

## **RESPONSE TO THE DRAFT REPORT OF THE PRODUCTIVITY COMMISSION**



**Submission to the Productivity Commission Inquiry into the Workplace**

**Relations Framework**

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## 1. Introduction

This submission is made on behalf of the Centre for Employment and Labour Relations Law ('CELRL') at the University of Melbourne. The CELRL is a specialist unit within Melbourne Law School devoted to teaching and research in labour and employment law. Further information about the CELRL is available at: <http://www.law.unimelb.edu.au/centre-for-employment-and-labour-relations-law>

The submission addresses a number of discrete aspects of the Productivity Commission's Draft Report. It does not comment upon all matters covered in the Draft Report. We confine our commentary and analysis to matters that draw most directly on our current research projects. In particular, Section 3 of the submission draws on a current research project funded by the Australian Research Council: 'Reshaping Employment Discrimination Law: Towards Substantive Equality at Work?'. Further information on this project is available at: <http://www.law.unimelb.edu.au/index.cfm?objectid=EF274900-97CB-11E1-9F420050568D0140&flushcache=1&showdraft=1>

**Section 2.2** of the submission has been prepared Dr Tess Hardy. **Section 3** of this submission on unfair dismissal and general protections has been prepared by Associate Professor Anna Chapman, Professor Beth Gaze and Ms Adriana Orifici. **Sections 4** on industrial disputes and right of entry has been prepared by Dr Tess Hardy and Ms Ingrid Landau. **Section 5** and **Section 6** of the submission have been prepared by Dr Tess Hardy and Mr Glenn Patmore respectively. **Section 7** of the submission on international obligations has been prepared by Ms Ingrid Landau.

Unless otherwise noted, all page numbers or chapter references below are to the Draft Report.

## 2. Institutions

### *2.1. The Structure and Powers of the Fair Work Commission*

Draft recommendations 3.1 to 3.5 deal with the structure and powers of the Fair Work Commission ('FWC') and the terms of appointment of members.

We believe the proposal for an independent expert appointment panel may have merit and deserves further attention, despite the practical problems associated with constituting a panel that is truly independent. Any measure which has reasonable prospects of enhancing the calibre of FWC appointments should be encouraged.

It is not clear that the draft recommendations concerning selection and appointment of FWC members adequately recognise the need for these members to have high order legal/ judicial skills. It is important to recognise that decisions of the FWC are subject to challenge in the Federal Court of Australia and the High

Court of Australia. This is an important consideration in formulating criteria for appointment and in selecting appointees.

We have concerns with draft recommendation 3.2, which proposes that FWC members should be appointed for a fixed term of 5 years, with reappointment subject to performance review. It does not need emphasising that the FWC operates in a politically charged environment. Many of its decisions have implications for employer costs and employee incomes. National decisions concerning, for example, minimum wages, public holidays and penalty rates, have broader economic implications, as the Draft Report acknowledges elsewhere. Almost every decision of substance is examined by parties, politicians and other commentators with an eye for the political implications and the effect on the relative interests of employers and employees. The FWC must be, and be seen to be, independent of Government. In these circumstances, appointment to the age of 65 (or another fixed age) is as important, and possibly more important, for the FWC as it is for judges. Despite some criticisms, the independence of the FWC is still widely accepted. Independence would be put at risk by fixed term appointments because of perceptions that members' decisions are influenced by factors relevant in some way to their prospects of reappointment. The proposal is unlikely to ensure that good calibre appointees are reappointed. If history is any guide, political considerations will loom just as large in reappointments as they do in appointments.

