditions, or departure with compensation (also replaces transfer of business protections).**
- **Only allow right of entry on a worksite when a representative has a member.**
- **Representatives are permitted to enter communal spaces, including lunch rooms, following agreement from the enterprise, or where an enterprise refuses to offer an alternate room.**
- **Amend Parts 2–8 of the Fair Work Act to restore the 12-month 'sunset clause' for transferring instruments which applied under the Workplace Relations Act.**

Creating an Industrial Protections category

In the current system there are a number of protections, including general protections, specified in the legislation. These are primarily for workers, but are spread disparately across the legislation. These protections include issues such as protection to freely associate, protection to take industrial action, protection from unfair dismissal and so forth.

For ease of use for all parties, the Business Council proposes all protections are grouped together into one section of the Act and classified as Industrial Protections. This will enable workers, enterprises and representatives to understand at a glance what protections each party has.

Role of protections

The Business Council believes it is important that workers, enterprises and representatives have a clearly identifiable set of protections that are mandated in the legislation and enforceable. Some of these reflect the expectations of workers and the community more broadly, and are ingrained in workplaces in Australia, such as the right to representation and the right to take industrial action.

The Business Council supports these protections. However, the way in which some of the current protections operate within the system go beyond Safety Net rights. They are also causing significant business issues for enterprises, including the protections of adverse action, right of entry and transfer of business.

To alleviate these issues, the Business Council proposes a range of amendments.

Adverse action

Under the current legislation, the onus of proof rests with the party accused of taking adverse action – in other words the legislation presumes the accused party is guilty until proven innocent. This is inconsistent with unfair dismissal, which could be considered a similar protection to adverse action, where the burden of proof rests with the party making the accusation.

It is unclear why the party accused of taking adverse action should be regarded as guilty until proven innocent and therefore bear the burden of proving they have not taken adverse action.

Parties should be protected from adverse action, however consistent with unfair dismissal, the burden of proof should lie with the party making the accusation.

Under the current legislation, it is unlawful to take adverse action, wholly or partly, against a person because they are entitled to the benefit of an industrial instrument. Under the former legislation, conduct was only unlawful if the sole or dominant purpose of the action was to avoid the instrument.

The sole or dominant purpose test was designed to address situations, such as the Greater Dandenong City Council v Australian Municipal, Clerical and Services Union (2001) 184 ALR 641, where an employer's decision making inescapably involved considerations of labour costs, arising from an industrial instrument, but where avoidance of the industrial instrument was not the principal reason for making the particular operational or investment decision.

It is recommended that the dominant purpose test be introduced across the adverse action category.

Bargaining

Enterprises have reported there are protracted delays in negotiation due to multiple representatives at the bargaining table, representatives getting involved in late stages of negotiations, and representatives delaying negotiations, despite representing only a small percentage of the workforce.

This can create uncertainty for the enterprise in knowing which workers they are negotiating with at any given time, or indeed how many of the workers they are negotiating with. It makes negotiating an agreement to suit the specific needs of the enterprise and the workers in it problematic.

To counter this, the Business Council proposes workers are required to specify in writing who their bargaining representatives are. This retains a worker's right to choose their representative, but should reduce protracted bargaining processes as enterprises will know what percentage of the workforce is represented by each bargaining party.

Case study – transfer of business

The ABC Group (a major construction and infrastructure company) implemented a corporate restructure to allow three of the corporate operating entities in the ABC group to focus on specific markets and geographic areas, to the exclusion of the other entities.

Enterprise agreement employees engaged in an entity that was exiting a particular market or area would be required to transfer to the other employer entity (that would continue to operate in that market or area), so as to facilitate their ongoing employment.

However, to effect these transfers, orders were required from the Fair Work Commission under the transfer of business provisions in the Fair Work Act.

Some of these employees, on a comparison of their legacy enterprise agreement and the industrial arrangements of the new employer, would have been slightly disadvantaged in entitlements as a result of their legacy agreement not transferring with them to the new employer. However, employees advised the ABC Group that they still wanted to transfer, as securing ongoing employment was more important to them than slight monetary disadvantage.

The relevant unions opposed these transfer orders, and sought 'uplift' payments for any transferring employees, to address this disadvantage. This was rejected by the ABC Group, as this would have resulted in transferring employees, and employees of the new employer, receiving different entitlements for performing the same work. Negotiations between the ABC Group and the relevant unions occurred for several months about this issue, without resolution.

