



Productivity Commission Inquiry into the Workplace Relations Framework

March 2015

EXECUTIVE SUMMARY

ACCI welcomes the opportunity to make a submission to the Productivity Commission inquiry into Australia's workplace relations framework.

The Productivity Commission has noted that "[t]he current structure is a product of history and social preferences"¹ and that it has not been tasked with simply evaluating the current system and considering improvements. The Productivity Commission has correctly described the task before it as going "beyond evaluating the current system to consider the type of system that might best suit the Australian community over the longer term".²

This task involves considering different reform propositions. Rather than looking exclusively at what we have, the Productivity Commission must look for what we need. Australia will not be served well by solutions confined by the current framework or that merely "tinker around the edges". Rather, ACCI recommends that the Productivity Commission consider reform options somewhere between wholesale deregulation and the complex system in place today. The task ahead requires emulating the policy reform trajectory that commenced in the 1990s.

To be clear, ACCI does not seek a completely deregulated system, underpinned only by common law. Such an approach would represent a significant departure from our current system and has potential for unintended consequences. However the current arrangements – intertwining the National Employment Standards, minimum wages, award conditions and agreements produced through restricted bargaining options – fails to deliver a simple framework. The current complexity and regulatory overlay is counterproductive and unsuitable for future conditions.

ACCI believes the workplace relations framework should complete the evolution from the centralised system of compulsory conciliation and arbitration of the past. It should become a truly decentralised system of collective and individual agreements underpinned by a simple safety net of minimum standards.

ACCI supports the national minimum wage and is not advocating for it to be cut. The national minimum wage should continue to be adjusted annually. There must be rationalisation of award content as we move toward legislated minimum standards that provide the foundation for agreement making.

Bargaining should not be layered with prescription. It should instead be focussed on delivering wages and conditions linked to productivity, industry and regional conditions as well as employee and employer circumstances at the enterprise concerned. To support this, a suite of agreement-making options must be available, including individual statutory agreements, with industrial action only a last resort.

¹ Issues Paper 1: Context, p. 1.

² *ibid.*, p. 2.

The workplace relations framework needs to strike a balance between protecting employees against unlawful behaviour and preserving the right of employers to manage their operations. Fundamental rights such as freedom of association and the freedom to contract must remain.

To meet the challenges of the future, the workplace relations framework must be pro-employment, small-business friendly, responsive to changing domestic and international conditions and receptive to the needs of the unemployed and underemployed.

ACCI has a broad membership and the Productivity Commission will receive submissions from ACCI's members. Each ACCI member will bring their own focus to this Inquiry and ACCI commends their submissions to the Productivity Commission for its consideration. ACCI acknowledges that there may be some points of difference or areas of differing emphasis. ACCI's submission is made without prejudice to the specific interests and views advanced by our members.

ACCI and its members have long held a vision for a workplace relations framework that empowers employers and employees across the nation to work co-operatively and make decisions in their shared interests that lead to more jobs, higher living standards and a better future.

ACCI'S RECOMMENDATIONS

1. *A framework with objects that not only protect those in employment but help the unemployed and underemployed become more competitive in the labour market.*
2. *A flexible, simple safety net comprising:*
 - *A set of legislated minimum standards reflected in a Minimum Conditions of Employment Act (or equivalent).*
 - *A national minimum wage and industry rates of pay retained from awards, adjusted annually by the independent wage setting body.*
 - *Other award conditions adopted as terms and conditions of employment by agreement.*
 - *A full suite of agreement making options assessed against the legislated minimum standards and applicable industry pay rates retained from awards or the national minimum wage (for those who fall outside award classifications).*
3. *The safety-net of legislated minimum terms and conditions to include:*
 - *maximum weekly hours;*
 - *requests for flexible working arrangements;*
 - *parental leave;*
 - *annual leave;*
 - *personal carer's leave and compassionate leave;*

- *community service leave;*
 - *long service leave;*
 - *public holidays;*
 - *notice of termination and redundancy pay;*
 - *rest breaks;*
 - *minimum wages (including casual loading and piece rates).*
4. *An appropriately balanced national minimum wage and compulsory industry rates of pay.*
 5. *Reform penalty rates.*
 6. *Include statutory individual agreements as part of a full suite of agreement making options.*
 7. *Simplify the bargaining framework, with:*
 - *processes that drive cooperative and productive negotiations;*
 - *agreement content limited to matters that pertain to the employer/employee relationship;*
 - *sensible limits relating to the taking of industrial action; and*
 - *streamlined agreement approval processes;.*
 8. *Exempt businesses with less than 20 employees from the unfair dismissal laws.*
 9. *Regulate workplace bullying within the WHS framework.*
 10. *Restore the longstanding 'Freedom of Association' protections and unlawful termination protections.*
 11. *Restore the Office of the Australian Building & Construction Commissioner (ABCC) with its full suite of powers.*
 12. *Balanced right of entry laws.*
 13. *Restore balance to transfer of business rules.*
 14. *Recognise the right to engage in contracting and labour hire arrangements.*

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1. ISSUES PAPER 1: CONTEXT

1.1 The context in which this inquiry takes place

If Australia's workplace relations framework (WR Framework) is to be relevant in addressing current and future needs, it must be responsive to the economic and social challenges and opportunities we confront now as well as those we will encounter in the future. Attention to driving productivity growth is essential if we are to improve upon Australia's living standards and ensure Australia's competitiveness within the global economy, particularly in new and emerging international markets. Our ageing population, growing unemployment (including youth and long term unemployment) and structural changes in the economy locally and globally also call for a recalibration of our national policy settings to better position us for sustained prosperity.

There are a number of telling factors that highlight the case for change. Australia's overall ranking on the World Economic Forum's Global Competitiveness Index has deteriorated from a peak ranking of 15th place in 2009-10 to 22nd place in 2014-15.³ The Chairman of the Productivity Commission has recently observed:

*It is evident ... that Australia's productivity performance has fallen well behind that of most other developed economies for more than a decade. There are various reasons for this, including differences in the rate of investment growth. But the picture painted in the statistics calls for strong policy attention, particularly in the current era where the recent record terms of trade will no longer support continued income growth.*⁴

Australia's economic vulnerabilities have been masked by the very strong prices received for mineral exports. The unprecedented high terms of trade swamped other economic facts and distributed a higher standard of living than otherwise affordable across the country. It couldn't last. With mineral prices falling and mining investment contracting we are seeing the symptoms of our vulnerability emerging and continuing low levels of business investment outside the mining sector highlight a failure to diversify our capabilities to the extent necessary to cushion the impact. In its February 2015 Statement on Monetary Policy the Reserve Bank of Australia (RBA) observed that "[t]otal business investment is expected to fall over the next two years as the large decline in mining investment offsets a recovery in non-mining investment"⁵ and that "[t]here continues to be significant uncertainty around the timing and strength of the expected pick-up in non-mining business investment growth".⁶

³ World Economic Forum, [The Global Competitiveness Report 2014-2015](#).

⁴ Productivity Commission. (2014). Productivity Update, April 2014.

⁵ Reserve Bank of Australia, Statement on Monetary Policy, February 2015, p. 75.

⁶ *ibid.*, p. 76.

Australia is trade exposed. Reliant upon local and international business investment to support jobs, economic growth and high living standards, we need to diversify our economy, reduce our reliance on any one sector and seek to capitalise on demand from the growing middle class across Asia. As is observed in the Competition Review Draft Report:

The rise of Asia and other emerging economies provides significant opportunities for Australian businesses and consumers, but also poses some challenges. A heightened capacity for agility and innovation will be needed to match changing tastes and preferences in emerging economies with our capacity to deliver commodities, goods, services and capital. We need policies, laws and institutions that enable us to take full advantage of the opportunities offered.⁷

Australia's hosting of the 2014 G20/B20 has brought the need for workplace relations reform into the spotlight. The 1.8 per cent growth target set by the G20 Finance Ministers should be a driver for sensible regulatory reform to improve operational conditions as Australia works toward that target. Regulation must be flexible and adaptable to changes in the domestic and global economies which, in the modern context as we have found, can occur quickly and dramatically. In key respects, the WR Framework fails this benchmark and there is significant scope for reform.

Australia has experienced sluggish productivity and job growth in recent years and we need to reverse the trend and support local job creation and retention. ACCI welcomes International Monetary Fund (IMF) Chief's call for labour market reforms⁸ and acknowledges that such reform will be critical to meeting the G20's growth target.

To achieve our growth targets, business needs to be freed up to be able to employ, improve profitability and productivity. Although a holistic approach is needed, workplace relations reform has an important role to play. The WR Framework must not exist as a regulatory barrier to productivity improvement and must be an enabler of other sources of productivity gains. At the time of the release of the Competition Review Draft Report, ACCI Chief Executive Officer Kate Carnell stated:

The time is ripe to lay the foundation for a more open, competitive and prosperous economy. We must be as prepared and flexible as possible for whatever the future may bring, given fundamental shifts in globalisation, our ageing population and digital disruption.

This competitive flexibility must extend to our workplace relations system...

When evaluating the WR Framework, it must be acknowledged that businesses are now operating in multiple countries and outside the jurisdiction of a single nation, and that even businesses confined to Australia are operating in an international

⁷ The Australian Government Competition Policy Review, Competition Policy Review Draft Report, September 2014, p. 4.

⁸ See for example, Tehan D, 'Reform IR market to deliver growth', Australian Financial Review, 29 September 2014.

market of potential customers and competitors. Many previously non-trade exposed services are now trade exposed. The local jobs created by multinational investment in Australia make a significant contribution to the Australian economy however corporations will naturally design labour structures in a way that secures competitive advantage and serious consideration needs to be given to the WR Framework with a view to improving the attractiveness of our labour market. The Government must shift its attention toward the adoption of a clear strategy to make the employment of Australian workers more attractive and sustainable to investors in our economy.

While the local and global economies have undergone significant structural changes, the WR Framework has not adapted to the extent necessary to respond. The Productivity Commission has sought views on “whether the current system is well suited to contemporary (and evolving) workplace needs for Australia in an increasingly globalised economy”.⁹ As a small, open economy the high living standards enjoyed by Australia are supported by seizing international trade opportunities. Policy settings in the 1980s and 1990s saw the Australian economy more closely integrating into the global economy and exposing local producers to heightened competition from beyond Australia’s borders. Increased competition has delivered undoubted economic benefits, delivering greater choice and lower prices for consumers and in that way increasing their standard of living. However challenges also emerge from a global marketplace and it is becoming increasingly easy to connect with the global marketplace with the rapid evolution of digital technology.

As noted in the Competition Review Draft Report:

The rise of Asia and other emerging economies puts new pressure and expectations on Australia’s domestic systems that were built for a particular economic landscape and at a particular time.

*Australia will need policies, laws and institutions that help us make the most of the opportunities we face. In particular, we need to build adaptability, flexibility and responsiveness into our systems. A heightened capacity for agility and innovation will be needed to match changing tastes and preferences with our own capacity to deliver commodities, goods and services into Asia and elsewhere in the developing world.*¹⁰

It is appropriate to now consider whether aspects of the WR Framework existing as historical legacies from over 100 years ago are appropriate in the contemporary setting. Within this submission ACCI will draw specific focus to areas of the system which impede the capacity of businesses to structure their work systems in the most efficient way.

We must pursue reforms that support and do not impede progressive business strategies that seek to respond to our fast changing operational environment. The nature of work is changing rapidly as technology is increasingly encroaching upon

⁹ Issues Paper 1: Context, p. 10.

¹⁰ *The Australian Government Competition Policy Review*, Competition Policy Review Draft Report, September 2014, p. 14.

manual, industrial labour in many industries. So are working patterns. Productive work is becoming less concerned with fixed hours and fixed work locations. Work is not confined to single jurisdictions and time zones and technology is continuing to change how consumers engage with business and their expectations about service. The social dynamic is trending toward a desire for smart technology, greater flexibility, convenience and freedom of choice.

Against this backdrop an increasing number of businesses have adopted ‘prospector’ style corporate strategies which encourage innovation, seek out new opportunities and seek more flexible and efficient ways of working and accessing the market. In the interests of diversifying the Australian economy and supporting jobs growth it is critical that entrepreneurial risk and innovation be encouraged and supported. Prospector strategies require a workplace that is agile, engaged and adaptable to change. Responsiveness and innovation should not be inhibited by complex and mechanistic pay and conditions structures that deny flexibility and adaptability.

Unfortunately, the WR Framework has failed to keep pace with the modern economy and this changing context. It has in fact gone backwards. The *Fair Work Act 2009* (FW Act) promotes a highly collectivist, centralised approach. This is most easily evidenced by its preference for collective agreement making and the ‘one size fits all’ character of the award structure. Limiting bargaining options to union focussed collective bargaining is at odds with the low levels of unionisation in the private sector and, together with prescriptive awards, works against the system’s capacity to be flexible and adapt to the necessary structural adjustments and changing social preferences.

A recalibration of our policy settings in pursuit of productivity growth is essential if we are to improve living standards, keep and create jobs in Australia, improve the competitiveness of the national economy in new and emerging international markets and address future challenges in skills and workforce participation.

1.2 Rising unemployment

Australia is experiencing continued softening of the labour market with employment growth slowing, hours worked falling and the unemployment rate (6.4 per cent in January 2015, up from 6.0 per cent in January 2014) reaching a 12 year high and expected to rise further.¹¹ The transition probability from unemployment to employment has fallen from 19.4 per cent in January 2014 to 13.7 per cent in January 2015.¹²

Our terms of trade have declined at a faster than expected rate stimulating renewed calls to diversify our sources of economic activity to reduce our level of reliance on minerals exports. As these structural shifts in the economy occur, Australia can expect challenging times ahead as the structure of labour demand shifts and reallocation occurs. It may be some time before the market stabilises.

¹¹ Australian Bureau of Statistics, [Labour Force, Australia](#), February 2015, (cat. no. 6202.0).

¹² *ibid.*

Structural changes in the economy have the potential to magnify the consequences of unemployment with many people finding they have skills which are no longer in demand. This heightens the risk of people being unemployed for longer periods of time or vacating the labour market entirely. The number of long-term unemployed persons has increased by 14.4 per cent in the year to December 2014 and is at its highest level on record.¹³ Long term unemployment has negative social consequences not only for the individual but for their dependents. Participation in paid work is critical to maintaining adequate living standards and to prevent poverty and social exclusion and we need to work toward the WR Framework that is most conducive to positive workforce participation outcomes.

The RBA Governor made the following statement in announcing the RBA Monetary Policy Decision of 3 March 2015:

*In Australia the available information suggests that growth is continuing at a below-trend pace, with domestic demand growth overall quite weak. As a result, the unemployment rate has gradually moved higher over the past year. The economy is likely to be operating with a degree of spare capacity for some time yet.*¹⁴

This sentiment is consistent with the RBA's February 2015 Statement of Monetary Policy in which it stated that "a number of indicators suggest that spare capacity in the labour market has increased consistent with below-trend growth in the economy".¹⁵

The softening labour market conditions have impacted low-paid, low-skilled workers most significantly and we have seen our youth unemployment rate of 14.2 percent, reach its highest level since July 1998 in November 2014 (14.6 per cent).¹⁶ The less volatile youth employment-to-population ratio (57.2 per cent in January 2015) has nonetheless reached its lowest level since December 1993.¹⁷

A recent report released by the Brotherhood of St Laurence makes the following observations that highlight the challenge confronting our youth in the contemporary setting with figures reflecting January 2015 data:¹⁸

- more than 290,000 young people aged 15 to 24 were categorised as unemployed;
- of this group, there were nearly 160,000 unemployed Australians aged 15-19 out of a total unemployed pool of more than 780,000 (i.e. more than one in five);
- the overall unemployment rate is at its highest since July 2002 and is still rising.

¹³ Australian Bureau of Statistics, [Labour Force, Australia](#), February 2015, (cat. no. 6202.0).

¹⁴ Statement by Glenn Stevens, Governor: Monetary Policy Decision, 3 March 2015.

¹⁵ Reserve Bank of Australia, Statement on Monetary Policy, February 2015, p. 37.

¹⁶ Australian Bureau of Statistics, [Labour Force, Australia](#), February 2015, (cat. no. 6202.0).

¹⁷ Australian Bureau of Statistics, [Labour Force, Australia](#), February 2015, (cat. no. 6202.0).

¹⁸ 'The Teenage Dream Unravels: Trends in Youth Unemployment', Brotherhood of St Laurence, March 2015.

The Brotherhood of St Laurence report notes “the impact of the GFC on employment has lasted for longer than the impact of the previous recession in the early 1990s. More than six years on from the GFC, unemployment is still rising. This is in stark contrast to the earlier recession, when national employment started to recover within two years”.¹⁹ It is apparent that the youth labour market is highly vulnerable to both excessive regulation and the effects of economic downturn and aspects of the FW Act exacerbate rather than help address this.

The data also indicates a disturbing trend: young people attaining higher levels of tertiary education are increasingly forming a part of the unemployed pool. While further targeted research should be conducted to more comprehensively understand why this is occurring, plausible contributing factors may be that qualifications they are attaining do not match the skills required by the market and that those undertaking formal, structured tertiary education are finding it increasingly difficult to secure forms of employment to complement their study patterns.

Unemployment pool by age and education profile (%)

	2005	2006	2007	2008	2009	2010	2011	2012
Age								
15–24	41.0	46.6	43.1	43.5	43.8	40.8	42.8	43.8
25–39	28.7	27.5	28.4	27.4	28.4	31.2	31.1	31.3
40–54	24.0	17.0	18.6	20.1	19.0	20.0	18.4	16.6
55 and over	6.3	9.0	9.9	9.0	8.8	8.0	7.7	8.4
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Education								
Less than Year 12	49.6	46.2	53.3	44.9	45.9	45.0	32.1	36.1
Year 12	18.4	21.3	18.1	19.7	22.5	23.8	20.0	20.2
Certificate III or IV	16.1	16.7	14.6	15.9	16.1	14.5	20.8	18.4
Other tertiary*	15.9	15.9	14.0	19.4	15.6	16.7	27.1	25.3
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

* This category includes individuals with diplomas and advanced diplomas, bachelors degrees and postgraduate qualifications.
Source: Author calculations based on HILDA data, wave 12.

Table from ‘The Teenage Dream Unravels: Trends in Youth Unemployment’, Brotherhood of St Laurence, March 2015, p 6, using data from the Household Income and Labour Dynamics in Australia (HILDA) Survey.

Trend data relating to apprentice and trainee activity in Australia is also concerning, with the most recent data indicating the number of seasonally adjusted apprentices and trainees in-training decreased in each of the last nine quarters, from a high of 491,000 in June 2010 to 344 200 in September 2014.²⁰ The most recent NCVER data also indicates that since 30 September 2013 commencements have dropped by 23.9% and completions have dropped by 20.4%.²¹

¹⁹ Brotherhood of St Laurence, op. cit., p. 2.

²⁰ NCVER 2015, *Australian vocational education and training statistics: apprentices and trainees 2014 – September quarter*, NCVER, Adelaide.

²¹ *ibid.*, p. 4.

The NCVER report suggests that “[r]ecent changes to commencement and completion numbers appear to be predominantly due to changes in Commonwealth incentive payments for existing workers, chiefly the removal of the commencement incentive payment for those apprenticeships and traineeships not on the National Skills Needs List. Under the changes, training needed to have been commenced prior to 1 July 2012”.²²

However while it is accepted that changes to incentives will impact decisions to employ apprentices, the impact of the Fair Work Commission’s (FWC) 2013 decision to substantially increase award rates of pay for first and second year apprentices by around 30 per cent has compounded the decline.²³ ACCI had warned of the potential impact in submissions made during the two-yearly review of modern awards, stating:

*...the Commission should be very cautious about increasing any costs associated with apprenticeships. In most industries, commencements are driven by the extent to which employers offer the opportunity, not by a lack of job applicants who may be discouraged by the wages and conditions. As the evidence of the extent of over-award payments indicates, the market mechanisms effectively deal with those less common situations where employers may find it difficult to attract apprentices through the payment of a higher wage in order to attract or retain apprentices. This should not be used as evidence in support of a new minimum wage. ...the cost of apprenticeships substantially affects commencements, which in turn will lead to skills shortages in the future.*²⁴

In a media release following the decision, ACCI former CEO Peter Anderson stated:

Australians wanting to tackle youth unemployment should view this decision with grave concern. The industrial relations tail has wagged the apprenticeship dog. Dramatically increased employment costs will cruel the capability of employers to take on apprentices in an affordable way. Increasing the costs of employing an apprentice not only impacts employers, but destroys the opportunities for many young people want to develop a career in the trades.

Coming so soon after the federal government again cut back employer incentive payments in the July mini budget, it is a double whammy that will keep catapulting apprenticeship start-ups into free fall.

This policy combination is not just damaging to employer confidence but also harmful to Australia's future skills development. I fear it will see fewer young people employed, and those that are employed more likely to be learning on the job rather than in structured training.

²² NCVER, op. cit., p. 21.

²³ Modern Awards Review 2012 – Apprentices, Trainees and Juniors (Full Bench) (AM2012/18 and Others) [\[2013\]FWCFB 5411](#).

²⁴ [ACCI submission in reply](#), Modern Awards Review 2012 – Apprentices, Trainees and Juniors (Full Bench) (AM2012/18 and Others).

Economically, the decision is harsh because it centrally determines increases on a one size fits all basis with no regard to differing capacity to pay.

Today's apprentices are nation builders of the future. They will drive innovation and productivity and lead the transition of the Australian economy into a high skilled, high performing economy. Effectively blunting the talent pipeline by making apprentices expensive to employ condemns Australia to future skills shortages and a reliance on talented tradespeople trained overseas.²⁵

An apprenticeship or traineeship wage should not be set at a level higher than is commensurate with the person's skill and productive capacity otherwise it will act as a disincentive to employ and will continue to contain opportunities for low skilled people to acquire skills and develop careers. Apprenticeships and traineeships provide an entry to the labour market for young people that can often lead to career-long productive employment or offer a transition point for people already in the workforce, often on lower paid, lower skilled jobs, to move into more highly paid skilled work with improved career prospects. The framework must promote this outcome, not work against it.

It is time for policy settings to respond to the Organisation for Economic Co-operation and Development's (OECD) cautions about the impact of the FW Act on youth unemployment.²⁶ The OECD identified that negative deviations in the growth rate of potential GDP disproportionately impacts youth employment and while uninterrupted economic growth for the 17 year period up until 2009 had seen youth unemployment at historically low levels, steps needed to be taken to 'avoid the build up of a large pool of youth at risk of becoming long term unemployed' as growth slowed and that 'care should be taken to avoid discouraging bargaining at the workplace level and pricing low-skilled youth out of entry level jobs. The process of streamlining and modernising awards started under *WorkChoices* should be continued'.²⁷ These 2009 comments have a certain prescience.

The process of streamlining and modernising awards as contemplated by the policy reform agendas prior to the enactment of the FW Act was not realised and youth unemployment has reached its highest level since 1998. The OECD advice to monitor the effect of the FW Act in the context of the youth labour market and to be prepared to make changes in responses to negative effects must now be heeded.²⁸

As noted by the Productivity Commission:

The WR framework affects unemployed workers as well as the employed. It can determine who gets employed, the total hours they work, when and where they can work, and how their employment is terminated. It can also influence the prospects of people who are unemployed or outside the labour force, as it may create barriers to their employment. Its effects can vary

²⁵ ['Wages Decision a Nation in the Coffin for Apprenticeships'](#), Statement by ACCI CEO Peter Anderson, 22 August 2013.

²⁶ See the OECD's report, "Jobs for Youth: Australia", OECD 2009.

²⁷ *ibid.*, pp. 13 and 21.

²⁸ *ibid.*, p. 22.

*across regions, by size and industry of firms, and by the age, skills and preferences of people. It can affect the way in which wages and prices move in an economy, and thereby influence overall macroeconomic performance and policy.*²⁹

ACCI recommends recalibrating the objects of the WR Framework with a focus on protecting jobs in the immediate term and helping the unemployed (particularly youth and the long-term unemployed) become more competitive in the labour market.

1.3 The historical evolution of the objects of Australia's workplace relations framework

The Productivity Commission has been asked by the Australian Government to 'undertake a wide-ranging inquiry into Australia's WR framework...' and 'to go beyond evaluating the current system to consider the type of system that might best suit the Australian community over the longer term.'³⁰

As this Inquiry will be giving consideration to principles that should underpin the WR Framework in the longer term, taking into account Australia's future needs, the evolution of the system to date is instructive.

Australia's system of compulsory conciliation and arbitration was established against the backdrop of the great strikes of the 1890s with the objective, amongst others, of preventing and settling industrial disputes. It operated for nearly 90 years.

In the decades that followed *the Commonwealth Conciliation and Arbitration Act 1904*, the system became highly regulated. The *Harvester Decision*³¹ was profoundly influential because it not only provided the basis for the minimum wage but also injected a social welfare dynamic to the regulation of industrial relations that made a deep imprint on the operation of the system.

The transformation of the Australian economy during the 1980s is well documented. It had become apparent that we could no longer insulate ourselves from global competition through policies that protected local industry, regulated trading relationships and influenced currency interaction with global financial markets. There was however initial resistance to change when it came to industrial relations.

The Hawke Government commissioned Professor Hancock to review the prevailing industrial relations law and systems.

In its 1985 report, the Hancock Committee stated:

²⁹ Issues Paper 1: Context, p. 2.

³⁰ *ibid.*

³¹ (1907-08) 2 CAR 1, November 1907.

*After an examination of all the material before us, we reached the conclusion that no substantial case has been made that industrial relations would improve if conciliation and arbitration were abandoned in favour of some other system, such as collective bargaining. Thus we have concluded that conciliation and arbitration should remain the mechanism for regulating industrial relations in Australia.*³²

This conclusion was not sustainable and its effect was short-lived. The *Industrial Relations Act 1988* followed a few years later and commenced on 1 May 1989, but by then, policy makers had begun to recognise that the global economy, increasing competition and greater mobility of capital and labour required new approaches to longstanding domestic policies. In time, industry, trade and financial policies were revised. This meant that the Australian WR Framework = also had to change to meet the new economic challenges. Foremost amongst these was the maintenance of living standards.

As was noted in ACCI's blueprint for the Australian Workplace Relations System, '*Modern Workplace: Modern Future*' (ACCI's Policy Blueprint), the challenge for Australia was to create a WR Framework where decisions about wages, conditions of employment and the resolution of disputes could be made in the workplace having regard to the circumstances and mutual interests of the actual employers and employees.³³ It was and remains ACCI's view that such a system is the most effective way to lift economic performance and living standards in conjunction with each other, not at each other's expense.

Of course such a change required modification of the pre-existing system and a reduction in the influence of third party institutions.

The process of necessary change was started by the Keating Government. The philosophy, which still resonates today, was encapsulated by then Prime Minister in April 1993 when he described the features of the new system he was aiming for:

Let me describe the model of industrial relations we are working towards. It is a model which places primary emphasis on bargaining at the workplace level within a framework of minimum standards provided by arbitral tribunals.

It is a model under which compulsorily arbitrated awards and arbitrated wage increases would be there only as a safety net.

The safety net would not be intended to prescribe the actual conditions of work of most employees, but only to catch those unable to make workplace agreements with employers.

Over time the safety net would inevitably become simpler. We would have fewer awards with fewer clauses.

³² Committee of Review on Australian Industrial Relations Law and Systems (Hancock Committee) (1985) Report, April 1985.

³³ ACCI, "Modern Workplace: Modern Future – A Blueprint for the Australia Workplace Relations System 2002-2010", 2002.

For most employees and most businesses, wages and conditions of work would be determined by agreements worked out by the employer, the employees and their union.

These agreements would predominately be based on improving the productive performance of enterprises, because both employers and employees are coming to understand that only productivity improvements can guarantee sustainable real wage increases.

We would have an Industrial Relations Commission which helped employers and employees reach enterprise bargains, which kept the safety net in good repair, which advised the Government and the parties of emerging difficulties and possible improvements, but which would rarely have to use its compulsory arbitral powers. Instead, parties would be expected to bargain in good faith.

We would have sufficient harmony between State and federal industrial relations systems to ensure that they all head in the same direction and used the same general rules.

That is the goal we are working towards.³⁴

That exposition was delivered in the immediate aftermath of the 1993 Federal election, to which the defeated Coalition had taken its ‘*Fightback!*’ policy.³⁵ In relation to industrial relations, the Coalition had promised to end universal compulsory arbitration and give employers and employees a choice about the way in which they would manage their employment relationship. The Coalition had proposed three types of employees:

- those who together with their employer chose to remain within the award system;
- those who together with their employer agreed to enter into a workplace agreement; and
- where agreement could not be reached to either re-enter the award stream or enter into a workplace agreement, the award entitlements of the employee would convert into the terms and conditions of the workplace agreement.

Where workplace agreements were made, they were to meet a safety net comprising a minimum hourly rate of pay derived from the relevant award classification, four weeks’ annual leave, two weeks’ (non-cumulative) sick leave and 12 months’ maternity leave. Matters such as penalty rates and annual leave loading would be a matter of negotiation but where agreement could not be reached, they would become an enforceable term of a workplace agreement. A commitment was given that there would be no legislation to remove or force any worker to give up any of these entitlements and nor would any employer be able to force an employee

³⁴ Prime Minister Keating, (1993) Speech to the Institute of Company Directors, Melbourne, 21 April 1993.

³⁵ ‘*Fightback! Fairness and Jobs*’, December 1992, was the Coalition’s Economic policy package, proposed under Opposition leader John Hewson.

to forgo them.³⁶

Only because the major political parties held similar views regarding the direction in which the industrial relations system had to head, was the transition towards greater enterprise focus was able to commence during the 1990's. Consensus as to further reform has been beyond them in more recent years.

The Keating Government's *Industrial Relations Reform Act 1993* introduced a system of direct bargaining which could displace award regulation for the first time through certified agreements and enterprise flexibility agreements. Its passage amended the objects of the principal *Industrial Relations Act 1988* by providing that it was 'to provide a framework for the prevention and settlement of industrial disputes which promotes the economic prosperity and welfare of the people of Australia' through objects which included 'encouraging and maintaining the making of agreements, between the parties involved in industrial relations, to determine matters pertaining to the relationship between employers and employees, particularly at the workplace or enterprise level'.³⁷

Agreements could reduce award entitlements only if considering employees' terms and conditions as a whole the reduction was not contrary to the public interest. The safety net of wages and conditions was maintained through the award system and other entitlements said to meet Australia's international obligations in relation to matters such as equal remuneration for work of equal value and termination of employment.

Certified agreements maintained the role of unions in the settlement of terms and conditions of employment. The provisions allowing for enterprise flexibility agreements (EFAs) were said to have the effect of allowing agreements between an employer and its employees in an enterprise³⁸ but did not remove the involvement of unions in the agreement making process. For instance, the implementation of an EFA could be refused or adjourned if the Australian Industrial Relations Commission (AIRC) was satisfied the employer did not adequately notify each eligible union about negotiations and had not given them the chance to participate in negotiations. Additionally, an eligible union had the opportunity to agree to be bound by any agreement submitted to the AIRC for approval, or already approved, and rights of representation and intervention were preserved.

The practical effect of these requirements was that it would be not possible for an employer who wanted to negotiate directly with employees without any union involvement to do so and nor were wholesale changes to employment conditions that might depart from awards possible without union consent. Additionally, the AIRC was empowered to refuse to approve an agreement if it was satisfied, because of exceptional circumstances, that approving it would be contrary to the public interest.

Such provisions maintained union involvement. Some regarded this favourably and

³⁶ "Fightback! Fairness and Jobs", December 1992.

³⁷ *Industrial Relations Act 1988* (Cth), s. 3(a).

³⁸ Explanatory Memorandum to the *Industrial Relations Bill 1993* (Cth), p. 59.

as necessary to protect those who were not in a position effectively to promote or protect their own interests in direct negotiations.³⁹ For those who regarded these requirements as limitations, there was at least the consolation that the focus of the framework had changed and there were new ways of reaching agreement on the terms and conditions of employment.

The significance of the Keating Government reforms should not be understated. They represented a decisive move away from compulsory conciliation and arbitration and the placement of bargaining at the enterprise level at the forefront of industrial relations. It was a seismic shift and recent history tells us that it would unlikely have been achieved or been able to endure without both sides of politics agreeing that such a movement was required. Unfortunately the finding of common ground in more recent instances of workplace relations reform has been very much the exception rather than the rule.

During the same period as the Keating Government reforms, the OECD concluded that *“increased flexibility of working time, making wages and labour costs more flexible and reforming employment security provisions”*⁴⁰ were essential policy components of a micro-economic reform agenda capable of delivering sustained growth in employment and living standards in domestic economies.

The Howard Government’s *Workplace Relations Act 1996* (the WR Act) accelerated the process of change. It comprehensively established a framework primarily focussed on collective and individual workplace agreements and away from centrally determined outcomes. The original objects of the WR Act, even though the subject of compromise, illustrated the shift:

3. *The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:*
 - (a) *encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and*
 - (b) *ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and*
 - (c) *enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act; and*
 - (d) *providing the means:*

³⁹ Creighton B. & Stewart A., *Labour law – an introduction* – 2nd edition, p. 121.

⁴⁰ OECD (1994) *OECD Jobs Study*, (recommendations 4,5 and 6 of OECD Jobs Study, 1994 OECD Ministerial Council).

- (i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level; and*
- (ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment; and*
- (e) providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them; and*
- (f) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and*
- (g) ensuring that employee and employer organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively; and*
- (h) enabling the Commission to prevent and settle industrial disputes as far as possible by conciliation and, where appropriate and within specified limits, by arbitration; and*
- (i) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and*
- (j) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and*
- (k) assisting in giving effect to Australia's international obligations in relation to labour standards.*

Bargaining at the enterprise level was given primacy over central regulation. Intervention rights in collective agreement making were limited. Awards were required to be simpler, with minimum wages and conditions to operate as a safety net only. The AIRC's powers to regulate the workplace and intervene in bargaining were more restricted. Systematic rights to freedom of association were enacted and individual agreement making was formally recognised.

A very significant feature of these structural changes in 1993 and in 1996 was that they were taken by Australian governments of different political persuasions. Despite seemingly inevitable political battles associated with industrial relations, there was however bipartisan support (at least between governments) for the new direction in Australian workplace relations. As was noted in the June 2002 *Report on*

Agreement Making in Australia under the Workplace Relations Act 1996:

For more than a decade now there has been widespread support for the policy of moving Australia's formal workplace relations system away from its traditional focus on the centralised determination of wages and conditions of employment by industrial tribunals – through a system of industry and occupational awards – to agreements reached directly at the enterprise and workplace level.

*Reforms to the wage setting arrangements began in the late 1980's with a growing recognition among Australians of the importance of ensuring greater international competitiveness by linking wages and improvements in conditions of employment to increases in productivity, skill and flexibility at the workplace level. The need to make enterprise based agreements a central part of the system has been endorsed by both major political parties, all major employer organisations, the ACTU, and the majority of individual unions although different approaches have been advocated.*⁴¹

The WR Act introduced new options for the making of agreements between employers and employees. In an extension from the 1993 reforms, employers and employees had the choice of entering into either individual agreements, called Australian Workplace Agreements (AWAs), or collective agreements (certified agreements). There was also the option of entering into agreements without any union involvement. The choice of agreement was to be a matter for each workplace according to its circumstances and preferences.

In terms of the safety net, the principle that an agreement not disadvantage employees in comparison to their award entitlements remained but the way in which this was tested was changed. A 'global' no-disadvantage test was introduced and an AWA or certified agreement would pass this test if its approval would not result, on balance, in a reduction of the overall terms and conditions of employment under the relevant award and state and federal laws (the NDT).

The first two years of the operation of the WR Act saw 52,961 AWAs and 12,064 certified agreements (including 1043 made directly with employees) approved.⁴²

In successive elections, the Howard Government sought to progress its agenda. In 1998, its election policy included commitments to:

- simplify the procedural and approval requirements for agreements;
- introduce an exemption for small business from unfair dismissal laws for newly employed workers; and
- continue the process of award simplification so that awards would be 'simple instruments that do not impede agreement making, workplace efficiency,

⁴¹ Department of Employment and Workplace Relations and the Office of the Employment Advocate (2002) Report on Agreement Making in Australia under the Workplace Relations Act 1996, June 2002.

⁴² Hawke, A. et al, *Agreement-making under the Workplace Relations Act: Report 1997*, Canberra, 1998 and *Collective Agreement-making under the Workplace Relations Act: January to June 1998*, Department of Employment, Workplace Relations and Small Business, Canberra, 1998.

organisational effectiveness or act as barriers to employment growth’.⁴³

In 2001, the Howard Government’s election policy maintained its commitment for the primary focus of the WR Framework to be on workplace agreements providing choice and underpinned by a minimum safety net and ‘no disadvantage test’ with a simplified agreement making process. The commitment to simplify awards was also maintained as was an exemption for small business from unfair dismissal laws.⁴⁴

The OECD endorsed the 1993 and 1996 policy changes, and called for further changes:

The benefits of a comprehensive approach to structural reform have become apparent in the pick up of Australia’s multi-factor productivity growth...better management practices and work arrangements have improved capital productivity...

The flexibility of the labour market has increased by the move towards a more decentralised system of setting wages and other conditions of employment, but there is a need for more effective decentralisation...The reform process needs to be completed in the light of Australia’s level of structural unemployment and the need to sustain the improvement in productivity performance.”⁴⁵

By 2004, the Howard Government’s policy was outlined in more general terms. It outlined commitments to achieve a ‘more harmonized’ WR Framework reducing duplication between the federal and state systems and to examine ways to ‘assist business, especially small business, to enter into workplace agreements, through simplifying and streamlining current agreement making processes’. The policy also articulated, in strong language, the Howard Government’s support for AWAs and its ongoing commitment to further simplify awards and ‘take the unfair dismissal laws burden off the back of small business.’ There was also a commitment to amend the objects of the WR Act to ensure the freedom to contract was protected, promoted and enhanced.⁴⁶

The then Opposition’s 2004 election policy⁴⁷ differed in emphasis. Amongst its measures were commitments to:

- maintain enterprise bargaining as the central focus of the system;
- restore the right to bargain collectively;
- lift restrictions on agreement and award content;
- ensure parties bargained in good faith;
- abolish AWAs;
- re-empower the AIRC to settle intractable dispute through arbitration;
- provide casual employees the right to request permanent employment; and
- revise the objects of the WR Act to require the AIRC takes into account job security and the need to prevent the misuse of casual employment.

⁴³ Coalition 1998 election policy - *More Jobs, Better Pay*, September 1998.

⁴⁴ Coalition 2001 election policy - *Choice and Reward in a Changing Workplace*.

⁴⁵ OECD (2001) *Economic Survey Australia 2001*

⁴⁶ Coalition 2004 election policy – *Flexibility and Productivity in the Workplace: The Key to Jobs*.

⁴⁷ ALP 6 August 2004 policy document – *Flexibility with Fairness for Australia’s Workplaces*.

After a decade had passed since the reform process had commenced under the Keating Government, there was still agreement between the major political parties on the primacy of enterprise bargaining. However, there were still significant differences relating to:

- the objects of the WR Act;
- award and agreement content;
- the role and powers of the AIRC;
- AWAs; and
- unfair dismissal laws.

There had been significant changes in the way that workplace relations were being conducted in many Australian workplaces. Wages and living standards were increasing on the back of strong productivity, a growth in agreement making and fewer disputes.

It was recognised by ACCI at the time that while significant, the role that the 1993 and 1996 structural changes to the system had in producing these results was difficult to quantify and that as with most aspects of economic and social change, a mix of factors contributed to outcomes. Regardless, the nature of the system and its regulatory institutions is crucial in all cases because it provides the legal framework around which commercially or industrially driven reform has to be implemented and depending on these arrangements, the system either acts to support or make more difficult workplace adaptability.

By the 2004 election, the Howard Government had spent its previous three terms compromising its preferred workplace relations reform agenda. It lacked bipartisan support from the Opposition and had never achieved a majority in the Senate. Its attempts to further award simplification, encourage agreement making, reform the unfair dismissal laws and better contain industrial action were ongoing. Between the 1996 and 2004 elections there were nearly 40 workplace relations bills presented which were applicable to the private sector. These bills were either:

- rejected; or
- enacted in an amended form; or
- enacted considerably amended, with major elements removed.

Still, by the 2004 election, Australia had an improved industrial framework in comparison with the framework prior to the 1993 reforms, even if the 1993 and 1996 changes had not really displaced the former system. Unfortunately, the framework had not moved significantly since the commencement of the WR Act. Australia was a decade into the transition from a 90 year old centralised multi-jurisdictional system but the reforms achieved had been overlaid; they had not substituted the former system.

As such, the nature and pace of enterprise workplace reform and the transition to the new system remained conditional upon the needs, choices, attitudes and decisions made at both the workplace and by third parties.

With its 2004 election victory delivering an unexpected Senate majority, the Howard

Government seized the opportunity to embark upon fundamental reform of the WR Framework through the WorkChoices Laws.

A national system of workplace relations was introduced by using the corporations power in the Constitution. The amended objects in s. 3 of the WR Act reflected the Howard Government's priorities:

The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

- (a) encouraging the pursuit of high employment, living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and*
- (b) establishing and maintaining a simplified national system of workplace relations; and*
- (c) providing an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by this Act; and*
- (d) ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment rests with the employers and employees at the workplace or enterprise level; and*
- (e) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances; and*
- (f) ensuring compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of:*
 - (i) employee entitlements; and*
 - (ii) the rights and obligations of employers and employees, and their organisations; and*
- (g) ensuring that awards provide minimum safety net entitlements for award-reliant employees which are consistent with Australian Fair Pay Commission decisions and which avoid creating disincentives to bargain at the workplace level; and*
- (h) supporting harmonious and productive workplace relations by providing flexible mechanisms for the voluntary settlement of disputes; and*
- (i) balancing the right to take industrial action for the purposes of collective bargaining at the workplace level with the need to protect the public interest and appropriately deal with illegitimate and unprotected industrial action; and*

- (j) *ensuring freedom of association, including the rights of employers and employees to join an organisation or association of their choice, or not to join an organisation or association; and*
- (k) *protecting the competitive position of young people in the labour market, promoting youth employment, youth skills and community standards and assisting in reducing youth unemployment; and*
- (l) *assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and*
- (m) *respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and*
- (n) *assisting in giving effect to Australia's international obligations in relation to labour standards.*

Primary responsibility for determining matters affecting the employment relationship remained with employers and employees at the enterprise level and the parties retained the right to choose the form of agreement most appropriate for their circumstances. However, there was a change in emphasis on the role of the safety net; it was changed from being 'an effective safety net of fair and enforceable minimum wages and conditions' to one that needed to be 'economically sustainable'.

Significant amongst the WorkChoices Laws were:

- the creation of a national WR Framework for constitutional corporations;
- the establishment of the Fair Pay Commission to set minimum and award classification wages;
- minimum conditions of employment enshrined in legislation as the Australian Fair Pay and Conditions Standard (AFPCS), comprising the applicable minimum rate of pay, maximum ordinary hours of work of 38 hours per week, 4 weeks annual leave per annum, 10 days paid personal leave per annum, up to 52 weeks unpaid parental leave;
- reduced award content, with clauses placing restrictions on apprenticeships, independent contractors and labour hire workers and requiring union picnic days and training leave removed and clauses regulating long service leave, jury service and superannuation not to be included in new awards;
- the removal of the NDT and the previous certification and approval processes for certified agreements and AWAs, enabling them to take effect from the date of lodgment;
- a capacity to trade, without compensation, penalty rates, allowances and rest breaks, even if they were defined as 'protected' meaning they were only able

- to be modified or removed by specific provisions in a new agreement approved by employees; and
- an exemption from unfair dismissal laws for businesses with 100 employees or less.