## **2.2. Regulatory Agencies**

We commend the Productivity Commission for recognising the critical role played by regulatory agencies, and other institutions, in upholding the integrity of the legislative regime.<sup>1</sup> We also welcome the Commission's recognition of the importance of ensuring that key agencies, such as the Fair Work Ombudsman ('FWO'), are adequately resourced so as to enable them to properly fulfill their core statutory functions. We note, however, that if the mandate and responsibilities of the FWO expand – as is proposed by a number of recommendations set out in the Draft Report<sup>2</sup> – resourcing would have to increase to ensure that performance of these new functions does not come at the expense of the agency's existing and principal role – that is, to promote and ensure compliance with the *Fair Work Act 2009 (Cth)* ('FW Act') industrial instruments, such as modern awards, through education, monitoring and enforcement.

### Assessing the effectiveness of institutions

In considering how to secure and improve compliance with minimum employment standards, there is now a considerable body of theoretical and

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<sup>1</sup> Peter Sheldon and Michael Quinlan, 'Minimum Labour Standards and their Enforcement' (2011) 22 *Economic and Labour Relations Review* 1.

<sup>2</sup> For example, the Draft Report proposes that the FWO should be made responsible for: recording and monitoring notifications of IFAs and enterprise contracts; providing information and resources on how the NDT is applied (Draft Recommendation 16.2); and providing an information package on IFAs (Draft Recommendation 16.3).

empirical literature which explores various approaches of optimal enforcement, including responsive regulation,<sup>3</sup> smart regulation,<sup>4</sup> risk-based regulation,<sup>5</sup> 'really responsive regulation'<sup>6</sup> and strategic enforcement,<sup>7</sup> amongst many others. While these enforcement theories display a range of common features, there are also some important differences. In light of this diversity, it is important to recognise – particularly when seeking to assess an agency like the FWO – that there is no single approach which can unequivocally be identified as internationally accepted best practice.

The Draft Report notes that in assessing the performance of institutions, such as the FWC and the FWO, 'the most important tests are whether the institutions are efficient and impartial, produce consistent and evidence-based decisions, have the confidence of stakeholders, and have governance and processes that support those outcomes.' The origin or basis of these so-called 'tests' is not entirely clear.<sup>8</sup> While the noted elements are significant, it is arguable that there are other criteria which are equally, if not more, important to any proper assessment of a regulatory institution.

For example, it is not just the efficiency of regulatory agencies which is crucial, but their effectiveness in terms of reducing the incidence of social harm and achieving key regulatory objectives.<sup>9</sup> Indeed, too much emphasis on 'efficiency' – particularly where it is solely measured by reference to quantitative data – has been found to compromise the effectiveness of regulators in various ways. For instance, while quantitative key performance indicators ('KPIs') may encourage timeliness and responsiveness,<sup>10</sup> research has revealed that it also has the

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<sup>3</sup> Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

<sup>4</sup> Neil Gunningham, and Peter Grabosky, *Smart Regulation: designing environmental policy*, (Clarendon Press, 1st ed, 1998).

<sup>5</sup> Julia Black, 'The Emergence of Risk-Based Regulation and the New Public Risk Management in the UK' (2005) *Public Law* 512.

<sup>6</sup> Julia Black and Robert Baldwin, 'Really Responsive Risk-Based Regulation' (2010) 32(2) *Law & Policy* 181; Robert Baldwin and Julia Black 'Really Responsive Regulation' (2008) 72 *Modern Law Review* 59.

<sup>7</sup> David Weil, 'Improving Workplace Conditions Through Strategic Enforcement, A Report to the Wage and Hour Division' (Report, US Department of Labour, May 2010). See also David Weil, *The Fissured Workplace*:

<sup>8</sup> We note that these factors do not necessarily reflect the key performance indicators set out in the Regulator Performance Framework which commenced on 1 July 2015.

<sup>9</sup> Neil Gunningham, 'Strategizing Compliance and Enforcement: Responsive Regulation and Beyond', in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011).