In the face of this union opposition, the Fair Work Commission rejected the application for the orders. This meant that the ABC Group could not transfer these employees, as it would not accept two sets of differing industrial arrangements applying to a single direct workforce on its projects. The effect of this was that employees lost the opportunity for continued ongoing employment via the new employer.

This case study is a clear example of the need for the proposed changes to the transfer of business provisions in the Fair Work Act to be implemented – namely that, if an employee freely and voluntarily seeks a transfer between related entities, these provisions will not apply, and they will be covered by their new employer's industrial arrangements. This would allow employers to maximise the prospect of continued ongoing employment for their workers, as well as being able to more flexibly manage the transfer of labour in restructuring scenarios.

Source: BCA member company

Better Off Overall Test (BOOT)

The 2009 reforms saw the introduction of the Better Off Overall Test (BOOT). The BOOT is applied by the Fair Work Commission when considering an Enterprise Agreement.

The BOOT does not require agreement negotiations to lead to improved outcomes for enterprises, but it assumes that all agreement negotiations should lead to improved outcomes for workers. The interpretation of the BOOT has often failed to take into consideration non-remuneration items.

Prior to the BOOT, a No-Disadvantage Test was applied to agreements to ensure workers were not made worse off on balance. The Business Council believes a no-disadvantage test is a more appropriate tool when considering if Agreements should be certified. Workers should not be disadvantaged as a result of negotiations, but nor should the system have an in-built assumption that their employment terms and conditions should improve.

Business and Managerial Decision Making (new protection)

The proposed framework limits regulatory oversight to Safety Net provisions and Agreements. It therefore proposes that all matters not related to the employment relationship are business and managerial decision making, and are therefore outside the scope of regulation and not subject to negotiation.

As noted throughout this submission enterprises need flexibility to structure their operation and business to be as competitive and efficient as possible. This means being able to make business and managerial decisions to source the most competitive labour, goods and capital. Enterprises might do this by revising their organisational structure, changing their production methods, changing their product mix or developing new marketing and distribution channels.

These decisions can have a negative impact on workers. In these cases enterprises should have mandated obligations to these workers. Therefore a new industrial protection is proposed that if a loss of conditions, wages, or a position occurs as a result of a business and managerial decision, the affected worker should be entitled to a choice between a role under new conditions, or departure with compensation.

New projects (greenfields)

On new project sites, enterprises risk significant costs if they are unable to reach a labour agreement with unions to commence work on the site. Where negotiations are at an impasse, enterprises need a mechanism that allows them to commence the project.

New projects do not have workforces already established. Therefore there is no agreed base for employment terms and conditions. Additionally, new projects are unique. No two projects have the same conditions, requirements, investment constraints and so forth. Consequently, agreements that have been reached on other project sites cannot be used as a starting point to bargain employment terms and conditions for a new project.

To resolve the issues that arise for new project negotiations, the Business Council proposes good faith bargaining is extended to the process, consistent with all other types of agreements.

In cases where negotiations break down it is further proposed that enterprises can put a new project agreement, in line with the relevant award, to the Fair Work Commission for ratification after a proscribed period of time. The agreement should be subject to a no-disadvantage test against the relevant award.

Case study – greenfields

Company JKL successfully tendered for a major infrastructure project.

Company JKL did not have an existing enterprise agreement in place that would cover this project. Instead, the company intended to enter into a greenfields Enterprise Bargaining Agreement.

As required under the current greenfields EBA provisions in the Fair Work Act, the company commenced negotiations with the relevant unions for this agreement.

However, the relationship between the relevant unions was strained as a result of demarcation issues around their right to represent workers.

This resulted in significant delays in the negotiation process, and inhibited the timely progression of these negotiations towards resolving the substantive provisions to be included in the greenfields agreement.

This in turn jeopardised the planned commencement date of the project, as the company required a greenfields agreement to be in place prior to the commencement of the works.

The company had to persevere with these negotiations, and in turn risked delay of the scheduled project commencement, as greenfields EBAs can only be entered into with the union.