The intent was clear. Agreements and the new legislated minimum standards were preferred over centrally determined awards. There was to be choice as to the form of agreement used and they were to be easier to make and maintain. The statutory preference was that employment conditions were decided at individual workplaces and they were underpinned by a safety net designed to encourage and sustain higher levels of employment.

Later amendments saw the ‘fairness test’ introduced. AWAs and certified agreements required third party approval from a regulating authority, with the fairness test being passed if the agreement provided ‘fair compensation’ in lieu of the exclusion or modification of certain ‘protected award conditions’. Relevant matters in this regard were:

- the monetary or non-monetary compensation to be received in lieu;
- the work obligations of the employee(s) and personal circumstances, including family responsibilities; and
- where not contrary to the public interest, any exceptional circumstances, such as a short-term crisis in the employer’s business.

The ‘fairness test’ was nonetheless attacked by opponents of the WorkChoices Laws on the basis that it was not the NDT. Despite findings that it had proved to be effective⁴⁸, the introduction of the fairness test did not stem the tide of discontent against the Howard Government.

The Opposition took the policy *Forward with Fairness*, together with the *Forward with Fairness – Policy Implementation Plan* to the 2007 Federal election. The measures of significance within the policy were:

- the repeal of the WR Act;
- the creation of national industrial relations laws for the private sector;
- the scrapping of AWAs;
- the restoration of the unfair dismissal jurisdiction to businesses employing 100 or fewer employees;
- a safety net of 10 National Employment Standards (NES) that would build upon the AFPCS;
- ‘modernisation’ of the award system and introduction of flexibility arrangements in awards and agreements;
- the right to collectively bargain and introduction of good faith bargaining rules;
- retention of right of entry laws and secondary boycott provisions in the *Trade Practices Act 1974* (Cth); and

⁴⁸ 55th report of the Workplace Research Centre’s *Agreements Database and Monitor*.

- retention of restrictions on industrial action, including mandatory secret ballots before protected industrial action.⁴⁹

At the time of the 2007 Federal election, ACCI's view, still held today, was that Australia sits in the middle of two systems. Apart from the reservations ACCI held about the *Forward with Fairness* platform, we held the view that the WR Framework, as it was in 2007, required further transformation order to implement the objectives of:

- labour market flexibility;
- productivity-orientated wage determination;
- decentralisation;
- freedom of choice;
- an enterprise emphasis;
- individualised approaches; and
- a reduction in complexity.

ACCI's 2007 Workplace Relations Policy Statement called for:

- a rationalisation of the Federal and State systems;
- voluntary conciliation and arbitration (subject to a few exceptions);
- a balance between employer and employee rights in unfair dismissal matters and a small business exemption;
- awards and agreements to be made binding only on identified employers and their employees, with a fixed period of operation;
- individual or collective enterprise level agreements implemented with a minimum of scrutiny and subject only to the requirements that they contain no less than the defined minimum standards and a grievance procedure;
- a retention of the AFPCS, with slight modification;
- the minimum wage to be fixed following consideration of recommendations made by the tribunal or other independent body at the request of the responsible Minister;
- rigour to be applied to settling of disputes regarding representational issues and, in prescribed circumstances, industrial disputes;
- continued regulation and restriction of industrial action, including the continued regulation of secondary boycott action through the *Trade Practices Act 1974* (Cth).

The Rudd Government was elected and proceeded to translate the *Forward with Fairness* documents into the FW Act.

1.4 What should the system's objects be in the current context

The Productivity Commission has encouraged stakeholders to "give their views on the appropriate objectives of the WR system, how these can be balanced and their

⁴⁹ See 'Forward with Fairness', together with Labor's 'Forward with Fairness Policy Implementation Plan', August 2007.

capacity to adapt to future structural changes and global economic trends”.⁵⁰ The FW Act was the subject of a Post-Implementation Review (PIR) in 2012. This gave rise to the report entitled *‘Towards more productive and equitable workplaces- An evaluation of the Fair Work legislation’* (PIR Report). ACCI, along with many other individuals and organisations, participated and made submissions. The ACCI submissions to that PIR remain relevant but must be assessed in the context of the terms of the PIR, which was confined to an assessment of the FW Act and the extent to which its effects had been consistent with its objects. In the context of this inquiry, ACCI will further address aspects of the operation of the framework that extend beyond the submissions made during the PIR.

It is over 10 years since the release of the ACCI Policy Blueprint with its stated goal being a *“workplace relations system that empowers employers and employees across the nation to work co-operatively and make decisions in their shared interests that lead to more jobs, higher living standards and prosperous businesses”*. This goal remains relevant as do ACCI’s recommended objects for a WR Framework as reflected in ACCI’s Policy Blueprint which are set out below:

ACCI recommends that the objects of the WR Framework be reformed to ensure a system characterised by decentralism and voluntarism, under which primacy is given to the interests of the direct employer and employee parties to the employment relationship. The system should deliver:

- ***labour market flexibility;***
- ***productivity-oriented wage determination;***
- ***decentralisation;***
- ***freedom of choice;***
- ***an enterprise emphasis;***
- ***individualised approaches;***
- ***a reduction in complexity.***

1.5 Learning from the international experience

The Productivity Commission has sought views on whether there are “broad lessons for Australia from overseas WR arrangements”. A cautious approach should be adopted when considering the applicability of international practices to the Australian context. ACCI agrees with the Productivity Commission’s statement that “it appears there is no single template workplace relations model globally that we can emulate”⁵¹. ACCI’s Policy Blueprint states:

As important as it is to keep reforming the system, Australia must guard against slavishly applying international policy or credo. The experience of some western European countries to load up employment regulation at a central source suggests that even a bargaining system can lure governments

⁵⁰ Issues Paper 1: Context, p. 8.

⁵¹ Productivity Commission Issues Paper 1: Context, p. 10.

*into centralised policy approaches that are hostile to good employment outcomes. Some of these European governments are now seeking to unwind such policies. The lesson for Australia is that moving to a decentralised system, as advantageous and essential as it is, will not in itself be insurance against hostile central regulation by a government of the day.*⁵²

It remains the case that the wholesale importation of external systems is unlikely to achieve the objectives sought, but it is not a reason to ignore what's done outside Australia and its consequences. It is worthwhile to consider what can be drawn from international systems, particularly where there are examples of systems which support positive economic growth.

In considering the merits of a decentralised system of wages and conditions determination, it is worthwhile to consider the New Zealand experience. Driven by economic crisis, which is the socially most costly way to undertake reform, New Zealand's reform agenda was implemented through its then revolutionary *Employment Contracts Act 1991* (ECA). Prior to the ECA New Zealand's system had strong similarities to Australia's. New Zealand's industrial regulation had centred on a system of compulsory arbitration with a long history, and the ECA reforms resulted in the abolition of industry and occupational awards, prohibition on compulsory union membership, removal of the registration and regulation of trade unions (the word 'union' did not appear in the ECA), and provided for non-collective bargaining. The ECA system did not move to full deregulation based on common law as it retained a number of employee protections including access to formal grievance procedures, unfair dismissal protections and statutory minimum standards which could not be bargained away.

The ECA reforms were not based on a preference for union-based collectivism and single employer collective agreements and individual agreements quickly became the most common forms regulating employment relationships. Unions continued to act as bargaining agents in the vast majority of collective agreements which were negotiated, but union coverage dropped significantly (from an estimated 55 per cent in 1986, to 37 per cent in 1992 and to 25 per cent in 1996).⁵³ Industrial disputation spiked initially (potentially impacted by rapid public sector restructuring and privatisation), but levels of disputation soon fell to historical lows and union intervention in bargaining reduced. The introduction of the unfair dismissal jurisdiction led to a surge in applications for remedies.⁵⁴

Kasper summed up the ECA and related reforms in New Zealand:

Previously antagonistic industrial relations have given way to cooperation between employers and works, flexible adjustment to competitive conditions and an enhanced competitiveness of New Zealand workplaces and firms in a rapidly changing, internationally open economy...The main effect of the labour reforms has been to assist in making the supply-side of the New Zealand economy fairly price elastic...

⁵² ACCI, "Modern Workplace: Modern Future – A Blueprint for the Australia Workplace Relations System 2002-2010", 2002, p.p. 11-12.

⁵³ Wooden M and Sloan J., "[Industrial Relations Reform and labour Market Outcomes: A Comparison of Australia, New Zealand and the United Kingdom](#)", RBA, 1998, p. 173.

⁵⁴ *ibid.*

Employers and most employees have welcomed the freedoms under the new contracts system. In many sectors, productivity has risen steeply, reflecting more rational work practices. Managers are now able to effectively manage the human resources that firms hire. Real wages have risen, but slowly, reflecting productivity gains. Union membership and the number of union officials have fallen, as many workers now use bargaining agents to negotiate employment contracts. The frequency of strikes and lockouts has fallen considerably.

The ECA and the other reforms have created a “Kiwi job-creation machine”, which has increased aggregated employment by over 10 percent during the long upswing of 1991-95. It has nearly halved the overall unemployment rate within less than two years – in contrast to earlier upturns in the New Zealand cycle and the pattern in Australia. ...Labour market deregulation has also increased the market premia for skills and reduced transaction costs in operating about markets.

Most observers predict a period of sustained, inflation free-growth and further drops in unemployment ...as New Zealand – despite strengthening currency – is now seen as an internationally highly competitive exporter and an attractive location to internationally mobile capital and enterprise.⁵⁵

The World Economic Forum recently ranked Australia’s cooperation in labour-employer relations 109th out of 144 countries whereas New Zealand ranked eighth, suggesting that the ECA based system is generally conducive of cooperative relationships.⁵⁶ With Australia’s workplace relations regulation impacting its global competitiveness, it seems useful to consider what countries which are becoming increasingly competitive are doing.

Particular consideration should be given to countries considered to have efficient labour markets. In this regard, the World Economic Forum ranks New Zealand sixth out of 144 in terms of the efficiency of its labour market⁵⁷, and the World Bank has ranked New Zealand second (compared to Australia’s tenth place ranking) in a report measuring the ease of doing business.⁵⁸ Given the historical similarities between Australia’s and New Zealand’s pre-ECA regulatory tradition, aspects of the decentralised approach reflected in New Zealand’s system warrant closer consideration by the Productivity Commission.

⁵⁵ Kasper, W E “Liberating labour: The New Zealand Employment Contracts Act”, Kiel Working Papers, No. 694, (1995), pp. 1-2.

⁵⁶ World Economic Forum, [The Global Competitiveness Report 2014-2015](#), p. 484.

⁵⁷ *ibid.*, p. 291.

⁵⁸ World Bank 2014, *Doing Business 2015: Going Beyond Efficiency*, Washington, DC: World Bank.

2. ISSUES PAPER 2: SAFETY NETS

2.1 The 'safety net'

ACCI has consistently expressed support for a genuine safety-net of minimum terms and conditions. However the existing multi-layered and highly regulated approach to minimum wages and conditions via the NES and industry/occupational awards is too complex and inflexible for small business. Small businesses find the complexity of awards overbearing and may try to find 'work-arounds' that risk compliance breaches when considered against the technical prescription of award provisions. Each individual breach of an award has the potential to result in legal action and financial penalty.

Against a backdrop of rising unemployment, some award conditions such as excessive penalty rates, prescriptive minimum engagement periods and part-time hours clauses create a disincentive to employ or offer more hours. Award modernisation consolidated rather than simplified historical award provisions from multiple jurisdictions but did not sufficiently adapt them to contemporary settings. Affecting even marginal changes to the modern awards to address such issues has proven difficult and costly.

Aspects of the NES are overly prescriptive in application and it is permissible for the NES to be supplemented by awards, with the result that the FWC can create a different standard. For example, despite the inclusion of small business redundancy exemption within the FW Act, this exemption can be overridden by an award, thus undermining the policy sentiment underpinning the exemption.

Australia has a unique system of minimum wages setting by reference to a national minimum wage plus industry and occupational classification structures which distort market wage determination. In a number of sectors, the wages of highly skilled and managerial employees are set by reference to the relevant award, which brings the award system's role as a 'safety net' into question.

The complex, multi-layered application of the NES and awards produces a costly foundation for bargaining due to the way in which the Better off Overall Test (BOOT) is applied. Award content is too prescriptive and costly to bargain away and bargaining outcomes are not delivering innovative, productivity enhancing provisions. ACCI does not propose moving to a fully deregulated system based on common law and considers it important to retain a number of fundamental employee protections which cannot be bargained away however there is a strong case for rationalisation of the current system.

2.2 The national employment standards

ACCI's submissions during the 2012 PIR of the FW Act, called for greater flexibility in how some of the NES conditions can be modified through agreement making. ACCI recommended that all NES provisions (except for the requirement to provide the Fair Work Information Statement) should be the subject of bargaining against the NDT or the existing BOOT. ACCI noted that there are already prohibitions on employers

applying coercion to employees to agree or not agree to enter into arrangements with employees which guard against unilateral actions of employers.

In submissions made during the PIR ACCI called for a number specific changes to the NES, in the context of the current legislated framework, including amendments to permit the averaging of hours for up to 52 weeks by agreement, to make clear that annual leave entitlements on termination be calculated on the “base rate of pay” as per the former standard; to ensure that the small business redundancy exemption in the NES cannot be undermined by a contrary provision contained in an award and to clarify that leave (paid or unpaid) does not accrue when an employee is receiving workers’ compensation.

While there is scope for improvement to the NES in the context of the existing framework it is necessary to reconsider what constitutes an appropriate set of legislated minimum standards against the safety net as a whole as well as how such legislated minimum standards should be determined.

Historically, industrial courts and tribunals have played a role in prescribing conditions that might be described as ‘core standards’. By way of example, the Arbitration Court’s 1927 decision to establish a general 44 hour week was gradually introduced into Federal Awards.⁵⁹ The Arbitration Court went on to further limit ordinary hours in awards to 40 per week in 1947.⁶⁰ In 1983 the Commission facilitated the introduction of a 38 hour week in awards by agreement only and in circumstances where there were ‘cost offsets’.⁶¹ It not widely acknowledged that it was not until the introduction of the WorkChoices Laws that the 38 hour week became a national legislated minimum entitlement, subject to averaging. Leave entitlements such as sick/personal leave annual leave and parental leave also had their genesis from awards determined by industrial courts and tribunals. Again, it was not until the passage of the WorkChoices Laws that national legislated entitlements to personal/carer’s leave came into being.

In seeking to move away from centralised wage and conditions fixation and third party interference, the WorkChoices Laws commenced a transitional process which reduced the influence of awards in the system. The laws regulated core minimum standards (that would otherwise be regulated through the awards system) via legislated standards in the form the AFPCS. The NES prescribed by the FW Act has continued this approach and contains legislated minimum terms and conditions relating to hours of work, requests for flexible working arrangements, parental leave, annual leave, personal/carer’s leave and compassionate leave, community service leave, long service leave, public holidays and the provision of a Fair Work Information Statement.⁶²

It must be acknowledged that the systems under the repealed WR Act and FW Act provide for differing roles of industrial awards in setting wages and conditions. In

⁵⁹ *Amalgamated Engineering Union v J. Alderdice & Company Pty Ltd & Others (44 Week Case)* (1927) 24 CAR 755, Dethridge CJ, Beeby and Lukin JJ, 24 February 1927.

⁶⁰ *Standard Hours Inquiry 1947 (40 Hour Week Case)* (1947) CAR 581, Drake-Brockman CJ, Foster and Sugarman JJ 8 September 1947.

⁶¹ *National Wage Case Decision September 1983*, Print F2900, Principle 5, Standard Hours, p/. 51.

⁶² Part 2-2., Division 2.

considering the appropriate ‘safety net’ it is necessary to consider the role of legislated standards, awards, bargaining options and tests underpinning bargaining as interrelated concepts.

The award modernisation and award review processes under the current system have again reinvigorated notional union test cases, which are being used as a means to expand national standards via the FWC, bypassing the regulatory impact assessment process that would now be expected to accompany proposals for legislated minimum standards. ACCI’s model for a reformed safety net will effectively overcome this.

It is ACCI’s view that legislated standards should provide an appropriate safety net for those who are unable to bargain and be sufficiently flexible so that those standards don’t need to be bargained away.

The current minimum entitlements provided by the NES deal with the following matters:

- maximum weekly hours;
- requests for flexible working arrangements;
- parental leave;
- annual leave;
- personal carer’s leave and compassionate leave;
- community service leave;
- long service leave;
- public holidays;
- notice of termination and redundancy pay;
- rest breaks.

ACCI’s major concerns relating to the NES relate to the way in which they are prescribed and their interaction with the complex award system. These concerns can be addressed within a reformed NES with modified features reflected in a *Minimum Conditions of Employment Act* (or equivalent). Within this context, matters outside of those accepted national legislated standards would be overwhelmingly determined by bargaining at the workplace and individual levels.

Accompanied with the complementary reforms to the safety net as recommended in this submission, ACCI would support a safety-net of legislated minimum terms and conditions addressing:

- ***maximum weekly hours;***
- ***requests for flexible working arrangements;***
- ***parental leave;***
- ***annual leave;***
- ***personal carer's leave and compassionate leave;***
- ***community service leave;***
- ***long service leave;***
- ***public holidays;***
- ***notice of termination and redundancy pay;***
- ***rest breaks;***
- ***minimum wages (including casual loading and piece rates).***

2.3 The award system and flexibility

The system of awards in Australia is the legacy of an industrial relations system focussed on centralised, arbitrated outcomes. A shift away from such a system and centralised wage determination and toward a workplace-focussed system commenced with the passage of the *Industrial Relations Reform Act 1993* and was accelerated with the passage of the WR Act and subsequent reforms of that Act. This shift was in line with policies facilitating a move toward an open and competitive market. Up until the commencement of the WorkChoices Laws, structural changes to the system adhered to a policy sentiment that was shared by Australian governments of differing political persuasions, reinforcing the reality that decentralised labour market regulation is in the national interest. Referring to the reform of the 1990s the then Shadow Minister for Industrial Relations stated:

*These reforms were based upon partnerships being formed in the workplace. Perhaps for the first time in Australia's industrial history the focus became on partnerships to grow the cake, not simply adversaries fighting over how to divide it.*⁶³

The reforms progressed during this period contributed to a range of positive outcomes including growth in productivity, lower inflation, growth in real wages, less industrial disputation, and improved employment outcomes.

While the case for sustaining the structural reform effort was a clear one, the introduction of the FW Act was a significant regression from previous reform objectives. This warrants correction. The evolution of the framework away from the system of arbitrating paper based award disputes and the changed nature of the legislated safety net triggers consideration of what work the system of industrial

⁶³ Shadow Minister for Industrial Relations, Robert McClelland (2002) Speech to Industrial Relations Society of New South Wales, 17 May 2002.

awards should now be doing. There remains a clear case for the reduction in the influence of awards and tribunals as was intended by the warranted reforms of the 1990s. This was a part of the vision of former Prime Minister Paul Keating in shifting the focus toward enterprise bargaining, stating:

*Over time the safety net would inevitably become simpler. We would have fewer awards with fewer clauses.*⁶⁴

Centralised labour regulation that operates on a ‘one size fits all’ basis or a 9am to 5pm Monday to Friday paradigm does not reflect the evolution of the modern economy. The current system of awards does not reflect the needs and capacities of the majority of employers who employ less than 20 employees. The inflexible labour rules contained within the awards system prevent businesses from structuring their arrangements in the most efficient and productive ways. The appropriateness of a ‘modern award’ system built around historic award content must be challenged.

Philipatos has described today’s award system as follows:

*In today’s competitive economy, the award system is an anachronism. Awards set industry-wide wages and conditions based on the principle of equal pay for equal work. This approach to determining wages and conditions ignores the particular circumstances of individual firms and their capacity to pay. Employers who cannot afford to pay these conditions must either sack workers or employ them ‘off the books’ at below award rates. Awards can also hamper productivity growth by preventing employers from restructuring remuneration arrangements to introduce performance-based pay.*⁶⁵

2.3.1 History of the awards system

The award system has its genesis from the time of the large scale-industrial strikes that occurred in the 1890s and which impacted key industries at that time including the shearing and maritime industries. Such industrial disputation fell outside the realm of regulation with the exception of criminal law.⁶⁶ Post-federation, the new Parliament responded to the lawlessness of the strikes and social division they created by establishing the *Commonwealth Conciliation and Arbitration Act 1904*. This statute empowered the industrial tribunal to impose awards on employers and unions engaged in a dispute if agreement was not reached via conciliation and became a unique feature of the Australian system. The move toward conciliation and compulsory arbitration was clearly intended as a bar to damaging industrial conflict with the then Attorney-General Deakin stating:

⁶⁴ Prime Minister Paul Keating, (1993) Speech to the Institute of Company Directors, Melbourne, 21 April 1993.

⁶⁵ Philipatos P., [Relics of a Byzantine IR System: Why Awards Should Be Abolished](#), Issue Analysis 140 (Sydney: The Centre for Independent Studies, 2013), p. 1.

⁶⁶ Fair Work Australia, *Waltzing Matilda and the Sunshine Harvester Factory: The early history of the Arbitration Court, the Australian minimum wage, working hours and paid leave*, ed. RS Hamilton (2011), p. 21.

Under the new system – and here is the revolution – a different aim will operate. Might is not to make right. But, as soon as it can be discerned and determined, right is to make might. The thought which has hitherto been set aside is now to be made the determining factor of the situation. It will not be asked which side commands the greatest capital, the greatest number of hands, or the greatest number of sympathizers, or can strike the community the most deadly blow to force its opponent into surrender.⁶⁷

Although the *Commonwealth Conciliation and Arbitration Act 1904* from which awards have their genesis had bipartisan support, the then opposition leader Reid made the following statement in debating the second *Conciliation and Arbitration Bill* which is worthy of consideration in the modern context:

In no sense is this a triumph for humanity. It is a confession that the ordinary rules have failed, and that we have to grope about for some method which is clumsy, and perhaps, inequitable...trusting that the time will come when, under a more rational and voluntary arrangement of intelligent men representing these great interests, a method will be found of settling their disputes without any recourse to legal machinery.⁶⁸

More than 110 years later we still have a system that is far from simple and still placing significant reliance on the role of courts and tribunals to resolve disputes.

While the system that developed throughout the 20th century was characterised by institutionalised minimum standard setting, compulsory conciliation and arbitration and considerable third party influence and intervention in the form of industrial tribunals, courts and industrial organisations, the reform agenda that commenced in the 1980s was taking us in a different direction. Policy makers began to recognise that the global economy, greater mobility of capital and labour and increasing competition warranted a shift away from the centrally controlled industrial relations framework if we were to maintain high standards of living. The focus shifted toward the creation of a system where decisions about wages and conditions of employment could be increasingly made in the workplace where the mutual interests of employers and employees would be paramount. Such an approach requires employers and employees to work with each other and not at each other's expense.

The passage of the Keating Government's *Industrial Relations Reform Act 1993* saw the development of a system of collective enterprise bargaining that, for the first time, enabled multi-employer award regulation to be displaced. The reform agenda was accelerated with the passage of WR Act which more comprehensively established a framework which attempted to move the primary focus of the system to collective and individual workplace agreements and away from centrally determined outcomes. Awards were required to have simpler minimum standards

⁶⁷ Australia, House of Representatives, 1901-1904, p. 2862 referenced in Fair Work Australia, *Waltzing Matilda and the Sunshine Harvester Factory: The early history of the Arbitration Court, the Australian minimum wage, working hours and paid leave*, ed. RS Hamilton (2011), p. 39.

⁶⁸ Hamilton, op. cit., p. 41.

operating as a safety net only, consistent with the workplace focus of the reforms. In 2002 the relevant federal bodies reported:

For more than a decade now there has been widespread support for the policy of moving Australia's formal workplace relations system away from its traditional focus on the centralised determination of wages and conditions of employment by industrial tribunals – through a system of industry and occupational awards – to agreements reached directly at the enterprise and workplace level.

*Reforms to the wage setting arrangements began in the late 1980s with a growing recognition among Australians of the importance of ensuring greater international competitiveness by linking wages and improvements in the conditions of employment to increases in productivity, skill and flexibility at the workplace level...*⁶⁹

Improvements to workplace relations are best measured from within the workplace which makes an assessment of 'system performance' challenging. However the reforms of the 1990s aided productivity and wages growth together with a mix of contributing factors.

The passage of the FW Act has wound Australia backwards on labour market reforms, ignoring the concerns of credible international bodies regarding the need for Australia to progress its reforms to sustain improvement in employment outcomes and productivity performance. In 2001, the OECD made the following observation:

*The flexibility of the labour market has increased by the move towards a more decentralised system of setting wages and other conditions of employment, but there is a need for more effective decentralisation...The reform process needs to be completed in the light of Australia's level of structural unemployment and the need to sustain the improvement in productivity performance.*⁷⁰

However against the backdrop of Australia's waning productivity and increasing unemployment, the FW Act has diverted from the policy objectives of the 1990s and has impeded the transition to a workplace based system. This is evident from the current operation of the system of 'modern awards'.

2.3.2 The 'modern awards and their review processes

The creation of modern awards together with their review processes has once again encouraged disputes between employer, industry and union representations triggering third party intervention by the FWC and the ad-hoc build-up of

⁶⁹ Department of Employment and Workplace Relations and the Office of the Employment Advocate, *Report on Agreement Making in Australian under the Workplace Relations Act 1996*, June 2002.

⁷⁰ OECD (2001) *Economic Survey Australia 2001*.

employment regulation. Such processes have arrested the effective transition from the centralised system of compulsory conciliation and arbitration to a decentralised enterprise bargaining system of collective and individual agreements, underpinned by a simple safety net of minimum standards as intended by the earlier policy makers of the 1990s and 2000s.

The award modernisation process stemmed from transitional amendments to the WR Act which provided for the AIRC to make modern awards in accordance with an award modernisation request.⁷¹

While the process of award modernisation reduced the number of awards, the award modernisation request made by the then Minister included the statement that the process was not intended to disadvantage employees or increase costs for employers. This served to constrain the award modernisation process such that it did not effectively revise content to adapt it to the modern context. Rather, the regulatory burden of the award system was entrenched and threatens to intensify with each successful union claim for further regulation and prescription.

Union claims during the reviews of modern awards run contrary to a system focussed on workplace bargaining and swing the pendulum back toward an arbitral system and award structures. Evidence of this trend can be seen in recent proceedings in relation to the four-yearly review of modern awards in which unions are seeking matters in all 122 modern awards such as:

- minimum engagement periods and greater prescription of part-time hours;
- an additional 10 days paid leave related to domestic violence;
- ‘family friendly work arrangements’ which would require an employer to accommodate part-time or reduced hours for employees returning from parental leave unless there were ‘substantial countervailing business grounds’ and provide a right to employees to revert to their pre-parental leave positions after two years.

The claims, if awarded, will curtail flexibility currently available in awards by preventing employers from structuring their business arrangements in the most efficient and productive manner. Such prescription results in additional regulatory and cost imposts for employers in what is already an unduly complex system. The ‘common’ nature of the claims is an attempt to expand the legislated NES yet such content is not subjected to a regulatory assessment process as would be expected of changes to the NES.

There is no place in the modern economy for award provisions which restrict the kinds of employment that employers and employees may wish to enter into. Regulations that force changes to the nature of an employee’s contract of employment (e.g. from a casual contract of employment to a full-time contract of employment) or which place impractical restrictions on engagement patterns inherently discourage hiring. Job opportunities should not be demonised because they offer fewer hours than full-time employment. The 2015 Intergenerational Report has highlighted:

⁷¹ See Part 10A.

*To drive higher levels of prosperity through economic growth, we must increase productivity and participation. If we are to achieve these goals we need to encourage those currently not in the workforce, especially older Australians and women, to enter, re-enter and stay in work, where they choose to do so.*⁷²

The report highlights the importance of opportunities to support increased participation rates and a system centred around the 9-5, Monday to Friday paradigm does not facilitate the creation of employment opportunities to cater for a broad range of personal circumstances, including persons looking to balance work and caring responsibilities or transition to retirement.

The OECD has also observed the benefits of flexible forms of labour engagement stating that “there is a strong positive correlation between holding a part-time job or a casual/fixed-term contract (as opposed to being unemployed or inactive) and the probability of holding a full-time/regular job at a later stage”.⁷³ Freedom to contract on a mutually agreed basis should be a fundamental principle of any modern WR Framework.

The impacts of award strictures such as minimum engagement periods can be seen from a case study prepared by the Chamber of Commerce and Industry Western Australia during the two-yearly review of awards. In this case study the operators of a small bookstore had a practice of offering paid training sessions to employees after hours which usually ran for between one and two hours. While the training sessions were not compulsory, employee attendance was incentivised by arranging a social outing after the session that was usually a dinner.⁷⁴ However, following the introduction of three hour minimum engagement periods in the General Retail Industry Award 2010, this employer initiative has faced significant obstacles as employees do not wish to stay at work for three hours after closing time (which is 5.30pm on a weekday) and then proceed to a social outing and instead. Rather, most employees preferred to either not attend the training or go straight home afterwards.⁷⁵

Training is a contributor to enhanced employee development and performance. Social participation can contribute to higher levels of employee satisfaction and engagement which in turn enhance productivity. The imposition of the minimum engagement negatively impacted both the employees of this business and the business itself. There is no rational business case for regulatory intervention in positive workplace level initiatives of this nature, especially as participation in the initiative was voluntary.

Employer attempts to vary award provisions that do not reflect the modern economy or unduly interfere in the way they engage with their employees have been

⁷² 2015 Intergenerational Report Australia in 2055, Commonwealth of Australia, March 2015, p iii.

⁷³ OECD, “[Economic Survey of Australia](#)”, Policy Brief, 2008, p. 16.

⁷⁴ Chamber of Commerce and Industry Western Australia, ‘[Supporting submission in reply on the 2012 review of Modern Awards – Penalty Rates and Public Holidays – General Retail Industry Award 2010](#)’, 14 September 2014.

⁷⁵ *ibid.*

opposed by unions. By way of example, during the four-yearly review of modern awards, employer parties are attempting to secure flexibility around annual leave arrangements (e.g. to enable management of excessive leave balances, payment by way of EFT during a normal pay cycle and payment of annual leave in advance) but these attempts are opposed by unions. While such changes are seemingly uncontroversial, these attempts to vary the awards have been subjected to litigation and will require adjudication by the FWC exercising a broad discretion in applying the objects within the FW Act. It is not unreasonable to ask why such changes are so difficult to affect. The overall regulatory burden created by the system cannot be eased without orders of the FWC or legislative change.

2.3.3 The burden on small business

Small business owners struggle to navigate the complex dual-layered safety net of NES and awards. In a study commissioned by the FWC to elicit insights from small businesses with between 1 and 19 employees that are end-users of the awards (FWC Small Business Study), the following findings emerged:

- the ‘layout of modern awards elicited negative sentiment and was considered daunting’;⁷⁶
- the awards ‘were seen as difficult to use, but in-line with their low expectations of a government, regulatory/policy document, i.e. complex and challenging’;⁷⁷
- the awards were considered to be ‘convoluted’, ‘complex’, ‘ambiguous’, ‘of questionable relevance’ and written for the benefit of ‘bureaucrats and lawyers’;⁷⁸
- there is little confidence in the modern awards and the ‘lack of certainty was disempowering for small business owners in the study’ leading to ‘active avoidance’.⁷⁹

The small businesses participating in the study reported working in a constantly changing business world characterised by “[i]ncreasing demands of customers, a more aggressively competitive market, increased burden of administration, the constant change of regulation and a more assertive workforce”.⁸⁰ The small businesses highlighted their time challenges and need to minimise negative productivity impacts in their efforts to compete and remain profitable in a demanding, competitive and uncertain environment.

The complexity of the award system against this backdrop creates apprehension, encourages avoidance strategies and acts as a barrier to employment as summarised in the findings of the FWC Small Business Study:

⁷⁶ [A Qualitative Research Report on: citizen co-design with small business owners](#), prepared by Sweeney Research for the Fair Work Commission, August 2014, p. 5.

⁷⁷ *ibid.*, p. 5.

⁷⁸ *ibid.*, p. 6.

⁷⁹ *ibid.*, p. 6.

⁸⁰ *ibid.*, p. 5.

A key implication of the current modern award information architecture is that low expectations and poor experiences were acting as barriers to using the modern awards for the participants. At the same time, participants were acutely aware of needing to adhere to and follow the modern awards.

To manage this apprehension, most participants reported simply paying a little above modern award pay rates as a form of insurance, so they didn't get caught out. They also reported providing basic holiday and leave entitlements but relied on reaching some understanding with employees about many of the other provisions around breaks and penalties. Some participants were changing their employment practises in order to avoid dealing with the modern awards, i.e. not hiring or moving toward contract labour.

In summary, the challenges faced by the smaller end of the business community suggest that regulatory documents will struggle to have optimal impact if not presented in a manner that demonstrates an appreciation of the needs and capabilities of the end-user. Information that is too hard to deal with may result in 'best guess' solutions or avoidance of the document altogether.⁸¹

Importantly, avoidance of the awards system is not driven by the desire of the small business participants to do the wrong thing by their employees but is more likely to emerge as a result of the complexity of the award system. The study indicated that employers valued their staff, with the research finding:

One of the key challenges for small business operators in the study was attracting and retaining good staff. Good employees were highly valued and these employers spoke of making a greater effort to keep good staff on board through flexible work practices.⁸²

Small business employers expressed concern that mistakes in applying terms and conditions could be costly, damaging to their reputation and ethically concerning with participants openly expressing 'a desire to the right thing by their employees'.⁸³ Frustration emerged from the tension between this desire to do the right thing and the lack of confidence small businesses had in interpreting the complex awards with participants reporting hesitation in engaging with the modern awards which 'either filled them with a sense of dread or resignation to the challenge (and tedium) ahead'.⁸⁴

The Fair Work Ombudsman (FWO) has also acknowledged that the award system is too complex, with the following statements emerging from an address in 2014:

We are very much aware that workplace laws can be complex for the uninitiated.

⁸¹ Sweeney Research for the Fair Work Commission, op. cit., p. 7.

⁸² *ibid.*, p. 12.

⁸³ *ibid.*, p. 14.

⁸⁴ *ibid.*, p. 16.

We know they also exist amongst a whole pile of rules you have to follow about all sorts of things...

...

For those who aren't industrial experts, the margin for error is high.

...

...there are many people who are a long way from understanding the intricacies of things such as the interaction between the National Employment Standards and awards, or the difference between above award payments, enterprise agreements and an Individual Flexibility Arrangement.

This is why we are publicly acknowledging that the system could be simpler.

That we should take every opportunity to make the framework clearer.

...

If we can decrease complexity then this reduces the red tape you have to grapple with.

There is a clear productivity benefit.⁸⁵

The compliance difficulties experienced by small business can also be observed in a recent FWO campaign targeting retail bakery employers with the FWO suggesting that one particular case of non-compliance “highlights that small mistakes, left over time, can result in hefty bills for back-payment of wages that employers had not budgeted for.”⁸⁶ The FWO has stated “[w]e know workplace laws can be complicated for the uninitiated, and for those who are not industrial experts, but we ask small business to use the tools and resources that we provide for them and inform themselves”. However the vast majority of small business operators are not lawyers or industrial experts and so the complexity of the system magnifies the potential for error and misinterpretation.

While efforts are underway to ‘simplify’ the awards, the bulk, scale and prescription within them will continue to exist as a barrier in their application. In fact, the regulatory burden of the award system has become so great and the instruments so complex that the FWC has recently foreshadowed the possibility of it preparing draft annotated versions of the award to accompany them. Given the desire for regulation to be clear in its application, such a solution should not be the preferred means of addressing award complexity and parties have raised concerns that this exercise could in fact become the source of further disputes.

The general objects of the FW Act require the framework to acknowledge ‘the special circumstances of small and medium small businesses’⁸⁷ yet the modern awards fail to do so. Small business employers clearly represent the majority of employers and regulation should be appropriate for application in these businesses.

⁸⁵ Fair Work Ombudsman (Natalie James), Speech for the National Small Business Summit: FWO’s Deal with Small Business, 8 August 2014, Melbourne.

⁸⁶ Fair Work Ombudsman Media Release, “Bakers Delight franchisee signs workplace pact after short-changing 26 employees \$40,000”, 4 March 2015.

⁸⁷ ss 3(g).

At the end of June 2013 there were 815,368 employing businesses and of these businesses:

- 69.1% (563,412) employed 1 to 4 people;
- 24.2% (197,412) employed 5-19 people;
- 6.3% (50,946) employed 20-199 people; and
- 0.4% (3,598) employed over 200.⁸⁸

The complexity of the award system compounds the burden on small business employers to comply with multiple regulatory instruments in implementing the safety net and is at odds with the principle that regulation should be clearly accessible to those who must comply and in an appropriate form to facilitate compliance. Regulation should also be contained in as few sources as possible.

ACCI encourages the Productivity Commission to engage in dialogue with the FWO regarding the level of award compliance given the regular campaigns the FWO conducts across a range of industries.

2.3.4 The case for individual agreements

The award system discourages firms from structuring their business arrangements in the most efficient and productive manner and this contributes to less than optimum labour market performance. The FWC Small Business Study made the following observation:

A key challenge for these small business operators was that there did not seem to be a modern award that clearly represented the type of activities of their employees. Participants stated that employees of small businesses are often required to multi-task and do not fit into neat or clear categories. For example, the same employee in a café could be part chef, part wait staff and part dish hand. This raised the key question for some participants of whether the modern awards were actually relevant to their business. Classification remained difficult even where an employee could be allocated to the role in which they perform the majority of their work, as this could still change depending on, for example, work flow, or peak times versus off-peak times.⁸⁹

In an environment where employers and employees are required to be adaptable and innovative and where employers have a genuine interest in negotiating flexible arrangements with their valued employees as a retention strategy, the continuation of a framework centred around industry awards is out of place. Policy settings should support an environment in which parties are free to negotiate arrangements of mutual benefit, underpinned by an appropriate safety net, which facilitates the structuring of work arrangements in the most efficient and productive manner feasible.

⁸⁸ Australian Bureau of Statistics, *Tables 1 - 20 of Counts of Australian Businesses, including Entries and Exits, Jun 2009 to Jun 2013 (Table 13)*, cat. no. 8165.0.

⁸⁹ Sweeney Research for the Fair Work Commission, *op. cit.*, p. 16.

Appropriate mechanisms for the formation of simple, tailored agreements at the enterprise and individual levels will aid in compliance. The current framework is hostile to individual agreements, with the FW Act's objects stated to include 'ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be a part of a fair workplace relations system'.⁹⁰

This is ridiculous statement. There is no valid basis for hostility to individual agreements provided there is an appropriate safety net. Instead, the current award system results in employers 'actively avoiding engagement with the modern awards, despite being conscious that not acting in the appropriate manner could put them at risk'.⁹¹

The FWC Small Business Study indicates that small business employers are already adopting measures to address the complex system of awards, including:

- ***To pay slightly above the award...****To ensure they were not 'caught' by any changes.*
- ***Overcompensate with breaks...****The notion that it was better to give too much than not enough.*
- ***To simply copy what they have done before...****Take a previous employment contract and simply swap out the names for a new employee.*
- ***To take a punt...****To review and make a 'best guess' judgement as to how the condition may apply to their unique circumstances – often based on past, outdated experience. One participant spoke of simply modifying an employment contract for the past 12 years with a new rate that they "thought would be ok."*
- ***To negotiate...****With employees directly to find a suitable arrangement, e.g. come in on a Saturday for half an hour at no charge but allow them to leave an hour earlier one day during the week.*
- ***To seek assistance...****From Fair Work, peers, third parties such as accountants. If the issue was particularly serious, i.e. dismissal, or if they were particularly risk averse and concerned about making errors.*
- ***To have 'work arounds'...***⁹²

The system is driving this behaviour. In more extreme cases the participating small businesses reported changing their employment practices in order to avoid having to engage with the modern awards and risk misunderstanding conditions, including by:

- *not employing low skilled staff and placing greater demands on current staff; and*
- *moving towards contract employment.*⁹³

⁹⁰ Fair Work Act 2009 (Cth), ss 3(c).

⁹¹ Sweeney Research for the Fair Work Commission, op. cit., p. 25.

⁹² ibid.

⁹³ ibid.

2.3.5 The way forward

ACCI's submission in relation to the PIR of the FW Act stated:

6.3 Due to the significant cost impost on employers and inflexibility that is imposed on firms, disproportionately small firms, ACCI believes that serious consideration for a small business exemption (20 employees or less) or micro-business exemption (10 employees or less) is warranted. It is clear that the small business community is most negatively affected by the strictures and cost impost of awards and just as other parts of the Act recognises the burden on small firms (i.e. in redundancy and unfair dismissal), there should be a similar consideration of the regulatory burden of modern awards. Such relief could apply to some or all parts of the modern award, but would not cover minimum wage classifications. The employee would be protected by the NES safety-net for all other conditions.⁹⁴

This may be one option for addressing the complexity the award system however longer term consideration needs to be given to simplifying the safety net so that it is appropriate for all who rely on it and must apply it. The complex awards system continues to underpin bargaining because collective agreements are assessed against the BOOT requiring that the agreement provide wages and conditions that make each worker better off than if the award continued to apply to them. As awards to continue to regulate for every contingency that might arise in the workplace, regardless of the utility or take up of provisions, attention must be given to the safety net underpinning bargaining.

ACCI's submission in relation to the PIR called for a Productivity Commission inquiry into all modern awards and for amendment to the FW Act to require the FWC to consider any report from the Productivity Commission or a statutory "request" from Government.⁹⁵ However in the longer term, a reduction in the influence of awards and tribunals is required to better facilitate choice for employers and employees in their workplace arrangements. Philipatos has stated:

...The problem is that awards represent a throwback to an era and an economy that no longer exists—an era defined by protectionism and paternalism.

Since the 1980s, microeconomic reform has fundamentally changed Australia's economy and society. Protectionism has given way to competition, and isolationism to globalisation. Removing tariffs, subsidies and restrictions has made Australian industry more flexible and adaptable to global pressures.

Although most parts of the Australian economy have been liberalised, the crucial labour market is still stuck in the past—and is a drag on the economy. Awards are the remnants of what Paul Kelly describes as the 'Australian Settlement.' They are the relics of a Byzantine industrial relations system

⁹⁴ [ACCI Submission in relation to the Inquiry into the Fair Work Act 2009](#), February 2012, p. 10.

⁹⁵ *ibid.*, p. 9.

*characterised by complexity and paternalism. They need to be abolished to make way for a more flexible and productive labour market.*⁹⁶

ACCI believes that the WR Framework should complete the evolution from the centralised system of compulsory conciliation and arbitration of the past and become a truly decentralised system of collective and individual bargaining underpinned by a safety net of simple minimum standards.

ACCI therefore recommends further rationalisation of award content as we move toward a dedicated Minimum Conditions of Employment Act that sensibly codifies minimum standards that provide the foundation for agreement making.

In supporting this approach ACCI recommends that any minimum standard be subject to regulatory impact assessment which:

- discloses the nature of proposed regulatory burden, the impact on those affected (including small and medium employers), the factors mitigating in favour of and against the imposition of the regulation, measures proposed to minimise impact, the extent to which outcomes could be better achieved through agreement making and employment impacts;
- works on the presumptions that regulation should:
 - be clearly accessible and in a form to facilitate and support compliance;
 - be contained within the minimum number of sources possible;
 - change as infrequently as possible and where changes do occur, such change is supported by due notice and proper information;
- recognises that regulation should not be the default solution and which adopts a presumption against the making (and maintenance) of detailed and delineated obligations.