<sup>10</sup> Responsiveness is one of the five principles of the FWO Customer Service Charter. In particular, the Charter states: 'We aim to offer the best possible service and are continually looking to improve upon our performance. In addition to treating customers with dignity and respect, we are also committed to the following delivery timeframes: we will resolve 80% of requests for assistance in 90 days; the Fair Work Infoline will resolve 80% of matters at the first contact; the Fair Work Infoline will be available 99% of the time during advertised hours; our website will be available 99% of the time.' See Fair Work Ombudsman, Customer Service Charter (accessed 13 September 2015).

capacity to compromise investigative integrity and procedural fairness.<sup>11</sup> Others have found that KPIs may provide incentives to inspectors to undertake tasks in a manner that easily converts into statistics concerning outcomes, but does not necessarily advance the substantive objectives of the agency.<sup>12</sup>

We note that the new Regulator Performance Framework, which came into effect on 1 July 2015, seems to shift some of the focus away from quantitative measures and places greater emphasis on outcome-based key performance indicators. In many respects, this represents a shift in the right direction. However, we also note that in concentrating on ways in which the regulator can 'reduce the cost of unnecessary or inefficient regulation imposed on individuals, businesses and community organisations',<sup>13</sup> the regulator (and those assessing or validating their performance) must not lose sight of the fact that reduction of compliance costs should not come at the expense of adequately protecting the beneficiaries of the regulation.

### Applying the enforcement pyramid

The Draft Report described the FWO's approach of combining 'softer' measures, such as advice and support, with 'harder' mechanisms, such as compliance notices, enforceable undertakings and litigation, as being 'broadly consistent with good regulatory practice'.<sup>14</sup> In defining what constituted 'good regulatory practice' in this instance, the Draft Report referred to an earlier report of the Productivity Commission,<sup>15</sup> as well as a figure depicting an enforcement pyramid (a theoretical device originally developed as part of the broader theory of responsive regulation).<sup>16</sup>

The central idea underlying the enforcement pyramid is that the 'more the regulated firm refuses to comply, the greater the sanction that should be

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<sup>11</sup> Mary Gellatly, John Grundy, Kiran Mirchandani, J Adam Perry, Mark Thomas, and Leah Vosko, "Modernising" Employment Standards? Administrative Efficiency and the Production of the Illegitimate Claimant in Ontario, Canada' (2011) 22(2) *Economic and Labour Relations Review* 81. See also Tess Hardy, "It's Oh So Quiet?" Employee Voice and the Enforcement of Employment Standards in Australia' in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014); and Joellen Riley, 'Workplace Dispute Resolution under the Fair Work Act: Is There a Role for Private Alternative Dispute Resolution Providers?' (2009) 20 *Alternative Dispute Resolution Journal* 236.

<sup>12</sup> Roberto Pires, 'Beyond the Fear of Discretion: Flexibility, performance and accountability in the management of regulatory bureaucracies' (2011) 5 *Regulation and Governance* 43.

<sup>13</sup> Draft Report, 798.

<sup>14</sup> Draft Report, 137.

<sup>15</sup> Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety* (Canberra, 2010).

<sup>16</sup> Draft Report, Figure 3.3, 138. While responsive regulation is an influential theory of regulatory practice, and the enforcement pyramid is a defining feature of this approach (see above n 3) it is not without its critics. See, eg, Salo Coslovsky, 'Relational Regulation in the Brazilian Ministério Público: The Organizational Basis of Regulatory Responsiveness' (2011) 5 *Regulation and Governance* 70; and Robert Baldwin and Julia Black 'Really Responsive Regulation' (2008) 72 *Modern Law Review* 59.

adopted.<sup>17</sup> A fundamental element of the pyramidal model of enforcement is that there is 'a credible pyramid peak which, if triggered, will be powerful enough to deter even the most egregious or reckless offender.'<sup>18</sup> This idea is reflected in the enforcement pyramid depicted in the Draft Report, which has at its apex, 'serious criminal and civil proceedings and banning orders.' Yet, this generic description of the tip of the enforcement pyramid does not necessarily reflect the civil remedy regime established under the FW Act.