This case study highlights the need for the greenfields EBA provisions in the Fair Work Act to be amended – for example, to include a 'sunset period' on greenfields EBA negotiations with the relevant unions (such as 3 months) after which time the employer can seek approval of the agreement by the Fair Work Commission, and/or impose good faith bargaining obligations on the negotiating parties.

Such changes would minimise the risk of employers being 'held to ransom' by the relevant unions through their use of effective veto for greenfields agreements, and the consequent risk of delays to the commencement of major projects.

Source: BCA member company.

Right of entry

The Business Council does not contest the right of representatives to enter workplaces where they have members. However, workers who are not members of a representative organisation should have the freedom to utilise open spaces, such as lunch rooms, in their workplace, without being subjected to unsolicited recruitment.

Amendments are therefore proposed to limit entry to sites where representative organisations have members, and limit their access to communal spaces, unless an enterprise refuses to provide an alternate space (see case study).

Figure 11: The proposed approach: Industrial protections

Current system	The proposed framework
Adverse action	Retain but reverse the onus of proof to the person making the allegation and introduce the dominant purpose test
Bargaining	Retain with amendments to: - Require workers to specify in writing their bargaining representatives - Introduce good faith bargaining for new project agreements - Allow enterprises to request the FWC ratify a new project agreement after a proscribed period, where negotiations have broken down.
Better off overall test (BOOT)	Replace with a no-disadvantage test as per 1993 model.
Business and managerial decision making (new protection)	Where a business and managerial decision, that sits outside the legislation, results in a loss of conditions, wages or a position, the affected worker will be entitled to a choice between a role under new conditions, or a departure with compensation
Dispute resolution	No change
Freedom of association	No change

Figure 11: The proposed approach: Industrial protections (continued)

Current system	The proposed framework
Good faith bargaining	Extend good faith bargaining to new project agreements
Notification of business change	No change
Protected action ballot	Require that majority support determinations be obtained before protection action ballot orders can be obtained, and it be done by secret ballot.
Protected industrial action	Enable the Fair Work Commission to suspend the capacity to take all protected industrial action for a period of up to 90 days in circumstances where a bargaining representative is found capriciously or unreasonably to have notified and withdrawn notice of protected industrial action.
Representation	No change
Right of entry	Retain with amendments. Only allow right of entry when a representative has a member. Permit representatives to enter communal spaces, including lunch rooms, following agreement from the enterprise, or where an enterprise refuses to offer an alternate room.
Transfer of business	Restore the 12-month 'sunset clause' for transferring instruments which applied under the Workplace Relations Act. Note: this would be superseded by the protection Business and managerial decision making.

Right of entry case study

Labour hire employees at a resources site in Western Australia have been subjected to persistent aggressive behaviour by a trade union seeking their support for the development of an enterprise agreement at their workplace.

Since late 2012, the union in question has used Right of Entry provisions to gain access to the worksite. It is estimated that the union had around 5 or 6 members out of a total workforce of 40.

The representative trade union has entered the site continually in order to encourage staff to join the union or support their campaign for an enterprise agreement, promising a 5 per cent increase above award conditions. Since February 2014, they have visited over 40 times the site.

The union was based in the lunch room which has proved disruptive to staff eating their lunch. Many of the labour hire staff have complained that they are uncomfortable and asked their employer to find them an alternative place to eat their lunch.

The employer has requested the union to conduct meetings in the warm-up area. However, the union has refused to agree to this. Under the Fair Work Act the default location is the lunch room if parties cannot agree.

Employers and employees have reported that the union has engaged in inappropriate behaviour as part of their campaign, such as:

- blocking employees who did not want to sign union documentation from leaving the worksite
- arranging for member employees to alienate non-member employees or others who are not interested in supporting the campaign and directing abusive language at them
- threatening the onsite manager who is responsible for the labour hire employees to discourage them from speaking to their staff.

Over many months the union continued to request the employees complete surveys which they could use as evidence to apply for a Majority Support Determination. This would compel the employer to bargain in an enterprise agreement on the basis that the majority of employees want it. Many staff completed the survey out of frustration.

This issue has been ongoing for the past 2½ years and the culture at the worksite has suffered. Many of these behaviours are not intended nor permitted under the Right of Entry provisions. However, resolving them through the Fair Work system is difficult and cannot guarantee that the union will not find another way to be disruptive.