During the transition to such a system, consideration must be given to further rationalisation of award content based on a set of reformed modern awards objectives. Of course, if ACCI's recommended model for a future safety net is not adopted, the objects would require modification to reflect the following outcomes:

ACCI recommends that the objects of modern awards be reframed to ensure that they do not exist as a barrier to the efficient structuring of working arrangements at the workplace level and set out simple minimum standards appropriate to the industries/occupations that they cover.

⁹⁶ Philipatos P., [Relics of a Byzantine IR System: Why Awards Should Be Abolished](#), Issue Analysis 140 (Sydney: The Centre for Independent Studies, 2013), p. 3.

2.4 The role of awards in setting wages

Awards have had a role in setting minimum wages since the *Harvester Decision*⁹⁷ was first applied in 1908. Wages paid by businesses manufacturing goods in Australia could be exempt from excise duties if businesses obtained an order from the Commonwealth Court of Conciliation and Arbitration that those wages were ‘fair and reasonable’.⁹⁸ The *Harvester Decision* was handed down in response to such an application, with Justice Higgins making the decision to fix minimum wages on the following basis:

*I cannot think of any other standard appropriate than the normal needs of the average employee, regarded as a human being living in a civilised community...I cannot think that an employer and a workman contract on equal footing, or make a “fair” agreement as to wages, when the workman submits to work for a low wage to avoid starvation or pauperism (or something like it) for himself and his family; or that the agreement is “reasonable” if it does not carry a wage sufficient to ensure the workman food, shelter, clothing, frugal comfort, provision for evil days, &c., as well as reward for the special skill of an artisan if he is one.*⁹⁹

In deciding upon the minimum wages to be paid for a tradesman and a labourer working across a 48 hour week, Justice Higgins applied his calculation based on the assumption that the wage earner was a husband supporting a wife and three children. In this context the wage could be described as a ‘family wage’ appropriate to ensure ‘frugal comfort’. Of note, at the time of the decision there was no government funded social welfare system, in place and the reference to ‘provision for evil days’ related to sickness and unemployment.¹⁰⁰

The *Harvester Decision* determined a basic wage for unskilled labourers and prescribed a ‘margin’ for skilled tradespeople and this approach saw the several levels of minimum wage develop in the awards system, distinguishing Australia from the minimum wage setting system that developed in many other countries.¹⁰¹ The setting of such margins had the effect of intervening in the market determination of rates for the various trades and while there was no prescribed formula by which margins were fixed, the Court considered factors such as rates paid by employers and market value, comparable rates and rates fixed in other awards, the period of apprenticeship and perceived difficulty of the skill.¹⁰²

In 1923, indexation of the basic wage for unskilled labour commenced and continued to be adjusted in line with the consumer price index and award wages were adjusted up or down depending on inflation until 1953.¹⁰³ In *Federated Gas Employees*

⁹⁷ (1907-08) 2 CAR 1, November 1907.

⁹⁸ Hamilton, op. cit., p. 57.

⁹⁹ (1907-08) 2 CAR 1, November 1907 at 3-4.

¹⁰⁰ Hamilton, op. cit., p. 67.

¹⁰¹ *ibid.*, p. 89.

¹⁰² *ibid.*, pp. 89 -90.

¹⁰³ *ibid.*, p. 82.

*Industrial Union v Metropolitan Gas Company*¹⁰⁴ the Conciliation and Arbitration Commission accepted that for wages to be sustainable, economic performance should weigh in on wage determinations. A growing recognition that the minimum wage could not be relied upon to maintain a social welfare safety net and that Government intervention may be required followed within the subsequent decisions of wage setting courts and tribunals.

Despite this, Australia's wage system has evolved to become one of the most regulated with minimum wages that are amongst the highest in the OECD. This is compounded by the fact that the Australia is the only country which has a cascade of multiple minimum wage rates ranging from the national minimum wage of \$640.90 per week to over \$3000 per week¹⁰⁵ with minimum wage regulation applying not only to unskilled workers but to tradespeople, managerial and professional employees. The minimum wage regulation is compounded by on-costs that are payable in addition to the base wage including penalty rates, loadings and allowances, workers compensation premiums, payroll tax, superannuation and administrative costs. This brings into question the role of minimum wage setting under the current system in addressing the 'needs of the low paid', with Wooden commenting:

Australia is, however, relatively unique among industrial nations in having not one single minimum wage, but a whole raft of different minima that vary both across awards and within awards. While the number of such minima has been greatly streamlined over the years, the question still remains as to why we need to set a multitude of minimum wage floors for jobs scattered across almost the entire wage distribution.

*If the rationale behind minimum wage adjustments is to protect the living standards of the lowest paid, I can see little reason why we need more than one global minimum wage. Varying award rates above the global minimum has little to do with protecting the needs of the lowest paid.*¹⁰⁶

2.5 Special forms of wage setting

Junior and apprentice wages have been a character of the award system since the pay outcomes of the early 1900s arising from Commonwealth Court of Conciliation and Arbitration. The impact of minimum wages is felt more acutely by young people as noted by Butler who stated:

There is a very large body of evidence that demonstrates that the negative effects of a minimum wage (or an increase in a minimum wage) is felt most acutely in the employment and employment prospects of young people. In a survey of over two dozen empirical studies of the effects of an increase in the minimum wage on youth employment, Brown et al found that on balance, a 10 percent increase in the minimum wage is estimated to result in about a 1-3 percent

¹⁰⁴ (1921) 15 CAR 838.

¹⁰⁵ See for example classifications within the [Air Pilots Award 2010 \[MA000046\]](#).

¹⁰⁶ Wooden M., "An Unfair Safety Net?", *Australian Bulletin of Labour*, Volume 36, No 3, 2010 p. 325.

reduction in total teenage employment. All studies find a negative employment effect for all teenagers together and the signs are almost exclusively negative for the various age-sex-race subgroups.¹⁰⁷

Whether it is the FWC or an alternative body, the statute should require that decisions promote youth employment and provide a bridge into the world of work particularly as softening labour market conditions have impacted low-paid, low-skilled workers most significantly.

It is ACCI's view WR Framework must support:

- the creation of employment opportunities for people whose productivity is limited by their disability through the inclusion of supported wages schemes;***
- employers in their efforts to provide training and employment for young people, including providing appropriate minimum wages and conditions for trainees and apprentices which properly reflect their experience and work and education balance as well as opportunities for young people seeking entry to the labour market.***

2.6 The national minimum wage

Minimum wage outcomes are determined by the FWC which is responsible for establishing a safety net of fair minimum wages, taking into account:

- the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
- promoting social inclusion through increased workforce participation; and
- relative living standards and the needs of the low paid; and
- the principle of equal remuneration for work of equal or comparable value; and
- providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.¹⁰⁸

This wage setting function, administered by the FWC's Expert Panel, is also underpinned by the overarching general objects of the FW Act and modern awards objective, to the extent that modern award minimum wages are varied.

Given that our economy is undergoing a period of transition, it will be necessary for the Productivity Commission to analyse the effects of minimum wages from a variety

¹⁰⁷ J Butler *Minimum Wage Laws and Wage Regulation: Do Changes to a Minimum Wage Affect Employment Levels?* 2006 (29(1)) University of New South Wales Law Journal p181 at 188

¹⁰⁸ *Fair Work Act 2009* (Cth), s 284.

of perspectives and ACCI members may make submissions relevant to the industries and geographical areas they represent. However at the national level Australia is continuing to experience softening labour market conditions with employment growth slowing, working hours falling and the unemployment rate (currently 6.4 per cent according to ABS data)¹⁰⁹ reaching a 12 year high and expected to rise further. The softening labour market conditions have impacted low-paid, low-skilled workers most significantly and we have seen our youth unemployment rate reach its highest level since 1998.¹¹⁰ Our terms of trade have declined at a faster than expected rate stimulating new calls to diversify our sources of economic activity to reduce our level of reliance on minerals exports.

As these structural shifts in the economy occur, Australia can expect challenging times ahead as labour demands shift and reallocation occurs and we expect it may be some time before the market stabilises. Such market fragility presents the risk that too great an increase in regulated minimum wages would negatively impact employment outcomes.

Participation in paid work is critical to maintaining adequate living standards and to prevent poverty and social exclusion. Structural changes in the economy have the potential to magnify the consequences of unemployment with many people finding they no longer have skills in line with demand. This heightens the risk of people being unemployed for longer periods of time or vacating the labour market entirely. Long term unemployment has negative social consequences not only for the individual but also their dependents.

The minimum wage function must not exacerbate the risk of unemployment for those most vulnerable in the labour market.

ACCI believes that key considerations in setting minimum wages should be the protection of jobs and helping the unemployed to be competitive in the labour market. The focus of minimum wage determinations should be directed to the impact on employers and employees (as well as those seeking employment).

Wooden made the following comments in response to the inaugural minimum wage decision post FW Act implementation:

Minimum wage rises benefit low-paid workers at the expense of the unemployed. Any action that increases the cost of hiring low-wage labour reduces the likelihood of those without jobs finding one in the future. Moreover, it is the long-term unemployed who's employment chances are most damaged. This seems very unfair. And it certainly doesn't promote social inclusion through greater workforce participation [...] The decision looks even more unfair once you realise that many low paid workers do not live in poor

¹⁰⁹ Australian Bureau of Statistics, [Labour Force, Australia](#) (cat. no. 6202.0).

¹¹⁰ *ibid.*

*households, and that a low-paid worker has a much better chance of getting a better paid job than someone who doesn't have a job at all.*¹¹¹

ACCI has concerns that minimum wage decisions disproportionately impact particular employers and sectors of the economy and that the broad domestic economy focus risks ignoring the impact on vulnerable small and medium sized employers. For example, services industries such as retail, hospitality and restaurants have a higher level of direct employment on minimum wages compared to all industry averages and industries with a higher incidence of collective agreements.

The award system is, in effect, attempting to interfere with the market by attaching a 'value' to work which has resulted in wage differentials. Lewis has made the following observation of this system:

*What can be said is that the removal of industry-specific minimum rates would allow greater flexibility for owners to manage their businesses and allow wages to be determined by the market. Most economists believe that competitive markets, through the price mechanism, represent the best way of allocating resources (Hubbard et al. 2011). Businesses will maximise their profits by selling the goods and services consumers want, when they want, at the lowest prices. Production will be efficient because businesses will organise capital and labour in such a way as to reduce costs and maximise revenue in order to maximise their profits. Employment will be at a maximum because businesses are producing the highest output that people are willing to buy. In order to be able to hire workers, businesses must offer wages and conditions that employees are willing to accept. This is the basis for allowing businesses flexibility to manage and prices (including wages) to be determined by the market.*¹¹²

No other major international trading economy has an award wage system like Australia and credible sources within the global community suggest that Australia is out of step with international best practice. This was observed by the IMF as far back as 2002 when it stated:

The awards system also still plays an important part in setting minimum wages, which remain very high in Australia relative to other advanced economies...The role of the award system in setting minimum wages should be diminished in order to reduce what may be a significant barrier to the entry of low-skilled individuals into employment. Historically, the minimum wage has been used as providing a "living wage". However; it has to be recognised that the wage determination system is a very blunt instrument to be used for this purpose. Ensuring a minimum standard of living for all

¹¹¹ Wooden, M. "A hole in the safety net", *The Australian Financial Review*, 9 June 2010.

¹¹² Lewis P, 'Paying the penalty? The high price of penalty rates in Australian restaurants', *Agenda: A Journal of Policy Analysis and Reform*, Vol. 21, No. 1, 2014: 5-26.

*working Australians could be achieved more efficiently, with the creation of fewer economic distortions, by using the tax and income support systems.*¹¹³

ACCI's view is that the long term objective of the system should be to move toward an environment where wages and conditions are overwhelmingly set by workplace bargaining, either collectively or individually, underpinned by minimum adult and youth wages. The World Economic Forum ranked Australia a dismal 125th out of 144 countries when considering the extent to which pay is linked to productivity.¹¹⁴

ACCI's does not aspire for Australia to be a low wage economy. In fact, ACCI policies have consistently promoted increased wages and improved living conditions via measures that will grow Australia's national prosperity. However policy settings should not exacerbate the risk of unemployment for those most vulnerable in the labour market and minimum wage growth cannot go unchecked.

Australia's minimum wage remains amongst the highest in the world and has resulted in the following recommendation from the National Commission of Audit:

Recommendation 28: The minimum wage

Australia's minimum wage is high by international standards. The Commission recommends that future growth in the minimum wage be contained to improve job opportunities. A degree of variation in the minimum wage should also be introduced across the States to better reflect local labour market conditions and the cost of living. This should be achieved by:

- a. establishing a 'Minimum Wage Benchmark', set at 44 per cent of Average Weekly Earnings;*
- b. transitioning to this new benchmark by indexing the current national minimum wage to grow in line with the Consumer Price Index less 1 percentage point for a period of 10 years; and*
- c. transitioning the minimum wage in each State and Territory to the lower of the 'Minimum Wage Benchmark' or 44 per cent of Average Weekly Earnings in that jurisdiction by 2023, noting that should this imply a reduction in the nominal minimum wage, the wage would instead be kept constant until aligned with 44 per cent of Average Weekly Earnings in that jurisdiction.*¹¹⁵

ACCI has previously expressed concern that minimum wages represent too high a proportion of median and average earnings and agrees with the National Commission of Audit's statement that "[a] minimum wage that is too high prevents groups, such as young job seekers, from entering the labour market, inhibiting the development of workplace skills and experiences that could increase their wages over time".

¹¹³ International Monetary Fund, (2002) Report on Australia, 9 August 2002.

¹¹⁴ World Economic Forum, [The Global Competitiveness Report 2014-2015](#), p. 489.

¹¹⁵ ['Towards Responsible Government: The Report of the National Commission of Audit Phase One'](#), 4 February 2014, p. xlviii.

ACCI also acknowledges that the decisions of the FWC are largely considered against a macro-economic assessment of the economy which is unlikely to be as useful as an approach that focusses on actual conditions at the industry and firm level. If there is no ability for an employer to off-set the minimum wages increases (e.g. because they are unable to pass costs on to consumers in a price sensitive environment) there will be firm specific impacts, including reducing the number of hours offered or employees.

ACCI acknowledges the challenges that a system of federal wage setting presents given the broad ranging impacts of minimum wage decisions on individual employees and employers. Accordingly, in administering the wage review function, greater weight should be accorded to the interests of those with a comparatively higher level of direct employment on minimum wages. Furthermore there is currently no statutory presumption or requirement that the FWC flow-on any increase to all classification levels and/or for all modern awards. It is ACCI's view that Parliament intended for the FWC to retain discretion to vary one or more modern award minimum wages.

As a result of the award modernisation process, there are now 122 modern awards which have replaced thousands of pre-reform federal awards and NAPSAs. Given that these modern awards are predominantly structured along an industry or occupational basis, it is now possible to distinguish and target decisions on an industry by industry basis. ACCI respectfully disagrees with the FWC's findings that "... the legislative framework reveals a preference for consistent variation determinations across all modern awards" and "the notion of a fair safety net of minimum wages embodies the concepts of uniformity and consistency of treatment".¹¹⁶ Statutory amendment or guidance may provide the FWC with greater confidence to execute the wage review function on this basis.

Importantly, the FW Act refers to minimum wages as a "safety net" and reflects the fact that minimum wages in awards are not market rates of pay. The system must not operate on the presumption that minimum wages (and award regulated jobs) should reflect or match what the private sector market is able to pay. The AIRC has previously rejected submissions that suggest award rates should match market rates, particularly in relation to bargaining outcomes. In the 2005 Safety Net Review decision [PR002005], the Full Bench stated:

[384] The Commonwealth rejected the ACTU's submission that there should be an appropriate nexus between average award movements and average movements in the WPI. It reiterated the position it has put in other safety net reviews that market rates and movements in earnings should not be the basis for safety net adjustments. In the alternative it submitted that if movements in market rates are to be taken into account, comparison should be limited to the WPI.

¹¹⁶ Annual Wage Review Decision 2011-12 [\[2012\] FWAFB 5000](#) at [257] and [258].

[385] In relation to these submissions we accept that the statutory concept of an award safety net requires that there be a separation between minimum rates and agreement rates and that bargained wage outcomes should not be transmitted through the award system. The Commission has also previously accepted, as the Commonwealth also pointed out, that the WPI is the most useful indicator for our purposes.

Whilst the WPI is a useful measure of wage growth, wage increases should not be linked to a corresponding change in the WPI in a quasi-mechanical fashion. One of the key and enduring divisions in setting minimum wages in Australia has centred on the relevance and utility of comparativist, redistributive analysis in minimum wage setting. This dates back to the 1970s, with notions of “comparative wage justice”. Further, it is linked to now very out-dated thinking of minimum wages as tools of economic redistribution in a society, which would move wealth from capital to labour. In its 2001 national wage case decision, the AIRC crucially articulated the limitations of its role in determining outcomes actually affecting the capacity of the low paid to meet their needs and expenditures:

As noted in previous decisions the statutory scheme does not give to the Commission a supervening social welfare responsibility either for incomes generally or their distribution. The scheme regulates wages and conditions of employment and requires the adjustment of the minimum wages safety net contained in awards having regard to particular considerations. The information about income levels and distribution provided by the parties is informative of Australian living standards. However, it must be taken into account having regard to the limited nature of our task and statutory responsibilities.¹¹⁷

The framework should not support any role of the wage setting body in setting minimum wages on a redistributive, comparative or “just wage” basis.

It should also be noted that Australia’s social welfare system is subject to a separate review. On 25 February 2015 the Government released a report entitled *A New System for Better Employment and Social Outcomes* which cautions against linking minimum wages to community living standards, stating:

...this would effectively place a substantial part of the Commonwealth Budget under the control of the Fair Work Commission members, who are required to make their National Minimum Wage decisions on grounds quite different from concerns over the living standards of either the general community or of income support recipients. This may have the potential to distort the processes and considerations of the Fair Work Commission, as the number of people receiving government payments is substantially larger than the number of people reliant on minimum wages.¹¹⁸

¹¹⁷ (2001) Safety Net Review, [Print PR002001], at [125]

¹¹⁸ *New System for Better Employment and Social Outcomes*, Commonwealth of Australia, February 2015.

ACCI recommends reframing the objects of minimum wage setting so that the process provides a genuine safety net which is appropriately balanced.

Minimum wage setting must promote youth employment and a reframed set of minimum wages objectives should accommodate industry and regional differentials, if appropriate.

2.7 Penalty rates

2.7.1 Where did penalty rates have their genesis?

During the two-yearly review of modern awards the former Government supported the continuation of penalty rates in their existing form placing reliance on the fact that ‘penalty rates for working unsociable hours and weekends have been reflected in the Australian workplace regulation for almost 100 years’¹¹⁹ and industrial commissions have reiterated this position. However simply because something has been in place for a long period of time does not justify its continuation in that form. In fact, the decisions of the past left open opportunities to review penalty rates for weekend work should community circumstances change. Significant change has undeniably occurred.

Lewis has observed:

*The notion of a ‘penalty’ rate has its origin in a labour market quite different from that of much of the Australian labour market today. The Australian economy used to be characterised by mostly males working full-time industrial jobs. There was little part-time or casual work. Working married women and jobs with flexible hours were rare (Norris et al. 2004). Most retail outlets shut at midday on Saturday and reopened on Monday, The weekends were, for many, the only time available for socialising, recreation, participating in sport and worship.*¹²⁰

A timeline of penalty rates decisions is set out in the former Government’s submission to Fair Work Australia (FWA) during the two-yearly review of awards.¹²¹ In that submission, a number of cases are referenced including:

- The *Gas Employees Case* [1919] 13 CAR 437 in which Higgins J stated:

The true position seems to be that extra rate for all Sunday work is given on quite different grounds for an extra rate for work on the seventh day. The former is given because of the grievance of losing Sunday itself – the

¹¹⁹ Australian Government ‘[Submission in relation to applications to vary penalty rates in the retail, hospitality, fast food, restaurant and hair and beauty awards \(AM2012/8 and others\)](#)’, 18 September 2012, p 2.

¹²⁰ Lewis, op. cit.

¹²¹ Australian Government ‘[Submission in relation to applications to vary penalty rates in the retail, hospitality, fast food, restaurant and hair and beauty awards \(AM2012/8 and others\)](#)’, 18 September 2012, p 2.

*day for family and social and religious reunions, the day on which one's friends are free, the day that is most valuable for rest and amenity under our social habits; whereas the latter rate is given because seven days per week for work are too many. This involves that even if time and a half be paid for Sunday work; there should be extra pay also for the seventh day of work. But the extra pay should be time and a half, not double rates. The norm of work being six week days and Sundays free, the payment for departure from the norm should be two time and a half rates, which is equivalent to one double rate.*¹²²

- The *Weekend Penalty Rates Case* [1947] 58 CAR 610 in which the Conciliation and Arbitration Commission determined that the amount of penalty rates that should be payable under the Metal Trades Award was 125 percent for a Saturday and 200 per cent for a Sunday. In this matter the Conciliation and Arbitration Commission stated:

*In one sense the use of the term 'penalty' as applied to such additional amounts is a misnomer, there is no question of punishment about the matter. But in another sense it expresses accurately enough the operation of the requirement of additional payment as, inter alia, a deterrent against calling upon employees to work in the circumstances in which the additional payment is required to be made. Most, if not all, of such requirements combine the element of compensation with that of deterrence.*¹²³

- The *Tramway & Gas Employees Case* [1949] 62 CAR 558 in which Conciliation Commissioner Blackburn stated:

*It is undeniable that, in our civilisation, Sunday, above all other days, is the recognised and accepted day of rest from labour. From the earliest Christian teaching to refrain from all unnecessary work and labour on Sunday, that day has been treated as a day apart and of different import from Saturday. The Unions, therefore, urge that the rate of pay for work which the community demands shall be done on a Sunday should be appreciably greater than the rate for work done on Saturday – a more convenient day of community recreation and pleasure.*¹²⁴

- *Re Engine Drivers General (State) Interim Award* [1950] AR (NSW) 260 in which the Commission stated:

From the foregoing review of decisions it would be seen that at the present time this Commission accepts that time and a quarter rate is a proper standard but it does not follow that this standard is immutable; like all such general findings, it must be subject to review from time to time with alterations of social, industrial and other relevant conditions.

¹²² *Gas Employees case* [1919] 13 CAR 437 at 469.

¹²³ *Weekend Penalty Rates Case* [1947] 58 CAR 610.

¹²⁴ *Tramway & Gas Employees Case* [1949] 62 CAR 558 at 564.

*In our opinion, additional rates for week-end work are given to compensate the employee having to work on days which are not regularly working days for all employees in the industry. The aim is to compensate for disturbance of social and family life and the full opportunity of religious observance, and in some cases to discourage employers working employees on non-regular working days.*¹²⁵

- An AIRC test case in which Commissioner Hingley said in 1998:

*"I am not persuaded, on what is before me, that the combination of deregulated shop trading hours and the evolution of new shopping lifestyles and consumer demands, consequently means that for retail workers, an expanded daily spread of hours, late night hours and Saturday and Sunday work, are a sought after lifestyle corollary, diminishing the unsociability of such work schedules. It is a corollary of such changes, should the Commission so determine, that current or future employees with little or no bargaining power may be obliged to work extended evening, Saturday or Sunday hours against their domestic responsibilities or personal convenience or gain their employment."*¹²⁶

It is also useful to reflect on the following comments of Drake-Brockman J, in the South Australian Railways Case (1935) 35 CAR 370 at 372 when considering the origins of penalty rates:

*They are not imposed for the purpose of increasing the rates of pay. They are imposed for the purpose of discouraging employers from employing men under conditions likely to impair their health, or for the purpose of discouraging certain kinds of work, or working under particular conditions. A good illustration of that, perhaps, is the penal rate ordinarily imposed for overtime. The court does not give extra pay for overtime work because it wants to increase the amount of pay to the man, but for the purpose of discouraging employers from working overtime where it possibly can be eliminated.*¹²⁷

Notably, the decisions distinguished work on weekends from work beyond ordinary hours. Penalties played a role in regulating hours of work and the days and times at which people worked. While penalties may still be relevant in regulating work beyond reasonable ordinary hours, the way in which people spend their time on weekends has undoubtedly changed. This is ACCI's central proposition. Australian society and the source of our economic activity have changed significantly since the genesis of penalty rates and service sector output and employment have outpaced other sectors. Small businesses account for a larger proportion of businesses in the services sector than in sectors such as mining and manufacturing and given the

¹²⁵ *Engine Drivers General (State) Interim Award* [1950] AR (NSW) 260 at 267.

¹²⁶ Australian Bureau of Statistics, 'Household Use of Information Technology, Australia', cat no 8146.0.

¹²⁷ South Australian Railways Case (1935) 35 CAR 370 at 372.

labour intensive nature of most service industries, policy settings must enable businesses in these industries to react to their workforce in a dynamic way.

2.7.2 What are Australians doing with their time?

In a bygone era where the predominant pattern of working on offer was full-time, five or six day per week day work spread across Monday-Saturday, it should come as no surprise that 'non-working' activities (in whatever form) took place on the only day that remained. However in our modern economy, we have a greater desire for choice in the way we spend our time and the shifting mix of economic activity has the capacity to facilitate choice and enhance the competitive environment if the appropriate policy settings are in place.

The Productivity Commission has foreshadowed its intention to draw on the ABS Time Use Survey.¹²⁸ The survey draws on 2006 data which is likely to be outdated given our rapidly changing contexts. Nevertheless it may provide the basis for trend analysis from which we can conclude that Australians don't spend much time on religious activities and spend significantly more time engaged in audio/visual media (such as watching television) than we do in sporting/outdoor activities or socialising on the weekend.¹²⁹

In a useful analysis of the ABS data, Lewis has made the following observations:

- *The ABS (2008a) definition of sport and outdoor activity includes organised and informal sport, exercise, walking, fishing, hiking and holiday travel and driving for pleasure.*
- *[E]ven under this extremely broad category of sport and outdoor activity, the time spent, even on weekends, is not large and pales into comparison with other activities. Clearly, for most, working on weekends would not significantly impose on their time spent on sport and outdoor activities.*
- *The amount of time spent on sport and outdoor activity (25 minutes per day) was the second-most popular activity for men in 2006. However, audio/visual media (154 minutes per day) far exceeds time spent on sport. For women, time spent on sport and outdoor activity (17 minutes per day), again was eclipsed by time spent on audio/visual media (122 minutes per day); talking and correspondence (36 minutes per day); reading (25 minutes per day) and other free time (18 minutes per day).*
- *For men the amount of time spent on sport and outdoor activity increases by only 17 minutes per day on the weekend and for women by only five minutes per day compared with time spent during the week.*
- *Religious activity is found to be a relatively minor activity with respect to time use.*¹³⁰

¹²⁸ Australian Bureau of Statistics, '[How Australians use Their Time](#)' 2006, cat. no. 4153.0.

¹²⁹ The ABS statistics indicate that even on a weekend males spend only 7 minutes per day on such activities and women spend only 9 minutes per day on such activities (see Table 2 All Persons, Primary Activities – by Weekday/Weekend day 1992, 1997, 2006).

¹³⁰ Lewis, op. cit.

Lewis also made the following observations based on analysis of the National Church Life Survey.¹³¹

- Sunday is only a day of religious observance for a minority of Australians.
- The number of people attending church fell from 44 per cent in 1950 to 17 per cent in 2007, only half of church attenders are employed and young people are even less likely to go to church with 15-19 year olds making up less than 6 per cent of church attenders and 20-29 year olds making up only 9 per cent of church attenders.¹³²

We can expect these trends to continue with young adults in 2011 being more than twice as likely as those in 1976 to have no religion (29 % compared to 12%).¹³³ Our society is also becoming more secular.¹³⁴

2.7.3 What changes are we seeing among our younger generations?

ABS data also tells us the following about our younger generations:¹³⁵

- young adults are delaying key life events compared with their 1976 counterparts including:
 - moving in with a partner or having a child. 2011 data indicates that 42% of young adults lived with a partner and of these only 52% had children compared with 65% of young adults having a partner and nearly three quarters (74%) of these people having children in 1976;¹³⁶
 - getting married. 2011 data indicates that 29% of young adults were, or had been, married compared with 64% in 1976. In 1976 67% of 24 year olds were, or had been married, compared with 14% of 24 year olds in 2011.¹³⁷
- nearly double the proportion of young people were attending an educational institution in 2011 than in 1976 (26% compared with 14%);¹³⁸
- many more young people are working part-time hours with 34% of young adults employed to work less than 35 hours per week compared with 11% in 1976. On this issue the ABS has observed:

Many students may need to work part-time in order to support themselves while studying, and the increased flexibility in the workplace has made it easier for them to do so

¹³¹ Lewis, op. cit. based on analysis of the National Church Life Survey (NCLS 2010); ABS Yearbook of Statistics 2006, cat. No. 1301.0.

¹³² Lewis, op. cit.

¹³³ Australian Bureau of Statistics, 2013, '[Young adults: Then and now](#)', cat. no. 4102.0.

¹³⁴ See for example Australian Bureau of Statistics, 2013, '[Young adults: Then and now](#)', cat. no. 4102.0 which indicates that in 2011 50% of young adults who stated a religious affiliation were Christian compared with 74% in 1976.

¹³⁵ From ABS data based on adults aged 18-34 years in 2011.

¹³⁶ Australian Bureau of Statistics, 2013, '[Young adults: Then and now](#)', cat. no. 4102.0.

¹³⁷ *ibid.*

¹³⁸ *ibid.*

...

*These differences may be a reflection of the changes in the labour market. For example, since the 1970s there has been a general fall in full-time job opportunities for young people. In addition there has been substantial growth in industries that offer part-time employment such as retail and hospitality services, while there has been a decline in industries that offer traditional full-time employment such as manufacturing...*¹³⁹

Such data provides some insight into the changing life stages of our younger generations. The historical norm of the young male working full time in a traditional trade or occupation to provide for his family and pay his mortgage is being eroded. The average young person is now more likely to be living without a partner and children and there is a higher probability of them studying and working casual or part-time hours in a service related industry.

The data is also reflective of structural changes in the economy as we are seeing a change in industry mix. The demand for full-time workers in industries that were once a significant source of economic activity are not keeping up with supply.¹⁴⁰ As noted by Professor Phil Lewis:

*In 1975 the 'soft' services (such as health, finance, retail, education, restaurants, and so on) accounted for just over 50 per cent of all jobs, but by 2013 the sector accounted for more than 70 per cent of all jobs (ABS 2012a). By contrast, manufacturing's share of total employment almost halved over the same period to about 10 per cent in 2013. There were also reductions in the relative shares of jobs in the 'industrial' services (such as construction, communications, electricity, gas and water)... It may be thought that for a modern service-based economy, such as Australia, imposing higher wages (penalty rates) when the demand for services is often greatest is something of an anomaly.*¹⁴¹

The RBA recently observed:

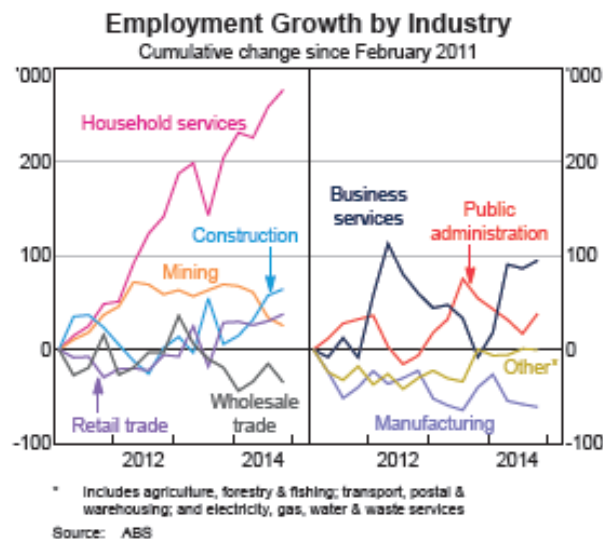
*Across industries, recent employment outcomes have reflected the changing composition of economic activity away from the resources sector. Over the course of 2014, a large portion of employment growth was household focussed industries, such as education, accommodation & food service, and retail trade.*¹⁴²

¹³⁹ Australian Bureau of Statistics, 2013, '[Young adults: Then and now](#)', cat. no. 4102.0.

¹⁴⁰ Lewis, op. cit.

¹⁴¹ *ibid.*

¹⁴² Reserve Bank of Australia, Statement of Monetary Policy, February 2015, p. 44.



Graph 3.19 from RBA, *Statement of Monetary Policy*, February 2015, p 44.

2.7.4 Digital disruption

Since the time of the decisions giving effect to and preserving penalty rates in awards the evolution of digital technology, particularly online digital technologies which were in their infancy in the 1990s, has been rapid. Smart phones, tablet computers, wireless internet, online shopping and social media continue to play a significant role in a connectivity phenomenon that has changed our lives, attitudes and behaviour.

In 2012–13, over three quarters (76 per cent) of Australia's 15.4 million internet users made a purchase or order over the internet, according to Australian Bureau of Statistics, remarkable statistics given the internet did not have a public face before the 1990s. The prevalence of personal devices is such that it is hard to imagine that the iPhone was only invented in 2007 and we now have more mobile phones than people. This era of digital disruption runs in parallel with changing consumer preferences, with the Competition Policy Review Panel observing that:

consumers are demanding more diversity in how and when they shop is clearly demonstrated in the take-up of online shopping. In recent years online retail sales have grown more quickly than spending at traditional 'bricks and mortar' retailers. Online retail sales are estimated to represent around 6 ½ per cent of spending at bricks and mortar retailers, up from around 5 per cent in 2010.¹⁴³ National Australia Bank estimates that Australians spent \$15.5 billion on online retail in the 12 months to June 2014.¹⁴⁴ Seeking to 'hold back the tide' by limiting the ability of consumers to shop at times of their choosing will act to limit competition between online and 'bricks and mortar' shopping.¹⁴⁵

¹⁴³ National Australia Bank 2012, [NAB Online Retail Sales Index In-depth report, January 2010 – January 2012](#) and [NAB Online Retail Sales Index](#), June 2014.

¹⁴⁴ *ibid.*

¹⁴⁵ [The Australian Government Competition Policy Review Draft Report](#), September 2014, p 105.

Our policy settings cannot ignore the reality that Australian retailers are facing increasing competition from domestic and international internet-based retailers who are able to compete effectively in price and product due to their lower operational costs.

2.7.5 Trading hours deregulation

Trading hours have also been the subject of further deregulation to facilitate increased competition. However for policies to be effective, they need to be complimentary and while trading hours restrictions exist as an impediment to trade, excessive penalty rates also act as a financial impediment to trade.

During the two-yearly review of modern awards, the National Retail Association (NRA) set out a concise summary of the deregulation of trading hours and the principles underpinning the case for deregulation:

Trading hours have been deregulated in NSW since 1990, in Victoria since 1996, in Tasmania since 2002, and in the ACT and the NT for longer periods. Seven day trading is the 'norm' for the great majority of Queensland locations, is the 'norm' in all regional centres and the Adelaide CBD in SA, in many areas of WA including Perth from August this year.

Seven day trading for retail is now overwhelmingly the 'norm' in all jurisdictions...

It is important that Fair Work Australia make determinations which are cognizant of the evolution of trading hours reform across Australia and in the context that in many instances State retail instruments reflected trading patterns which were no longer contemporary...

The shift to seven day trading in the retail sector has occurred because of a range of considerations:

- To achieve a more efficient utilisation of capital in the retail sector and to stimulate investment in the retail sector.*
- To ensure the long term economic well being of the retail sector.*
- To more effectively cater for the changing needs, preferences, and shopping patterns of consumers. Customers are the lifeblood of retailing and the retail industry must be able to respond to customer preferences about when, and where, they want to go shopping. It is the preference of the majority of consumers to have the freedom to shop on Sundays. Sunday is a time when many customers have more time to shop at their leisure, particularly for non-food items, and it makes little economic sense to prohibit retailers from taking advantage of this obvious desire of consumers more effectively compete with the 24/7 characteristics of internet shopping and the rapid take up by consumers of internet shopping.*
- To stimulate economic growth and improve profitability.*

- *To support growth in our tourism industry.*
- *A vibrant, competitive and flexible retail industry will maximise total long term employment opportunities both directly in the industry and indirectly in support of retail businesses.*¹⁴⁶

These sentiments are echoed in the Competition Policy Draft Report which stated:

Trading hours have been progressively deregulated by state and territory governments over recent years. This has widened choices for consumers. Yet consumers have continued to demand greater diversity in how and when they shop, as is evident in the rapid take-up of online shopping.

The growing use of the internet for retail purchases is undermining the original intent of restrictions on retail trading hours, while at the same time disadvantaging 'bricks and mortar' retailers. This provides strong grounds for abandoning remaining limits on retail trading hours.

...

*The Panel believes that full deregulation of retail trading hours is overdue, and that remaining restrictions should be removed as soon as possible. To the extent that jurisdictions choose to retain restrictions, these should be strictly limited to Christmas Day, Good Friday and the morning of ANZAC Day.*¹⁴⁷

Given the trend toward deregulation of trading hours and the expectation of consumers that markets are responsive to their needs and prices are as low as possible, it is foreseeable that remaining trading hour restrictions will be lifted in the near future. However the penalty rates structures of a number of awards will hamper such reform agendas in industries where trading outside of the 9am-5pm Monday to Friday pattern is a feature. Excessive penalty rates that hamper employment, service levels or see businesses close their doors have negative consequences for the economy and its participants (particularly low paid consumers). As noted by the panel:

*Access and choice are particularly relevant to vulnerable Australians or those on low incomes, whose day-to-day existence can mean regular interactions with government. They too should enjoy the benefits of choice, where this can reasonably be exercised, and service providers that respond to their needs and preferences. These aspects of competition can be sought even in 'markets' where no private sector supplier is present.*¹⁴⁸

¹⁴⁶ National Retail Association [submission to Fair Work Australia in relation to the Fast Food Industry Award 2010](#), 13 August 2012, p 4-6.

¹⁴⁷ [The Australian Government Competition Policy Review Draft Report](#), September 2014, p 67.

¹⁴⁸ *ibid*, p 15.

2.7.6 The ‘grievance’ of being ‘forced’ to work ‘unsocial’ times

The previous penalty rates decisions assume that employees are working outside of ‘traditional’ working patterns under compulsion or with inconvenience, ignoring the fact that a number of people have a desire to work hours sitting outside of the 9am to 5pm Monday to Friday span around which the award system is built. Among the decisions reference is made to:

- *the **grievance** of losing Sunday;*¹⁴⁹
- *a **deterrent** against calling upon employees to work;*¹⁵⁰
- *Sunday as a **more convenient** day of community recreation and pleasure;*¹⁵¹
- *additional rates for week-end work... given to compensate the employee having to work on days which are **not regularly working days** for all employees in the industry;*¹⁵²
- *employees being **obliged** to work extended evening, Saturday or Sunday hours **against their** domestic responsibilities or **personal convenience** or gain their employment.*¹⁵³

ACCI does not foresee penalty rates being bargained away in their entirety. However what is not adequately addressed in historical decisions is the fact that ‘ordinary hours’ and peak times of demand for businesses are not the same among all industries and that certain industries will attract employees from ranging demographics due to the capacity of varying industry patterns to suit an individual’s needs. For example, people looking to balance study commitments or supplement their income will be attracted to industries operating outside of the 9am-5pm Monday-Friday cycle and will have a preference to work at hours the industrial tribunals have characterised as ‘unsociable’. In such circumstances, it is difficult to see how a rate of pay should ‘compensate’ a person for inconvenience that has not materialised or should ‘penalise’ an employer for opening their doors on a day where their services are expected. As noted by the NRA during the two-yearly review of modern awards:

*The expectation of Australians is that fast food businesses will be open seven days a week, during evening hours. Employees who work within this industry expect to be rostered to perform work during these hours.*¹⁵⁴

While many people will have a desire to work in the span of hours between 9am and 5pm Monday to Friday at particular junctures of their life, it is difficult to foresee a person pursuing employment in sectors such as retail or hospitality holding an

¹⁴⁹ *Gas Employees case* [1919] 13 CAR 437 at 469.

¹⁵⁰ *Weekend Penalty Rates Case* [1947] 58 CAR 610.

¹⁵¹ *Tramway & Gas Employees Case* [1949] 62 CAR 558 at 564.

¹⁵² *Engine Drivers General (State) Interim Award* [1950] AR (NSW) 260 at 267.

¹⁵³ Australian Bureau of Statistics, ‘Household Use of Information Technology, Australia’, cat no 8146.0.

¹⁵⁴ National Retail Association [submission to Fair Work Australia in relation to the Fast Food Industry Award 2010](#), 13 August 2012, p 6.

expectation that they will be working between 9am and 5pm Monday to Friday when they know that peak times of consumer demand fall outside of these hours. Rather, the nature and pattern of work in different industries serves to compliment the different personal priorities that people have at varying junctures in life. As noted by the ABS:

*The nature of the labour force has changed remarkably over the last 50 years. Today, people are working an increasingly diverse range of hours and patterns, often related to their stage of life or family circumstances...*¹⁵⁵

The difficulty with drawing broad brush conclusions about the need for or impact of penalty rates from aggregate analysis of data sets such as the Australian Work and Life Index (AWALI), is that the sample is taken from a cross section across the entire community without giving specific consideration to the needs of the businesses and consumers in a particular sector or the needs of particular sectors (such as our youth) within the labour market. The AWALI survey sample of 2690 includes employees and 411 self-employed persons in:

- agriculture/forestry and fishing;
- mining;
- manufacturing;
- electricity/gas/water and waste services;
- construction;
- wholesale trade;
- retail trade;
- accommodation and food services;
- transport/postal and warehousing;
- information media and telecommunications;
- financial and insurance services;
- rental/hiring and real estate services;
- professional/scientific and technical services;
- administrative and support services;
- public administration and safety;
- education and training;
- health care and social assistance;
- arts and recreation services; and
- other services.

The survey also captures a broad range of occupations including managers and professionals, many of whom could be reasonably assumed to fall outside of award coverage or to be in receipt of wages that are higher than any award that would apply to them.

ACCI does not suggest that the existence of or treatment of penalty rates across sectors and occupations should be universal. To the contrary, ACCI's view is that a 'one size fits all approach' in the determination of employment conditions, including

¹⁵⁵ Australian Bureau of Statistics, 'Australian Social Trends', December 2011, cat no 4102.0.

penalty rates, is not appropriate. ACCI is not seeking to discourage the application of penalty rates (or equivalent compensation) to the low paid in circumstances in which an employee is required by their employer to work long hours or 'overtime'. However there is no rational basis for labelling 'unsocial' trading hours in sectors where businesses are expected to trade and during which employees employed in those sectors expect to and have a desire to work. In these sectors, a revision of the penalty rate will deliver benefits for consumers who access the services, businesses who provide the services and employees who seek employment in the particular sector due to the skills that they possess and their personal priorities at that particular juncture in their life.

Notwithstanding this, some of the observations made within analysis of the AWALI data are not disputed by ACCI including observations that:

- greater flexibility in working hours '*can be good for the economy for participation in the workforce, and boosting productivity and competition*';¹⁵⁶
- '*younger workers (18 to 24) were more likely to work weekends only, evenings and weekends, or any type of unsocial hours (57.8%)*';¹⁵⁷
- '*workers aged 18 to 24 years were ... less likely to report financial reliance on these payments and more likely to continue working if penalty rates were not offered*';¹⁵⁸
- child free couples and single employees with no children '*were also more likely to continue working if penalty rates were not available*';¹⁵⁹
- '*casual workers were more likely to receive penalty rates for work outside standard hours and to continue working non-standard hours if penalty rates were not available*';¹⁶⁰
- casual employees are more likely to prefer more hours.¹⁶¹

These findings reflect a reality that people will be seeking different employment outcomes depending on their personal circumstances and with ABS data indicating that young Australians spend a significantly greater portion of their time in educational activities during the week¹⁶², it should come as no surprise that they seek to balance this by pursuing employment in sectors where trading activities fall outside of learning time and that the penalty rate is not the motivation behind such decisions. The Productivity Commission has also noted:

In principle, penalty rates in awards should not be set in excess of the minimum necessary to avoid unfair or unduly harsh treatment of employees, and an efficient level of penalty rates would be one which is just sufficient to induce people with appropriate skills to voluntarily work the relevant hours.