Indeed, as we have pointed out elsewhere,<sup>19</sup> in comparison to a number of other federal and state regulators, the FW Act does not entrench a particularly stringent enforcement regime.<sup>20</sup> First, under the FW Act, there is very limited capacity to seek criminal penalties,<sup>21</sup> even where the contravening behaviour is viewed as egregious.<sup>22</sup> In this respect, the FW Act stands in striking contrast to work health and safety regulation which is largely premised on a criminal model.<sup>23</sup> Other spheres of corporate regulation also provide a point of comparison. In particular, the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission are able to pursue criminal, as well as civil sanctions in relation to various provisions.

In addition, the maximum pecuniary penalties which are available under the FW Act are much lower than those available under other regimes. In particular, the maximum monetary penalties for most civil remedy provisions under the FW Act are:

- A\$54,000 (300 penalty units) for a corporation;
- A\$10,800 (60 penalty units) for an individual.<sup>24</sup>

In comparison, certain consumer protection breaches under the Competition and Consumer Act 2010 (Cth) can attract maximum fines of A\$1.1 million for a corporation and A\$220,000 for an individual. Maximum penalties in relation to trade practices contraventions are significantly higher than these amounts. For example, the maximum penalties applicable to corporations for each act or

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<sup>17</sup> Julia Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, June 2001).

<sup>18</sup> Tess Hardy, John Howe and Sean Cooney, 'Less Energetic but More Enlightened? Exploring the Fair Work Ombudsman's Use of Litigation in Regulatory Enforcement' (2013) 35 *Sydney Law Review* 565.

<sup>19</sup> Ibid.

<sup>20</sup> For instance, individuals found guilty of cartel conduct could face criminal or civil penalties, including: up to 10 years in jail and/or fines of up to \$360,000 per criminal cartel offence; a pecuniary penalty of up to \$500,000 per civil contravention.

<sup>21</sup> Some breaches of the FW Act are designated as criminal offences, such as where a person breaches an order of Fair Work Commission: FW Act ss 674–8.

<sup>22</sup> See, eg, *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408 (20 April 2012). In imposing a penalty nearing the maximum set by Parliament, the Court noted that this case 'involved a deliberate, calculated and systematic refusal to comply with the requirements of the WR Act and to take advantage of the vulnerability of the complainant employees.'

<sup>23</sup> Richard Johnstone, Elizabeth Bluff and Alan Clayton, *Work health and Safety Law and Policy* (3<sup>rd</sup> ed, 2012).

<sup>24</sup> The monetary value of a penalty unit was increased to A\$180 from 31 July 2015: Crimes Legislation Amendment (Penalty Unit) Act 2015 (Cth).



omission found to be in contravention of the provisions relating to restrictive trade practices is the greater of:

- a) A\$10 million;
- b) if a court can determine the total value of the 'reasonably attributable' benefit obtained by the act or omission, 3 times that total value; or
- c) if a court cannot determine benefit, 10% of annual turnover in preceding 12 months.<sup>25</sup>

The low level of pecuniary penalties available under the FW Act is particularly pronounced when comparing penalties which have been previously levied against larger businesses under different statutory regimes. For example, in proceedings brought by the ACCC against Flight Centre Travel Group Limited, the regulator recently instituted a cross-appeal on the basis that the penalties imposed at trial, amounting to a total of \$11 million, did not provide adequate deterrence in light of the nature of the conduct and the size and financial strength of Flight Centre.<sup>26</sup>

In comparison, in a case brought by the FWO against the Jetstar Group Pty Ltd and Jetstar Airways Pty Ltd, Buchanan J found that Jetstar had pursued plans to unlawfully deduct training costs from the wages of cadet pilots. These deductions were made notwithstanding the fact that senior managers within Jetstar had received advice that the proposed arrangement was in contravention of the relevant award. Despite the deliberateness of the conduct, and the size of the respondents, Buchanan J ultimately imposed total penalties of \$90,000.<sup>27</sup> In reaching this finding, Buchanan J conceded that these penalties 'will doubtless have little serious impact upon the respondents'.<sup>28</sup>