Tier 2: Agreements (subject to negotiation)

Recommendation 8 – agreement making

- **Clauses to be included in agreements are limited to the employment relationship. Only clauses specified in the legislation can be negotiated. These include:**
  - **allowances**
  - **employment categories**
  - **leave arrangements**
  - **notifications**
  - **ordinary hours of work**
  - **remuneration**
  - **rostering issues, limited to maximum days of work, maximum hours per day, meal breaks, minimum break between times worked and minimum daily engagement.**
- **Individual Agreements are introduced into the workplace relations framework. Safety Net provisions or an Enterprise Agreement are the base for an Individual Agreement and a no-disadvantage test is applied.**
- **High-income workers can trade off their safety net rights in negotiating Individual Agreements, and are not subject to a no-disadvantage test.**
- **Extend good faith bargaining to new project agreements (greenfields).**
- **Enterprises can request a new project agreement be certified by the independent workplace relations body after a prescribed period if negotiations have reached an impasse. The agreement would be subject to a no-disadvantage test against the relevant award.**
- **Clarify it is not permissible to bargain for, or include provision in, an agreement which has the effect (direct or indirect) of limiting the enterprise's capacity to use contract or on-hire labour or in any way to seek to regulate or set the terms and conditions of the employment of workers who are not covered by a particular Enterprise Agreement.**

Agreement options

The framework offers enterprises the option of negotiating an Enterprise Agreement, an Individual Agreement or a combination of both, with their workforce. Enterprises may also choose to offer common law contracts.

Where a new project is being established, an enterprise can negotiate a New Project Agreement, negotiate Individual Agreements, or offer common law contracts.

Enterprise Agreements

Collective bargaining was introduced in Australia in the 1990s and 42 per cent of the current labour market is employed under a collective agreement.

Enterprise Agreements have proven a useful tool for both workers and enterprises, and the Business Council proposes they remain part of the system.

Individual Agreements

Individual Agreements have previously existed in Australia, but with the introduction of the Fair Work Act, enterprises were no longer able to offer Individual Agreements to their workers.

Enterprises may offer workers a common law contract which must adhere to the National Employment Standards, but the court system, rather than the workplace relations independent third party, has jurisdiction over disputes in these contracts.

The Business Council proposes that Individual Agreements are added into the workplace relations framework.

Enterprises and workers need the option to negotiate a customised agreement and construct it in a way most suitable to both parties.

To ensure workers are not coerced into an Individual Agreement, Safety Net provisions, or an Enterprise Agreement (if in place) would be the base for an Individual Agreement. An Individual Agreement would also be subject to a no-disadvantage test and checked and certified by the independent workplace relations body, before it applies to the worker.

It is proposed high-income workers will be able to trade off entitlements in their Safety Net as part of their negotiations and the no-disadvantage test would not apply. Their agreements would be registered with the independent workplace relations body to allow them jurisdiction, in cases of dispute about the adherence to the agreement.

New Project Agreements

New Project Agreements are currently available for ‘greenfields’ sites, where there is no workforce or agreement in place.

Under the current system, all the negotiation power rests with workers and their representatives. Enterprises commencing new projects are under time pressures and need to form an agreement with a future workforce as quickly as possible.

As discussed in the Industrial Protections section earlier in this submission, the Business Council proposes that good faith bargaining is introduced in these negotiations and that enterprises are given an option to have agreements certified within a specified period of time, where negotiations break down. This change would ensure enterprises still negotiate with the union, but the development of the project is not held up where an enterprise is negotiating in good faith.

Clauses to be included in agreements

As discussed in Part 1, some clauses within agreements have gone beyond the employment relationship and reflect business and managerial decision making.

The inclusion of these clauses means that managers have to negotiate with their workforce on management decisions. Management decisions are not part of the employment relationship and should not be subject to negotiation.

The Business Council proposes limiting clauses in all agreements to employment-related matters including:

- allowances
- employment categories
- leave arrangements
- notifications
- ordinary hours of work
- remuneration
- rostering issues, limited to maximum days of work, maximum hours per day, meal breaks, minimum break between times worked and minimum daily engagement.