¹⁵⁶ Daly T (2014), [Evenings, nights and weekends: Working unsocial hours and penalty rates](#): Centre for Work and Life, University of South Australia, p 1.

¹⁵⁷ Ibid., p 9.

¹⁵⁸ Ibid., p 14.

¹⁵⁹ Ibid., p 15.

¹⁶⁰ Ibid., p 16.

¹⁶¹ Skinner N & Pocock B, [The Australian Work and Life Index 2014: The Persistent Challenge: Living, Working and Caring in Australia 2014](#), Centre for Work and Life, University of South Australia, p 3.

¹⁶² Australian Bureau of Statistics, [How Australians use Their Time](#) 2006, cat. No. 4153.0.

*Some workers may be very comfortable with (or even prefer) weekend and evening work and, for these people, the additional pay incentive may not need to be as large as exists under the current penalty rate structure.*¹⁶³

A person's work preferences will of course depend on a number of variables including but not limited to whether they have dependents, partners and the stages in life that their friends are at. As observed by Richardson:

There is a time in the lives of many people when they want full-time permanent employment. This is especially true for men in their main earning years and women too, if they do not have young children. But there are also times in the lives of many people when they want less 'consuming' forms of employment to accommodate study, family needs, health limitations and phased retirement.

...

*The much greater diversity of the modern workforce is better suited to a variety of terms of employment, than by full-time (and long) hours permanent terms as the only options...*¹⁶⁴

Evidence suggests (unsurprisingly) that the degree to which hours are in line with workers' preferences impacts subjective wellbeing and that blanket restrictions on work hours for any and all employees would likely generate a mismatch in work hours and preferences which might reduce job and life satisfaction.¹⁶⁵

The characteristics of workers who work non-standard' hours are very different to the characteristics of workers that work standard hours. Unfortunately the award system does not adequately reflect this.

2.7.7 Service sector contribution to youth unemployment

As noted earlier in this submission, we have seen continued softening of the labour market with employment growth slowing, working hours falling and the unemployment rate (currently 6.4%)¹⁶⁶ expected to rise in 2015. The softening labour market conditions have impacted low-paid, low-skilled workers most significantly and we have seen our youth unemployment rate reach its highest levels since 1998.¹⁶⁷ Policy settings should not exacerbate the risk of unemployment for those most vulnerable in the labour market and particular attention should be directed to tackling youth unemployment. Many service sector industries make a

¹⁶³ Productivity Commission 2011, "Economic Structure and Performance of the Australian Retail Industry", Report no. 56, Canberra.

¹⁶⁴ Richardson S, [Do we all want permanent full-time jobs?](#), Insights Vol 15, April 2014, University of Melbourne Faculty of Business and Economics, pp 15-21.

¹⁶⁵ See for example Wooden, M, Warren, D and Drago, R 2009, '[Working Time Mismatch and Subjective Wellbeing](#)', British Journal of Industrial Relations, vol. 47 (1): 147-179. 2009.

¹⁶⁶ Australian Bureau of Statistics, [Labour Force, Australia](#) (cat. no. 6202.0).

¹⁶⁷ *ibid.*

significant contribution to youth employment.¹⁶⁸ By way of example, the NRA has explained that:

The retail sector in Australia employs in excess of 1.2 million people. As well as being one of the nation's largest employers, the retail sector is also the first port of call for many young people beginning their working career. And it is the major employer of low-skilled, part-time and casual personnel.

...

A strong retail sector has economy-wide benefits, not the least of which is generation of job opportunities for those people on the margins of skills demand – unskilled or non-qualified workers, those entering the workforce for the first time, and single parents or students balancing work with other lifestyle demands. Federal Government policy making that is targeting towards supporting the retail sector will boost employment opportunities for these groups of workers – delivering fiscal and social dividends to the government and nation.¹⁶⁹

Lewis also observed of the café, restaurant and catering services industry:

Over 40 per cent of all employees in the industry are under 24 years old, compared to less than 14 per cent for the economy as a whole. Clearly, the industry is a major source of employment for young people. The growth of part-time work for young people has also been a major factor in improving participation of youth in education.¹⁷⁰

Importantly, if young Australians can secure work in such industries, such work may serve as an entry point to other areas of the labour market and accommodate study to facilitate transition to careers in other industries.

The RBA's February 2015 Statement on Monetary Policy identified that challenges the current labour market are presenting for our youth, noting:

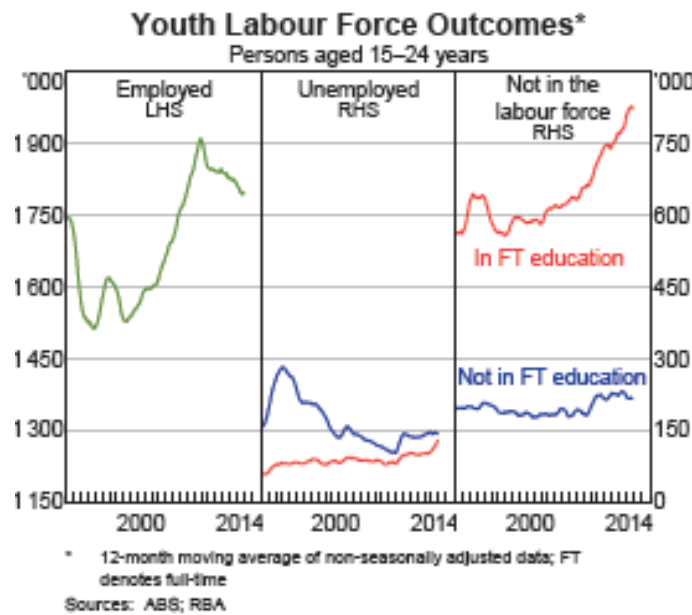
Youth unemployment, which tends to be particularly sensitive to the business cycle, has increased notably; 270 000 people aged between 15 and 24 years are now unemployed, 20 000 more than a year ago. Much of the increase in youth unemployment over the past few years, and in 2014 in particular, has been accounted for by those in full-time education who are searching for work (Graph 3.19). More generally, a higher incidence of full-time education has accompanied the reduction in the size of the youth labour force. However, there is also evidence that it is becoming harder to find a job on completion of tertiary education. As a result, a rising portion of young jobseekers are yet to

¹⁶⁸ See for example 'Sunday Trading in Australia Research Report', Australian Centre for Retail Studies, August 2012, p 12, which highlights the contribution of the retail sector to youth employment with 72.5% of the workforce aged under 45 years (compared to 61.5% for all industries).

¹⁶⁹ National Retail Association, '[Generating jobs growth in a constrained economy: Longer-term priorities for the retail sector](#)', October 2013.

¹⁷⁰ Lewis P, 'Paying the penalty? The high price of penalty rates in Australian restaurants', Agenda: A Journal of Policy Analysis and Reform, Vol. 21, No. 1, 2014: 5-26.

find their first job and the average duration of unemployment among 20 to 24 year olds has increased.¹⁷¹



Graph 3.19 from RBA Statement of Monetary Policy, February 2015, p 44.

2.7.8 Haven't the awards been modernised to deal with these issues?

One might assume that a process of 'modernising' awards would give robust consideration to the significant change in context since the making of the pre-modern instruments, including the competitive environment and broader policy settings. However that process was significantly restrained by a requirement that those making the modern awards give careful consideration to prevailing arrangements under the historical instruments and the previous Government's commitment that no-one would be worse off as a result of the process.

This 'award modernisation' process commenced in March 2008 after the then Minister made a request under Part 10A of the WR Act. A review of more than 1500 awards was undertaken by the AIRC resulting in the creation of 122 industry and occupational awards. However this exercise did not live up to expectations, as the awards are not reflective of flexible and modern work practices but are simply a consolidation of out-dated pre-modern instruments.

The weight given to the pre-modern instruments during this process can be seen in the AIRC's response to submissions made by Restaurant and Catering Association of Australia to reduce penalty rates during the modernisation process with the Full Bench stating:

The R&CA's approach is directed at substantially reducing or eliminating penalty payments provided for in existing instruments applying to the

¹⁷¹ Reserve Bank of Australia, Statement of Monetary Policy, February 2015, p. 44.

*restaurant industry during times when restaurants are open. That approach ignores the inconvenience and disability associated with work at nights and on weekends – which are the basis for the prevailing provisions in pre-reform awards and NAPSAs. Nor does the R&CA approach take into account the significance of penalty payments in the take-home pay of employees in the restaurant industry. A modern restaurant award based on the penalty rates proposed by the R&CA would give the operational requirements of the restaurant and catering industry primacy over all of the other considerations which the Commission is required to take into account, including the needs of the low paid and the weight of the regulation. A more balanced approach is required.*¹⁷²

The AIRC proceeded on assumptions that don't hold. Such reliance on 'prevailing provisions' in pre-reform awards and NAPSAs and on the existing payments made to employees was an obstacle to a fresh assessment of the awards and generated outcomes inconsistent with the policy intent as set out in the previous Government's 'Forward with Fairness – Policy Implementation Plan' which stated:

*Under Labor awards will be relevant to our modern economy. Awards will not be prescriptive; they will be flexible. Awards will not enshrine inefficient work practices; they will promote flexible and family friendly work arrangements.*¹⁷³

2.7.9 What about the review of awards?

On 17 November 2011 FWA released a statement announcing that it would conduct a review of modern awards as required by Item 6 of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth). During a directions hearing on 9 May 2012 FWA considered the 'preliminary issue' regarding the scope/breadth of the review and on 29 June 2012 determined as follows:

[99]...we reject the proposition that the Review involves a fresh assessment of modern awards unencumbered by previous Tribunal authority. It seems to us that the Review is intended to be narrower in scope than the 4 yearly reviews provided in s.156 of the FW Act. In the context of this Review the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome. Having said that we do not propose to adopt a "high threshold" for the making of variation determinations in the Review, as proposed by the Australian Government and others.

Despite the strong case for a 'fresh assessment' of the awards given the significant contextual changes that had occurred during the course of their history, this has not occurred in either the making of the awards or their review process.

¹⁷² [2009] AIRCFB 865 at [232].

¹⁷³ Labor's 'Forward with Fairness Policy Implementation Plan', August 2007, p. 15.

During the two-yearly review of modern awards, the Restaurant and Catering Association of Victoria (RCAV) appealed a decision rejecting a range of proposals to vary the Restaurant Industry Award 2010, including a proposal to abolish weekend penalty rates. The RCAV appealed the refusal to grant an alternative application to reduce the Sunday penalty rate in the Restaurant Award from 50% to 25%. On appeal, the Full Bench found that Sunday penalty rates may have a limited effect on employment, particularly in relation to owner-operators working on Sundays in preference to engaging staff for additional hours and that for transient and lower-skilled casual employees working on weekends, who are primarily younger workers, the superimposition of the casual loading of 25% in addition to the 50% penalty rate overcompensated them for working on Sundays and was more than was required to attract them to work on that day. However the RCAV case that the level of disability for working on Sundays is no higher than that for Saturday was rejected with the Full Bench finding that the position had not changed since the Full Bench of the AIRC considered the issue in 2003. It was considered that working on Sundays involves a loss of a day of family time and personal interaction upon which special emphasis is placed by Australian society.

Nevertheless, in reducing the Sunday penalty rate in the Restaurant Industry Award 2010 by 20 per cent for lower skilled casual employees during the two-yearly review of modern awards, the Full Bench of the FWC made the following statement:

*From the evidence led in this case we are not persuaded that in the restaurant and catering industry there is an ongoing justification for a level of Sunday penalties significantly above the Saturday rate for employees. There has been a need since 2010 to review modern award provisions in the context of the modern awards objective. An inherent requirement in that task is to consider each industry in the context of its particular circumstances. Adopting that approach, we do not believe that previous considerations of Saturday and Sunday penalties, especially those with respect to other industries, should outweigh the analysis now required to be undertaken under the current Act. Relatively recent previous cases, such as the Retail Case in 2003, were determined as part of a more general legislative discretion and related to the circumstances of other industries. The close relationship between restaurant and catering services and the leisure needs of the community and the elements of the modern awards objective that require a consideration of the circumstances of each industry render such previous cases of marginal significance. Historical considerations should not be elevated to the point of outweighing a contemporary and relevant analysis as required by the current Act.*¹⁷⁴

Such incremental change was only secured after a significant dedication of resources by the applicant and after award variation attempts to secure a reduction in the penalty rate spanning years. This demonstrates the significant constraints on the capacity of the system to respond to our changing context. However since the time of the 2003 decision, significant changes have occurred within society including

¹⁷⁴ [2014] FWCFB 1996 at [311].

changes to Sunday trading restrictions in a number of key jurisdictions. Sunday trading was introduced in South Australia in 2003 (with restrictions), in Queensland in 2004 (with restrictions), in New South Wales in 2008 and in Western Australia in 2012.

2.7.10 Public holidays

As already qualified in this submission, ACCI is not seeking for penalty rates to attract universal treatment across all industries and occupations. However an area of award regulation that is particularly problematic for service sector businesses is the application of penalty rates on public holidays when there is an expectation of trade.

Public Holidays Test Case in 1994-1995 established a standard for public holiday minima in the pre-reform award “safety net” which was largely transplanted into the system of federal and state awards in operation prior to 1 January 2010.¹⁷⁵ These instruments typically observed ten public holidays per year with employees entitled to penalty rates for work performed on the public holiday or on a additional substituted day, but not on both days.

The interaction of the FW Act with state legislation has had the effect of increasing the number of recognised public holidays. Section 115 of the FW Act defines public holiday as follows:

115 Meaning of public holiday

The public holidays

(1) The following are public holidays:

(a) each of these days:

- (i) 1 January (New Year’s Day);*
- (ii) 26 January (Australia Day);*
- (iii) Good Friday;*
- (iv) Easter Monday;*
- (v) 25 April (Anzac Day);*
- (vi) the Queen’s birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);*
- (vii) 25 December (Christmas Day);*
- (viii) 26 December (Boxing Day);*

(b) any other day, or part day, declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day or part day, or a kind of day or part day, that is excluded by the regulations from counting as a public holiday.

The practice of state and territory governments in prescribing or declaring different days for the same public holiday or prescribing additional public holidays that do not

¹⁷⁵ Public Holidays Test Case Bench, March 1995 (Print L9178)

apply on a national basis creates a significant cost impost for business. The number of public holidays has grown significantly over the years and is compounded by the imposition of extremely high wage costs to multiple days in respect of a single public holiday event. This has a negative impact on businesses, consumers and employees as employers are forced to adopt strategies to address this significant cost impost in a low-margin economic environment.

The impact of additional public holidays was observed by the FW Act Review Panel which made the following statement in its report:

The ability for state and territory governments to declare additional public holidays has a fairly significant impact on wages costs for employers who operate on such days, due to public holiday penalty rates typically involving a loading of 200 per cent or 250 per cent of base rates of pay (in recognition of the unsocial nature of working on such days). Employers affected by the penalty rates typically include those operating in the hospitality, retail and tourism sectors. Employers may alternatively elect that it is not economic to open on the particular day (unless they are obliged to open on such days, due to, for example, lease requirements), which would mean forgoing any takings for the particular day. Additional public holidays also impose costs for businesses that decide not to operate on such days, as they may be required to pay employees even though the employees have not had to work.¹⁷⁶

...

The issue of public holidays was identified as important for many stakeholders in submissions and discussions with the Panel. Current arrangements have meant that the number of public holidays in each jurisdiction can vary widely. For example, in 2012 the number is expected to range from between 10 and 13 days, depending on the state or territory. The uncertainty with current arrangements for employees and employers and the potential additional costs for employers concerns the Panel. To overcome these concerns, the Panel's view is that under the NES, there should be a nationally consistent number of public holidays each year for which penalty rates are payable, and that the number of days for which penalty rates are payable should not be able to be increased by declaring additional or substitute days by state and territory governments. This would not prevent employers and employees entering agreements to provide for penalty rates to be payable on a greater number of public holidays, nor to specify additional days as public holidays.¹⁷⁷

During the two-yearly review of modern awards, significant evidence was filed by employers in relation to the impact of penalty rates in the services sectors. By way of example, the Australian Hotels Association filed several witness statements and included the following concise summary of key points arising from the evidence of owners, managers and senior staff members of hotels across Australia regarding the impact of public holiday penalty rates:

¹⁷⁶ Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation, p. 102.

¹⁷⁷ *ibid.*

- *In recent years the members have incurred increased expenses as a result of additional public holidays being declared.*
- *All of the members gave evidence that they had taken one or more of the following steps in order to cope with the increased costs of trading on public holidays:*
 - *significant reduction in trading hours as compared with a normal day;*
 - *reduction in service offerings (e.g. closing certain areas of the establishment or not offering certain services);*
 - *closing the establishment.*
- *The majority of the member's employees are employed as casual employees. The members indicated that they do not roster casual employees to work on public holidays, unless necessary, due to the high penalty rates. This results in casual employees losing a day's pay that they otherwise could have earned. Between 25-75% of the casual workforce are not rostered to work on public holidays.*
- *Members try to use salaried staff on public holidays where possible.*
- *Less staff are rostered to work on public holidays than on a normal day.*
- *Members indicated that profitability is significantly reduced on a public holiday. Due to penalty rates, labour costs are more than double what they are on a normal day; however, income is less than a normal day.*
- *Wages form over half of the members' venues' expenses, therefore additional public holiday add even more to this.*
- *Members find it difficult to add surcharges on public holidays as there is a backlash from customers.*
- *Public holidays result in an operating loss as revenue reduces significantly and it is hard to break even on these days.¹⁷⁸*

The NES provides a robust safety net for employees in that there is a baseline entitlement to be absent from work on a public holiday and, in the event that they are asked to work, may refuse if either the request is unreasonable or the refusal is 'reasonable' taking the prescribed matters into account. It flows from this that an employee cannot be compelled to work on a public holiday in circumstances where the request is unreasonable or the refusal is reasonable. In assessing reasonableness, the nature of the work, the type of employment and compensation are variable factors that need to be considered. If a base line safety net entitlement is to be reflected in awards, when applied in conjunction with the NES entitlements, it must be appropriate the circumstances of the industry and the enterprises operating in that industry.

A minimum payment at the rate of double time and a half for people working in service sectors which are expected to trade on public holidays such as retail, hospitality and leisure and tourism related sectors does not distinguish these industries from those that do not ordinarily trade on public holidays.

As noted earlier, the Competition Policy Review Panel considered the full deregulation of retail trading hours to be overdue.¹⁷⁹ For the Panel's

¹⁷⁸ Australian Hotels Association, [submission in relation to the Hospitality Industry \(General Award\) 2010](#), 2 November 2012.

recommendations to be capable of practical implementation, excessive penalty rates in service sector industries must be reviewed.

2.7.11 Weekend penalty rates

In submissions made during the two yearly award review process regarding weekend penalty rates, the Australian Retailers Association (ARA) identified a number of concerns relevant to penalty rates in the General Retail Industry Award 2010 which it argued prevented the award from meeting the modern awards objective.¹⁸⁰ Among those submissions were concerns that:

- The safety net under the award is ‘too high’ and is ‘leading to substantial labour cost pressure on retailer, which are being exacerbated given the prevailing trading conditions in the industry and the increased competition faced by the industry through online sales’. The ARA commissioned research also identified the safety net as being too high, from the perspective of employers and employees, ‘specifically as it relates to the penalty rate for Sundays’;¹⁸¹
- ‘the safety net set by the Award is not relevant to the modern retail industry taking into account community expectations and demand, changing customer shopping patterns, retail trading hours and operational imperatives’;¹⁸²
- the award ‘is failing to promote employment growth and social inclusion through increased workforce participation’ with a survey conducted by ARA identifying the award, and Sunday penalty rates in particular as a key factor in the reduction in employee numbers and hours worked in retail businesses;¹⁸³
- ‘the failure of the Award to establish a fair and relevant minimum safety net combined with the economic challenges facing the industry has impacted on the performance of the industry’ and that given ‘the retail industry contributes 4.1% of Australia’s GDP and employs 10.7% of Australia’s workforce this has had a related detrimental impact on the national economy’.¹⁸⁴

In attempting to remedy this, the ARA did not propose abolition of penalty rates altogether. Rather, it sought variations that would (among other matters) reduce Sunday penalty rates to 50% (inclusive of casual loading).

The ARA stated ‘[i]t is inconceivable that the Sunday penalty under the Award would align to industries which predominantly do not trade on Sundays...It is accepted that at one point in time a double time penalty for Sunday work would have been appropriate as a penalty rate for trading on Sundays and as compensation for work performed at unsociable times. This time has now passed, and a modern

¹⁷⁹ [The Australian Government Competition Policy Review Draft Report](#), September 2014, p 67.

¹⁸⁰ *Fair Work Act 2009* (Cth), s. 134(1).

¹⁸¹ Australian Retailers Association [submission in relation to the General Retail Industry Award 2010](#), 13 August 2012.

¹⁸² *ibid.*

¹⁸³ *ibid.*

¹⁸⁴ Australian Retailers Association, *op. cit.*

award...needs to reflect this'.¹⁸⁵ In support of this submission are a number of themes the ARA identified as emerging from its survey, the Productivity Commission Report into the Retail Industry and the evidence of witnesses:

- the sector 'is facing substantial structural and financial challenges' including 'increased competition...through the penetration of international online retailing into the Australian market, increased physical presence of international retailers..., advancement of technology and its impact on consumer choice, consumer spending habits and a highly volatile and uncertain economic outlook';¹⁸⁶
- deregulation of trading hours has occurred over the last 10 to 15 years with all Australian states and territories (excepting South Australia) permitting seven day trade. Where this has occurred, consumers have embraced Sunday shopping as a weekend social activity and it has become a significant trading day for retailers;
- despite increased trade on Sundays profitability is below average due to higher labour costs and employers seek to address this through:
 - reducing Sunday trading hours;
 - operating with fewer or a lower than optimal mix of employees. This has negative implications for the performance of the business and consumer experience;
 - small business owners carrying out more of the work on Sundays themselves.
- if the penalty rate was reduced in the manner proposed by the ARA, more hours and employment opportunities would be made available;
- a significant number of people choose to work on Sundays for a ranges of personal reasons. While the quantum of a Sunday penalty rate impacts the choice made by employees to work Sunday, a 50% penalty is the optimal rate for impacting retail employee satisfaction.¹⁸⁷

In 2012 the ARA commissioned the Australian Centre for Retail Studies to undertake research into Sunday trading in Australia to obtain 'information about the nature of Sunday trading in Australia and the attitudes of retail employees, employers and consumers toward Sunday as a working, operating and shopping day'.¹⁸⁸ The following findings were among those that emerged from that research (as summarised in the report):

- *Retail is challenged: By a range of consumer and marketplace trends including online retail, increased consumer desire for 24/7 convenience, consumer knowledge power and increased savings levels.*
- *Sunday trade is generally strong: Accounting for 10 to 25% of weekly trade...But is not always profitable: Due to higher labour costs, Sunday can trade at a loss. In that the increase in trade for Sunday is not always sufficient to offset wage increases.*

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ 'Sunday Trading in Australia Research Report', Australian Centre for Retail Studies, August 2012, p 7.

- *Sunday employment: While increased pay is the key benefit of working a Sunday, flexibility is also an important driver for Sunday work.*
- *Some employees not able to work: higher pay rates generally mean that more qualified staff tend not to be rostered to work on Sunday to keep labour costs 'manageable', resulting in less available hours of choice for such employees.*
- *While others are forced to: with many stores forced to open Sunday (i.e. property leasing agreements), store owners are often forced to work themselves on Sunday to avoid penalty rates which would otherwise make Sunday trading non-profitable.*
- *Pay does not increase employee satisfaction: time-and-a-half rates significantly increase retail employee satisfaction, with a rate of double time only marginally increasing satisfaction levels. This means that a Sunday penalty rate of time-and-a-half has the largest impact on employee satisfaction.*¹⁸⁹

The proposition that penalty rates negatively impact employment in many service sector businesses when attaching to hours of ordinary trade is irrefutable. During the two-yearly review of modern awards, various statements in support of this proposition were advanced, including the following statement from a witness tendered by the NRA:

The imposition of the labour cost imposed by the modern fast food award means the following to my business:

- Weekend trading day is not profitable. Generally on weekends our total expenses exceed our turnover and the labour cost percentage is the main component of this costs. The high labour cost on Sunday alone reduces our business' overall profit for the week.*
- I have reduced the number of employment hours I can offer employees on Saturday, Sundays and public holidays, as a result I have difficulty servicing my clients to meet their expectations.*
- As a result of the decrease in hours being offered to employees it has fallen onto my family and I to cover those hours.*
- Because the weekend and public holiday penalty rates compound the adult rate to a level which makes it untenable to regularly roster adults on weekends, we are not able to offer more hours of work on weekends for the adult employees because the business cannot afford them. Instead we rely predominately on junior employees.*
- Declining net profit on Sundays is weakening the overall profitability of the business.*
- The centre which my store operates is experiencing a decrease in foot traffic. This is because a lot of other retailers in the centre have decided not to open because the Sunday penalty rate places too much of a burden on businesses. As a result those other traders like me who do trade further impacted.*¹⁹⁰

¹⁸⁹ *ibid.*, p 4-5.

¹⁹⁰ See National Retail Association [submission to Fair Work Australia in relation to the Fast Food Industry Award 2010 and witness statements](#), 29 October 2012.

The reality of the fast food industry in 2012 is that customer's expect us to be open for service on these days. It would be more damaging for our business and our brand should we not open on these days because we would lose customers to our competitors.

Lewis also made to following findings when undertaking case study analysis into the impact of penalty rates on the café, restaurant and catering industry:

- penalty rates for 10pm –midnight work reduce demand for labour by between 5 and 30 percent below what would be the case with no penalty rates;¹⁹¹
- penalty rates for work on Saturday have reduced demand for labour by between 12.5 and 75 per cent below what would be the case with no penalty rates;¹⁹²
- penalty rates for work on Sunday are projected to have reduced demand for labour by between 75 per cent and 100 per cent;¹⁹³
- penalty rates for public holidays are projected to have almost eliminated demand for hired labour.¹⁹⁴

In analysis of these findings Lewis found that the penalty rates had a negative effect on employment and turnover in the sector and would significantly reduce profit given the lean margins in the sector.¹⁹⁵ Lewis found that the reduced labour demand arising from penalty rates reduced job availability and reduced competition.¹⁹⁶ If such rates were set at a level that better enabled the market to structure its operations and labour to meet market conditions, it is likely that the increased number of businesses operating on the cost prohibitive days on which penalty rates apply, will actually increase demand for labour. This will have flow on effects to the wages paid as businesses compete to secure labour.

ACCI submits there is a firm basis for the Productivity Commission to give consideration to penalty rate reform.

2.7.12 Can the issue of penalty rates be addressed through bargaining or individual flexibility arrangements?

The Issues Paper has stated that there is “already some in-principle flexibility under the modern awards system (and enterprise agreements) for employees and employers to negotiate individual agreements that alter penalty and overtime rates

¹⁹¹ Lewis P, op.cit.

¹⁹² *ibid.*

¹⁹³ *ibid.*

¹⁹⁴ *ibid.*

¹⁹⁵ *ibid.*

¹⁹⁶ *ibid.*

in exchange for other benefits (so long as the employee is better off overall)” and seeks “views on the advantages and limitations of such (or other existing) approaches, and whether there could be alternatives approaches that are superior.” Enterprise agreements are not the dominant mode of engagement for small business employers and their employees in service industries such as retail, accommodation and food services.¹⁹⁷ This is no surprise given the composition of businesses within the sector.

For example, the Productivity Commission has observed that retail businesses are small businesses with almost half of employing businesses employing four or less workers. Conversely, the largest retailers (employing more than 50 workers) only represent four per cent of employing retail businesses.¹⁹⁸ Small businesses are concentrated in the services sectors such as retail trade and accommodation/food services.¹⁹⁹ ACCI addresses aspects of the system that are not conducive to bargaining for small business in its response to Issues Paper 3.

Individual flexibility arrangements (IFAs) have not been widely taken up by employers with a FWA survey in 2011 indicating that only six percent of surveyed employers responded that they had used an IFA. The PIR Report recommended changes to encourage and make it easier for employers and employees to enter into IFAs. The Productivity Commission has acknowledged ACCI’s concerns that employers have difficulty assessing with certainty whether a particular IFA meets the BOOT and the financial risk that this presents.²⁰⁰

While amendments proposed by the *Fair Work (Amendment) Bill 2014* remain before parliament and, if passed, will take steps to addressing some of the deficiencies in these arrangements, significant structural impediments to agreement making in the system will remain and ACCI addresses these issues in its response to Issues Paper 3. It is neither desirable nor practical to require an employer, particularly a small business employer, to navigate a multiplicity of regulatory instruments in giving effect to employee entitlements. Individual agreement making underpinned by a fair minimum safety net would help to overcome this complexity.

The Productivity Commission has also acknowledged that some aspects of the system, such as the operation of the BOOT, may be inhibiting the adoption of flexibility enhancing provisions in the retail sector.²⁰¹

¹⁹⁷ See [ACCI Submission in relation to the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the Fair Work Amendment \(Small Business Penalty Rates Exemption\) Bill 2012](#), p. 12.

¹⁹⁸ Productivity Commission 2011, “[Economic Structure and Performance of the Australian Retail Industry](#)”, Report no. 56, Canberra, p. 343.

¹⁹⁹ See [ACCI Submission in relation to the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the Fair Work Amendment \(Small Business Penalty Rates Exemption\) Bill 2012](#), p. 15.

²⁰⁰ See Productivity Commission 2011, “[Economic Structure and Performance of the Australian Retail Industry](#)”, Report no. 56, Canberra, p. 351.

²⁰¹ Productivity Commission 2011, “[Economic Structure and Performance of the Australian Retail Industry](#)”, Report no. 56, Canberra, p. 32.

2.7.13 The ‘preferred model’ for determining penalty rates

The Issues Paper has sought specific comment on the ‘preferred model’ in relation to penalty rates and, in particular, how penalty rates should be determined, whether the setting of penalty rates is required as a part of the regulatory structure and the potential impacts of deregulation.

The evolution of the framework away from the system of arbitrating paper based award disputes and the changed nature of the legislated safety net triggers consideration of what work the system of awards should now be doing. The appropriateness of an award system built around historic award content having application in an economic context that has changed significantly must be challenged. This legacy has preserved a layer of regulation that can only be revised by the FWC exercising a broad exercise of judgement in applying the objects within the FW Act. However award content is not subjected to a regulatory assessment process as would be expected of other forms of regulation.

Rather than adapting terms and conditions to the evolution of the modern service sectors, the award modernisation process had the effect of introducing further impediments to trade and employment for employers in some sectors and regions. In its submission in relation to the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the *Fair Work Amendment (Small Business Penalty Rates Exemption) Bill 2012*, ACCI made reference to the circumstances of independent supermarkets in Queensland which could trade up to 12 midnight without incurring penalty rates under the former state awards.²⁰² However the ‘modern’ award introduced a 25% penalty after 6pm and 50% penalty after 9pm. A 100% penalty for work on Sunday replaced the 50% penalty that had applied previously. Such increases in costs had the effect of making employers less competitive, placing pressure on businesses to reduce operating hours, and reducing employment opportunities.

There is no evidence to suggest that such regulatory intervention in the market is necessary and the currently penalty rate structure within a number of service sector awards are not appropriate for application in circumstances where late nights, weekends and public holidays are significant trading periods. As noted by Wooden:

Ultimately, the retention of most penalty rates in awards reflects a world that is long gone, and in a truly modern award system many would have been abandoned. Penalty rates might still be prescribed for work on certain public holidays, shift work in the evenings, and for overtime regimes requiring working hours that are excessive from the perspective of individual worker well-being (though even this will be difficult to define on an award basis given it will vary with the nature of work undertaken).

²⁰² [ACCI Submission in relation to the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the Fair Work Amendment \(Small Business Penalty Rates Exemption\) Bill 2012](#), September 2012, p. 10.

*And of course, even if awards were silent on penalty rates, it does not follow that they would disappear. Many employers will still need to pay workers more to attract sufficient labour to work at undesirable times.*²⁰³

Such sentiments are echoed by Philipatos who stated:

The award system today is a secondary safety net of wages and conditions building upon an already generous set of statutory protections that rank high among the world's wealthiest countries.

While it is important to ensure working Australians are guaranteed socially acceptable minimum standards, it is also important to ensure this safety net is not too onerous, particularly for small businesses which have a limited capacity to pay. An onerous safety net, with excessive minimum wages and employment conditions, erodes competitiveness and destroys jobs. The award system today, particularly after the award modernisation process, is a significant cost burden to businesses.

*In particular, the rationale for penalty rates and overtime are out of place in the makeup of the modern Australian business. Large parts of the services sector—such as retail, hospitality and services—conduct their greatest volume trade outside standard hours. These are convenient times for consumers and if businesses are to be competitive, particularly against growing online competition, they need to be able to cater to these demands. Penalty and overtime rates increase labour costs during operating hours and impede the ability of employers to remain profitable or provide work to employees.*²⁰⁴

Small businesses in the service sectors have a personal face, with many being run by families and people who have decided to pave their own way to economic independence. They put in their own hours and sacrifice time with their own families to keep open the doors and navigate the myriad of compliance obligations that attach to running a business. They run on tight margins and many have mortgaged their own homes to take on a risk which ultimately provides jobs in the community.

ACCI's view is that long term objective of the system should be to move toward an environment where wages and conditions are overwhelmingly set by workplace bargaining, either collectively or individually, underpinned by a sustainable and effective safety of minimum wages and conditions. Penalty rates will remain a feature of bargained outcomes. ACCI fully expects that in highly coordinated, unionised sectors such as nursing, teaching and emergency services, penalty rates will remain a feature of agreements. In other industries, payment of a premium may also be required to attract people to work at certain times. However ACCI's proposed approach enables the organisation of labour in the most efficient way for

²⁰³ Wooden M., [*Penalty rates in awards: do we really need them?*](#), The Conversation, 10 September 2012.

²⁰⁴ Philipatos P., [*Relics of a Byzantine IR System: Why Awards Should Be Abolished*](#), Issue Analysis 140 (Sydney: The Centre for Independent Studies, 2013)

small businesses in sectors that are critical to Australia's growth as the structural changes in our economy trigger distributional consequences.

ACCI notes that such a shift may impact some employees during a transitional period and while this should not prevent beneficial reforms from progressing, such impacts should be a consideration in policy implementation. A step that can be taken in the immediate term in working toward this longer term policy objective would be to reframe the objects of the FW Act and awards in a manner that drives further rationalisation of award content to ensure the role of awards is focused on being a safety net for the low paid and that awards contain essential minima only. The reframed objects should, for example, require special consideration of the need to ensure that penalty rates in businesses that ordinarily trade during non-standard times (such as evenings, weekends and public holidays) do not negatively impact employment opportunities in those sectors.

2.8 A safety net for the long term

The Productivity Commission has identified its task as one which involves going “beyond evaluation the current system to consider the type of system that might best suit the Australian community over the longer term”. This being the case, a system for the long term requires a set of minimum standards constituting an appropriate safety net that becomes one of the drivers of employment and economic growth. The design of the safety net must be appropriate to meet the needs of the industries where growth, investment and job creation are likely. This is a critical consideration given that below trend economic growth and rising unemployment are expected to continue and peak higher than previously expected.

As noted earlier in this submission, Australians have relied heavily on the boom in mining investment to ripple through the economy and underpin wage and employment growth. However the decline in key commodities prices and downturn in capital investment and output means we need to be looking to other sources to maintain and improve upon our standard of living. Our terms of trade are declining at a faster than expected rate and we cannot simply wait for a reversal of this trend to deliver prosperity. We need to work more efficiently and increase our workforce participation rates if we are to see growth in wages and profits.

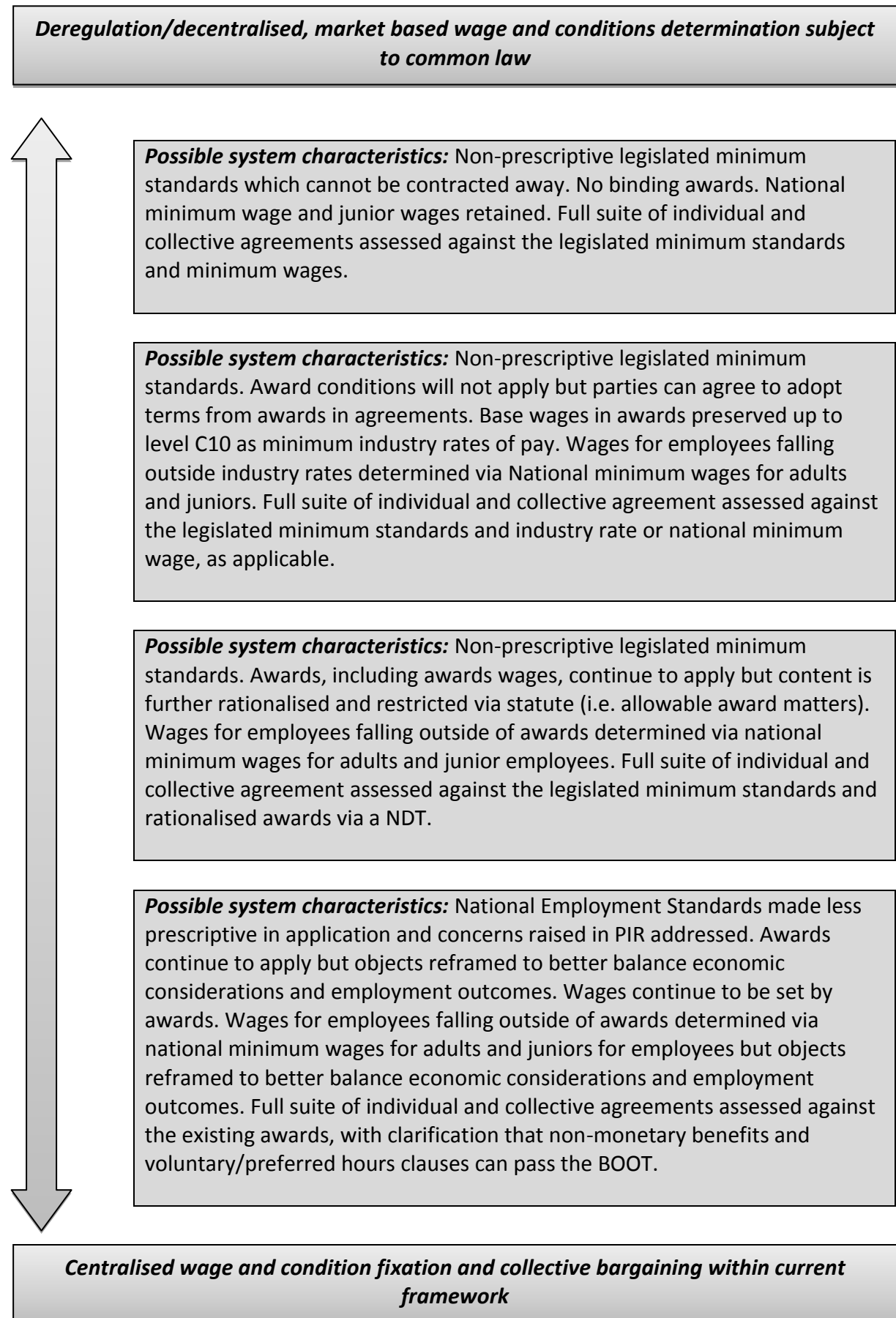
Job creation is not a given. As our sources of economic activity shift, it will be important that those upon whom we rely on for job creation are producing goods and services for which there is demand and at a price people will pay. Our safety net must permit the structuring of work hours and arrangements in an efficient way and in a way that best enables businesses to interact with the market. If goods and services are not in line with demand, employment outcomes will be negatively impacted. If businesses are not productive, there is an impact on their bottom line and this has an obvious impact on employment.

Much has been said of the need for the business community in Australia to be innovative, invest in technology and diversify capabilities. This is agreed. There is also the need to respond to trend data indicating the growing importance of service

sectors to our economy, including those such as retail, hospitality, accommodation and food services which are largely comprised of small businesses.

For many of these small businesses in labour intensive service sectors, excessive mandated penalty rates within the system exist as a cost barrier to accessing the market at times where consumers expect trade. Likewise, restrictive regulation such as prescription of ordinary part-time hours and minimum engagement periods and the current system's limitations when it comes to parties agreeing on alternative working patterns of mutual benefit interfere with the efficient scheduling of work arrangements and negatively impacts participation outcomes. Our overly complex and multi-layered safety net is the antithesis of a flexible regulatory environment and entangles business operators in red tape. Excessive and prescriptive employment regulation is a blunt and ineffective tool for driving positive employment outcomes and businesses need to be freed up to respond to our economic challenges in a way that places less reliance on the active input of policy makers, legislators, institutions and regulators. This requires emulating the policy reform trajectory that commenced in the 1990s and a move to a less regulated system of market based wage and conditions determination truly focussed on the needs of single enterprises and their employees.

Australia will not be well served by solutions confined by the current framework or which merely 'tinker around the edges'. Rather, ACCI recommends that the Productivity Commission give consideration to reform options that sit somewhere between wholesale deregulation and the complex system that we have in place today. The options available for the Productivity Commission to consider could be viewed across the following spectrum:



To be clear, ACCI does not seek a completely deregulated system, underpinned only by common law. Such an approach would represent a significant departure from our current system and has potential for unintended consequences. However the current intertwining framework of the NES, minimum wages, award conditions and agreements produced through restricted bargaining options fails to deliver a simple framework. The current level of complexity and regulatory overlay is counterproductive and unsuitable for future conditions.

Given the problems associated with the current system and Australia's future challenges, it is ACCI's prevailing view that reliance on awards should be reduced and that the system should become truly decentralised, where wages and conditions are overwhelmingly set by workplace bargaining.

The Productivity Commission has noted "[t]he current structure is a product of history and social preferences"²⁰⁵ and it has not been tasked with simply evaluating the current system and considering improvements that could be made to it. It has been given the task of considering the type of system that might best suit the Australian community over the longer term. This task involves considering different reform propositions. Rather than looking at what we have, the Productivity Commission must look for what we need.

The WR Framework must better address the needs of small businesses, which crave a safety net that is simple and easy to follow. The disincentives to employ must be removed and businesses and their employees need greater flexibility to negotiate arrangements of mutual benefit. Restrictions preventing parties reaching agreement on preferred hours of work must be removed and rates of pay must not act as a barrier to offering employment. The system should be such that it is just as appropriate for the needs of the service sector businesses whose growth we are relying upon to sustain and enhance our national living standards as it is for the declining proportion of private sector workplaces regulated by union collective agreements. It must provide those who are currently unemployed with better opportunities to enter the labour market.

ACCI suggests the following model would achieve these objectives and deliver the system that would best suit the Australian community over the longer term:

²⁰⁵ Issues Paper 1: Context, p. 1.