Figure 12: The proposed approach: Agreements

Current system	The proposed framework
Enterprise Agreements	Retain but reduce clauses to the employment relationship.
Common law contracts Enterprises can agree a set of workplace conditions through common law contracts. These cannot be less than or trade off conditions under an applicable collective agreement, award or the NES. Conditions that go beyond the mandated minimums are not enforceable through the Fair Work system but can be enforced through the regular court system.	Retain
Individual Agreements Currently no scope to make agreements with individuals.	Introduce Individual Agreements which would have to pass a No-Disadvantage Test against the award or collective agreement.
New Project Agreements Enterprises must negotiate with a union when putting together a workplace agreement for a new project.	Rename greenfields agreements to New Project Agreements. Extend good faith bargaining and give enterprises the option to have the Agreement certified when negotiations break down.
Agreement content Currently can include terms relating to the employment relationship, the relationship with a representative organisation, deductions from wages and how the Agreement will operate.	Remove all managerial and business decision making clauses from Enterprise Agreements. The Business Council proposes limiting clauses in agreements to employment-related matters including: allowances employment categories leave arrangements notifications ordinary hours of work remuneration rostering issues, limited to maximum days of work, maximum hours per day, meal breaks, minimum break between times worked and minimum daily engagement.

Tier 3: Business and Managerial Decisions (not subject to negotiation)

Recommendation 9 – Business and managerial decision making

- **All workplace relations matters not specified in Safety Net provisions or Agreements, are beyond the scope of the employment relationship and therefore outside the scope of regulation.**

This category does not exist within the current framework.

The proposed creation of this tier acknowledges that business or management decisions to ensure the competitiveness of an enterprise are by nature necessary and circumstantial. They go far beyond the scope of the employment relationship and therefore should not be specified in Safety Net provisions or Agreements. These decisions are outside the scope of regulation and the jurisdiction of the Fair Work Commission.

Enterprises should be able to make business and managerial decisions, including having the ability to source the most cost-effective products, labour and capital, to ensure their ongoing viability. A number of these decisions have become incorporated into Agreements or Awards, and these decisions have therefore become subject to negotiation or industrial action, to the detriment of the enterprise.

While the legislation will not specify the matters that sit outside regulation, examples of such matters include hiring practices, organisational design, re-engineering workflows, changing the mix of worker categories, and so forth. If a matter is not listed in the legislation, it falls outside the scope of regulation and is not subject to negotiation.

While business and managerial decisions sit outside regulation, protections remain for workers negatively impacted by such decisions, with those protections specified in the Industrial Protections section (see Industrial Protections section earlier in the submission).

4. Governance and administration

Recommendation 10

- **Develop a skills matrix for Commissioners and require all Commissioners to demonstrate a minimum set of skills, and collectively demonstrate the breadth of skills and experience.**
- **Review the terms of appointments, making them time-limited with the option for Commissioners to nominate for re-appointment.**
- **Ensure appointment processes and the ongoing performance of Commissioners are subject to public accountability.**
- **Create an appeals panel that is time-limited and subject to review to determine the confidence in the system and the ongoing need for the panel.**

Fair Work Commission

As noted earlier in this submission, the current workplace relations system does not have sufficient support or confidence from all the parties in the labour market. The Fair Work

Commission, including its members and operations, is essential in building confidence in the system. Consistent with the proposed principles, it is important the Commission is expert, independent, impartial, and timely.

The appointment process, and building confidence that the appointment process is based on merit and transparent, will establish a foundation of trust in the Fair Work Commission.

To make the process more transparent the Business Council proposes a skills matrix is developed that provides a balance of expertise and background across the group of decision makers (Commissioners).

All Commissioners should be able to demonstrate a minimum set of skills, and in cases where a vacancy opens up, the skill set and experience of the group is assessed, with the recruitment focused on the areas where skills and experience are lacking. In addition, Commissioners should be able to demonstrate key personal attributes that ensure they are fit for the role, such as a high level of personal integrity.

The appointment process should be subject to public accountability, with roles advertised and information on the interview process and appointment made publicly available at the time of the appointment.

Consistent with other independent offices and good corporate governance, the appointment term for a Commissioner should be time-limited. Commissioners should resign at the end of the term with the option of nominating for another term.

Commissioners should also be required to adhere to a set of procedures and protocols that are included in the legislative framework. Failure to adhere to these could result in dismissal.

Appeals panel

The creation of an appeals panel, with judicial appointments, that has oversight of decision making will contribute to creating confidence in the system.