It is ACCI's view that a flexible safety net for the long term should be focussed on simplicity and productivity based bargaining and comprise:

- ***A set of legislated minimum standards reflected in a Minimum Conditions of Employment Act (or equivalent).***
- ***A national minimum wage and industry rates of pay retained from awards, adjusted annually by the independent wage setting body.***
- ***Other award conditions adopted as terms and conditions of employment by agreement.***
- ***A full suite of agreement making options assessed against the legislated minimum standards and applicable industry pay rates retained from awards or the national minimum wage (for those who fall outside award classifications).***

It is acknowledged that implementing such a system would require a substantial shift from the current framework and the manner of transition is very important. During the transitional period, it would be necessary to ensure existing employees are protected against unilateral changes to their terms and conditions or termination because of their entitlement to them. Bargaining for agreements would ensure that any changes to existing conditions would have to be negotiated and agreed. For new employees, terms and conditions would be set against the safety net and prevailing industry standards. Both employers and employees would be able to approach the task of agreeing terms and conditions of employment using a safety net that is easier to understand and easier to comply with.

The New Zealand Government pursued a workplace relations reform agenda with the passage of the *Employment Contracts Act 1991*. New Zealand's system had been similar to Australia's, based on an historical system of compulsory arbitration. The New Zealand reforms resulted in the abolition of the New Zealand award system and introduction of non-collective bargaining, with immediate effect. The system retained a number of employee protections, including legislated minimum standards which could not be bargained away, grievance procedures for employees and unlawful dismissal protections.

ACCI's proposal represents fundamental change but it is submitted in response to the task before the Productivity Commission. A key consideration is to mitigate unforeseen impacts through **appropriate transitional arrangements which are as simple as possible to comply with and administer.**

Every policy change will have a consequence and in the context of our changing economic conditions, a shift toward a less prescriptive, decentralised system will have adjustment impacts. While adjustments to the safety net may result in varied entitlements for those who are already in employment, such a policy shift will support the growth of total labour incomes through connecting a larger pool of people to paid employment. It presents challenges for the current participants within the system because a key driver is addressing the needs of the unemployed and underemployed who currently sit outside the system. However such a policy shift would deliver net economic and social benefits because participation in paid

employment is central to our economic and social goals. As noted by former Prime Minister Gillard:

Life is given direction and purpose by work. Without work there is corrosive aimlessness. With the loss of work comes a loss of dignity. Believing in the important of jobs for all who seek them – of work in every household – is deep in our own national culture and deep in my Government's beliefs.”²⁰⁶

3. ISSUES PAPER 3: THE BARGAINING FRAMEWORK

3.1 The evolution of bargaining in Australia

Enterprise bargaining at the federal level derives its genesis from the *Industrial Relations Act 1988* via recognition of consent awards and certified agreements. The Keating Government's passage of the *Industrial Relations Legislation Amendment Act 1992* served to further facilitate enterprise level certified agreements made by unions and employers. The second reading speech to the *Industrial Relations Reform Act 1993* captured the Keating Government's desire to move to “a system based primarily on bargaining at the workplace, with much less reliance on arbitration at the apex”.

Although the employer community harboured concerns that elements of the reforms reflected bias towards trade unions, the policy direction toward a decentralised system was welcome and, on the face of the legislation, awards were intended to take on a subordinate role as a safety net of minimum wages and conditions which underpinned direct bargaining. The Keating Government's *Industrial Relations Reform Act 1993* and the Howard Government's subsequent reforms in the WR Act progressed the reform agenda, shifting the focus from a centralised system of setting wages and working conditions towards a more enterprise and workplace based system. These reforms played a positive role in improving firm productivity, efficiencies and overall levels of employment across the Australian economy.

Whilst there have been many reforms over the last two decades most have retained core concepts of collective bargaining underpinned by a safety net, with protected industrial action only sanctioned in limited circumstances. However significant legislative change made to the national workplace relations laws by the Rudd Government's FW Act shifted the reform direction. Some key elements of the former reforms have been retained in the FW Act, including a national system for the private sector predominantly based on the corporations power of the Australian Constitution, prohibitions on unlawful industrial action during the life of an enterprise agreement, secret ballots authorising industrial action, prohibitions on industrial action when pattern bargaining occurs, secondary boycotts, and strike pay.

²⁰⁶ Prime Minister Julia Gillard, Robert Garran Memorial Oration, Institute of Public Administration 26th August 2011.

The OECD's 2008 Economic Survey of Australia noted:

*The simplification and gradual decentralisation of industrial relations since the early 1990s has made the economy more resilient. But the pursuit of reforms towards a greater individualisation of labour relations, following the WorkChoices Act in March 2006, did stir much controversy, because of equity concerns. [...] While equity concerns need to be addressed, care should be taken not to undermine labour market flexibility. To maintain a close link between productivity gains and wages, the future organisation of collective bargaining must remain within the company framework, as recognised by the government. Harmonising the system of industrial relations across the states is an important goal, but the result must not be alignment on the most restrictive standards.*²⁰⁷

Whilst the FW Act advanced ACCI's long standing policy priority of creating a national industrial relations system for the private sector, other changes represented a shift back toward centralisation and introduced inflexibility at the enterprise.

3.2 The system's challenges for small business

The FW Act has significantly constrained the capacity for small business to implement agreements appropriate to the nature of a particular enterprise and the individuals working within it. The FW Act facilitates a significant shift in the framework back toward a system promoting collective bargaining only and which is characterised by increased regulation of minimum terms and conditions, an expanded role of the unions and a formalised approach to agreement making.

Bargaining measures introduced by the FW Act which strengthened the position of unions at the bargaining table represented a direct response to the Howard Government's WorkChoices Laws that had made significant changes to the industrial relations landscape when they took effect in 2006. Those changes, introduced via the *Workplace Relations Amendment (Work Choices) Bill 2005*, had sought to facilitate increased use of the statutory individual agreements that had been a feature of the system from the commencement of the WR Act, further reduce third party interference and continue the simplification of the award system.

Importantly, the individual agreements provided employers with increased flexibility as to the terms and conditions on which they could employ people. These agreements overrode collective agreements, could be negotiated without union involvement and existed as an effective means to limit unwanted third party interference at the workplace and in the employment relationship. The process for registering individual agreements was a simple one with agreements lodged with the Office of the Employment Advocate (which became the Workplace Authority). Agreements would start operating from the point of their lodgement without being

²⁰⁷ OECD, "[Economic Survey of Australia](#)", *Policy Brief*, 2008, p. 8.

subject to a complex approval process. Employers were required to make and lodge a declaration stating that the agreement satisfied the statutory requirements and agreements could still become effective and registered if the pre-lodgement procedure had not been strictly adhered to.

The FW Act introduced significant changes to workplace bargaining including:

- the establishment of FWA to facilitate workplace bargaining and the making of agreements, including through:
 - making bargaining orders and dealing with bargaining disputes; and
 - assessing and approve agreements by ensuring that employees covered by an agreement are better off overall against an expanded safety net of modern awards and NES;
- providing employees and employers with the right to appoint representatives in negotiations for a proposed agreement;
- making the union the default bargaining representative for its members;
- restricting the capacity to bargain with individuals in favour of collective bargaining.

The FW Act set out to create “a national workplace relations system that is fair to working people, flexible for business and promotes productivity and economic growth”.²⁰⁸ However small businesses have not benefited from the promise of flexibility and productivity as collective bargaining does not address the specific needs of small businesses. ACCI made the following observations in the context of the WR Act, stating in the ACCI Policy Blueprint:

A two tier system may be emerging:

A range of unionized and/or larger enterprises that are successfully benefiting from bargaining. They have the resources and can on a cost-benefit basis, access the expertise/invest the time necessary to successfully use available bargaining options.

*Other employers, especially smaller businesses, are left to use an increasingly unsuited award system or rely solely on unregistered arrangements. They lack the expertise and resources to successfully use available bargaining options. They may also lack the margins to justify the costs of formal bargaining under the current system.*²⁰⁹

The effects of excessive employment regulation are strongly felt by small businesses. Individual agreements are an attractive option for small business employers seeking greater flexibility with respect to terms and conditions of employment in order to meet the needs of individual and the business. This is particularly so in industries where the industrial awards had, as a consequence of a long history of arbitration, evolved to become highly complex, prescriptive and inflexible instruments. The

²⁰⁸ Explanatory Memorandum , *Fair Work Bill 2008* (Cth).

²⁰⁹ Australian Chamber of Commerce and Industry, *Modern Workplace: Modern Future - A Blueprint for the Australian Workplace Relations System 2002-2010* (2002) 49
<http://www.acci.asn.au/text_files/blueprint/Chapter3.pdf> at 24 June 2010.

individual agreements available under the WR Act, AWAs, represented a popular option for addressing these issues and the Office of the Employment Advocate estimated that there were 794,000 'live' AWAs at 30 June 2007.²¹⁰

The option of individual statutory agreements was removed following the introduction of the FW Act and those covered by existing agreements have reverted back to complex, burdensome and inflexible award conditions that are largely reflective of the conditions of the very pre-modernised instruments that employers and employees had sought to move away from.

So what is the alternative? Employers that do not want to negotiate an enterprise agreement with employees, and would prefer to deal with employees on an individual basis, may choose to explore the option of and IFAs that allow for variations to the instrument to meet the individual needs of employers and employees. However the award terms that can be vary under an IFA are limited to:

- arrangements for when work is performed (such as working hours);
- overtime rates;
- penalty rates;
- allowances; and
- leave loading.

An employer cannot ask a prospective employee to agree to an IFA as a condition of employment and an employee covered by an IFA must also be "better off overall" when the IFA is compared to the prescriptive award terms. As well, the potential subject matter of IFA's (such as arrangements for when work is performed) has been read narrowly and is constrained by the object of the FW Act providing that the safety net, including modern awards, cannot be undermined by statutory individual agreement making. Individual arrangements are permitted in a circumscribed way but not encouraged.

While IFA's are free from many of the procedural complexities associated with enterprise bargaining, they do not offer the same level of certainty and stability as they may be terminated unilaterally. An IFA which was made whilst the award applied will be extinguished by the commencement of an enterprise agreement. A practical difficulty associated with the IFA option may exist where all of the workers do not all agree to vary hours of work. It would be impractical for a small business employer to have employees working at different times when this does not meet the labour requirements for the site.

Accordingly, if an IFA does not provide the level of certainty and flexibility desired, an employer who does not wish to adhere to the prescriptive terms of the modern award will risks facing the repercussions of non-compliance or could seek attempt to seek flexibility within the collective bargaining framework.

Collective bargaining has traditionally served to address a perceived power imbalance between employers and employees when negotiating wages and terms

²¹⁰ Department of Employment and Workplace Relations, *Annual Report 2006-2007* (2007).

and conditions of employment.²¹¹ However imbalances in the FW Act bargaining framework give unions the upper hand in bargaining negotiations. The expanded role of the union during bargaining is a notable feature of the FW Act²¹² and represents a drift away from policies that encouraged the negotiation of both collective and then individual agreements in an environment that limited third party interference.

The Explanatory Memorandum of the *Fair Work Bill 2008* contemplated the expanded role of unions, stating:

*Employers and employees are entitled to appoint any person as their bargaining representative for a proposed enterprise agreement. Employers are required to take all reasonable steps to notify each employee of their right to be represented during bargaining. The Bill provides a more significant formal role for bargaining representatives in the bargaining process compared to bargaining agents under the WR Act.*²¹³

The FW Act provides that the union will automatically be the default bargaining representative for its members.²¹⁴ The only way to displace this assumed, entrenched position is for an employee to displace this default appointment in writing.

The small business employer is now more exposed to a union presence in bargaining negotiations, even if there is not a strong union presence in the enterprise. This is problematic for 'industrially uninitiated' small business operators, if faced with terms that may not be sustainable and do not deliver a productivity dividend.

The introduction of good faith bargaining requirements also represents significant regulatory change. If a majority of employees in the workplace want to bargain and the employer refuses to enter into negotiations for an agreement, the FWC has the power to determine whether there is majority support for bargaining and make orders requiring that the employer bargain with employees. Evidence relevant to the question of majority support may include evidence of union membership, petitions or a ballot of employees.²¹⁵ If bargaining representatives are not effectively bargaining together, the FWC also has the power to issue orders requiring the bargaining representatives to bargain in good faith. This will include satisfying a prescribed list of requirements that extend to:

²¹¹ R Welch, 'Into the twenty-first century – the continuing indispensability of collective bargaining as a regulator of the employment relation' in H Collins, P Davies and R Rideout (eds), *Legal Regulation of the Employment Relation*, 2000, Kluwer Law International, The Hague p 585, 619.

²¹² Rae Cooper and Bradon Ellem, 'Fair Work and the Re-regulation of Collective Bargaining', (2009) 22 *Australian Journal of Labour Law* 284 [27].

<http://www.lexisnexis.com.ezproxy1.library.usyd.edu.au/au/legal/results/docview/docview.do?docLinkId=true&risb=21_T9631960687&format=GNBFULL&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T9631960690&cisb=22_T9631960689&treeMax=true&treeWidth=0&csi=267868&docNo=4> at 21 June 2010.

²¹³ Explanatory Memorandum, *Fair Work Bill 2008* (Cth) [684].

²¹⁴ *Fair Work Act 2009* (Cth) s 176.

²¹⁵ Explanatory Memorandum, *Fair Work Bill 2008* (Cth) [r.166].

- attending and participating in meetings at reasonable times;
- disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- responding to proposals made by other bargaining representatives in a timely manner;
- giving genuine consideration to the proposals of other bargaining representatives and providing reasons for responses to those proposals; and
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.²¹⁶

In the technical sense, bargaining orders do not require bargaining representatives to make concessions or sign up to an agreement where they do not agree to the terms of the agreement. If bargaining representatives cannot agree regarding agreement content, they may agree to abandon negotiations and continue to observe existing arrangements (an unlikely consequence if the union is involved), take protected industrial action or seek the FWC's assistance through mediation, conciliation or in determining a settlement. However in a practical sense, businesses may find themselves agreeing to terms that produce a 'least worst case' outcome.

In small business environments businesses operators and employees work alongside each other in a necessarily collaborative environment. They communicate regularly and become very aware of each other's personal circumstances and the circumstances of the business. However collective bargaining under the current system has the potential to erode collaborative approaches by encouraging the involvement of a third party in the negotiations pursuing a largely pre-determined industrial agenda that does not appropriately consider the needs of the particular business or the individuals working within that business.

3.3 Pattern bargaining

In industries with a prevalence of complex contracting arrangements, collective bargaining is often initiated between the principal contractor and a union and may be instigated by a particular project. It is common for unions and the principal contractor to have those provisions flowed on to other businesses in the chain of contracting who are working on site. This presents an opportunity of the union to reach out to potential members in the negotiation of terms and conditions of employment. For the principal contractor, bound by their contractual obligations to the client and investors to complete a the project by a particular time, to a particular standard and for a fixed price, such approaches represent a means of reaching consensus as to what wages and conditions will apply and if their contractors enter into a similar arrangement, the risk of industrial action or disruption that may create a contractual liability is minimised.

The difficulty with this situation is that the terms and conditions of the agreement that are intended to be flowed on down the chain of contracting have been negotiated based on the needs and bargaining position of the principal contractor's

²¹⁶ *Fair Work Act 2009* (Cth) s 228(1).

workplace and, to a greater extent, the default bargaining position of the union. This conduct may be described as “pattern bargaining”. The FW Act provides that a course of conduct by a person is pattern bargaining if:

- the person is a bargaining representative for two or more proposed enterprise agreements; and
- the course of conduct involves seeking common terms to be included in two or more of the agreements; and
- the course of conduct relates to two or more employers.²¹⁷

However the FW Act also clarifies that a bargaining representative does not engage in pattern bargaining if the bargaining representative is genuinely trying to reach an agreement with an employer.²¹⁸ Some commentators have interpreted this to mean that the FW Act was not intended to and does not prevent bargaining representatives from making common claims and engaging in pattern bargaining (according to the ordinary understanding of that term) provided that are ‘prepared to genuinely reach agreement with each individual employer’.²¹⁹

A number of factors are relevant in considering whether a bargaining representative is genuinely trying to reach an agreement with a particular employer including:

- whether the bargaining representative is demonstrating a preparedness to bargain for the agreement taking into account the individual circumstances of that employer, including in relation to the nominal expiry date of the agreement;
- whether the bargaining representative is bargaining in a manner consistent with the terms of the agreement being determined as far as possible by agreement between that employer and its employees;
- whether the bargaining representative is meeting the good faith bargaining requirements.²²⁰

Despite the attempted limitation on pattern bargaining via the requirement to genuinely try to reach agreement, pattern bargaining remains a prominent feature of some industries. The Construction Forestry Energy and Mining Union (CFMEU) has promoted common terms that exist within the agreements it negotiates, stating that for the period 2009-2011 over 90% of its enterprise agreements are identical, with a small number containing either higher or lower benefits, depending on the sector/trade.²²¹ This is not only indicative of strong evidence of a pattern bargaining approach in the construction industry but also demonstrates the bargaining strength of the union in negotiations relative to the employers with whom it is bargaining.

²¹⁷ *Fair Work Act 2009* (Cth) s 412(1).

²¹⁸ s 412(2).

²¹⁹ Cooper, Rae and Ellem, Bradon, ‘Fair Work and the Re-regulation of Collective Bargaining’, (2009)

22 *Australian Journal of Labour Law* 284 [48].

²²⁰ s 412(3).

²²¹ Construction Forestry Energy and Mining Union, *CFMEU EBA Summary 2009-2011* (2009) < <http://www.cfmeunsw.asn.au/member-services/wages-information/eba> > at 13 March 2015.

ACCI has made it concerns regarding pattern bargaining known, stating in the ACCI Policy Blueprint:

*It remains a concern that many employers are bargaining based substantially on union agendas, particularly where unions are disproportionately strong, or where employers are new to the bargaining system. Such approaches can be counterproductive e.g. employers agreeing unsustainably high redundancy pay that cannot then be properly financed.*²²²

The notion of pattern bargaining fails to accommodate the competitive environment in which small businesses operate. Small businesses have limited capacity to absorb the cost impacts of high wage increases and the accompanying effects on employment on-costs such as workers compensation, superannuation and payroll tax. Any bargaining claims must be carefully considered in the context of the economic climate and circumstances of an individual business to ensure the ongoing viability of a small business. Pattern bargaining running counter to such considerations is inherently anti-competitive.

The pre-determined outcome of pattern bargaining does not sit well in this context and the framework needs to provide protection from pattern bargaining beyond what currently exists within the FW Act.

3.4 The procedurally complex nature of collective bargaining

The inability of employers and employees to enter into individual agreements has seen some businesses attempt to address the lack of flexibility within the current system via collective bargaining. This has resulted in employers being forced into procedurally complex, costly and sometimes very public negotiations relating to collective agreements, once bargaining has been initiated. In this regard, the current system of bargaining does not contemplate the lack of resources and expertise available to small business.

In the early stages of industrialisation, collective bargaining evolved as a means of overcoming unilateral decision making by employers and the weak bargaining position of employees.²²³ Collective bargaining sometimes occurred at the industry level but was also prevalent in manufacturing enterprises that were typically large businesses with large groups of wage earners.²²⁴ The small business proprietor is not contemplated in commentary concerning the evolution of collective bargaining because collective bargaining did not arise in this context. Bargaining concerned the ability of large groups of workers to take coordinated industrial action.

²²² Australian Chamber of Commerce and Industry, *Modern Workplace: Modern Future - A Blueprint for the Australian Workplace Relations System 2002-2010* (2002), p. 51.

²²³ Bamber, G and Sheldon, P, 'Collective Bargaining: An International Analysis' in R Blanpain, *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, (9th ed) 2007, Kluwer Law International, The Hague, pp 585-631, p. 590.

²²⁴ *ibid*, p. 591.

In the modern era, while larger business may have a dedicated team of human resources and industrial relations specialists representing the business during discussions, small businesses will not typically have access to such resources, nor do they have the time or expertise to dedicate to the complex processes themselves. Equally, they may not be able to fund the engagement of external consultants to represent them during negotiations. The cost of bargaining can take its toll on the profitability of small businesses and they are much more limited in the concessions they can viably make during bargaining.

The FW Act 2009 has introduced processes and steps that an employer must follow to make an enterprise agreement that are highly prescriptive. The good faith bargaining rules prescribe requirements to attend and participating in meetings at reasonable times; disclose relevant information (other than confidential or commercially sensitive information) in a timely manner; respond to proposals made by other bargaining representatives in a timely manner; give genuine consideration to the proposals of other bargaining representatives and provide reasons for responses to those proposals have already been considered above. This in itself creates a paperwork burden for businesses as they will need to carefully document the discussions and provide carefully considered written responses to claims.

However, in addition to these rules that regulate negotiations, there are a number of prescriptive administrative requirements including the requirement:

- for an employer to provide employees with notification of their bargaining representation rights as soon as practicable and no later than 14 days of initiation of bargaining;
- that an employer not conduct a vote to approve an enterprise agreement until at least 21 days have passed since the notification of the right to representation during bargaining has been distributed;
- that employees be given at least seven days' notice of the vote to approve the enterprise agreement. The employees must also be given a copy of the agreement and any material referenced in the agreement.

Under the current model, businesses that decide to implement an enterprise agreement are at high risk of failing to meet the procedural requirements and having their agreements rejected. This can be a costly and resource intensive dilemma in itself and the public nature of such applications and their subsequent rejections may also expose small businesses to regulatory or union intervention.

Agreements made under the WR Act could still become effective and registered even if the pre-lodgement procedure had not been strictly adhered to. However the FWC has demonstrated a reluctance to approve an agreement if the pre-lodgement requirements have not been complied with, despite the approval of the agreement by majority of employees and notwithstanding that the requirements regarding content may have been met. While the Explanatory Memorandum to the FW Act specifically noted the previous Government's intention to make the new legislation 'simple and straightforward to understand' this is not the case with the bargaining provisions.

In addition to the procedural rules, the regulation attached to the content of agreements and administration of the BOOT can be equally as problematic. Revision of the criteria and assessment of an agreement may be necessary for small business employers seeking to access greater flexibility. This should involve a reassessment of the minimum statutory criteria that cannot be compromised via bargaining or for which compensation must be provided.

The bargaining framework under the FW Act is not sufficiently calibrated to drive productivity improvement at the enterprise level. This is a consequence of third party interference, limited bargaining options and limited capacity of small and medium businesses to resist the largely pre-determined industrial agenda of the unions. Further protections against unwarranted third party interference will be necessary to ensure the ongoing business viability and encourage growth in employment. **There is a clear case for reinstating the option of individual agreement making.**

In order to make bargaining more available to a broader range of employers, changes to the system are necessary to minimise the paperwork burden and streamline the procedural and administrative requirements. Furthermore, the failure to satisfy paperwork and procedural requirements should not, of itself, be a barrier preventing approval of an agreement where agreement has been reached.

Changes to the test underpinning bargaining may assist in addressing the practical difficulties in the application of the BOOT. There is merit in an approach that would displace the awards as the basis for the test in favour of clear and simple minimum statutory standards, particularly given the process of award modernisation merely consolidated the content of the pre-modern instruments.

It is essential that workplace bargaining be made more appropriate for small business to allow for an environment in which employees and employers are encouraged to negotiate employment conditions in exchange for increases in productivity.

3.5 Current limitations of the system

As has been noted, the award system restricts the capacity of firms to structure their business arrangements in the most efficient and productive manner and this contributes to less than optimum labour market performance. The system must offer viable alternative mechanisms for setting wages and conditions. The previously cited FWC Small Business Study made the following observation:

A key challenge for these small business operators was that there did not seem to be a modern award that clearly represented the type of activities of their employees. Participants stated that employees of small businesses are often required to multi-task and do not fit into neat or clear categories. For example, the same employee in a café could be part chef, part wait staff and part dish hand. This raised the key question for some participants of whether the modern awards were actually relevant to their business. Classification remained difficult even where an employee could be allocated to the role in

*which they perform the majority of their work, as this could still change depending on, for example, work flow, or peak times versus off-peak times.*²²⁵

The system must offer viable alternative mechanisms for setting wages and conditions for small business.

AWAs existed as a bargaining option between 1996 and 2009 until the commencement of the FW Act. Employers also had the ability to make union and non-union collective agreements and the WorkChoices Laws also provided for employer greenfield agreements.

Current agreement making options are covered in particular detail in Part 2-4 of the FW Act but they do not include individual agreements or employer greenfield agreements. A modern, flexible WR Framework needs a full suite of agreement making options.

For the reasons set out earlier in this submission, enterprise agreements are not the dominant mode of engagement for small business employers and their employees.²²⁶ Sectors in great need of flexibility such as retail trade and accommodation/food services have a concentration of small business employers.²²⁷ For example, the Productivity Commission has observed that retail businesses are small businesses with almost half of employing businesses employing four or less workers. Conversely, the largest retailers (employing more than 50 workers) only represent four per cent of employing retail businesses.²²⁸ The collectivist focus of the system limits the capacity of small businesses to enter into other arrangements to meet mutual interests.

The FW Act's current focus on union based collectivism means little to small business and is at odds with the low levels of unionisation in the private sector generally. The entrenchment of the union in the bargaining process, regardless as to whether this is reflective of the wishes of the majority of employees in a workplace, undermines direct and cooperative relationships between employers and employees. It makes no sense that the system can drive workplaces into conflict based adversarial processes that disrupt otherwise harmonious and productive workplaces while specifically discouraging and excluding direct engagement options.

In August 2013 ABS data indicated that 17 per cent of all employees were trade union members in relation to their main job.²²⁹ Trade union membership was higher in the public sector, with 42 per cent of all employees being members, compared with 12 per cent in the private sector.²³⁰

²²⁵ Sweeney Research for the Fair Work Commission, op. cit., p. 16

²²⁶ See [ACCI Submission in relation to the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the Fair Work Amendment \(Small Business Penalty Rates Exemption\) Bill 2012](#), p. 12.

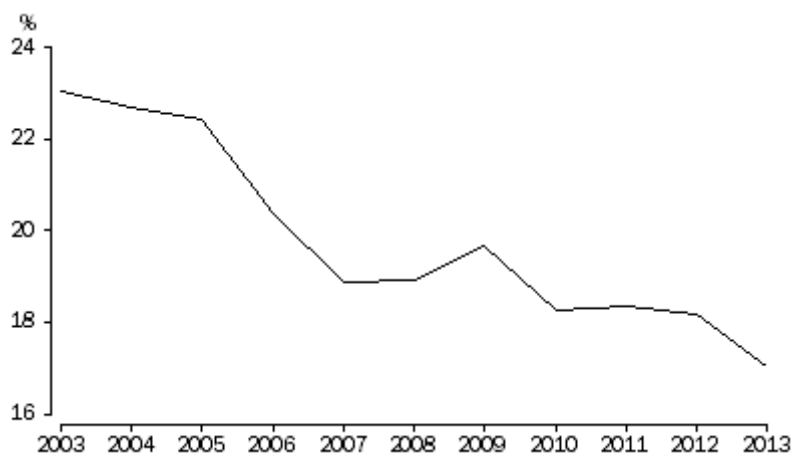
²²⁷ *ibid.*, p. 15.

²²⁸ Productivity Commission 2011, "[Economic Structure and Performance of the Australian Retail Industry](#)", Report no. 56, Canberra, p. 343.

²²⁹ Australian Bureau of Statistics, [Employee Earnings, Benefits and Trade Union Membership, Australia](#), August 2013 (cat. no. 6310.0).

²³⁰ *ibid.*

Proportion of employees with trade union membership in main job



Source: ABS, [Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013](#), cat. no. 6310.0.

Trade union membership is continuing a steady decline, as plotted in the graph above, yet bargaining options under the WR Framework have not reflected this trend. So much of the system is built around the notion that unions and their members will negotiate collectively with employers. The FW Act facilitates an extraordinary amount of third party involvement in bargaining processes as can be seen in the following areas:

- the default position of the union as an employee's bargaining representative unless the employee appoints an alternative in writing or resigns;
- the ability of the union to initiate bargaining despite the desires of the employer or a majority of both union and non-union member employees;
- the requirement for an employer to bargain in good faith with the union if bargaining has commenced and the capacity for unions to use the provisions in a way that indirectly initiates or triggers bargaining to catch out less industrially aware employees (many of whom are SMEs).²³¹

The absence of appropriate constraints on third party intervention has the potential to undermine positive engagement strategies at the workplace level.

The objects of the FW Act make it clear that the framework is hostile to individual agreements including by 'ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be a part of a fair workplace relations system'.²³² However there is no valid basis for such a ridiculous statement or hostility to individual agreements with a safety net underpinning them, particularly in an environment where the award system results in employers 'actively avoiding

²³¹ ACTU "Fair Work Bargaining Guide", Version 2.2 (11 March 2011). Accessed here: http://www.qcu.asn.au/index.php?option=com_content&view=section&layout=blog&id=12&Itemid=109

²³² Fair Work Act 2009 (Cth), ss 3(c).

engagement with the modern awards, despite being conscious that not acting in the appropriate manner could put them at risk'.²³³

Policy settings should support an environment in which parties are free to negotiate arrangements of mutual benefit, underpinned by an appropriate safety net, which facilitates the structuring of work arrangements in the most efficient and productive manner feasible. Appropriate mechanisms for the formation of simple, tailored agreements at the individual level will also aid in compliance.

3.5.1 The problems with Individual Flexibility Arrangements

The Productivity Commission has stated in Issues Paper 2 that there is “already some in-principle flexibility” under the modern awards system (and enterprise agreements) for employees and employers to negotiate individual agreements and seeks “views on the advantages and limitations of such (or other existing) approaches, and whether there could be alternatives approaches that are superior.”

The previous Government had promised that “each and every award will contain a flexibility clause that enables arrangements to meet the genuine individual needs of employers and employees”.²³⁴ The low utilisation of IFAs suggests they cannot effectively do so.

Employers have identified a number of deficiencies with IFAs including but not limited to:

- the inability to make IFAs a condition of employment;
- the ability to unilaterally terminate an IFA with notice;
- limitations on the scope of terms and conditions that can be individually negotiated.

A Fair Work Australia survey in 2011 indicated that only six percent of surveyed employers responded that they had used an IFA. The report of the FW Act Review Panel recommended changes to encourage and make it easier for employers and employees to enter into IFAs. The Productivity Commission has acknowledged ACCI’s concerns that employers have difficulty assessing with certainty whether a particular IFA meets the BOOT and the financial risk that this presents.²³⁵ The Productivity Commission has also acknowledged that some aspects of the system, such as the operation of the BOOT, may be inhibiting the adoption of flexibility enhancing provisions in the retail sector.²³⁶

Employers are discouraged from using IFAs to confer a non-monetary benefit on an employee in exchange for a monetary benefit in the manner contemplated by the

²³³ [A Qualitative Research Report on: citizen co-design with small business owners](#), prepared by Sweeney Research for the Fair Work Commission, August 2014, p. 16

²³⁴ [“Forward with Fairness: Labor’s plan for fairer and more productive Australian workplaces”](#), April 2007.

²³⁵ See Productivity Commission 2011, [“Economic Structure and Performance of the Australian Retail Industry”](#), Report no. 56, Canberra, p. 351.

²³⁶ Productivity Commission 2011, [“Economic Structure and Performance of the Australian Retail Industry”](#), Report no. 56, Canberra, p. 32.

FW Act's Explanatory Memorandum as there is an element of risk that they may be breaching the award terms should a court conclude that the IFA does not meet the BOOT as against all award conditions. A FWC Full Bench decision (considering multiple fast food employer agreements) has cast doubt that they can be used in this way when it ruled that a "preferred hours" clause (which allows an employee to nominate which hours it prefers to work, without paid penalty rates being applicable), was less beneficial than the award. These clauses were a feature in many approved pre FW Act agreements (both collective and individual agreements).

While amendments proposed in the *Fair Work (Amendment) Bill 2014* remain before Parliament and, if passed, will take steps to addressing some of the deficiencies in IFAs, it is neither desirable nor practical to require an employer, particularly a small business employer, to continually navigate a multiplicity of regulatory instruments in giving effect to employee entitlements. Individual agreement making underpinned by an appropriate minimum safety net would help to overcome this complexity.

3.5.2 How the bargaining framework must change

It is against this backdrop that required changes to the system are to be understood; changes which will impose constraints on third party intervention and provide greater ability for employers to flexibly manage and engage with their employees.

ACCI recommends:

- ***The reintroduction of statutory individual agreements to promote greater choice and flexibility;***
- ***A full suite of agreement options, including:***
 - ***Registered individual agreements;***
 - ***Employer-employee enterprise agreements;***
 - ***Employer-union enterprise agreements;***
 - ***Employer greenfield enterprise agreements;***
 - ***Employer-union greenfield enterprise agreements;***
- ***Revision of current bargaining processes which undermine the 'voluntary' nature of agreement making.***

During the PIR of the FW Act ACCI called out the need for the following specific changes which remain relevant in the context of the current WR Framework:

- ***amendments preventing a union from intervening in an approval proceeding if they are not a properly appointed bargaining representative of an employee and present during the bargaining process;***
- ***inclusion of a list of matters that do not pertain to the employment relationship, over which industrial action cannot be taken including matters relating to:***
 - ***independent contractors;***
 - ***work health and safety;***
 - ***right of entry;***

- *industrial action and “extra claims”;*
- *dispute resolution beyond what is in a model clause;*
- *a requirement for the FWC to assess agreements against a “productivity and competitiveness” criteria prior to approval;*
- *a requirement that the FWC provide 14 days for an employer to provide further information addressing concerns prior to rejecting the agreement;*
- *a requirement that the FWC consider the views of an employee representative prior to deciding not to approve an agreement (even if it does not pass the BOOT or offends on technical/procedural grounds). ACCI asserted that a failure to pass the BOOT should not override the view of the majority of employees;*
- *amendments to replace the current default bargaining rules which allow unions, even if having just one member in the workplace, to be automatically involved in the bargaining process with an ‘active bargaining agent’ process that ensures and employee is free to choose who they would like;*
- *an ability for employers to apply to the FWC to terminate bargaining in certain circumstances (e.g. bargaining is not proceeding efficiently due to multiple bargaining representatives, the bargaining representatives are not genuinely representing employees or are otherwise undermining bargaining).*

3.6 Industrial action

The Productivity Commission has suggested that in the contemporary setting “cooperative relations between employees and employers may be more important for innovation, technological diffusion and investments in skills – developments that are critical for future productivity, economic growth and adaptability”.²³⁷ This is a correct understanding. Agreement making based on cooperative relationships and recognition of genuine mutual interests is far more likely to generate positive and productive bargaining outcomes than conflict based approaches which threaten industrial action and negatively impact on workplace culture and relationships.

Industrial action is sometimes referred to as a circuit breaker, and that too is correct. The incidence and in many economic circumstances, the genuine threat of industrial action clears the bargaining table by bringing the focus onto the short term need for least cost resolution, rather than the longer term needs of the business.

Although the extent and longevity of the impact of industrial action will differ between workplaces and the particular experience of industrial action, there is little doubt that in its aftermath industrial action leaves damaged social relationships and antipathy after the action has ceased and any resulting agreement has commenced. Industrial action can undo years of patient culture building, a key to adaptable productive workplace relations. The FW Act freed up access to industrial action in comparison with the WR Act and the resulting loss of productive culture was particularly noticeable in workplaces where unions felt they had lost ground under

²³⁷ Issues Paper 1: Context, p. 4.

the WR Act and with the commencement of the FW Act took the opportunity to reassert themselves.

Policy changes addressing industrial disputes are required in proper recognition of the fact that industrial action really should be a last resort and confined to circumstances of legitimate bargaining activity.

Putting statutory rules around legitimate (protected) industrial action raises the question of whether there is or should be a right to strike, and if so what are appropriate constraints. The concept of a right to strike itself points to the fact that striking involves forms of action and economic objectives which are otherwise unlawful and do damage to the usual civil and economic rights of citizens. Those rights are intruded upon or curtailed and the unlawfulness of that is suspended.

Most countries provide a right to strike. Each country must tailor that right to its particular social and economic environment and the detail of its system of labour market regulation. This view is not without controversy. Apart from the extent to which political factors intrude upon sound policy formulation, there are also international treaty obligations which countries may subject themselves to.

Australia is signatory to the *International Covenant on Economic, Social and Cultural Rights, 1976*, (ICESCR) and 41 operating International Labour Organisation (ILO) conventions, including seven of the eight “fundamental conventions”.²³⁸

The ICESCR requires that signatory countries ensure the right to strike subject to that country’s laws, but does not qualify that right in any other way. It also requires that signatories to ILO Convention 87, *Freedom of Association and Protection of the Right to Organise, 1948*, (‘Freedom of Association Convention’) not observe the ICESCR so as to undercut the Freedom of Association Convention. Nonetheless, nowhere in Convention 87 is the explicit right to strike.

ILO conventions are supervised by its tripartite constituency through the Committee on the Application Conventions and Recommendations (CAS). CAS is reliant on the work of the Committee of Experts on the Application of Standards and Recommendations (CEACR) which reviews member country reports of their compliance. This system is supplemented by a complaints mechanism under which freedom of association complaints, which can involve complaints about the capacity to take industrial action, are generally referred to the Committee on Freedom of Association (CFA). The CFA is established by the ILO’s Governing Body, but does not itself administer the observance of conventions.

The question of whether there is an implicit right to strike contained in the Freedom of Association Convention, and its limits (which over time have been interpreted and given increasingly broad reach by the CEACR), and the question of whether the CEACR has any proper capacity to significantly interpret conventions, have been the subject of intense disagreement amongst employers and workers at the ILO, coming to a head over the past three years. Unions have argued that the right to strike arises

²³⁸ Taken from ILO website:

http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102544

by implication from two ILO conventions: mostly their focus is on the Freedom of Association Convention but also on Convention 98, *Right to Organise and Collective Bargaining Convention 1949*, (Right to Organise Convention).

Australia's legacy of legislation based on the conciliation and arbitration power meant that there was no nationally legislated right to strike for most of the twentieth century. Constitutionally, conciliation and arbitration was seen to provide an alternative to taking industrial action to break the deadlock. Nevertheless, the 1993 System allowed for the first time at the federal level, the taking of protected industrial action in specified circumstances. Protected industrial action could be taken by employees or employers (i.e. in the form of a lock out) and was linked with the following requirements:

- the existence of an industrial dispute;
- a bargaining period initiated by an employer or trade union by giving written notice (accompanied by details to be dealt with in an agreement) to the other party and the IRC that it intends to negotiate a certified agreement.

A body of complex and detailed case law has since developed in relation to industrial action and employers have expressed concern at the absence of sufficient "safety valves" in the current system to enable an employer (or an affected third party) to prevent threatened industrial action or to stop protected industrial action that is damaging it or a third party.

The current agreement making system and rules relating to industrial action²³⁹, as interpreted and applied, has given unions the ability to by-pass good faith bargaining and threaten protected strike action at an early stage in making demands.²⁴⁰ This is at odds with assurances the previous government gave regarding how the good faith bargaining provisions would operate and at odds with the notion of good faith bargaining itself. ACCI has called for amendments to the system that would ensure protected strike action can only be a final resort in intractable disputes.

The threat of protected industrial action has adverse economic consequences, including undermining the quality of wage settlements and the capacity to secure productivity trade-offs in those settlements. This can have the effect of producing ...

By expanding the range of matters over which a union can demand an agreement, the fair work system has expanded the circumstances in which industrial action can be taken. ACCI has consistently called for the reinstatement of earlier constraints on industrial action.

ACCI has also expressed concerns about unions by-passing the majority support determinations and threatening to take industrial action to force the employer to the bargaining table. A modern WR Framework should not be skewed towards providing unions with powers that compel bargaining to occur, particularly where this is not reflected by the majority employees of the workforce.

²³⁹ See particularly Part 2-4 (Enterprise Agreements) and Part 3-3 (industrial Action) of the *Fair Work Act 2009* (Cth).

²⁴⁰ *JJ Richards Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53.

Without voluntary bargaining, the real risk is that employers can be held to ransom by powerful union officials, particularly if they have strong bargaining power and the employer requires commercial/industrial stability for projects or its operations. There is also the risk that enterprise agreements which are reluctantly agreed to by employers will not be in the mutual interests of the employer and employees.

ACCI policies have reflected the following principles:

- *“Industrial action is an extreme industrial weapon that should only be used as a last resort within the bargaining system. There should be no unfettered right to take industrial action. Recent extensions of the right to strike in Australia must be reversed. The intended boundaries to the right to strike laws when created in 1993 and 1996 should be restored”;*
- *“It should only be possible to take protected industrial action within the context of genuine bargaining over proposed enterprise agreements and after all alternative approaches have been exhausted”;*
- *“The law does not, nor should it, compel the taking of industrial action. Almost all agreement making should proceed on a consensual basis without strikes or the threat of strikes being used as a coercive tool”;*
- *“There should be no scope for protected industrial action to be taken in support of industry wide pattern bargaining that is not accompanied by genuine workplace bargaining”;*
- *“There should be no scope for protected industrial action to be taken in support of demands of claims that do not pertain directly to the employer/employee relationship – that is, only claims for wages and employment conditions between employers and employees”;*
- *“Industrial action should only take place with the genuine consent of employees, preferably by effective secret ballot”;*
- *“Remedies for unlawful industrial action must be readily accessible and effective”.²⁴¹*

These principles remain relevant today.

²⁴¹ ACCI, “Modern Workplace: Modern Future – A Blueprint for the Australia Workplace Relations System 2002-2010”, 2002, p.p. 94-95.

ACCI recommends changes to ensure that industrial action can be suspended and terminated to avoid unwarranted damage to employers, employees and the wider community, including changes:

- ***providing that industrial action cannot be taken unless the union obtains majority support of all workers in circumstances where an employer refuses to bargain;***
- ***providing that unions must particularise their claims and provide this to employers prior to applying for a protected action ballot;***
- ***providing that industrial action cannot be taken over “non-pertaining employment matters”;***
- ***to require applicants for a protected action ballot to demonstrate that they are meeting all Good Faith Bargaining obligations;***
- ***to help prevent industrial action in circumstances where claims are not in the public interest via a new “public interest” criteria”;***
- ***to build a ‘safety-valve’ by way of a cooling off period which allows the bargaining process to be re-set following damaging industrial action;***
- ***to render unlawful threats of violence, intimidation, coercion or duress at picket lines, associated with protected or unprotected industrial action;***
- ***that prevent industrial action in support of pattern bargaining.***

The current protected industrial action provisions are circumvented in a number of ways. These include taking action to support claims for matters which are not permissible, and also as raised by Productivity Commission there is the question of “aborted strikes”.

3.7 Aborted strikes

An aborted strike occurs when promised industrial action is not delivered or is curtailed after the employer has put its mitigation strategies in place. The effect is that the employer bears the costs of the mitigation strategy together with the wages of the employees who precipitated the need for mitigation and whose labour is unnecessary because of the mitigation action which was taken.

One principle which has underpinned the statutory right to strike in federal legislation since its introduction is that the employer should not, and should not be coerced into, paying employees for periods of industrial action. Imposing industrial action should not be costless on the party imposing it, otherwise there will be less constraint in its use. Aborted strikes offend this principle.

Aborted strikes also do lasting cultural damage. When industrial action is seriously on the table the parties have moved or are pushed away from needs-based discussions into rights-based approaches. They are now seeking to maximise their capacities within the rules. Aborted strikes are a gaming of the rules which leave a victor which put one over the employer and engaged in successfully costless industrial disruption and an employer damaged by technically lawful but unfair disruption.

There is no easy measure of how extensive aborted strikes are because they do not show up as industrial action and would not be distinguishable if they did. There are few remedies for employers which means there are few recent cases. However, they were quickly recognised as a capacity in the system after the FW Act commenced.

In 2009 following a sequence of aborted strikes, Boral Resources (NSW) Pty Ltd sought a “good faith” bargaining order (s 229) directing that the union not notify industrial action it was not intending to take and an order under s 418 directing that the union not take unprotected industrial action (i.e. notifying and then aborting industrial action).²⁴² Both actions failed and failed again on appeal.²⁴³ This illustrates how prescriptive, technical and counterproductive the provisions regulating protected action have become.