In anticipation of the growing confidence in the system, the appeals panel could have a built in review or sunset clause to determine if it is still needed.

Figure 13: The proposed approach: Governance

Current system	The proposed framework
The Fair Work Commission (FWC) Fair Work Ombudsman Australian Building and Construction Commissioner	Keep governance structure with some changes to appointments of the FWC. Separate information body (currently with FWO) is retained. Restore original Australian Building and Construction Commissioner powers.
Parties do not have a right to appeal – they must get permission. If this is granted, the appeal is heard by a Full Bench of Commissioners.	Creation of an external appeals panel.

PART 4: PRACTICAL PATHWAY FOR CHANGE AND TRANSITIONAL ARRANGEMENTS

Proposed timeline and reform horizons for change

Horizon 1: Immediate action needed in 2015–2016

1. Prioritise reforms of Bills currently in parliament.

2. Prioritise previous recommendations from the Business Council's previous submissions reviewing the Fair Work Act including:

   – Require that majority support determinations be obtained before protection action ballot orders can be obtained.

   – Specify that establishing majority support, for the purposes of making a majority support determination under Section 237 of the Fair Work Act, must be by means of a secret ballot.

   – Enable the Fair Work Commission to suspend the capacity to take all protected industrial action for a period of up to 90 days in circumstances where a bargaining representative is found capriciously or unreasonably to have notified and withdrawn notice of protected industrial action.

   – Clarify it is not permissible to bargain for, or include provision in, an agreement which has the effect (direct or indirect) of limiting the enterprise's capacity to use contract or on-hire labour or in any way to seek to regulate or set the terms and conditions of the employment of workers who are not covered by a particular Enterprise Agreement.

   – Amend Parts 2–8 of the Fair Work Act to restore the 12-month 'sunset clause' for transferring instruments which applied under the Workplace Relations Act.

   – Restore original Australian Building and Construction Commissioner powers.

   – Require the Fair Work Commission to take account of any compulsory increase in employer superannuation contributions when setting minimum wages in terms of:

   – Annual minimum rate reviews

   – Low pay determinations

   – Arbitration where a bargaining period has been cancelled.

3. Prioritise some specific amendments proposed in this submission that should not require extensive consultation including:

   – Reverse the onus of proof for adverse action onto the party making the allegation and introduce the dominant purpose test (Recommendation 7).

   – Require workers to specify in writing their bargaining representative (Recommendation 7).

- Extend good faith bargaining to new project agreements (Recommendation 7)
- Allow enterprises to request the Fair Work Commission ratify a new project agreement after a proscribed period of time where negotiations have broken down (Recommendation 7).
- Only allow right of entry on a worksite when a representative has a member (Recommendation 7).
- Representatives are permitted to enter communal spaces, including lunch rooms, following agreement from the enterprise, or where an enterprise refuses to offer an alternate room (Recommendation 7).
- Create a time-limited appeals panel for the Fair Work Commission with judicial appointments (Recommendation 10).

Horizon 2: Medium term 2016–2017

1. Adopt the proposed framework for the workplace relations system.
2. Run a national consultation process involving all parties, including the community, to consider what should be contained in each of the following categories of the framework:
   - Purpose (Recommendation 1)
   - Principles (Recommendation 2)
   - Three tiers of regulation (Recommendation 3)
   - Minimum Wage Order (Recommendation 4)
   - National Employment Standards (Recommendation 5)
   - Awards (Recommendation 6)
   - Industrial Protections (Recommendation 7)
   - Agreement making (Recommendation 8)
   - Business and managerial decision making (Recommendation 9)

Horizon 3: Longer term 2018–2020

1. Based on the feedback received in the consultative process conducted across 2016-2017 draft legislation for a new workplace relations framework. Use the Plain English Foundation, or an equivalent organisation, to assist in drafting the new framework and legislation so it is easy to understand and navigate for an average worker or enterprise (2018).
2. Consult on and develop a transition plan (2018).

3. Introduce legislation to implement the new framework (2019).

4. Implement the new legislation and framework in stages consistent with the transition plan (2020)

BUSINESS COUNCIL OF AUSTRALIA
42/120 Collins Street Melbourne 3000 T 03 8664 2664 F 03 8664 2666 **www.bca.com.au**