Aborted strikes are an unattractive consequence of the bargaining regime. Although they do not offend the letter of the good faith bargaining principles, aborted strikes are against the spirit and only undermine the credibility of the relevant bargaining representative(s) employing them as a tactic.²⁴⁴ While there are situations where after industrial action has been advised both sides agree that the notified industrial action should not proceed or not proceed at the advised time, this is not a feature of the aborted strike tactic.

That fact should be the basis of a statutory remedy for aborted striking. Where there is agreement about the postponement or abandonment of notified industrial action no consequences should follow. Where notified industrial action is unilaterally cancelled or postponed, the period of the notified industrial action should be treated as such.

4. ISSUES PAPER 4: EMPLOYMENT PROTECTIONS

4.1 Unfair dismissal laws

ACCI seeks an exemption from the unfair dismissal laws for businesses employing less than 20 employees with casuals engaged on a regular and systematic basis and employees employed by associated entities of the employer to be included in the headcount.

²⁴² *Boral Resources (NSW) Pty Ltd v The Australian Workers' Union*, [2009] FWA 1412

²⁴³ *Boral Resources (NSW) Pty Ltd* [2010] FWA 1771. [This has been cited in at least 6 matters before the Commission since, but these subsequent cases concern proper notice, and none concerns aborted strikes.](#)

²⁴⁴ Para 15, [2010] FWA 1771.

The reasons for this recommendation and the other suggested reforms that would to apply to employers that would remain within the unfair dismissal jurisdiction include:

- The Small Business Fair Dismissal Code (SB Code) is of limited value to small business because reliance upon it is open to challenge, with a small business employer required to provide evidence of compliance with the SB Code if the employee makes a claim for unfair dismissal to the FWC.
- There has been a 30 per cent increase in unfair dismissal claims made per annum since the commencement of the FW Act and about a quarter of unfair dismissal applications conciliated involve a business with less than 20 employees.
- The existence of a valid reason for termination is easily relegated in importance due to the FW Act's emphasis on process and the vesting of a broad discretion in the decision makers. ACCI does not believe the unfair dismissal processes are delivering a 'fair go all round' to both employers and employees.
- The broad discretion also results in different decisions being made in applications dealing with similar scenarios thus creating uncertainty for employers.
- 'Go away money' is an entrenched part of the system. Three quarters of matters conciliated settle with a monetary payment and 80 per cent of employers are influenced by the desire to avoid the cost, time, inconvenience or stress of further legal proceedings in choosing to settle rather than proceeding to an arbitrated outcome. Employers make commercial decisions to dispense with applications rather than incur further expenditure defending a claim.
- Apart from the actual cost of managing difficult or poor performing employees, there are costs associated in the management of the termination in both contested and uncontested contexts.
- Behavioural economics can impact on the way in which the unfair dismissal laws weigh on employers' minds. The unfair dismissal laws impacts operate to reduce fairness and equity in the following ways:
 - recruitment and selection decisions are being influenced, resulting in greater use of fixed term contracts, the employment of more casuals, family and friends and fewer permanent staff and the adoption of longer probationary periods;
 - there are certain types of job applicants less likely to be employed including candidates who have changed jobs a lot for no apparent reason, or who are currently unemployed or who are long-term unemployed;
 - employees who do not appear to be a good fit with a new employer are more likely to be dismissed during the probationary period. This in turn might have the effect of reducing the employee's chance of securing future work because of the disincentive to hire candidates with a history of changing jobs several times for no apparent reason;
 - the laws make it less likely that an SME will hire long-term unemployed candidates;

- the increased formality and written documentation that is required by the laws may disadvantage employees more suited to less formal supervision or less literate than average.
- The impact of unfair dismissal laws on workforce management and culture materialises in reduced management authority, more time spent in resolving performance issues, poor performing employees having a corrosive impact on others and greater formality leading to difficulties in communication between management and employees.
- It has previously been estimated that the existence of the unfair dismissal laws had increased business costs, with the lower bound of estimates putting the total at \$1.3 billion per annum and have reduced employment by at least 0.46 percent (about 46,000 persons).

4.1.1 Background

The *Industrial Relations Reform Act 1993* introduced the federal system of protection against unfair dismissal closely modelled on the ILO Termination of Employment Convention (1993 System). The jurisdiction was jointly administered by the AIRC and a newly established Industrial Relations Court of Australia.

Under the 1993 System, it was unlawful to terminate an employee's employment unless there was 'a valid reason, or valid reasons, connected with the employee's capacity or conduct or based on the operational requirements of the undertaking, establishment or service.'²⁴⁵ The employer bore the onus of establishing there was a valid reason. If the reason or reasons related to the employee's conduct or performance, there could be no dismissal unless the employee had been given the opportunity to defend herself/himself against the allegations or the employer could not reasonably have been expected to have given the employee the opportunity.²⁴⁶

A reason would not be valid if the employee could establish the termination was harsh unjust or unreasonable, having regard to the employee's capacity and conduct and the operational requirements.²⁴⁷

The AIRC dealt with applications under the 1993 system by conciliation and, by consent, arbitration. Where conciliation did not produce a settlement or there was not arbitration by consent, the application would be dealt with by the federal Industrial Relations Court. The Court could only deal with matters where the applicant was employed under an award or, if award free, not earning more than \$60,000 per annum. The compensation that could be awarded was capped at 6 month's salary or \$30,000 for non-award employees.

Therefore, under the 1993 System there firstly had to be a valid reason. The reason would not be valid if the termination was harsh unjust or unreasonable. Secondly, procedural fairness was required.

²⁴⁵ *Industrial Relations Reform Act 1993* s170DE (1) .

²⁴⁶ s170DC.

²⁴⁷ s170DE (2).

ACCI had concerns about the emphasis on procedural fairness in these provisions, expressing the view:

“ACCI considers that procedural fairness should be seen as a means to the end of ensuring that termination decisions are not unfair. It should not be seen as an end in itself, as it is under the present Act. At present, even if a decision to terminate employment is substantively ‘fair’ on the facts of the employee’s conduct, employers can be ordered to pay compensation to employees terminated without being given written warnings or an opportunity to be heard.”²⁴⁸

ACCI sought a reduced emphasis on the procedural fairness requirements in the 1993 System so that employees who should have been dismissed for a valid reason did not receive compensation simply because a procedure was not followed.

The WR Act made a number of changes to the jurisdiction. The Industrial Relations Court was abolished, with unlawful termination cases to be heard by the Federal Court and the ‘harsh, unjust or unreasonable cases’ to be heard by the AIRC. The ‘termination of employment’ division of the WR Act was given its own objects which provided:

“170CA(1) *The principal object of this Division is:*

- (a) to establish procedures for conciliation in relation to certain matters relating to the termination or proposed termination of an employee's employment in certain circumstances; and*
- (b) to provide, if the conciliation process is unsuccessful, for recourse to arbitration or to a court depending on the grounds on which the conciliation was sought; and*
- (c) to provide for remedies appropriate to a case where, on arbitration, a termination is found to be harsh, unjust or unreasonable; and*
- (d) to provide for sanctions where, on recourse to a court, a termination or proposed termination is found to be unlawful; and*
- (e) by those procedures, remedies and sanctions, and by orders made in the circumstances set out in Subdivisions D and E, to assist in giving effect to the Termination of Employment Convention.*

170CA(2) *[“fair go all round”]The procedures and remedies referred to in paragraphs (1)(a) and (b), and the manner of deciding on and working out such remedies, are intended to ensure that, in the consideration of an application in respect of a termination of employment, a “fair go all round” is accorded to both the employer and employee concerned.*

Note: *The expression “fair go all round” was used by Sheldon J in in re Loty and Holloway v Australian Workers' Union (1971) AR (NSW) 95.”*

The rationale behind the adoption of the ‘fair go all round’ principle for unfair dismissal applications under the WR Act was articulated as follows:

²⁴⁸ Unfair Dismissal in Australia – ACCI Discussion Paper July 1995 p.10.

“This expression has been used to summarise the objective in unfair dismissal cases which is to provide industrial justice by giving due weight to:

- *The importance but not inviolability of the right of an employer to manage the employer’s business;*
- *The nature and quality of the work in question;*
- *The circumstances surrounding the dismissal; and*
- *The likely practical outcome if an order is made”.*²⁴⁹

During the term of the Howard Government, a number of attempts were made to further reform the unfair dismissal jurisdiction. They generally did not succeed due to the lack of a Senate majority. Numerous attempts to secure an exemption for small business from the jurisdiction failed²⁵⁰ but some other, minor changes were secured:

- the requirement that new employees to be employed for three months before they could claim unfair dismissal;²⁵¹
- the requirement that the AIRC to take into account the different size of businesses when assessing whether their dismissal procedures were reasonable;²⁵²
- the requirement that the AIRC to take into account the degree to which the absence of dedicated human resource management expertise would be likely to impact on the procedures followed in effecting the termination.²⁵³

Substantial change was achieved due to the Senate majority achieved at the 2004 federal election which enabled the WorkChoices Laws to be passed. Businesses with 100 employees or less were exempted from the unfair dismissal jurisdiction and those larger businesses remaining within the jurisdiction were able to escape its reach if:

- the would-be applicant had not been employed for 6 months when given notice or terminated; or
- they were able to establish that the employee’s employment was terminated for ‘genuine operational reasons’ which included reasons ‘ of an economic, technological, structural or similar nature relating to the employer’s undertaking, establishment, service or business...’.²⁵⁴

During 2004/2005, the last full year prior to commencement of the WorkChoices Laws, there were 6707 applications lodged pursuant to s.170 CE of the WR Act. This

²⁴⁹ Workplace Relations and Other Legislation Amendment Bill 1996 – Explanatory Memorandum Clause 7.19

²⁵⁰ For example, the Workplace Relations Amendment Bill 1997, the Workplace Relations Amendment (Unfair Dismissals) Bill 1998, , the Workplace Relations Amendment (Fair Dismissal) Bill 2002 and the Workplace Relations Amendment (Fair Dismissal) Bill 2004.

²⁵¹ *Workplace Relations Act 1996* ss.170CE (5A) & (5B).

²⁵² s170CG(3)(da).

²⁵³ s170CG(3)(db).

²⁵⁴ See *Workplace Relations Act 1996* ss. 643(6)-(10)

total included unfair dismissal applications, unlawful termination applications and applications that alleged both.²⁵⁵ This number dropped to 5173 in the first full year of the WorkChoices Laws²⁵⁶ before rising again to 7994 in its final year of operation.²⁵⁷

The Rudd Government's FW Act introduced a number of unfair dismissal reforms:

- the removal of the exemption for businesses employing 100 employees or less;
- the introduction of qualifying periods before employees can apply for unfair dismissal, comprising 12 months service for employees working for SMEs with less than 15 employees and 6 months service for other employees;²⁵⁸
- having declared there would be no 'go away money'²⁵⁹, reinstatement is to be the primary remedy;²⁶⁰
- a SB Code has been introduced to provide 'protection' against unfair dismissal claims for employers with fewer than 15 employees, in circumstances where this SB Code has been complied with.

The FW Act dedicates Part 3-2 to Unfair Dismissal and includes in this specific objectives which were upon enactment, and remain:

"381 Object of this Part

(1) The object of this Part is:

- (a) to establish a framework for dealing with unfair dismissal that balances:*
 - (i) the needs of business (including small business); and*
 - (ii) the needs of employees; and*
- (b) to establish procedures for dealing with unfair dismissal that:*
 - (i) are quick, flexible and informal; and*
 - (ii) address the needs of employers and employees; and*
- (c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.*

(2) ["Fair go all round" to be afforded] The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.

Note: *The expression "fair go all round" was used by Sheldon J in in re Loty and Holloway v Australian Workers' Union [1971] AR (NSW) 95."*

²⁵⁵ Annual report of the Australian Industrial Relations Commission 2004-2005.

²⁵⁶ Ibid. p. 9. The 5173 total comprised 2125 Unfair Dismissal applications, 1050 unlawful termination applications and 1998 applications alleging both.

²⁵⁷ Annual report of the Australian Industrial Relations Commission 2008-2009.

²⁵⁸ Fair Work Act 2009 s 383

²⁵⁹ 'Forward with Fairness Policy Implementation Plan', August 2007, p.18.

²⁶⁰ Fair Work Act 2009 ss. 381(1)(c) and 390(3)(a).

4.1.2 Current exemptions

As previously mentioned, the FW Act provides for qualifying periods before an employee is eligible to bring an unfair dismissal application. In addition, employers will be exempt from the unfair dismissal laws in the following circumstances where an employee is terminated:

- and has been a casual employee who has not been engaged on a regular and systematic basis and with no reasonable expectation of continuing employment on a regular and systematic basis;²⁶¹
- due to a genuine redundancy;²⁶²
- at the expiration of a contract of employment:
 - for a specified period of time;
 - for a specified task, or
 - for the duration of a specified season;²⁶³
- at the expiration of a training arrangement;²⁶⁴ and
- in circumstances where an eligible employer has complied with the SB Code.²⁶⁵

4.1.3 The Small Business Fair Dismissal Code

In answer to the questions regarding strengths or weaknesses of the SB Code, the suggestion that small business employers have greater protection from an unfair dismissal claim due to the existence of the SB Code is flawed because a claim will still proceed where an employer seeks to rely on compliance with it, if compliance is disputed. The SB Code itself makes this clear:

*“A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.”*²⁶⁶

Where the circumstances of the termination are in dispute and for as long as the small business employer’s assertion that the SB Code has been complied with can be challenged, the small business employer is in no better position merely because the SB Code is in existence. Small business employers will bear the onus of defending their actions and justifying their reliance on the SB Code. This is the SB Code’s weakness.

²⁶¹ s. 384(2).

²⁶² s. 385(d).

²⁶³ s. 386(2)(a).

²⁶⁴ s. 386(2)(b).

²⁶⁵ ss. 385(c) and 388.

²⁶⁶ *Small Business Fair Dismissal Code* at p.2.

While the reliance on the SB Code can be disputed, this weakness will persist regardless of its content or any widening of its application.

4.1.4 Growth in unfair dismissal applications

In 2009/2010, the first full year of the operation of the FW Act, there were 11,421 federal unfair dismissal applications²⁶⁷. This represented an increase of approximately 7,300 per annum compared with the number of applications that alleged unfair dismissal in 2006/2007²⁶⁸.

Obviously, there was going to be an impact from the removal of the exemption for businesses employing 100 or less employees and an increase in numbers of employees subject to the laws under the FW Act because employees employed by sole traders or partnerships became covered, having previously been covered by state unfair dismissal laws. However the impact of the absorption of state unfair dismissal applications should not be overstated. There were 1254 State unfair dismissal applications in 2008/2009 and the number fell to 278 in 2010/2011. For the same two years the number of Federal unfair dismissal applications were 6307 and 12,848.²⁶⁹

In 2010/2011, there were 12,840 unfair dismissal applications followed by 14,027 in 2011/2012.²⁷⁰ The total rose again to 14818 in 2012/2013²⁷¹ and in 2013/2014, the number of s394 applications for unfair dismissals lodged was 14,796.²⁷²

4.1.5 The diminution of 'valid reason'

ACCI's submission to the PIR of the Fair Work Legislation in 2012 highlighted circumstances in which employers were being penalised despite having been found to have had a valid reason to terminate. Despite ACCI expressing concerns in this regard since the introduction of the unfair dismissal laws as part of the 1993 system, the issue of process and other considerations trumping a valid reason have not been adequately addressed.

ACCI included in its submission to the PIR some case studies that involved:

- an applicant being awarded compensation despite a conviction for possession of child pornography, allegations of sexual harassment, and the employer's concerns regarding its duties to provide a safe workplace;²⁷³

²⁶⁷ See *General Manager's report into the operation of the first three years of the Fair Work Act 2009 (Cth) unfair dismissal system* – December 2012, Table 3.2 at p. 10.

²⁶⁸ There were 2125 Unfair Dismissal applications and 1998 applications alleging both unfair dismissal and unlawful termination - Annual report of the Australian Industrial Relations Commission 2006-2007 at p.9.

²⁶⁹ See *General Manager's report into the operation of the first three years of the Fair Work Act 2009 (Cth) unfair dismissal system* – December 2012, Table 3.2 at p. 10.

²⁷⁰ *ibid.*, Table 3.3 at p. 19.

²⁷¹ Annual Report of Fair Work Commission 2012-2013 p.41.

²⁷² *Ibid.*, p.120.

- an applicant found to have committed serious and repeated breaches of work health and safety (WHS) protocols and procedures nonetheless being reinstated and awarded compensation because the impact of the decision was harsh on him financially;²⁷⁴ and
- a finding of unfair dismissal because of procedural defects despite there being a valid reason to terminate the applicant because of his use of profanities while teaching.²⁷⁵

ACCI also highlighted over 50 cases in which a termination was held to have been harsh, unjust or unreasonable despite findings of a valid reason to terminate²⁷⁶. While the FW Act Review Panel was evidently not uncomfortable with these results and content to require employers to submit themselves to further cost, time, inconvenience and stress of conducting an appeal if they were, this is an unsatisfactory conclusion as far as business is concerned. It also tends to completely underestimate the loss of confidence in the system that occurs when employers are told that they even though they had a valid reason to terminate an employee's employment, they must nonetheless reinstate the employee and/or pay compensation.

Ultimately, members of the FWC have a broad discretion when hearing unfair dismissal cases. Section 387 of the FW Act outlines a range of considerations to be taken into account when considering whether a dismissal was harsh unjust or unreasonable.

ACCI's concern remains that a valid reason for termination, the assessment of which specifically includes the impact of the terminated employee's conduct on the safety and welfare of other employees, can be too easily downgraded due to six other criteria fixated on process and the catch-all '*any other matters that the FWC considers relevant*' in s. 387(h).

Issues of process and the wide discretion held by FWC members, place employers in an unenviable position as they also grapple with their duties under WHS laws to provide a safe workplace and their obligations under discrimination and anti-bullying laws. The wide discretion can and does lead to decisions at first instance that view employee conduct, employer duties and process differently. Employers are left trying to make sense of them and ACCI has previously highlighted examples.²⁷⁷

²⁷³ Annual Report of Fair Work Commission 2012-2013, p.151.

²⁷⁴ *ibid.*, p. 153.

²⁷⁵ *ibid.*, p.155.

²⁷⁶ ACCI Submission – *Inquiry into the Fair Work Act 2009 – Australian Government Discussion Paper- February 2012* at pp 143-147. ACCI acknowledges that one decision included in that table was subsequently overturned on appeal (*Parmalat Food Products v Wililo* [2010] FWA 10089).

²⁷⁷ *ibid.*, p.148.

- Social media related dismissal considered fair (*O'Keefe v The Good Guys* [2011], FWA5311 (11 August 2011))
- Social media related dismissal considered unfair (*Stutsel v Linfox Australia Pty Ltd* [2011], FWA8444, (19 December 2011));
- Dismissal considered fair, despite procedural flaws (*Mr Anyuon Mabior v Baiada Group Pty Ltd T/A Adelaide Poultry* [2011] FWA 5778 (August 25 2011));
- Dismissal considered unfair, because of procedural flaws (*Miralles v Epic Security Pty Ltd T/A Epic Security* [2011] FWA 4838 (5 August 2011));
- Dismissal by text considered fair (*Brett Martin v DecoGlaze Pty Ltd* [2011] FWA 6256 (15 September 2011));
- Dismissal by text considered unfair (*Sedina Sokolovic v Modestie Fashion Australia Pty Ltd (ABN: 671444920838)* [2011] FWA 3063 (18 May 2011));
- Breach of safety considered unfair (*Paul L Quinlivan v Norske Skog Paper Mills (Australia) Ltd* [2010] FWA 883 (8 February 2010);
- Breach of safety considered fair (*Parmalat Food Products Pty Ltd v Mr Kasian Wililo* [2011] FWA FB 1166 (2 March 2011)).

The fixation on process and a lack of certainty impacts on employers in ways which will be explored further below.

4.1.6 The cost for employers

Harding has identified some of the negative impacts of the unfair dismissal laws on management decisions and behaviour relating to recruitment and then managing employee behaviour.²⁷⁸ It is uncontroversial to submit that management time spent on performance management tasks and in the day to day supervision of difficult employees and relationships within the workplace comes at a price. The impact of this is felt before the decision to terminate the employment of an employee has been made and before management of the termination in either a contested or uncontested context.

Management tasks associated with an uncontested dismissal were identified by Freyens and Oslington²⁷⁹ as including time spent writing warnings, obtaining managerial and legal advice, gathering evidence and documenting the dismissal decision, meeting with the employee to guarantee her right to respond to the charges, and meeting with union delegates.

²⁷⁸ Harding, D., 'The effect of unfair dismissal laws on small and medium sized businesses', Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, 29 October 2002.

²⁷⁹ Freyens, B. and Oslington, P., 'Dismissal Costs and their Impact on Employment: Evidence from Australian Small and medium Enterprises', University of NSW, 2005 (Online at <http://mpira.ub.uni-muenchen.de/961/>) at p.6

Freyens and Oslington associated costs associated with conciliated and settled dismissals as including the costs of an uncontested dismissal plus the time cost of the conciliation process, the cost of obtaining legal advice, and any settlement payment to the dismissed employee.²⁸⁰ They acknowledged that costs would be higher if a contested dismissal proceeded to an arbitrated outcome.²⁸¹

The conclusions of Freyens and Oslington were as follows:

*Overall, the survey data indicate that the average cost of an uncontested dismissal is \$3,044 which represents 10.3 percent of annual wage cost. The average total cost of a contested dismissal settled through conciliation is \$12,817 or 27.8 percent of annual wage cost, and for a dismissal requiring arbitration \$14,705 or 35.7 percent of annual wage cost.*²⁸²

Their conclusions were obviously based on wage data as at the time of their study (2005) but were not based on an absolute dollar cost. Obviously the costs will vary from case to case. For example, in a particular case study, Southey found the conciliation experience cost the employer between \$15,000-\$20,000 with the HR Manager stating:

*“... once he made a claim, that consumed, I would say, at least three weeks of my time as well as the engineering manager’s time – probably about a third of that. Travelling to Brisbane for the conciliation - we both went ...(in relation to legal and wage costs) I’d say somewhere between ten and fifteen thousand when you look at our hourly rates and what we had to pay our advisor. The advisor fee, I think, was \$6,800...”*²⁸³

The cost of defending a claim from the time it proceeds beyond conciliation to an arbitrated outcome would be considerably more than the \$2000 suggested by Freyens and Oslington. An arbitration hearing entails the cost of engaging professional advice and case preparation, which can include the preparation of written submissions and witness statements and other evidence together with all tasks associated with meeting the applicant’s claim. There is also the time and expense required for the hearing itself.

One of ACCI’s members, the Victorian Employers’ Chamber of Commerce & Industry (VECCI), offers representative services to members for the defence of unfair dismissal claims. In material that will be referenced in the VECCI submission to the Productivity Commission, VECCI assessed the time it spent acting as representative for members on 50 matters that proceeded from conciliation to arbitration from mid-2011 to date. The assessment indicated that following a conciliation, an average

²⁸⁰ Freyens, B. and Oslington, P., ‘Dismissal Costs and their Impact on Employment: Evidence from Australian Small and medium Enterprises’, University of NSW, 2005 (Online at <http://mpra.ub.uni-muenchen.de/961/>), p.8.

²⁸¹ Ibid., p.9.

²⁸² Ibid., pp. 5-6.

²⁸³ Southey, K. “A framework for investigating participant perceptions of unfair dismissal conciliation conferences” University of Southern Queensland 2012, p.9. (Online at <http://cdn.workplaceexpress.com.au/files/2012/14Southey.pdf>)

of 52 hours representative time was spent in taking a matter through to hearing. The 52 hours was VECCI representative time only and did not include the time the member/employer had to allocate to the defence of the claim.

The previous Government claimed prior to its election “*Under Labor’s policy there will be no ‘go away money’*”.²⁸⁴ However, with only 6.4% of unfair dismissal applications finalised during 2013/14 resolved by a decision of the FWC and 93.6% resolved prior to decision²⁸⁵, it is irrefutable that employers defending claims are forced to continually weigh up the cost to their businesses and the merit of resolving them by way of financial settlement.

Indeed, of the 4941 unfair dismissal claims settled in conciliation during the seven months from 1 July 2012 to 31 January 2013, 75% (3691) involved a payment and none involved agreement to reinstate. The settlement breakdown for settlements over \$1000 was as follows:

- 617 payments between \$1000-\$1999;
- 940 payments between \$2000-\$3999;
- 662 payments between \$4000-\$5999; and
- 404 payments between \$6000-\$7999;
- 237 payments of \$8000-\$9999;
- 283 payments between \$10,000-\$14,999;
- 97 payments between \$15,000-\$19,999;
- 91 payments between \$20,000-\$29,999;
- 21 payments between \$30,000-\$39,999;
- 12 payments at the maximum amount of \$40,000; and
- 7 payments exceeding the maximum amount.²⁸⁶

This is consistent with the manner in which settlements were reached at conciliation during the financial years 2010/2011 and 2011/2012, with 73% involving a monetary payment in both years.²⁸⁷

There has been a suggestion that an increase in the cap on compensation for the cases where employers are required to pay compensation in lieu of reinstatement would be a way to tackle ‘go away money’ because it would give more incentive to employers to fight groundless claims.²⁸⁸ ACCI rejects this proposition and any suggestion that the compensation cap should be lifted. To do so would simply encourage more claims in a jurisdiction requiring only a nominal filing fee (\$67.20) as a precursor to pursuing a claim.

²⁸⁴ *Forward with Fairness Policy Implementation Plan* -August 2007 at p.18.

²⁸⁵ Fair Work Commission *Unfair Dismissal Quarterly Reports* for 2013/214.

²⁸⁶ Unfair dismissal results and outcomes. July 1 2012 to January 31 2013, Fair Work Commission, March 2013 (online at <https://www.fwc.gov.au/about-us/news-and-events/unfair-dismissal-statistics-results-and-outcomes-published>).

²⁸⁷ See *General Manager’s report into the operation of the first three years of the Fair Work Act 2009 (Cth) unfair dismissal system* – December 2012, Table 5.4 at p. 36.

²⁸⁸ Suggestion made by Forsyth and Stewart referred to in McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, June 2012 at p. 221.

Southey herself made a comment that illustrates the motivations of employers in paying a settlement rather than defending a matter through to arbitration:

*Arbitration produces a 'winner takes it all' outcome because either the employee wins a settlement or the employer is 'morally' exempted. Yet in conciliation, the employer may need to be prepared to 'pick up the tab' if they want assurance that the matter is resolved, otherwise they leave the table not knowing whether they will face an arbitration hearing. This suggests future investigations can consider whether dismissed workers have more power than may be apparent at conciliation, as they control whether their employers will need to endure an arbitration hearing. This covert power is reinforced if the employer wants to avoid putting at peril their authority or reputation.*²⁸⁹

Invariably, employers are faced with a commercial decision regardless of the merits of the claim. The desire to avoid the cost, time, inconvenience or stress of further legal proceedings influenced the decision of over 80% of employer respondents surveyed for Fair Work Australia in 2010 to settle rather than proceed to an arbitrated outcome.²⁹⁰ The FW Act Review panel that conducted the PIR concluded:

*We do not doubt that employers continue to make a commercial decision to pay an amount to an applicant to settle an unfair dismissal claim, and that the factors identified by Forsyth and Stewart and other contribute to this approach. In some cases the employer may genuinely consider that the application has no merit, but is convinced that settling the claim for a small or nominal amount is preferable to incurring significantly higher costs in defending it.*²⁹¹

The responses VECCI received in a survey of members for this Inquiry regarding their reasons for settling unfair dismissal claims confirm that employers make commercial decisions to settle claims rather than spend more money defending them and are resigned to having to pay 'go away' money. ACCI draws the Productivity Commission's attention to those employer responses outlined in the VECCI submission.

Combining the dynamic of 'go away money' with the growth in 'No Win No Fee' arrangements has produced a toxic mix for employers to grapple with because the 'No Win No Fee' arrangements require payment to the representative when a

²⁸⁹ Southey, K. "A framework for investigating participant perceptions of unfair dismissal conciliation conferences" University of Southern Queensland 2012, p.9.
(Online at <http://cdn.workplaceexpress.com.au/files/2012/14Southey.pdf>)

²⁹⁰ Fair Work Australia, "Fair Work Australia: Unfair Dismissal Conciliation Research Survey results" November at p. 51 (Online at <http://www.fwc.gov.au/documents/documents/dismissals/report.pdf>).

²⁹¹ McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, June 2012 at p. 222.

settlement is reached, not just when a favourable decision at arbitration is obtained. These arrangements were referred to in ACCI's submission to the PIR.²⁹²

The 'No Win No Fee' model is predicated on employers making commercial decisions in what is essentially a 'no cost' jurisdiction.

That said, the FW Act now empowers the FWC to make an order for costs against a lawyer or paid agent in certain circumstances, including for their own unreasonable acts or omissions in the conduct of an unfair dismissal application²⁹³, with the previous Government having acknowledged the requirement to amend the FW Act in 2012:

*New subsections 401(1) and 401(1A) will provide a stronger deterrent for lawyers and paid agents from encouraging parties to bring or continue speculative unfair dismissal claims, particularly claims they know have no reasonable prospect of success. The provision will also deter lawyers or paid agents from unreasonably encouraging a party to defend a claim or make a jurisdictional argument where there is no prospect of the argument succeeding. It will act as a stronger deterrent than the current provision as it will make lawyers and paid agents subject to the possibility of adverse costs orders even if they are not granted, or do not seek, permission to represent the party in the matter before the FWC.*²⁹⁴

While these amendments offer some consolation for employers, the power to award costs in these circumstances still remains discretionary. Employers will still have to spend more time and money to bring an application for costs, with no guarantee of success.

Freyens and Oslington stand by their conclusion that the actual costs imposed on business by unfair dismissal are small.²⁹⁵ ACCI does not agree with this characterisation of 'small', particularly in the context of a small business. Nonetheless, Freyens and Oslington do acknowledge the impact the unfair dismissal laws have on the employer community:

If the expected costs to employers of unfair dismissal actions are indeed small, then why is there so much agitation about unfair dismissal regulation? Is it concern about anything that reduces the power of employers to exercise managerial prerogative? Are employers and the associations that represent them ignorant or playing some perverse political game? We think not. Behavioral economics (e.g. Kahneman, 2003) suggests an alternative explanation of their concern about dismissal regulation. A consistent experimental finding is that agents heavily weight large low probability losses

²⁹² ACCI Submission – *Inquiry into the Fair Work Act 2009* – Australian Government Discussion Paper-February 2012 at pp 137-141.

²⁹³ *Fair Work Act 2009* s.401.

²⁹⁴ Explanatory Memorandum to the *Fair Work Amendment Bill 2012* at paragraph 180.

²⁹⁵ Freyens, B. and Oslington, P., 2013 'A first look at incidence and outcomes of unfair dismissal claims under the Fair Work, WorkChoices and the Workplace Relations Act', *Australian Journal of Labour Economics*, vol. 16, no.2, pp. 295-306 at 303.

*when making decisions. To the extent that payouts capped at six months wages can be regarded as large losses then we would expect these to weigh more heavily on employers minds when making employment decisions than the expected cost calculations might suggest. Another explanation might be concerns about fairness (Fehr, Goette and Zehnder, 2009) of compensation payouts weighing heavily on the participants – employers don't like paying out when they are in the right.*²⁹⁶

4.1.7 Employment impacts

ACCI's primary argument against unfair dismissal laws is their negative impact on employment. The argument has been raised in support of a small business exemption²⁹⁷ and while attracting scepticism from some in the academic community²⁹⁸, the proposition is not without academic support.

The report by Harding (2002)²⁹⁹ provides a useful basis for discussion. Produced prior to the WorkChoices Laws, it was completed while there was, as is the case now, no small business exemption in place. The author indicated in his work that he was at pains to avoid 'leading questions' by conducting a survey that sought to establish the existence of an effect before asking about the nature of the effect.

As to the impact of employment, while Harding concluded that the unfair dismissal laws reduced employment of workers on the average wage by 0.46 per cent and the employment of workers on the minimum wage by approximately 1 per cent he stated these were underestimates.³⁰⁰

While there has been much conjecture about how many jobs a small business exemption might create and proving or disproving this tends to become the focus of those who oppose a small business exemption, Harding's report revealed a number of other impacts:

UFD laws have resulted in large and intended changes in the recruitment and staff management procedures of small and medium sized businesses; some 69.8 per cent of firms said that the UFD laws had had some influence on their business' procedures (see Table 9) while 51.6 per cent of businesses reported that the laws had influenced their procedures for dealing with workers whose performance is unsatisfactory (see Table 11). These changes are in the direction of what might be described as more formal and arguably fairer and

²⁹⁶ Freyens, B. and Oslington, P., 2013 'A first look at incidence and outcomes of unfair dismissal claims under the Fair Work, WorkChoices and the Workplace Relations Act', Australian Journal of Labour Economics, vol. 16, no.2, pp. 295-306 at 303.

²⁹⁷ Successive Coalition Government ministers Peter Reith and Tony Abbott advanced this argument in seeking a small business exemption.

²⁹⁸ For example, 'The case for unfair dismissal reform: a review of the evidence' Robbins W. and Voll G., Australian Bulletin of Labour Vol 31 Issue 3 (2005) pp 237-254).

²⁹⁹ Harding, D., 'The effect of unfair dismissal laws on small and medium sized businesses', Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, 29 October 2002.

³⁰⁰ *ibid.*, p. viii.

more transparent human resource management procedures and practices (see Table 12).

These intended changes in human resource management procedures also have a number of unintended effects on firm behaviour that must be weighed against the intended effects in any assessment of the UFD laws. Some 47.9 per cent of small businesses reported that their recruitment and selection decisions are influenced by the UFD laws (see Table 13). These changes, more details of which are in Table 14, involve the following:

- 11.6 per cent of businesses reported greater use of fixed term contracts;*
- 1.3 per cent reported that they employ more casuals and fewer permanent staff;*
- 20.7 per cent reported that they employ more family and friends; and*
- 26.6 per cent reported use of longer probationary periods.*

The strongest effect on recruitment and selection decisions, however, was that 39.5 per cent of businesses reported that the UFD laws meant that there were certain types of job applicant that their business was less likely to hire (see Table 14). The types of job applicant disadvantaged by the UFD laws are: a person who has changed jobs a lot for no apparent reason (35.1 per cent of businesses); a person who is currently unemployed (15.9 per cent of businesses); a job applicant who has been unemployed for more than one year (27.4 per cent of businesses); a person who has been unemployed for more than two years (30.3 per cent of businesses) (see Table 15).

Some 44.3 per cent of respondents reported that reported that the UFD laws make the management of their workforce more difficult than it would otherwise be (see Table 16). The nature of those adverse effects are as follows: 38.9 per cent reported reduced authority over their workforce; 40.8 per cent of businesses reported that because of UFD laws it takes longer to resolve issues associated with poor performance; 37.9 per cent of businesses reported that poor performance by one worker is more likely to adversely affect the performance of other workers; and 38.3 per cent of businesses reported that more formality in dealing with workers makes communication between management and employees more difficult. See Table 17.³⁰¹

The impact of the unfair dismissal laws on workforce management and culture materialises in reduced management authority, more time spent in resolving performance issues, poor performing employees having a corrosive impact on others and greater formality leading to difficulties in communication between management and employees. Impacts such as these have also been recognised as possibilities by the Productivity Commission.³⁰²

³⁰¹ Harding, D., 'The effect of unfair dismissal laws on small and medium sized businesses', Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, 29 October 2002. p.iv & v.

³⁰² Productivity Commission report *Retail Economic Structure and Performance of the Australian Retail Industry*, p. 366.

Harding also found that 37.5 percent of businesses reported that the unfair dismissal laws would make it less likely that they would dismiss a worker who was an unsatisfactory performer, indicating a further loss of authority over the workforce.³⁰³

While Harding was prepared to conclude that the unfair dismissal laws had produced more formal and arguably fairer HR procedures and practices, he also found some 'unintended' consequences that could reduce fairness and equity. He concluded that young people, the long-term unemployed and less literate would receive unequal treatment due to the laws because they were over-represented in the pool of job applicants and thereby victims of the influence the laws were having on the recruitment and selection decisions of nearly half of employers³⁰⁴ The consequences were, in essence:

- recruitment and selection decisions were being influenced, resulting in greater use of fixed term contracts, the employment of more casuals, family and friends and fewer permanent staff and the adoption of longer probationary periods;
- the unfair dismissal laws meant there were certain types of job applicants less likely to be employed including candidates who had changed jobs a lot for no apparent reason, or who were currently unemployed or who were long-term unemployed;
- employees who did not appear to be a good fit with a new employer were more likely to be dismissed during the probationary period. This in turn might have the effect of reducing the employee's chance of securing future work because of the disincentive to hire candidates with a history of changing jobs several times for no apparent reason;
- the laws make it less likely that an SME will hire long-term unemployed candidates; and
- the increased formality and written documentation that is required by the laws may disadvantage employees more suited to less formal supervision or are less literate than average.

A final finding of significance included was that just over one third of businesses reported that the existence of the unfair dismissal laws had increased their business costs, with the lower bound of estimates putting the total at \$1.3 billion. This was about 0.2 percent of the then GDP.³⁰⁵

Harding produced a further paper in December 2005, by which time it had become apparent that the exemption in the WorkChoices Laws for firms employing 100 employees or less was likely.³⁰⁶ Building on his 2002 paper, he identified some other factors that add to the cost of the unfair dismissal laws: the cost to business in managing and dealing with poor performers who would have previously been

³⁰³ Harding, D., 2002, p. v.

³⁰⁴ Harding, D., 'The effect of unfair dismissal laws on small and medium sized businesses', Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, 29 October 2002. p.iv & v.p.iv and 26.

³⁰⁵ *ibid.*, p. v & viii.

³⁰⁶ Harding, D., 'Identifying and measuring the economic effects of unfair dismissal laws', Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, 2 December 2005.

dismissed for cause and the difference between the marginal product of those who would have previously been dismissed for cause and the cost to the business of continuing to employ them. Amongst his 2005 conclusions were:

- the unfair dismissal laws had the effect of reducing employment by at least 0.46 percent (about 46,000 persons);
- as small and medium sized businesses are more likely than large businesses to dismiss an employee for cause, the unfair dismissal laws impacted more heavily on SMEs than they do on large business;
- SMEs have limited opportunity to pool the risk that an employee dismissed for cause might initiate an unfair dismissal claim and this inability was 3.3 times higher for a business with 9 employees than it is for a business with 100 employees, providing a further reason why unfair dismissal laws impose larger costs on SMEs.³⁰⁷

In drawing upon the conclusion of a reduction in employment of 0.46 percent, Econtech concluded the following from Harding's 2005 report:

*However, WorkChoices exempted businesses with 100 or fewer employees from the laws and according to Harding (2005, Table 10) these smaller businesses had borne 93 per cent of the cost of the laws. On that basis, exempting smaller businesses from unfair dismissal laws has added 0.43 per cent to employment. When allowance is made for discouraged worker effects, this implies that **exempting smaller businesses from unfair dismissal laws has reduced the structural unemployment rate by 0.27 percentage points.***³⁰⁸

4.1.8 ACCI's reform proposal: small business exemption from unfair dismissal laws

For the reasons outlined above, the SB Code is flawed because an unfair dismissal claim will still proceed where an employer seeks to rely on compliance with it, if compliance is disputed.

The costs associated with managing an underperforming employee and a termination in either a contested or uncontested context have also been canvassed and as Harding found:

- as small and medium sized businesses are more likely than large businesses to dismiss an employee for cause, the unfair dismissal laws impact more heavily on SMEs than they do on large business; and
- SMEs have limited opportunity to pool the risk that an employee dismissed for cause might initiate an unfair dismissal claim and this inability was 3.3

³⁰⁷ Harding, D., 'Identifying and measuring the economic effects of unfair dismissal laws', Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, 2 December 2005 pp 23 & 24.

³⁰⁸ Econtech, *The Economic Effects of Industrial Relations Reforms since 1993* (prepared for the Australian Chamber of Commerce and Industry by Econtech Pty Ltd) July 2007.

times higher for a business with 9 employees than it is for a business with 100 employees, providing a further reason why unfair dismissal laws impose larger costs on SMEs.

Harding also made macro findings as to the impact on business costs and reducing of employment. The Productivity Commission itself has previously recognised, the unfair dismissal '*laws, if tipped too far in favour of protecting workers, can lead to underperformance and reduced productivity.*'³⁰⁹

Freyens and Oslington alluded to the impact of Behavioural Economics and the way in which the unfair dismissal laws can weigh on employers' minds. Harding detailed the impact the laws can have on recruitment decisions, including the filtering out of candidates of certain profiles and encouraging the use of employment arrangements that will escape the reach of the laws. He also outlined the way in which the laws impact on the tasks of management.

Such concerns will not be allayed by an SB code or new tests to be applied by a decision maker with broad discretion or tinkering with compensation limits, filing fees and cost orders.

Australia's WR Framework must stimulate employment growth. Employers should be encouraged to employ more people, not less. The system is failing when it works against young people, the long term unemployed and less literate candidates for employment.

ACCI submits the unfair dismissal laws should be reformed so as to create an exemption for businesses employing less than 20 employees, with casuals engaged on a regular and systematic basis and employees employed by associated entities of the employer to be included in the headcount.

The figure of 20 corresponds with the Australian Bureau of Statistics defining of a small business as one employing 5 or more people but less than 20 people (businesses employing less than 5 people are defined as micro businesses) and would also ensure micro businesses are exempt.³¹⁰

The Productivity Commission can be fortified by the knowledge that a small business exemption operates in Germany. Under the *Termination Protection Act* employers with 10 or less employees are exempt. The exemption previously applied to employers with 5 or less employees and was expanded to the current pool of employers in 2004.³¹¹

Employees in businesses with less than 20 employees will still retain the protection against unlawful termination and discrimination in the workplace.

³⁰⁹ Productivity Commission report *Retail Economic Structure and Performance of the Australian Retail Industry* p. 366.

³¹⁰ ABS 1321.0 - Small Business in Australia, 2001.

³¹¹ Baker & McKenzie, *Worldwide Guide to Termination, Employment Discrimination, and Workplace Harassment Laws* - 2009 edition at p.151.

Available statistics for the years 2010/2011 and 2011/2012 indicate that 22.7% of unfair dismissal applications that proceeded to conciliation involved an employer with 1-14 employees.³¹² With a threshold of less than 20 employees, it is to be expected that this percentage would be slightly higher.

ACCI's policy proposal would take employers with less than 20 employees out of the system and free them from the shackles of the unfair dismissal jurisdiction that imposes cost, absorbs time and generates inconvenience and stress. This will have a more profound impact on employment decisions than making changes to the way in which the jurisdiction currently operates.

4.1.9 Other changes

In addition to the small business exemption, ACCI would support other changes to jurisdiction as it applies to employers with 20 or more employees.

Measures that could be considered are:

- ***Making a valid reason a complete defence to an unfair dismissal claim, such that procedural defects in carrying out the termination should not be considered once a valid reason is found.***
- ***Making a complete defence available if an employee was dismissed for the dominant purpose of complying with laws relating to discrimination, sexual harassment, bullying, WHS or any other relevant federal, state or territory law.***
- ***Exempting employers where they are able to establish that the employee's employment was terminated for genuine operational reasons. If this is not accepted, the existing requirement for an employer to consider alternative positions across "associated entities" as part of a "genuine redundancy" should be removed.***
- ***Reinstatement no longer being the primary remedy and only to be ordered if the employer consents.***
- ***Measures that create reasonable barriers to entry so as to deter frivolous and vexatious claims lacking in merit, such as higher filing fees, greater access to costs orders or preliminary screening processes designed to filter out speculative claims.***

4.2 Anti-bullying laws

Bullying is a complex and often subjective behaviour. It is a community problem that requires a response in the community as well as in the workplace. These behaviours can flow into workplaces from outside and changing these behaviours is a

³¹² See *General Manager's report into the operation of the first three years of the Fair Work Act 2009 (Cth) unfair dismissal system* – December 2012, Table 4.2 at p. 26.

community wide issue. Sustainable change can occur through community information and education and not just through the workplace, nor just through more and complicating legal framework.

ACCI's membership is committed to appropriate workplace behaviour and has no tolerance for serious misconduct in the workplace. This includes threats of, or actual violence, intimidation, harassment or workplace bullying and we support workplace based activities to prevent and manage any issues.

Issues Paper 4 asks whether changes should be made to the anti-bullying provisions of the FW Act. The change ACCI proposes is the repeal of the anti-bullying provisions. Workplace bullying must instead continue to be addressed as a work health and safety (WHS) issue and not through the national WR Framework.

Rather than pursue the path of seeing what can be done to build the FWC's anti-bullying jurisdiction, ACCI believes Productivity Commission should have regard to the same considerations that were before the previous Government but ignored, when it legislated for the jurisdiction in 2013.

The anti-bullying provisions were part of the Government's response to the House of Representatives Standing Committee on Education and Employment Inquiry, in which ACCI was a participant. Recommendations 1 and 23 from the Committee's report, *Workplace Bullying "We just want it to stop"*, prompted the anti-bullying provisions:³¹³

Recommendation 1

The Committee recommends that the Commonwealth Government promote national adoption of the following definition: workplace bullying is repeated, unreasonable behaviour directed towards a worker or group of workers, that creates a risk to health and safety.

Recommendation 23

The Committee recommends that the Commonwealth Government implement arrangements that would allow an individual right of recourse for people who are targeted by workplace bullying to seek remedies through an adjudicative process.

It was regrettable the previous Government did not give sufficient weight to some of the other recommendations in the report before proceeding with the anti-bullying provisions. In addition to nine recommendations regarding actions that could have been taken through Safe Work Australia and a further two recommending work to be undertaken between the federal and state/territory governments, the previous Government did not give sufficient consideration to two very significant recommendations:

Recommendation 14

³¹³ Revised Explanatory Memorandum to the *Fair Work Amendment Bill 2013* (taking into account amendments made by the House of Representatives to the Bill as introduced) at Paragraph 86.

The Committee recommends the Commonwealth Government work with its state and territory counterparts to develop better cross-agency protocols in respect of workplace bullying, to allow for better information-sharing, cross-jurisdictional advice and complaint referrals across the following areas of regulation:

- *work health and safety laws;*
- *industrial relations laws;*
- *antidiscrimination laws;*
- *workers compensation laws; and*
- *relevant criminal laws.*

Recommendation 21

The Committee recommends that the Commonwealth Government seek agreement from the work health and safety regulators of each jurisdiction through the Safe Work Australia process, for the development and endorsement of a uniform national approach to compliance and enforcement policy for preventing and responding to workplace bullying matters.

Recommendation 14 is an acknowledgement of the complex web of laws giving rise to an at times overlapping regulatory response to workplace bullying. This web predated the anti-bullying provisions and existed in addition to internal grievance procedures and associated investigatory processes in place within individual workplaces.

ACCI outlined issues arising from this legal framework in its submission to the Inquiry into the *Fair Work Amendment Bill 2013* (which gave rise to the anti-bullying provisions):

Legal Framework

1. *There remains a comprehensive legal framework for dealing with allegations of bullying (including unlawful harassment, intimidation or coercion) at federal, state and territory levels.*
2. *Depending on the factual circumstances of the case, an employee alleging bullying (whether they are the victim of, or raises allegations about bullying against co-workers) may have a cause of action against an employer under Part 3 -1 of the Fair Work Act 2009 (general protections), Part 3 -2 of the Fair Work Act 2009 (unfair dismissal).³¹⁴*
3. *Claims could also be made pursuant to anti-discrimination laws (including unlawful harassment), if it is alleged that the bullying occurred because the person possessed a protected attribute.³¹⁵*
4. *There remains comprehensive legislation dealing with Occupational Health and Safety (OH&S) in each jurisdiction.*

³¹⁴ For example, see *Barnes v Flight Centre Limited & Ors*, VID360/2012.

³¹⁵ See the Australian Human Rights Commission Fact Sheet (Workplace Bullying), accessible here: http://www.hreoc.gov.au/info_for_employers/fact/workplace.html.

5. *Depending on the harm or injury suffered as a result of bullying, compensation claims may be available through workers' compensation schemes applying in each jurisdiction.*³¹⁶
6. *It is possible that bullying may also involve a breach of a relevant industrial instrument³¹⁷ or contractual term³¹⁸. Tortious or equitable causes of action may also be pursued through the courts.*³¹⁹

In addition to these, part of the regulatory response to workplace bullying now includes making it a criminal offence. As part of a response to the tragic circumstances involving Brodie Panlock, who committed suicide after persistent bullying and harassment by co-workers, the *Crimes Amendment (Bullying) Bill 2011* (Vic) was introduced to amend the *Crimes Act 1958* (Vic). This Bill had the effect of making the offence of stalking applicable to situations of serious bullying. The resulting offence is not limited to a defined category of individuals in the workplace (i.e. employees) and nor is it confined to the workplace itself. The offence of stalking is punishable by a maximum term of 10 years imprisonment. The Bill also introduced amendments to the *Stalking Intervention Orders Act 2008* (Vic) and the *Personal Safety Intervention Orders Act 2010* (Vic), to allow victims to apply for intervention orders.

ACCI submits that the previous Government rushed into creating the anti-bullying jurisdiction for the FWC without having had the sort of engagement and discussion with state and territory counterparts that was contemplated by Recommendation 14. Put another way, work was required under Recommendation 14 before any action pursuant to Recommendation 23 was undertaken.

As to Recommendation 21, ACCI submits that work amongst work health and safety regulators of each jurisdiction through the Safe Work Australia (SWA) process would have produced a better quality uniform national approach than inserting the anti-bullying provisions into the FW Act. Apart from introducing a layer of complexity due to the interaction of the WR Framework and WHS laws, their overlapping and patchy coverage has resulted in not all persons being covered anyway because of the limited constitutional powers available to the Commonwealth.

A better quality uniform national approach would have prevented the different legal tests that have emerged. Under State WHS jurisdiction, the legal test is to minimise the risks to work health and safety 'so far as is reasonably practicable'. The legal test under Federal anti-bullying jurisdiction is one based 'on the balance of

³¹⁶ For example, under the *Victorian Accident Compensation Act 1985* (Vic) for bullying which results in a compensable injury.

³¹⁷ For example, under ss 545 and 546 of the *Fair Work Act 2009*. There are a range of orders that can be made, including civil penalties imposed on an employer or "any person who is involved in a contravention of a civil remedy provision" under s 550. This may extend to the imposition of penalties and compensation against an employee, such as a manager or supervisor involved in a contravention.

³¹⁸ Contractual terms can be express or implied. For a case involving a breach of an express contractual term (contained in a 'policy' document), see *Nikolich v Goldman Sachs J B Were Services Pty Ltd* [2006] FCA 784 (23 June 2006).

³¹⁹ Significant compensation was awarded against an employer in *Naidu v Group 4 Securitas & Anor* [2005] NSWSC 618; *Naidu v Group 4 Securitas Pty Ltd & Anor* [2006] NSWSC 144; and *ISS Security Pty Limited v Naidu & Anor* [2007] NSWCA 377.

probability'. Further, the approach under the workers' compensation schemes is 'no fault' compensation for injury or disease arising out of or in the course of employment. This layer of complexity ushered in with the anti-bullying jurisdiction is not going to provide much needed clarity to the community.

SWA has tripartite representation, comprising an independent Chair, nine members representing the Commonwealth and each State and Territory, two representing the interests of workers, two representing the interests of employers and the Chief Executive Officer of SWA. SWA has and is already undertaking work to address workplace bullying. A comprehensive guide on *Preventing and Responding to Workplace Bullying* was published in November 2013, along with *Dealing with workplace bullying – a workers' guide*. These should have been given the opportunity to be used in the workplace and reviewed before the anti-bullying jurisdiction commenced on 1 January 2014.

It is not possible for the Commonwealth to unilaterally override State and Territory WHS regulation. The previous Government ought to have undertaken more of the activity contemplated by Recommendation 21 in order to harmonise a national response to workplace bullying before imposing a new workplace relations-based regulatory framework that workers and employers now have to navigate, in conjunction with the pre-existing WHS framework.

In the first nine months of their operation there was a very low utilisation of the anti-bullying provisions, with just 532 applications³²⁰ and just one order to prevent further bullying made. The low level of utilisation, the fact that over 90% of applications do not require an FWC decision³²¹ and the making of just one order demonstrate that repealing the provisions would not leave a gap in the regulatory framework that could not be easily overcome, particularly when some of the work being performed by the FWC involves establishing whether or not it has jurisdiction or there is a more appropriate avenue an applicant could pursue. Over 100 of the Bullying applications have been 'withdrawn early in case management process' which, while suggesting the FWC is playing a triaging role, also confirms that such enquiries could be made elsewhere.³²²

As ACCI stated in its submission to the Inquiry into the *Fair Work Amendment Bill 2013*:

"Workplace bullying should remain within the expertise of WH&S agencies and their experienced and trained officers. Relevant WH&S agencies are already dealing with these matters, sometimes on a daily basis, and they are more than capable of triaging such matters as appropriate. Evidence to the House Committee inquiry suggested that thousands of complaints and inquiries are made to relevant jurisdictions."

The impacts and disadvantages of the anti-bullying provisions for employers are:

- having to navigate the complex regulatory framework referred to above;

³²⁰ Fair Work Commission Quarterly Anti-bullying reports: Jan-March, April-June and Jul-Sep 2014.

³²¹ *ibid.*, Only 36 out of 532 applications have been finalised by an FWC decision.

³²² *ibid.*, 108 out of 532 applications.

- a widening exposure to potential claims;
- the cost in time and money of managing this exposure, responding to allegations and claims and defending applications (whether or not workplace bullying or meritorious);
- the possibility of facing multiple investigatory and adjudicative processes arising out of the same set of circumstances (indeed this is contemplated under the provisions³²³); and
- the possible impact on managerial prerogative including where bullying allegations arise during a performance management process³²⁴.

Additionally, even though orders for compensation and reinstatement are explicitly excluded, the orders which the FWC could make are still significant and broad ranging because they can be any order it considers appropriate to prevent a worker being bullied. The examples of orders the FWC may make included in paragraph 121 of the Revised Explanatory Memorandum to the *Fair Work Amendment Bill 2013* are orders requiring:

- the individual or group of individuals to stop the specified behaviour;
- regular monitoring of behaviours by an employer;
- compliance with an employer's workplace bullying policy;
- the provision of information and additional support and training to workers;
- review of the employer's workplace bullying policy.

Good policy requires any order made being capable of being complied with without ongoing supervision by the decision-making body. In the one order made by the FWC, the employee against whom the allegation was made was ordered to:

- have no contact with the co-worker alone;
- make no comment about the co-worker's clothes or appearance;
- refrain from sending any emails or texts to the co-worker except in emergency circumstances;
- "complete any exercise" at the employer's premises before 8am; and
- raise no work-related issues without first notifying the employer's chief operating officer or his subordinate.³²⁵

In that case, the co-worker was also ordered not to arrive at work before 8.15am and the parties had leave to have the case re-listed for a further conference if they experienced any difficulties in implementing the orders. These orders indicate that the jurisdiction can result in the FWC making even the most minor of operational decisions that bind an employer with ongoing or even indefinite effect and that the requirement for ongoing supervision is a distinct possibility. Whether this is an unintended consequence or not, the potential impact on the functioning of a workplace is evident.

³²³ Revised Explanatory Memorandum to the *Fair Work Amendment Bill 2013* (taking into account amendments made by the House of Representatives to the Bill as introduced) at Paragraph 128

³²⁴ Applicant v Respondent [2014] FWC 6285 (31 October 2014) and YH v Centre and Others [2014] FWC 8905 (11 December 2014).

³²⁵ Applicant v Respondent PR 548852 (21 March 2014).

The extent the anti-bullying provisions are substitutes for state and federal WHS laws or other provisions of the FWA was vaguely addressed in paragraph 129 of the Revised Explanatory Memorandum to the *Fair Work Amendment Bill 2013* and it is far from conclusive that they are a necessary substitute:

“The Committee acknowledged that workplace bullying can be addressed through many existing regulatory avenues; however, some of these avenues were not tailored specifically to address bullying, and in some instances did not provide a remedy for a bullied worker. The Committee recognised in some instances it is appropriate that the bullying matter be pursued through other available avenues, including workers’ compensation or criminal law, to ensure a fair and just outcome.”

For reasons outlined above, ACCI does not consider that anti-bullying provisions serve to complement state and federal WHS laws or other provisions of the FWA and these pre-existing laws already provided an appropriate regulatory response.

ACCI considers that workplace bullying must remain fundamentally as pertaining to the health, safety and welfare of workers and not as a broader industrial relations matter. ACCI further encourages the constant and consistent application of the distinction between what can be perceived of as bullying and what is reasonable management.

ACCI must also place on the record its opposition to changes that would see monetary compensation inserted into the anti-bullying provisions. This would introduce the concept of ‘go away’ money with bullying claims leading to settlements at the instigation of either the alleged victim or employer, prior to any determination by the FWC. ACCI has previously expressed concern in this regard.

Depending on the nature of the alleged bullying and terms of the settlements reached, they may not assist the alleged victim and will unfortunately see some individuals exploit the system for their own purposes. This includes exploitation by individuals, (including those who may offer “no-win no fee” services to clients) in the expectation that some respondents (who we anticipate will generally be employers,) may be willing to make a commercial decision to settle the matter even where there is no merit in the accusations made in an application to the FWC.

It is an unfortunate reality that vexatious and unmeritorious claims are already often experienced by employers under unfair dismissal, adverse action and anti-discrimination laws. The anti-bullying jurisdiction of the FWC should not become a province for potentially vexatious claims to be made in relation to such a serious WH&S matter.

4.2.1 Conclusion

ACCI supports continuing dialogue with governments at the federal and state/territory levels, their WH&S agencies and stakeholders to progress a significant reduction in workplace bullying. ACCI and its members have sought to be part of the

solution to this issue and continue to encourage employers to take proactive measures to prevent bullying from occurring in the first place. Where allegations do arise, ACCI and its members support employers in carrying out workplace investigations and responding to complaints in lawfully, appropriately and compassionately.

At the beginning of this section, ACCI noted that Issues Paper 4 asks whether changes should be made to the anti-bullying provisions of the FW Act. ACCI confirms that the change must be the repeal of the anti-bullying provisions in toto and the Productivity can so recommend, safe in the knowledge that a comprehensive regulatory framework will still remain.

ACCI considers that workplace bullying must remain fundamentally as pertaining to the health, safety and welfare of workers and not as a broader industrial relations matter. Accordingly, ACCI recommends repeal of the anti-bullying provisions of the FW Act.

4.3 General Protections and Adverse Action

Laws recognising and protecting the right to freedom of association, preventing discrimination, and preventing other unfair conduct have long been a feature of the WR Framework.

There was, however, no indication in the *Forward with Fairness* policy documents released by the previous Government prior to its election in 2007 that it would replace the regime of unlawful termination and freedom of association protections in the WR Act with the “general protections” against “adverse action” based on a broader range of protected “workplace rights” and discrimination grounds.

The Productivity Commission has asked a range of broad questions regarding the general protections regime. It is regrettable there was no formal consideration of questions of this nature as part of the preparation of a regulatory impact statement (RIS) prior to the regime’s enactment. As has been discussed previously, the previous Government exempted the FW Act from this requirement.

Regardless of the lack of community debate and the absence of a RIS, the previous Government justified the insertion of the general protections regime into the FW Act on the basis that it would promote fairness and representation at the workplace,

*...through streamlined and simple general protections dealing with workplace and industrial rights, including the rights to freedom of association and protection against discrimination, unlawful termination and sham arrangements...*³²⁶

³²⁶ Explanatory Memorandum, *Fair Work Bill 2008* (Cth), p. ii.

As was noted at the time of the PIR of the FW Act, a PIR was mandatory when regulation was introduced without a RIS and was required to examine, inter alia, the problem that the regulation was intended to address.³²⁷

It was said that the Government had considered that the pre-existing scheme lacked regulatory coherence, involved duplication and contained inconsistencies³²⁸. However the PIR Panel was moved to conclude:

*While one would imagine that the consolidation of previously scattered protections into a single Part of the FW Act would make the protections easier for employers and employees to understand and apply, the Panel is aware that this has not been the immediate result. Moreover, there is uncertainty and confusion (primarily among employers and their representatives) about the implications of the provisions. The Panel consider that much of this is due to the lack of judicial consideration of matters that test the limits of the new protections. As more legal precedent develops, the Panel hopes employer uncertainty will subside.*³²⁹

As to this, ACCI is not convinced that waiting for legal precedent to develop is the best way to address uncertainty arising from the operation of provisions that were neither adequately flagged nor assessed in the first place.

The PIR was of course constrained by its terms of reference, with the FW Act only to be assessed against its own objects and the Review examining the extent to which it was operating as intended. ACCI would be very concerned if the Productivity Commission regards the Post-Implementation Review as having settled questions of concern regarding the general protections regime raised by employers and employer representatives then and maintained.

4.4 Unlawful termination

The 1993 system, through s 170DF of the *Industrial Relations Act 1988* made the following terminations unlawful:

170DF(1) An employer must not terminate an employee's employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons:

- (a) temporary absence from work because of illness or injury;*
- (b) union membership or participation in union activities outside working hours or, with the employer's consent, during working hours;*
- (c) non-membership of a union or of an association that has applied to be registered as a union under the provisions of this Act;*
- (d) seeking office as, or acting or having acted in the capacity of, a*

³²⁷ McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, June 2012 at p.30.

³²⁸ *ibid.*, at p.232.

³²⁹ *ibid.*, at pp 246-24.

- representative of employees;*
- (e) *the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;*
- (f) *race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;*
- (g) *absence from work during maternity leave or other parental leave.*

There were two exceptions to these prohibitions. They provided protection to employers if the discrimination was based on the inherent requirements of the particular position or, if the termination was of a member of staff at a religious institution, the employment was terminated in good faith in order to avoid injury to the religious susceptibilities of the adherents of that religion³³⁰.

If an individual brought an application alleging that a termination was for a particular reason or reasons referred to in s.170DF(1) or was for reasons that included a particular reason or reasons referred to s.170DF(1), the onus was on the employer to prove that:

- the termination was not for a particular reason or reasons **or** for reasons that included a particular reason or reasons referred to s.170DF(1); or
- the reason was a reason to which either of the two exceptions applied.³³¹

Remedies available included an order for reinstatement and any order necessary to maintain the continuity of the employee's employment and compensate for lost remuneration but where reinstatement was 'impracticable', compensation was available. Significantly, the compensation available was capped at six months' remuneration for award covered employees and six month's remuneration or \$30,000, whichever the lower for non-award employees³³².

Under the WR Act these provisions became part of s.170CK modified only slightly, as highlighted below:

- (2) *Except as provided by subsection (3) or (4), an employer must not terminate an employee's employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons:*
 - (a) *temporary absence from work because of illness or injury **within the meaning of the regulations**;*
 - (b) *trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;*

³³⁰ *Industrial Relations Act 1988 ss 170DF(2) and (3).*

³³¹ s. 170EDA(2).

³³² s. 170EE.

- (c) *non-membership of a trade union;*
- (d) *seeking office as, or acting or having acted in the capacity of, a representative of employees;*
- (e) *the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;*
- (f) *race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;*
- (g) **refusing to negotiate in connection with, make, sign, extend, vary or terminate an AWA;**

(h) *absence from work during maternity leave or other parental leave.*

(3) *Subsection (2) does not prevent a matter referred to in paragraph (2)(f) from being a reason for terminating employment if the reason is based on the inherent requirements of the particular position concerned.*

(4) *Subsection (2) does not prevent a matter referred to in paragraph (2)(f) from being a reason for terminating a person's employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the employer terminates the employment in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.*

Changes of significance were made to the onus of proof, as outlined in the new s.170CQ:

170CQ Proof of issues in relation to alleged contravention of section 170CK

*In any proceedings under section 170CP relating to a termination of employment in contravention of section 170CK for a reason (a **proscribed reason**) set out in a paragraph of subsection (2) of that section:*

(a) it is not necessary for the employee to prove that the termination was for a proscribed reason; but

(b) it is a defence in the proceedings if the employer proves that the termination was for a reason or reasons that do not include a proscribed reason (other than a proscribed reason to which subsection 170CK(3) or (4) applies).

The Explanatory Memorandum said of s.170:

*It will not be necessary for the employee to prove that the termination is for a proscribed reason. This provision is necessary because the range of reasons for terminating employment is usually within the employer's exclusive knowledge. As a result, it is a defence for the employer to show that the reasons for the termination did not include a proscribed reason.*³³³

In terms of remedies, the WR Act gave the Courts a new power to impose a penalty on employers and powers to make any orders necessary to remedy a termination and any other consequential orders:

170CR Orders available to courts

(1) If the Court is satisfied that an employer has contravened section 170CK or 170CN in relation to the termination of employment of an employee, the Court may make one or more of the following orders:

(a) an order imposing on the employer a penalty of not more than \$10,000;

(b) an order requiring the employer to reinstate the employee;

(c) subject to subsection (2), an order requiring the employer to pay to the employee compensation of such amount as the Court thinks appropriate;

(d) any other order that the Court thinks necessary to remedy the effect of such a termination;

(e) any other consequential orders.

A Court did not however have the power to grant an injunction before a termination of employment had taken effect³³⁴.

In the WorkChoices Laws, the provisions of s.170CK were reproduced in the new s.659. To the existing protections was added a protection against termination due to a temporary absence from work because of the carrying out of a voluntary emergency activity.³³⁵

The onus of proof remained unchanged and the orders available to Courts were largely unchanged, although an amount awarded in compensation was not to include a component "for shock, distress, or humiliation, or other analogous hurt caused to the employee by the manner of terminating the employee's employment."³³⁶

³³³ *Explanatory Memorandum to the Workplace Relations and Other Legislation Amendment Bill 1996* (Cth), p.49 at para 7.79.

³³⁴ *Workplace Relations Act 1996* (Cth) s.170CR(6).

³³⁵ s.659(2)(i).

³³⁶ s.665(2).

4.4.1 Industrial action

The 1993 system, through s334A of the *Industrial Relations Act 1988* (Cth), contained the prohibition against dismissing an employee, injuring an employee in his or her employment or altering the position of an employee to his or her prejudice merely because the employee had engaged or was proposing to engage in industrial action.

Section 170MU of the WR Act replaced s334A and extended the prohibition to threats by an employer to discriminate and offered protection to employee when they were engaging in industrial action. In terms of the burden of proof, it was presumed, unless the employer could prove otherwise, that the alleged conduct of the employer was carried out wholly or partly because the employee was proposing to engage, was engaging, or had engaged in protected action.³³⁷

In the WorkChoices Laws, the provisions of s.170MU were reproduced in the new s.448 and Courts were empowered to make orders imposing a pecuniary penalty or granting injunctions and any other orders that they considered necessary to stop the contravention or remedy its effects.³³⁸

4.4.2 Freedom of association provisions

The 1993 system, through sections 334, 335 and 336 of the *Industrial Relations Act 1988*, provided freedom of association protections. They were replaced by new Part XA in the WR Act and the onus of proof was such that once a complainant had alleged that conduct carried out or threatened to be carried out was motivated by a reason or intent that contravened the freedom of association provisions, the person or industrial association had to establish on the balance of probabilities, that the conduct was not carried out for the unlawful reason or intent.

The WorkChoices Laws changed this onus of proof for circumstances in which it was alleged that an employer:

- dismissed an employee;
- injured an employee in his or her employment;
- altered an employee's position to the employee's prejudice;
- refused to employ another person; or
- discriminated against another person in the terms and conditions on which the employer offered to employ the other person,

because the employee or other person had the benefit of a particular industrial instrument or entitlement. In these circumstances the employer would not be regarded as having committed a breach unless that benefit or entitlement was the sole or dominant reason for his or her conduct.³³⁹

³³⁷ *Workplace Relations Act 1996* (Cth) s.170MU(3).

³³⁸ s.448(4).

³³⁹ s.792(1), 792(4) and 793(i).

This onus of proof also applied where behaviour of the same manner was alleged to have been carried out against independent contractor.³⁴⁰

For the 15 other prohibited reasons in s.793 of the WR Act, the test was whether the conduct was for a prohibited reason, or for reasons that included a prohibited reason.³⁴¹

This suite of protections and the way in which they operated has been outlined to highlight that fairness and representation at the workplace was already available in a variety of ways prior to the FW Act.

4.4.3 *Fair Work Act 2009 (Cth)*

The FW Act replaced the regime of unlawful termination and freedom of association protections in the WR Act with the “general protections” against “adverse action” based on a broader range of protected “workplace rights” and discrimination grounds.

Contrary to the assertions made, the new regime of general protections and workplace rights has not streamlined the rights to freedom of association and protection against discrimination, unlawful termination and sham arrangements but has instead increased the regulation of employment.

4.4.4 Discrimination

A new layer of anti-discrimination regulation has been introduced. The previous provisions in s659 of the WR Act have been retained in s.772 of the FW Act but with employers now subject to a changed burden of proof, presumed to have taken the alleged action for a prohibited reason unless they prove otherwise.³⁴² The Explanatory Memorandum gave no insight as to why it was considered necessary to change the longstanding burden of proof in relation to these existing protections against discriminatory conduct.

In addition, there are now general protections against discrimination available to both employees and prospective employees on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin,³⁴³ with employers subject to a reverse onus of proof; presumed to have taken the alleged action for a particular reason or intent that would amount to a contravention of the provisions unless they prove otherwise.³⁴⁴ This is in contrast to Federal and State anti-discrimination laws that have required ‘direct’ or ‘indirect’ discrimination to be established.

³⁴⁰ s.792(5), 792(8) and 793(i).

³⁴¹ *Workplace Relations Act 1996* (Cth) ss. 792(1) and (5).

³⁴² *Fair Work Act 2009* s.783(1).

³⁴³ s. 351.

³⁴⁴ s. 361(1).

Employers now have to grapple with anti-discrimination provisions in the FW Act that have broader application than before. They apply to employment more generally, not just termination and now cover prospective employees too. As was outlined in the Explanatory Memorandum to the *Fair Work Bill 2008*³⁴⁵:

The consolidation of the existing specific WR Act provisions into generally applicable prohibitions means that the new provisions protect persons against a broader range of adverse action.

Illustrative example

The unlawful termination ground in paragraph 659(2)(e) of the WR Act provides that an employer must not dismiss an employee because the employee has participated in proceedings against an employer involving alleged violation of laws. Under the new protections, an employee is protected from the full range of adverse action (e.g., dismissal, refusal to employ or injury to the employee in his or her employment) for this reason (see the protection in subparagraph 340(1)(a)(iii) discussed above in relation to the exercise of workplace rights).

Employers are therefore exposed on multiple fronts and must also give consideration to both the other Federal anti-discrimination laws (*Sex Discrimination Act 1984*, *Racial Discrimination Act 1975*, *Disability Discrimination Act 1992*, *Age discrimination Act 2004*, *Australian Human Rights Commission Act 1986* and the *Workplace Gender Equality Act 2012*) and applicable State anti-discrimination laws. Aggrieved employees and prospective employees can ‘forum shop’.

4.4.5 Employee complaints

Another example of increased regulation is in the area of employee complaints. Whereas there was a longstanding protection for employees who had filed a complaint or participated in proceedings involving alleged violation of laws or regulations or recourse to competent authorities³⁴⁶, the FW Act now offers protection to a person (employee or prospective employee) who makes **any** complaint or enquiry relating to his or her employment/prospective employment.

It is now possible for employees or prospective employees to bring a complaint alleging that because of a complaint or inquiry they have made, their employer/prospective employer has:

- ‘injured’ them in their employment; or
- altered their position to their detriment; or
- discriminated against them; or
- refused to employ them; or

³⁴⁵ Explanatory Memorandum, *Fair Work Bill 2008* (Cth), p. 221 at para. 1386.

³⁴⁶ *Workplace Relations Act 1996* (Cth) ss. 170CK(2)(e) and then s659(2)(e), *Industrial Relations Act 1988* (Cth) s170DF(1)(e).

- discriminated against them in the terms of a job offer,

In these circumstances, it will be presumed that the employer/prospective employer has taken the alleged action because of the complaint or inquiry was made unless he or she proves otherwise. Where the alleged action complained of does not involve a termination, it is open for the employee/prospective employee to apply for the FWC to deal with the dispute pursuant to s. 372 of the FW Act.

4.4.6 Coercion

The prohibition against coercive behaviour has also been expanded by the general protections provisions. Formerly relating to agreement making under the WR Act³⁴⁷, s. 343 of the FW Act provides that the prohibition now applies to the full suite of workplace rights outlined in s. 341.

4.4.7 Undue influence or pressure

There is also an expansion in the exposure of employers that has been brought about by s. 344 of the FW Act, which provides:

An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to:

- (a) make or not make an agreement or arrangement under the National Employment Standards;*
- (b) make or not make an agreement or arrangement under a term of a modern award or enterprise agreement that is permitted to be included in the award or agreement under subsection 55(2); or*
- (c) agree to, or terminate, an individual flexibility arrangement; or*
- (d) accept a guarantee of annual earnings; or*
- (e) agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.*

The Explanatory Memorandum to the *Fair Work Bill 2008* made it clear that this was a new avenue for claims with a deliberately lower threshold than coercion and one be forgiven for thinking it was designed to work against employers seeking to negotiate directly with their employees.³⁴⁸

³⁴⁷ *Workplace Relations Act 1996* (Cth), s.400.

³⁴⁸ Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) pp 222-223 at paragraph 1396 “Under influence or pressure is a lower threshold than coercion. This is deliberate as it recognises there should be higher obligations on an employer when they are entering into arrangements with employees that effectively modify or alter their conditions under the safety net.”

4.4.8 Misrepresentation

While it was stated that s.345(1) of the FW Act was intended to cover the pre-existing s. 401 from the WR Act, which dealt with false or misleading statements in relation to agreement-making, the new section has removed the causal element³⁴⁹ and creates greater exposure for employers by applying to representations about all workplace rights, not just agreement making.

The impact of these changes is that an employer can be held liable for a representation about the workplace rights of another person, without the requirement for evidence that the representation caused the other person to act in a particular way, unless the other person would not be expected to rely on it.³⁵⁰

4.4.9 Machinery & practical issues

The broad nature of workplace rights and the reverse onus of proof combine to place business operators in an unenviable position when it comes to managing their operations:

- duties extend beyond employer/employee and principal/contractor relationships and now include prospective employees, with prospective employees taken to have the workplace rights they would have if they were employed in the prospective employment³⁵¹;
- with protection given to a person who makes any complaint or enquiry relating to his or her employment, employees are able to take advantage of this, if subsequently the subject of performance management;
- the selection of employees for redundancy has become a fraught process, no matter how genuine the operational reasons are. There is no longer a prohibition on a Court granting an injunction to prevent an alleged unlawful termination. This means it is possible, in circumstances where an employer is managing a redundancy scenario, for an employee to seek an injunction to prevent the termination of his or her employment.
- Similarly, injunctive relief may be sought where other restructuring is being contemplated or implemented.
- Despite the previous Government's assertion that it had created 'streamlined and simple general protections' there is a web of anti-discrimination provisions and employee rights, sourced from different jurisdictions, housed in different pieces of legislation and, in the case of the FW Act, still scattered throughout its contents.
- Greater exposure to Court proceedings has produced new drains on business resources and as there are no caps on compensation, businesses are exposed more profoundly to the dynamics of 'go away money'.
- Amongst the provisions of the general protections regime, there are approximately 15 civil remedy provisions applicable to employers. In the

³⁴⁹ Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) pp.223-224 at paragraph 1397.

³⁵⁰ *Fair Work Act 2009* s.345(2).

³⁵¹ s.341(3).

event of a breach, a civil remedy may be sought and the FWO is amongst the persons empowered to make applications for them.³⁵² In such circumstances, employers will be required to fund their own cases whilst being pursued by a Government regulator, placing them in an unenviable position particularly if they are a small business employer.

ACCI foresees the general protections having similar impacts on employers as the impacts the unfair dismissal laws are having (referred to earlier in this submission). With uncapped compensation, 'Go away money' will become an entrenched part of the system and employers will continue to be influenced by the desire to avoid the cost, time, inconvenience or stress of further legal proceedings (particularly in the Court system) in choosing to settle in order to minimise their exposure and cost.

It is suggested that with the general protections laws, *Behavioural Economics* will impact even more profoundly than would be the case with the unfair dismissal laws, weighing heavily on employers' minds. As the potential exposure is greater, avoiding poor decision making is even more vital. The vesting of rights in prospective employees will have an influence on recruitment practices and selection decisions. There will be impacts on workforce management and managerial authority, as employers become risk averse due to the burden of proof imposed on employers if and when management action becomes the subject of complaint.

4.4.10 Growth in the number of claims

It is difficult to refute that the rates of growth outlined below are not attributable to the following characteristics of the general protections provisions:

- They cover a broader range of workplace rights than were available under either the 1993 system or the WR Act;
- They are available to a broader pool of people (employees, contractors and prospective employees);
- They are more attractive in terms of remedies (e.g: uncapped compensation); and
- They give claimants encouragement, due to the burden of proof imposed on employers/prospective employers (i.e. it is presumed that the employer/prospective employer/principal/prospective principal has taken the alleged action in breach, unless he or she proves otherwise).

The rate of growth in general protections claims is illustrated through the following figures:

- In four years, annual general protections applications pursuant to ss365 and 372 of the FW Act have increased more than two and half times, **from 1442** in 2009/2010 **to 3659** in 2013/14.

³⁵² Part 4-1 Division 2 s.539(2).

- The number of annual applications pursuant to s.365 was nearly two and a half times higher in 2013/2014 compared with 2009/2010, increasing from **1188** to **2874**;
- The number of annual applications pursuant to s.372 was more than three times higher in 2013/2014 compared with 2009/2010, increasing from **254** to **785**.³⁵³

Further, the rate of growth is also increasing. There has been a 27% increase in the number of applications filed pursuant to ss365 for the first two quarters in 2014/2015 compared with the first two quarters in 2013/2014 (1419 to 1799) and a 30% increase in the number of applications filed pursuant to ss372 for the first two quarters in 2014/2015 compared with the first two quarters in 2013/2014 (360 to 361). The comparable rates of growth between 2010/2011 and 2011/12 were 15% and 18%.³⁵⁴

4.4.11 Conclusion

The general protections regime in the FW Act offers expanded workplace rights to a broader pool of potential claimants with attractive remedies and a favourable burden of proof for those inclined to agitate a claim.

The regime was not foreshadowed and nor was it publicly debated. It was not the subject of regulatory impact statement prior to enactment and the PIR was unhelpfully constrained by that review's narrow terms of reference. What has been produced is neither streamlined nor simple with the very early requirement for judicial review by the High Court a significant rebuttal of this proposition. It was at least arguable that a 'clean up' of existing provisions would have been worthwhile but the expansion was never justified.

Regardless, for interested parties concerned about the regime and its ongoing implications, there is now the requirement to prosecute the case for change to a standard that was not demanded of those who conceived and introduced the regime.

There is scope for improvement and there is scope for rationalisation, particularly where duplication exists. ACCI would support the Productivity Commission giving consideration to recommendations that address:

- limiting the general protections framework to unlawful termination provisions only;
- removing the reverse onus of proof;
- reinstating the former, pre-Fair Work Act 'Freedom of Association' protections;

³⁵³ *Annual Report of Fair Work Australia 2009-2010* p.11 at paragraph 2.2 and *Quarterly Reports of Fair Work Australia and the Fair Work Commission to the Minister pursuant to s.654* for 2013/2014.

³⁵⁴ *Quarterly Reports of Fair Work Australia and the Fair Work Commission to the Minister pursuant to s.654*.

- imposing higher barriers to entry such as increased filing fees for applications and caps on compensation.

As has been illustrated, prior to the FW Act, there was a comprehensive range of protections available covering unlawful termination, freedom of association and the taking of industrial action. Scaling back the general protections regime and reverting to the previous suite of rights would restore balance and provide reasonable relief to employers while not depriving employees of fundamental protections.

ACCI recommends repeal of the General Protections laws, with pre-FW Act 'Freedom of Association' protections and unlawful termination provisions reinstated.

ACCI notes the Productivity Commission *"considers Australia's broader human rights framework to be distinct from the WR system and only considers any tensions between the two frameworks"*.

ACCI has referred to the web of anti-discrimination legislation at Federal and State levels and should there be a recommendation to at least consolidate Federal anti-discrimination laws, this would be supported by ACCI on the condition that there is no net detriment to business and a reduction of regulatory overlap between existing Federal laws that prohibit discrimination in employment.

5. ISSUES PAPER 5: OTHER WORKPLACE RELATIONS ISSUES

5.1 Institutions

As the Australian workplace relations system has evolved in recent times the work performed by the FWC, and its predecessor bodies, has changed profoundly from the resolution of 'collective disputes' to making determinations regarding disputes involving individual workplaces and individual employees³⁵⁵. In addition to the longstanding impact on the cost of doing business, implications flowing from the decisions of the FWC have widened and now reach into how business may be conducted and the right of businesses to manage their staff more than ever before.

ACCI agrees with the Productivity Commission's proposition that the workplace relations system in Australia gives "more weight than other Anglo-Saxon countries to elaborate rules about WR processes and, most particularly, to the centralised determination of wages and conditions for many employees".³⁵⁶ ACCI also considers that this has led to the emergence of a "complex and legal institutional framework that is distinctive to Australia".³⁵⁷ The Productivity Commission has identified that:

³⁵⁵ Annual Report of Fair Work Commission 2013-2014 p.16, Chart 2.

³⁵⁶ Issues Paper 1: Context, p.9.

³⁵⁷ Issues Paper 1: Context, p.10.

*WR policy, institutions and regulation are now highly elaborate and broad ranging. They have grown from a limited Commonwealth role in dispute settlement one hundred years ago to a position today where the Commonwealth regulates the bulk of industrial awards, resets minimum wages, and had created three specialist bodies that collectively mediate disputes, provide information, register agreements, check compliance with the law and adjudicate on some key matters of WR law. Other jurisdictions still retain a role.*³⁵⁸

ACCI supports a continuing role for the FWC. The role it plays must be complementary to the overall nature of the system. The system's focus should be on cooperative relations between employees and employer and emphasise the resolution of any disputes at the workplace level, reducing the need for external party involvement. Reforms recommended in this submission would result in some of the current functions of the FWC changing. Some of the principles that guide it in the exercise of its functions would also change.

ACCI acknowledges that the role the FWC plays in determining minimum wages and award regulation is defined by parliament. Further, it is acknowledged that the FWC is required to fulfil these obligations in accordance with the provisions of the Act. ACCI has identified ways in which the objects that underline the setting of minimum wages and the review of Modern Awards could be improved via amendment. Once amended, it would be incumbent on the FWC to discharge its functions in accordance with them.

At present, the ACTU and its affiliates are effectively seeking the imposition of some new national standards via the current four yearly review of modern awards. While the current system provides scope for such claims to be made, ACCI is concerned about this and believes that setting and imposing national standards should be a task now undertaken by Parliament alone. The role of the FWC as lawmaker is not compatible with the decentralised system proposed by ACCI.

The FWC has a constructive role to play in dispute settling. Its approach should emphasise the benefits of making the system less adversarial and more reflective of contemporary alternative dispute resolution practices. In a system underpinned by a clear and simple safety net and where a full suite of agreement making options is available, the role of the FWC in agreement making would be reduced and assessment and approval powers could eventually vest in a statutory agency.

A simple and streamlined framework and safety net would also result in changes to the nature and scale of activity undertaken by the Fair Work Ombudsman (FWO) or equivalent enforcement agency. A simplified safety net would see the role of the FWO transform to one primarily concerned with compliance and enforcement outcomes. The educative function would change and become less necessary over time.

The Productivity Commission will be aware that the Government is considering establishing a specialist appeals jurisdiction for the FWC. With an appeals jurisdiction under consideration, it is not unreasonable to ask why we shouldn't have the best possible Appeals process. There is precedent for specialist Appeals divisions both

³⁵⁸ *ibid.*, p.2.

within Australia and internationally. A number of the former state tribunals had appeal benches which were separate from Commission decision makers which in a number of cases resided in the court function in that state's tribunal.³⁵⁹ Internationally, examples include the United Kingdom Employment Appeal Tribunal and the United States National Labour Relations Board.

Coherent principles from Appeal decisions providing guidance to FWC members hearing cases at first instance increase the capacity for parties and practitioners to anticipate likely decisions, which in turn helps inform management and litigation strategies. Certainty also serves to reduce the amount of litigation. It is imperative that the principles are sound, so as to not unduly interfere with decisions of management, and that they are capable of delivering certainty.

5.2 A regulator for the building and construction industry

ACCI remains concerned about a culture of industrial lawlessness persisting in the building and construction industry. This warrants continued and strengthened regulatory intervention in this sector. Re-establishing the Australian Building and Construction Commission (ABCC) with the full suite of powers held during the currency of the *Building and Construction Industry Improvement Act 2005* (Cth) will have the effect of increasing productivity, boosting long term investment in infrastructure projects, and restoring confidence to this critical part of the national economy.

Research conducted for Master Builders Australia by Independent Economics found that abolishing the ABCC led to a permanent loss of 1.5 per cent of construction activity, a loss in consumer real wages of 0.7 per cent on a post-tax basis, and an increase in working days lost by 65,000 days to an estimated total of 89,000 working days lost in 2012/13.³⁶⁰ The Government's Mid-Year Economic and Fiscal Outlook indicate that the Government's Infrastructure Growth Package will lead to over \$125 billion of new productive infrastructure over the next decade. A productive workforce and industrial stability will be essential in ensuring that such infrastructure is delivered efficiently, within budget and in a manner that ensures maximum value for the taxpayer. Reinstating the independent industrial regulator with its full suite of powers will also result in significant gains for the national economy, as a result of a more productive and efficient industry that observes the rule of law and recognises free enterprise over intimidation and industrial thuggery.

The ABCC was created as a direct result of the Cole Royal Commission to stamp out such industrial violence and the pervasive culture of lawlessness in the building and construction industry. ACCI notes that the Productivity Commission is not, in the context of this Inquiry, examining in any detail institutional arrangements in the construction industry which were addressed in the Productivity Commission's 2014 inquiry into Public Infrastructure. However as these issues intersect with the

³⁵⁹ For example, under the *Industrial Arbitration Act 1940* (NSW), appeals from members of the Commission were heard by the Commission in Court Session.

³⁶⁰ 'Economic Analysis of Building and Construction Industry Productivity: 2012 Report', Independent Economics for Master Builders Australia, 27 February 2012.

framework ACCI encourages the Productivity Commission to consider the findings of the Cole Royal Commission and give consideration to reforms addressing the following ‘four tenets’ that the Cole Royal Commission Report identified as appropriate for driving ‘reform and cultural change’:

First, there should be as clear a definition as possible of that industrial activity which is permitted, and that which is not.

Second, the rule of law should be re-established so that conduct which is not permitted attracts serious consequences. Penalties for breaches must be increased substantially.

Third, those who engage in unlawful conduct or practices should bear the loss suffered by other participants in the industry. A quick, cheap and effective method of establishing and imposing liability for that loss must be established.

Fourth, it should become widely known and accepted within the industry that there is an independent body, not subject to the pressures applicable to participants in the industry, which will, with vigour, uphold the law and prosecute any participant in the industry who breaches.³⁶¹

ACCI also encourages the Productivity Commission to consider the issues identified in the interim report of the Heydon Royal Commission in assessing the need for reforms that will drive respect for and adherence to the rule of law in workplace relations in the building and construction industry.

ACCI recommends restoration of the Office of the Australian Building & Construction Commissioner (ABCC) with its full suite of powers.

5.3 Compliance costs

The Productivity Commission has sought views on ‘the main compliance costs faced by parties in the WR system’. It should be noted from the outset that the quantum of compliance costs and main sources of compliance will be impacted by a number of variables including but not limited to the size of the business, the instruments applying to employees in the business, workplace culture, structure, incidence and likelihood of industrial action, region and industry/sector, and in small businesses, the sophistication of the employer. Examples of the compliance challenges faced by employers and opportunities to reduce compliance costs and simplify the system in a way that will help achieve certainty of compliance are included throughout this submission.

³⁶¹ Commonwealth of Australia, *Final Report of the Royal Commission into the Building and Construction Industry* February 2003, www.royalcombcgi.gov.au Volume 11, p.11, paras. 34 – 39 and 42.

ACCI remains critical of the decision of the Rudd government in 2008 to exempt the *Fair Work Bill* from a regulatory impact assessment. The impacts of this decision are manifest in the range of issues of concern associated with the application of these laws in the economy and its workplaces. The parliament's unwillingness to make appropriate amendments to the Fair Work Bills in 2008 and 2009, including rejection of most of the then proposals from the business community (including ACCI's 200 suggested amendments) has contributed to a raft of undesirable impacts (as highlighted in this submission) without delivering any net benefit. The subsequent failure of the previous government to adopt recommendations from the PIR Review of the FW Act has perpetuated some of the detrimental impacts. Granted the current government is attempting implement PIR Review recommendations, there is no certainty that its amendments will be passed by the Senate.

Submissions made during the PIR Review of the FW Act demonstrate the extent to which employers consider the current system has increased the compliance burden. For example, the Chamber of Commerce and Industry Queensland (CCIQ), highlighted the following findings based on a survey of 1000 Queensland businesses:

- the majority of Queensland businesses surveyed (66%) expressed major or critical concern regarding the overall complexity of the system;
- post FW Act implementation compliance with industrial relations laws increased from the 14th to the 4th most significant constraint on business growth in Queensland;
- “[m]ajor concerns were raised about unfair dismissal legislation, wage levels and increases, leave provisions, restrictions on individual agreements, penalty rates and public holiday entitlements”;
- 42% of businesses reported that the FW Act had a negative impact on their business;
- the overall compliance costs with the FW Act increased for 48% of businesses while workplace productivity decreased in 30% of businesses and profitability decreased in 46% of businesses;
- around 30% of businesses reported a decrease in staff levels as a result of the FW Act and one in four saw a reduction in staff hours and an increases in penalties and overtime paid;
- 35% of businesses saw an increase in wage levels as a result of moving to modern awards;
- 58% of businesses reported that the FW Act increased the regulatory burden on their business.³⁶²

In its submission CCIQ reported that *“major concerns were raised about unfair dismissal legislation, wage levels and increases, leave provisions, restrictions on individual agreements, penalty rates and public holiday entitlements”*.³⁶³

A 2011 survey commissioned by the Australian Human Resources Institute tells a similar story, finding that more than three-quarters of human resources practitioners

³⁶² CCIQ Submission to the Fair Work Act Review Panel, February 2012.

³⁶³ CCIQ Submission to the Fair Work Act Review Panel, February 2012, p. 4.

surveyed perceived an increase in the need to seek legal advising in complying with the FW Act. Among the key findings were the following statistics:

- 63% of respondents reported an increased level of record keeping;
- 47% of respondents believed that operating under the Fair Work Act will decrease their organisation's willingness to employ people in the three years post the 2011 survey;
- 65% reported it taking more time to formulate employment contracts;
- 47% reported spending more time bargaining over employment contracts;
- 46% reported the negotiation of employment contracts is more difficult
- 29% reported a decrease in productivity
- 31% believed that allowing individual labour contracts, subject to a "better off overall" test, would either somewhat or greatly improve productivity;
- 31% believed allowing a choice between union and non-union negotiated agreements would somewhat or greatly improve productivity.
- 40% believed greater flexibility in use of contractors and labour hire firms would positively impact productivity
- 47% reported the importance of managing union relations has increased;
- 41% reported the number of union visits to work sites has increased;
- 58% reported increases in labour costs.³⁶⁴

ACCI does not wish to underplay the public expenditure required to support the present workplace relations framework but the bulk of its costs are imposed or result from its imposition on enterprises. The compliance burden associated with the current framework is best considered at the enterprise level. ACCI encourages the Productivity Commission to consider the case examples put forwards by ACCI members in the course of this Inquiry, and particularly to focus on the circumstances of small business navigating what is uncontroversially recognised as a highly complex framework.

5.4 Interaction of the system with competition laws

The recommendations advanced in this submission are intended to drive the creation of a holistic framework that will enhance competition and assist businesses to respond to competitive pressures at the local and global levels. Notwithstanding this the Productivity Commission has asked for views on a number of specific aspects of the framework in relation to the *Competition and Consumer Act 2010* (Cth) (CCA), administered by the Australia Competition and Consumer Commission (ACCC).

In June 2014 ACCI made comprehensive submissions to the Competition Policy Review which addressed the interaction of the workplace relations system and the anti-competitive practices it gives rise to with the CCA. ACCI specifically addressed secondary boycotts, anti-competitive agreements and transfer of business rules. The serious impacts of anti-competitive conduct, particularly secondary boycott conduct

³⁶⁴ 'The Fair Work Act: Its impact within Australian Workplaces', January 2012, Australian Human Resources Institute, p. 5.

engaged in by unions in the building and construction industry can be seen from Boral's Annual Report 2014 which estimates a \$10m loss on account of unlawful secondary boycott action.³⁶⁵

Recommendations to address anti-competitive agreement content and transfer of business rules are dealt with elsewhere in this submission and ACCI's specific recommendations made in relation to secondary boycotts are highlighted below and remain relevant in the context of this Inquiry.

ACCI recommends that:

- ***the ACCC provides transparent and consistent reporting with respect to its enforcement activities involving secondary boycotts. This should include, but not be limited to, clear, consistent and comparative reporting about:***
 - ***all complaints and enquiries received;***
 - ***assessments commenced (and concluded);***
 - ***investigations undertaken (whether at their own initiative or otherwise);***
 - ***undertakings made; and***
 - ***litigation commenced (and concluded).***
- ***approximately one year after the abovementioned transparency mechanisms have been in operation, a further review should be conducted which in light of additional information invites stakeholders to provide comment about whether the provisions of the CCA are actually operating effectively.***
- ***the ACCC be mandated to give a firm commitment to enforcing the secondary boycott provisions which is ideally more authoritative than a policy statement as is currently the case.***
- ***the Government should give consideration to providing the ACCC with an additional budget apportionment for the purposes of enforcing the secondary boycott provisions of the CCA.***
- ***the legislative framework for the secondary boycott provisions should be simplified, or failing that, the Government should give consideration to providing the ACCC with funding to formulate information tools and/or educate individuals, particularly small businesses, about the relevant provisions;***
- ***the Cole Royal Commission Report recommendations 181 and 182 be adopted, but consideration should be given to:***

³⁶⁵ Boral Limited Annual Report 2014 at p5.

- *simplifying the provisions (including removing the ‘dominant purpose’ test under section 45DD(1) of the CCA) whilst ensuring that there is harmonisation of penalties and compensation, and that the Fair Work Building and Construction (FWBC)/ Australian Building and Construction Commission (ABCC) possesses the same powers as the ACCC;*
- *requiring a reverse onus of proof for unions alleged to have engaged in such conduct; and*
- *developing a formal Investigation and Prosecution Cooperation Protocol to guide the functions of the FWBC/ABCC and ACCC, particularly in circumstances where both bodies may be investigating the same matter;*
- *in the interests of small business, a separate procedure for small business claims should be considered;*
- *there should be a positive obligation to report secondary boycott behaviour including circumstances in which an individual is approached by another individual requesting that an agreement, arrangement or understanding is reached in contravention of sections 45D and 45.*

5.5 Public sector workplace relations

The broad economic and social environments within which the public and private sectors operate are very different and governments in their role of employer, and often operating actual or effective monopolies, have developed public sector entitlements which do not easily fit with those in private sector economic activities. There are significant differences between public sector and private sector conditions and in most jurisdictions there has been a very long tradition of separate awards, agreements, employment statutes and formal policies covering public sector employees. This can be seen in sectors where there is a great deal of public-private sector employee interchange such as health or community services. Ultimately public sector wages policy is a matter for government but amendments by the previous government concerning the transfer state public sector employers were unwarranted.

The Productivity Commission would no doubt be familiar with the practice of governments to outsource the delivery of services to the private sector. The *Fair Work Amendment (Transfer of Business) Act 2012* amended the Act to provide that any state industrial instruments applying to an employee of a state public sector employer would transfer with the employee when there is a transfer of business from that employer to a private sector employer. This Act also received a Prime Ministerial exemption from assessment by the Office of Best Practice Regulation and was recently the subject of a Post-Implementation Review. Government response is still pending.

The effect of the amendments was that the previous approach of negotiating transmissions of business and transfers of employment from state public sector employers which accommodated movement into the private and the nature of the employees involved is now no longer lawful. Likely as intended, these transfer of business provisions materially impact the potential for efficiency gains, and the state public sector employers' decisions about whether to retain, transfer, re-size or redirect or close. A clear impact of the amendments is to reduce the likelihood that the new business service provider will engage former state public sector employees. This particularly affects the least specialist of displaced public sector employees.

It is difficult to believe that these amendments represent good policy. They have created a disincentive to outsource by locking in public sector terms and conditions of employment, no matter how restrictive, antiquated or expensive they are. By removing the pressure of credible competition they create a disincentive for public sector reform that may drive efficiency, better services and result in savings for taxpayers.

5.6 Independent contractors

The subcontracting of independent businesses provides a flexible, workable and efficient model of labour engagement and preservation of contracting independence is essential to boost national productivity.

The law distinguishes between 'employees' engaged under a contract *of* service and 'contractors' engaged under a contract *for* services. Whether a relationship is a contract of service or a contract for services is a matter for the courts and tribunals to determine using a series of tests and indicia that is applied to each case. Standard legal definitions of "employee" and "contractor" do not exist, for good reason.

The lack of clarity at the boundary is unfortunate, and not desirable, but nevertheless ACCI considers that the common law generally provides the most appropriate basis on which the law should give legal recognition to a contract for services. The reason for this is that in a number of employment-related statutes the common law notion of "employee" is added to by deeming classes of non-employee, or borderline non-employee, to be "employees" or "workers" for that statute. Unsurprisingly different classes are deemed employees/workers under different types of legislation, but importantly, deeming does not eliminate unclear borderlines, they are just shifted. This is addressed more fully below.

The control test, as considered in the matter of *Stevens v Brodribb*³⁶⁶, remains the most enduring means of determining worker status and requires a consideration of whether an employer has the right to control the manner of doing the work. Not unnaturally this will require assessment in certain circumstances, and this need to make these judicial assessments is not lessened by shifting to a notion such as "independence". In an era when new ways of working and types of engaging with the provision of services for others unclear situations will continue to be thrown up.

³⁶⁶ 1986 CLR 160.

To assist with trying to properly identify sufficiency of control the courts have developed other relevant indicia including:

- whether the contract permits the worker to perform similar work simultaneously for other employers;
- whether the worker is free to subcontract the work, or employ someone else;
- whether the worker invoices for their work or receives wages;
- whether the payment conditions mean the worker could make a profit or loss;
- whether the worker supplies their own tools or equipment; and
- where responsibility for the payment of injury insurance premiums lies.³⁶⁷

In the case of *Vella v Integral Energy* [2011] FMCA 6 (Unreported, Driver FM, 31 January 2011), Driver FM emphasised the importance of upholding the parties' intentions (at [9]):

... The assessment of whether the applicant has a prima facie case of an employment relationship is not, in my view, to be answered by a mathematical assessment of the various indicia, or a laborious weighing of the detail of the available evidence. Rather, the correct approach is to look at the form and substance of the relationship between the parties and the general weight of the available evidence. In addition to the factors referred to by the parties in their submissions, I take into account that working arrangements have been significantly liberalised in recent years and, in the more flexible working environment that now exists, it ought to be open to the parties to determine whether the relationship is one of employment or independent contract. That must be subject to several qualifications. The first is that the parties cannot turn an employment relationship into an independent contracting relationship which is a sham, for example, for the purposes of defrauding the revenue. Secondly, an employer should not be permitted to deprive a vulnerable employee of employment entitlements by attempting to dictate an arrangement of independent contract. Leaving aside taxation shams and arrangements imposed by duress and a gross inequality of bargaining power I see no general reason to deconstruct the fundamental nature of the relationship which the parties intended. (emphasis added).

Whether or not a person is classified as an independent contractor can be broadly viewed at the employment and tax level. At the employment level, businesses that engage independent contractors are not generally required to extend government mandated or employer provided benefits, such as superannuation³⁶⁸, workers' compensation, award rates, sick pay or annual leave. Independent contractors typically use their own equipment and facilities and cannot (with limited exceptions) collectively bargain for rates or form a union. From a tax perspective, businesses are not required to withhold PAYG instalments on payments made to independent

³⁶⁷ Waite, M. and Will, L. 2001, *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, p. 11.

³⁶⁸ Under superannuation legislation a contractor who is engaged wholly or principally for their (individual) labour is deemed an employee for the purposes of the superannuation guarantee charge.

contractors but rather pay GST on their services. In turn, independent contractors are eligible to utilise the business expense deduction regime.

ACCI rejects the proposition that sham contracting is a 'growing problem' and does not consider that there is a need to make changes to strengthen the FW Act provisions dealing with sham contracting. There is often confusion as to what the term "sham contracting" actually refers to. The notion of "sham" contracting has its origins in labour law and implies that those "falling victim" of such arrangements have involuntarily subjugated themselves out of the benefits of being an employee or have otherwise been "duped".

In some circumstances there will be benefits to one or both parties from misrepresenting an engagement and it is reasonable to address this with anti-avoidance provisions. These need to be appropriately confined. Under the FW Act "sham contracting" occurs where an employer attempts to disguise an employment relationship with an independent contracting relationship and in order for a contract to be a sham, either of the following must occur:

- a misrepresentation of the nature of the employment relationship, in effect disguising an employment relationship as an independent contract relationship; or
- an employment relationship was terminated, or there was a threat to, by either dismissal or false representation of it in order for the engagement to become a contract for services.

Ultimately contracts of employment where employees at law are labelled as contractors do not have legal recognition as contracts for services. Furthermore, arrangements which are non-consensual or which are tainted by coercion or undue influence are also not enforceable, subject to penalty and do not have legal recognition as contracts for services at law.

ACCI submits that evidence of a widespread problem of illegitimate use of subcontracting arrangements which would warrant changes to the sham contracting provisions within the Act is lacking. Rather, the workplace relations framework throws up negative and inappropriate intrusion upon the common law right to offer as an independent contractor, such as the capacity to include terms in enterprise agreements that would restrict the use of contractors, referred to below.

5.6.1 Creating a statutory definition?

As outlined above, certain statutes also deem groups of contractors and other non-employees as "employees" or "workers". Typically, workers' compensation laws have the effect that at least small numbers of contractors are treated as "workers" and sometimes that certain classes of employee are not "workers" notwithstanding these acts' starting point of employee which is determined under the common law

tests and indicia.³⁶⁹ Similarly, the superannuation laws deem (with regard to a contract that is wholly or principally for labour).³⁷⁰ State payroll tax laws also deem payments under service contractors to be wages subject to certain exemptions.³⁷¹ In the case of state laws there is rarely national consistency in what is deemed.

Legislated deeming provisions interfere with commercial relationships by remaking an arrangement which the parties willingly and knowingly entered into, effectively “converting” one type of legal relationship into another. Deeming provisions exist to serve differing objects including revenue raising and other social objects.

There is no case for deeming provisions within the workplace relations framework. To include them would fail to recognise that people offering for work have the right to choose to work as subcontractors should they wish. People may choose to enter into commercial rather than employment arrangements to make profits and, in doing so, knowingly take risks. The need to understand respective obligations and the social desire to regulate employment gave rise to the development of the common law tests of employment and employment regulation should not seek to control commercial contractors. To do so only blurs the distinction between employee and contractor, and as submitted above, does not add clarity.

ACCI also rejects claims that contractors who mainly or solely have their labour to sell are really employees. There are many categories of genuine business contractor who sell only their labour. As Australia moves towards a skill and knowledge based service economy, the proposition that one cannot be a subcontractor unless one supplies goods should not be taken seriously. A workplace relations framework that sought to interfere in such arrangements would significantly reduce competition in the Australian marketplace and impede efficiency, innovation and flexibility in business dealings.

To artificially force contractors to be employees for the purpose of regulating the terms of their engagement under the industrial relations system, would involve a significant and inappropriate cost burden and may deny many Australians the opportunity to establish their own business. Award restricted work arrangements would also be very difficult and counter-productive to apply to contractors. They would impose additional costs and mandate inefficient working arrangements to the detriment of innovation and productivity in Australia.

In the matter of *AWU v Hammonds Pty Ltd* [2000] QIRComm 1, (AWU v Hammonds) Commissioner Bloomfield noted in relation to the deeming provision existing under the *Industrial Relations Act 1999* (Qld):

³⁶⁹ See *Workers Compensation and Rehabilitation Act 2003* (Qld), *Workers Compensation Act 1951* (ACT); *Workplace Injury Management and Workers Compensation Act 1998* (NSW), *Workers Compensation Act 1958* (Vic), *Workers Rehabilitation and Compensation Act 1988* (Tas), *Workers Rehabilitation and Compensation Act 1986* (SA); *Workers Compensation and Rehabilitation Act 1981* (WA); and *Work Health Act 1986* (NT).

³⁷⁰ *Superannuation Guarantee (Administration) Act 1992* (Cth), s 12(3).

³⁷¹ See *Payroll Tax Act 1971* (Qld), *Payroll Tax Act 2007* (NSW), *Payroll Tax Act 1987* (ACT), *Payroll tax Act 2007* (Vic), *Payroll Tax Act 2008* (Tas), *Payroll Tax Act 2009* (SA), *Payroll Tax Act 2002* (WA), *Payroll Tax Act 2009* (NT).

In my view the very nature of the section – which allows the Commission to interfere with relationships entered into between (apparently) consenting parties – dictates that it should be only exercised with caution and, even then, only when a strong case for exercise of the discretion has been made out. This is particularly so where the class of persons in respect of whom an application has been made have freely (and knowingly) entered into such arrangement and are content with the way that it is working.

In the same matter, Commissioner Blades also stated:

It is clear that the Act recognises that both systems of employment, i.e. contracts for service and contracts of service, are equally valid systems for organising work. The discretion to use s. 275 should take into account that it is an intrusion into an essentially foreign area which may create great uncertainty for business. The discretion should be exercised bearing in mind the serious consequences which may flow both to the individuals directly concerned and to industry generally. A key consideration is that it must be “more appropriate” for the class of persons to be regarded as employees.

The inflexibility of the award system is an unnecessary restriction on productivity, particularly where the extension of award conditions would be to those who would find the restrictions of an industrial instrument “unfair and frustrating”, as was found to be the case in *AWU v Hammonds*.

This sentiment is also reflected in the Explanatory Memorandum to the *Independent Contractors Bill 2006* which stated:

Facilitating the use of independent contractors and the flexible arrangements afforded by them is imperative to contributing to the dynamic efficiency of the economy. State laws which create barriers to the use of independent contractors in Australian workplaces mean that these flexible arrangements are stifled.

There are problems with deeming provisions which seek to change the nature of a working arrangement from independent contractor to employee, and thereby draw independent contractors into the net of workplace relations regulation. Deeming provisions have the effect of invalidating individual choice and flexibility in choosing working arrangements. They infringe on individuals’ freedom to choose from a diversity of workplace relationships, including their right to negotiate conditions of work that suit their own individual needs. Further, deeming provisions undermine the legitimate desire of many employers to increase efficiency by allowing for a flexible workforce they can augment or restrict to meet their requirements.

Deeming provisions can also result in arbitrary distinctions, where, for example, driving a bus makes an independent contractor an employee, but driving a taxi does not, or cleaning premises makes one an employee but cleaning cars does not. Such an approach makes it almost impossible to

*maintain a principled distinction between employees and independent contractors, and only serves to drag independent contractors into the workplace relations regulation net regardless of their preference or actual circumstances.*³⁷²

Rather than looking to prescriptively define an employee, it is worthwhile considering policy actions that would assist in preserving independent contractor status and the freedom to enter into commercial arrangements. This may involve creating a safe harbour for contractors who are legitimately carrying on their own business.

Policy settings should recognise the significant contribution that small independent businesses make to the economy and recognise the flexibility, efficiency and productivity associated with the contracting model. It is important that policy settings encourage and support the creation of small businesses opportunities within the contracting model, recognising the need for competition as well as entrepreneurship in the creation of employment opportunities, skills and new technologies.

As noted by the Explanatory Memorandum to the *Independent Contractors Bill 2006 (Cth)*, the flexibility provided by independent contractors:

- Enables “business to compete more effectively in Australian and international markets and to adapt to changing economic conditions”;
- “facilitates businesses engaging workers on a short-term basis to address fluctuating work levels”;
- “can provide more freedom to choose working hours, to decide when to take holidays, who to work for and what type of work to undertake”;
- “contributes to ... ease of worker mobility”.³⁷³

Aside from pointing to the clear economic benefits of the independent contractor model, the Explanatory Memorandum to the *Independent Contractors Bill 2006 (Cth)*, notes that:

*These factors can make independent contracting attractive to many workers. For professionals and tradespeople, this may equate to gaining higher pay without the managerial responsibility that tends to accompany higher paying jobs in large organisations.*³⁷⁴

Any changes that are likely to impact the contracting model must be treated with extreme caution. If the flexibility, efficiency, productivity and freedom to choose supported by the common law is not retained the capacity of the economy to grow sustainably and at a reasonable rate will be restricted, options for individual economic independence will be confined and the nation’s living standards will be adversely impacted.

³⁷² Explanatory Memorandum, *Independent Contractors Bill 2006 (Cth)*.

³⁷³ *ibid.*

³⁷⁴ *ibid.*

Contracting and employment (whether through labour hire or otherwise) are both equally valid systems for organising work, securing and offering labour. In some industries, where human capital is firm specific, work is ongoing and outcomes are difficult to measure, the firms will tend to use employees rather than contractors. In other industries, where different circumstances apply (such as construction, where there are graduated levels of specialist skills required but not continuously), contractors will be a common source of labour.

The freedom of persons to set themselves up as a small business if they chose to do so should be preserved. Skilled workers very often progress from employee status to starting their own business – many going on to employ and at times small businesses have grown to become very large and successful contributors to employment and the economy. The values of entrepreneurship, risk taking, innovation, investment and choice which underpin contracts for services are values that should be welcomed, encouraged and highly regarded by policy makers.

5.6.2 Agreements restricting independent contractors

ACCI recommends the framework operate to prohibit enterprise agreements from restricting the engagement of contractors. This outcome could be achieved by:

- Amending the definition of ‘permitted matters’ under section 172 of the FW Act so that the terms of enterprise agreements are strictly limited to matters pertaining to the employment relationship; and
- Tightening the list of ‘unlawful terms’ contained in section 194 of the FW Act to make it clear that unlawful matters include matters which are not “permitted matters” and in particular terms which seek to restrict the engagement of contractors or imposing conditions upon their engagement.
- Requiring that non-permitted, unlawful or designated outworker terms are excised from agreements before or when they are approved.

In the interests of a competitive environment, businesses should generally be free to supply goods and services, including contract labour, if they choose.

5.6.3 Labour hire and other flexible forms of labour engagement

The principle of freedom of contract is the fundamental pillar on which our system of commerce and industry operates. Persons genuinely and freely entering into contracts for the provision of their services should not have those arrangements interfered with by persons or bodies (including governments, regulators, tribunals or courts) who are not parties to those contracts.

Consensual labour hire arrangements in which workers provide services on commercial terms to companies on a short term, contract or project basis as required through an intermediary are legitimate, welcome and beneficial forms of commercial arrangement that add value to the Australian economy. Such forms of labour engagement are no less appropriate than other forms of genuine and consensual labour engagement and provide flexibility, efficiency and productivity dividends.

The Productivity Commission has identified that reasons firms and workers choose labour hire arrangements can include the ease at which these arrangements enable firms to fill temporary positions and meet fluctuations in demand and the access that such arrangements can provide to flexible hours and potentially to ongoing employment.³⁷⁵

The 2015 Intergenerational Report has highlighted the participation challenges confronting an ageing Australian population stating:

The community and economy will benefit from opportunities to support older Australians who want to work, as well as boosting opportunities for women, young people, parents and people with disability to participate in the workforce. This can be achieved through policies that support people who choose to stay in the workforce for longer, or re-enter it sooner after a temporary absence.

It is important that the WR Framework facilitates the broadest possible range of options for workforce participation to meet our diverse workforce needs.³⁷⁶

The WR Framework must recognise the right to engage in contracting and labour hire arrangements.

5.7 Sponsored foreign workers

With six reviews and two Senate inquiries regarding subclass 457 visas in recent years it is not unreasonable to conclude that the questions posed in the Issues paper regarding sponsored foreign workers simply provide another platform for those who are opposed to subclass 457 visas to ventilate their opposition. This is an unlikely area for unanimity.

Subclass 457 visas should be available for use so that the needs of industry can be met in circumstances where local labour cannot be sourced. It is mendacious to claim that sourcing unmet skills needs by sponsored employment is cheaper, easier or faster than attracting available local labour and disingenuous to suggest that training and skills development is any answer for the short-medium term.

³⁷⁵ Productivity Commission 2006, *The Role of Non-Traditional Work in the Australian Labour Market*, Commission Research Paper, Melbourne, May 2006, p. 3.

³⁷⁶ 2015 Intergenerational Report Australia in 2055, Commonwealth of Australia, March 2015, p. iii.

Enterprise agreements should not be able to be used in a way that would restrict the use of subclass 457 visas.

5.8 Union right of entry

Industrial legislation has provided union officials right of entry to workplaces long a long time. This right has generally developed into three scenarios under trigger lawful entry:

- for discussion purposes;
- to investigate suspected breaches of workplace laws and instruments; and
- for work health and safety (WHS) purposes.

ACCI's fundamental position on the regulation of right of entry is that it has expanded dysfunctionally under the current workplace relations framework. Lawful right of entry should be returned more nearly to the situation prevailing under pre-FW Act statute. This is not an arbitrary point, although in the case of entry to investigate, it overlooks the fact that the entry to investigate developed during an era when there was much greater union density and much less intensive public labour inspection. The more recently developed entry for WHS purposes was basically modelled on entry for inspection as it stood under the FW Act in 2011.

By its nature right of entry is contentious. From the perspective of unions, entry is an essential part of the right to organise and represent. Conversely, uninvited lawful access suppresses normal property rights and can infringe what is sometimes called the employee right to freedom from association (implicit in the freedom of association). Entry can be and is abused with little effective recourse because uninvited lawful entry is recognised as a contentious right, a suppression of other rights, and is read beneficially. A legislative judgement is required which balances economic costs and normal civil property rights against a socially acceptable level of representation and disruption.

Despite promising to 'maintain the existing right of entry rules'³⁷⁷ prior to its election, the previous Government extended the ability for a union official to enter a private business for discussion purposes. Previously, the entering official's union had to be bound by the applicable award or agreement, and this restriction conditioned the union's eligibility rule. Modern awards no longer bind unions but the removal of this condition where agreements are in place, as well as removing it where the award applies, removes any condition on eligibility. Unions with no previous history at a workplace, unionised or not, can now enter on the basis of an aspect of their coverage which overlaps, or is purported to.

As a result, unions have greater scope to enter for recruitment and organising purposes, provided they are entitled to industrially represent at least one employee for whom the entry is related.³⁷⁸ ACCI believes that such entry for discussion

³⁷⁷ *Forward with Fairness Policy Implementation Plan*, August 2007, p.23.

³⁷⁸ *Fair Work Act 2009* (Cth), s.484.

purposes should be conditional on the workplace at least having union members who actually invite the union to enter.

The changes the previous Government made to the right of entry rules gave rise to much debate about both frequency of entry and the location of discussions. While the FW Act Review Panel made recommendations regarding these issues that suggested changes that made some re-balance to the competing rights³⁷⁹, they were not taken up by the previous Government.

Rather it amended entry rules in 2013 by:

- giving the Commission the power to deal with disputes over frequency of entry (for discussions). However, the Commission can only make orders where the applicant employer or occupier can demonstrate ‘an unreasonable diversion of the occupier’s critical resources’³⁸⁰, that is, there is no excessively frequent entry if there is only a *reasonable* diversion of *critical* resources (read beneficially). The explanatory memorandum confirms this, describing the test as an ‘appropriately high threshold’
- removing the section empowering the Commission to deal with disputes about the location to hold discussions by making the lunch room the default location in the absence of agreement between the union and employer/occupier.

ACCI notes the *Fair Work Amendment Bill 2014* (Cth) is currently before the Senate and seeks to restore part of the earlier balance by narrowing the circumstances of entry.

ACCI members will be providing further details outlining the experience of employers with respect to the right of entry framework and how it is particularly impacting some industry sectors and workplaces. ACCI commends this material and the accompanying recommendations of ACCI members to the Productivity Commission.

ACCI’s fundamental position on provisions providing for right of entry is that they should be amended so that they reflect the pre-FW Act rules and restrictions.

5.9 Transfer of business

The Act introduced a new test for determining whether industrial instruments applying at the former employer’s enterprise transfer with an employee formerly employed there if (s)he accepts employment with the new employer. Much like the general protections regime, it was suggested that the intention of the previous Government in doing so was to simplify matters.³⁸¹ However, the amendments in

³⁷⁹ McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, June 2012 at pp. 195 (Recommendation 35) and 197 (Recommendation 36).

³⁸⁰ s.505A(4).

³⁸¹ McCallum, R., Moore, M. and Edwards, J., op.cit., at p. 201.

the Act, purportedly for simplification, were in fact “designed to broaden the circumstances in which a transfer occurs...”³⁸²

ACCI does not believe that the current transfer of business rules are good policy. Transfer of business allows change so long as there is no change. The rules unduly restrict the capacity of employers to restructure their businesses, create a disincentive to outsource and for entrepreneurs to offer better ways of doing things to the market. This has been discussed above with the discussion about the *Fair Work Amendment (Transfer of Business) Act 2012*, and its effective locking in of public sector terms and conditions of employment so as to remove or lessen the effective competition.

Under the current workplace relations framework transfer of business is not confined to the transfer of industrial instruments, it imposes the transfer of existing and future legal liabilities accrued with the former employer onto a new employer. As ACCI indicated in its submission to the Senate Committee on the *Fair Work Bill 2008*, feedback from employers indicates the effect of the changes to the former transmission of business provisions has been the following:

- diminish the likelihood of a purchaser keeping on existing employees;
- make it difficult for a purchaser to undertake changes to stabilise or restructure the business, or alter inefficient work practices;
- increase the chances of industrial disputes on the sale of a business;
- reduce the purchase price of commercial arrangements for the sale of business if inefficient work practices have to be inherited.

The Productivity Commission Report into the Retail Industry indicated that business concerns over the new provisions should be monitored closely:³⁸³

Whether, in the application of the Act, the appropriate balance is being struck, is a question that requires further evidence based on the experience of employers and employees and a careful weighing of the costs and benefits. Such an analysis is not feasible in the context of this inquiry, but the Commission considers that the operation of the transfer of business provisions should be closely monitored by DEEWR. If there is evidence of more widespread employer concerns, a more detailed investigation should be undertaken.

The transfer of business rules sit poorly with the objects in s.3 (a) of the Act which intends laws that are flexible for businesses and promote productivity and economic growth.

As with other significant changes introduced by the Act, they were not foreshadowed and in neither in their initial iteration with the enactment of the FW Act, and their expansion with the *Fair Work Amendment (Transfer of Business) Act*

³⁸² Ibid. p.201 and footnote 979 on that page.

³⁸³ Productivity Commission 2011, “*Economic Structure and Performance of the Australian Retail Industry*”, Report no. 56, Canberra, p.370.

2012, were they subject to the pre-legislative review process of the Office of Best Practice Regulation. Both bills received the Prime Minister's exemption. The transfer of business rules disturbed established principles about transmission which had been developed by the High Court over many years, a fact confirmed by the FW Act Review Panel when it stated *"The transfer of business provisions under the FW Act are a departure from the previous arrangements and are novel in many ways"*.³⁸⁴

ACCI does not accept the assertion of the former Minister in his Second Reading speech for the *Fair Work Amendment (Transfer of Business) Act 2012* that as a result of the post-implementation of review into the FW Act *"the overwhelming evidence suggests that the transfer-of-business provisions, which this government put in place in our Fair Work Act 2009, deliver a balanced framework that provides both fairness and flexibility to both employees and employers."*³⁸⁵

Indeed, the FW Act Review Panel was not moved to reach such firm conclusions about the balance of fairness and flexibility on the evidence before it. It recognised additional cost, complication and complexity for business, but was much less sure about the balance:

- *"It is not possible to accurately estimate the number of businesses that have been affected by the changes to the transfer of business provisions. On our analysis, the new provisions are likely to have resulted in transitional costs to some employers as they adjust to the new regulatory framework, although exactly how much is difficult to estimate. The new provisions also place some additional burden on some employers in that they expand the circumstances in which a transfer of business will be considered to have occurred. Again, the magnitude of this cost is difficult to estimate, and must be weighed against the clear benefit to employees, along with the employer's capacity to neutralise any additional costs by applying to FWA."*
- *"The new provisions may make outsourcing and insourcing more complicated or expensive for businesses, which may have an impact on decisions to go down this path. However, the evidence is inconclusive."*
- *"If the additional complexity outweighs what are considered to be substantial cost benefits available through outsourcing, there may be a reduction in the practice. However, it is not clear from the evidence, and probably too early to tell, if this has occurred."*³⁸⁶

To some extent the understandable caution of the Panel misses the point. If the transfer of instruments and entitlements is expanded over a wider range of circumstances and a wider range of liabilities associated with accrued service with the former employment transfer, consequences can only fall a number of ways: reduced numbers of transfers, reduced benefits from transfers or reduced take up of

³⁸⁴ Productivity Commission 2011, *"Economic Structure and Performance of the Australian Retail Industry"*, Report no. 56, Canberra, p. 208.

³⁸⁵ Hon. Bill Shorten MP, House of Representatives Hansard, 11 October 2012 at p. 12035.

³⁸⁶ McCallum, R., Moore, M. and Edwards, J., op. cit., pp.206-207.

former employees. The question then is whether the “protections” extended by the transfer regime justify the costs to the economy.

ACCI does not think so. The former “transmission of business” provisions under the predecessor federal legislation which provided for “transmission of business” were intended as anti-avoidance provisions to deter employers from transferring employees into what was essentially the same business to avoid the operation of an agreement or a responsiveness based award and over time the High Court, developed rules, which (subject to the emergence of grey areas) were understood, more balanced, workable and did not act as a major disincentive for innovation nor for incoming employers to take on existing staff.

The existing transfer of business rules should be restored to the former longstanding provisions and there should be a maximum time limit for transferring industrial instruments.

ACCI recommends that the existing transfer of business rules should be re-aligned with the former longstanding provisions under the Workplace Relations Act 1996 (Cth) and there should be a maximum time limit for transferring industrial instruments.

5.10 Long service leave

The Productivity Commission has accurately identified issues relating to long service leave entitlements. The experience of ACCI and its members during the process of Award Modernisation, when various federal and state entitlements were consolidated, was largely unsatisfactory. The results tended to be common standards with increased costs for employers.

The overwhelming majority of employers only operate in one jurisdiction so it is reasonable to ask whether the transitional costs they would incur if a national long service leave standard was introduced, are justifiable.

ACCI would not be able to support the establishment of a national long service leave standard that would impose additional costs on businesses which would be in no better position as a result.

5.11 International labour standards

ACCI has been an active and strong participant in international labour relations bodies, including the ILO, International Organisation of Employers (IOE) and OECD.

Turning directly to labour regulation ACCI believes that international labour standards should only be set in the ILO, and not by or in other cross national

organisations. International labour standards intrude, they put acceptable floors on conditions and the regulation of employment, and so far as possible because of the need to assess what is “acceptable” these should be set with the maximum of international agreement. Standards are intrusions into the market and civil rights and freedoms. International labour standards rule out areas of competition which are regarded as inappropriate or unacceptable, suppress some persons’ civil and economic rights and also impose obligations onto governments.

Member states are conditioning their potential legislative capacity and there is a ceding of national sovereignty.

What is acceptable and appropriate given its economic cost and the diversity of national economic circumstances, social development and culture is a complex act of judgement. The tripartite nature of the ILO and the expectation that member states will take up and comply with the standards which the ILO sets reduces the influence of sectional and border bound national interest on the content of standards.

Despite the emphasis on broad international agreement about the setting of International Labour Standards the reality is that few are made with unanimous consensus and they will not always fit local needs and legislation, and this can be for legitimate reasons as well as not.

In the case of developed economies with developed labour law, labour inspection and labour practices, aspects of an international labour standard may not be appropriate because of the way that local law and practice operate, rather than any deficiency in the protection of those in the labour market.

ACCI believes that domestic labour relations policy and practice is appropriately determined by domestic decision makers and international instruments should not be ratified unless appropriate to local circumstances.³⁸⁷

³⁸⁷ For example, Australia has not ratified Convention 138, *Minimum Age Convention, 1973*, which requires there to be national legislation providing that the minimum age for working is 15. This is mainly state legislated, but the states’ approach is typically to provide a minimum age for ceasing compulsory schooling and a requirement that children are not subjected to obligations which interfere with their schooling.

6. KEY TERMS

1993 System	System created by the <i>Industrial Relations Reform Act 1993</i> (Cth)
2012 Amendments	Amendments contained within the <i>Fair Work Amendment Bill 2012</i>
ABCC	Australian Building and Construction Commission
ACCC	Australian Competition and Consumer Commission
ACCI's Policy Blueprint	ACCI, "Modern Workplace: Modern Future – A Blueprint for the Australia Workplace Relations System 2002-2010", 2002
AIRC	Australian Industrial Relations Commission
AFPCS	Australia Fair Pay and Conditions Standard under the WR Act
AWA	Australian Workplace Agreement made under the WR Act
BOOT	The 'better of overall test' under the FW Act
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
Competition Review Draft Report	<i>The Australian Government Competition Policy Review, Competition Policy Review, Draft Report</i> September 2014
ECA	<i>Employment Contracts Act 1991</i> (NZ)
FW Act	<i>Fair Work Act 2009</i> (Cth)
FW Act Review Panel	Body appointed by the previous Government to conduct a two-year post implementation review of the FW Act, resulting in the report: <i>'Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation'</i>
FWA	Fair Work Australia. Industrial tribunal created under the FW Act which was to become known as the Fair Work Commission.
FWC	Fair Work Commission. Australia's national industrial tribunal.
ILO	International Labour Organisation
IMF	International Monetary Fund
NCVER	National Centre for Vocational Education Research
NDT	The 'no-disadvantage test' under the WR Act
OECD	Organisation for Economic Co-operation and Development
PIR	2012 post-implementation review of the FW Act
PIR Report	The report <i>'Towards more productive and equitable workplaces- An evaluation of the Fair Work legislation'</i> resulting from a Post-Implementation Review (PIR) of the FW Act in 2012
Productivity Commission Report into the Retail Industry	Productivity Commission 2011, <i>"Economic Structure and Performance of the Australian Retail Industry"</i> , Report no. 56, Canberra.
RBA	Reserve Bank of Australia
SB Code	Small Business Fair Dismissal Code
WorkChoices Laws	Amendments to the WR Act by the <i>Workplace Relations Amendment Act 2005</i> , that came into effect on 27 March 2006.
WR Act	<i>Workplace Relations Act 1996</i> (Cth)
WR Framework	Australia's workplace relations framework

7. ABOUT ACCI

7.1 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- All eight state and territory chambers of commerce
- 29 national industry associations
- Bilateral and multilateral business organisations.

In this way, ACCI provides leadership for more than 300,000 businesses which:

- Operate in all industry sectors
- Includes small, medium and large businesses
- Are located throughout metropolitan and regional Australia.

7.2 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- Federal Government Ministers & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants
- Regulatory Authorities
- Federal Government Agencies.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally;
- Business representation on a range of statutory and business boards and committees;

- Representing business in national forums including the Fair Work Commission, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;
- Representing business in international and global forums including the International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, Confederation of Asia-Pacific Chambers of Commerce and Industry and Confederation of Asia-Pacific Employers;
- Research and policy development on issues concerning Australian business;
- The publication of leading business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of law and policy.

ACCI MEMBERS

ACCI CHAMBER MEMBERS: ACT AND REGION CHAMBER OF COMMERCE & INDUSTRY
BUSINESS SA CHAMBER OF COMMERCE NORTHERN TERRITORY **CHAMBER OF
COMMERCE & INDUSTRY QUEENSLAND** CHAMBER OF COMMERCE & INDUSTRY
WESTERN AUSTRALIA **NEW SOUTH WALES BUSINESS CHAMBER** TASMANIAN CHAMBER OF
COMMERCE & INDUSTRY **VICTORIAN EMPLOYERS' CHAMBER OF COMMERCE &
INDUSTRY** **ACCI MEMBER NATIONAL INDUSTRY ASSOCIATIONS:** ACCORD – HYGIENE,
COSMETIC AND SPECIALTY PRODUCTS INDUSTRY **AIR CONDITIONING & MECHANICAL
CONTRACTORS' ASSOCIATION** AUSTRALIAN BEVERAGES COUNCIL **AUSTRALIAN DENTAL
INDUSTRY ASSOCIATION** AUSTRALIAN FEDERATION OF EMPLOYERS & INDUSTRIES
AUSTRALIAN FOOD & GROCERY COUNCIL ASSOCIATION AUSTRALIAN HOTELS
ASSOCIATION **AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP** AUSTRALIAN
MADE CAMPAIGN LIMITED **AUSTRALIAN MINES & METALS ASSOCIATION** AUSTRALIAN
PAINT MANUFACTURERS' FEDERATION **AUSTRALIAN RETAILERS' ASSOCIATION**
AUSTRALIAN SELF MEDICATION INDUSTRY **BUS INDUSTRY CONFEDERATION** CONSULT
AUSTRALIA **HOUSING INDUSTRY ASSOCIATION** LIVE PERFORMANCE AUSTRALIA **MASTER
BUILDERS AUSTRALIA** MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF
AUSTRALIA (THE) **NATIONAL BAKING INDUSTRY ASSOCIATION** NATIONAL ELECTRICAL &
COMMUNICATIONS ASSOCIATION **NATIONAL FIRE INDUSTRY ASSOCIATION** NATIONAL
RETAIL ASSOCIATION **OIL INDUSTRY INDUSTRIAL ASSOCIATION** PHARMACY GUILD OF
AUSTRALIA **PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION** PRINTING INDUSTRIES
ASSOCIATION OF AUSTRALIA **RESTAURANT & CATERING AUSTRALIA** VICTORIAN
AUTOMOBILE CHAMBER OF COMMERCE