The issues that arose in the Jetstar case, amongst others, not only underlines the importance of having a sufficiently strong deterrent, but also the need to target key individuals within the organisation who may be driving the contravening behaviour.<sup>29</sup> Indeed, the FWO routinely pursues company directors or officers under s 550 of the FW Act where the corporate employer is, or is likely to become, insolvent, externally administered or deregistered and consequently unable to meet its obligations to employees.<sup>30</sup> The right to pursue a party other

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<sup>25</sup> Competition and Consumer Act 2010 (Cth) s 76(1A).

<sup>26</sup> On appeal, the Full Court of the Federal Court found in favour of Flight Centre in relation to the substantive issues raised in this case. Therefore, no final determination was made on the penalty question. See *Flight Centre Limited v Australian Competition and Consumer Commission* [2015] FCAFC 104 (31 July 2015); *Australian Competition and Consumer Commission v Flight Centre Limited (No 2)* [2013] FCA 1313 (6 December 2013); and *Australian Competition and Consumer Commission v Flight Centre Limited (No 3)* [2014] FCA 292 (28 March 2014).

<sup>27</sup> Penalties of \$45,000 each were imposed against Jetstar Group Pty Ltd and Jetstar Airways Pty Ltd respectively.

<sup>28</sup> *Fair Work Ombudsman v Jetstar Airways Ltd* [2014] FCA 33 (6 February 2014) [52].

<sup>29</sup> See Tess Hardy and John Howe, 'Gatekeepers in Labour Law: Accessorial Liability and Employment Standards Compliance' (Paper presented at Australian Labour Law Association National Conference, Sydney, November 2014).

<sup>30</sup> See, eg, *Fair Work Ombudsman v Shrek Pty Ltd* [2010] FMCA 907 (24 November 2010). See also *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408.

than the employer company is particularly important in the insolvency context where the doctrine of limited liability effectively shields shareholders from any personal liability for these debts.

While the increasing number of cases brought by the FWO under s 550 against individuals, such as company directors, represents an important and positive development, these actions have also revealed a number of weaknesses in the statutory regime. First, as a result of a statement in the Explanatory Memorandum,<sup>31</sup> the FWO has historically not applied to have compensation orders awarded against individuals as it considers that such orders are not available against anyone but the corporate employer itself.<sup>32</sup> In order to try to rectify the relevant underpayment in these cases, particularly where the corporate employer no longer exists or no longer has any assets, the FWO often seeks that all or part of the pecuniary penalty amount is paid to the relevant employees.<sup>33</sup>

While this approach is designed to deliver a practical solution to a somewhat technical problem, it is unsatisfactory in a number of respects. First, it weakens the deterrence effects of the litigation action and may implicitly encourage directors to place corporations into liquidation so to as minimise (if not avoid altogether) the amounts payable pursuant to court orders. Indeed, even if the individual is found to be 'involved in' the contravention under s 550, as they are a natural person, they are faced with a maximum penalty that is one-fifth of the penalty set for corporations. This is reduced even further by the fact that the individual will only be liable to pay a pecuniary penalty (as compared to corporations which would generally be liable for both compensating the aggrieved employees and paying any pecuniary penalties which are imposed). An additional weakness of this approach is that, depending on the amount of the total penalty which is determined to be appropriate by the court, the employee may not even recover the amount by which they have been underpaid. While there have been a number of court decisions which have found that the Federal Court and Federal Circuit Court<sup>34</sup> have the power to order an accessory to pay compensation for loss suffered as a result of a contravention of a civil remedy provision,<sup>35</sup> the FWO's more restrictive approach appears to continue.<sup>36</sup> In order to address the issues identified above, these provisions should be amended to

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<sup>31</sup> The Explanatory Memorandum states: '[W]hile a penalty may be imposed on a person involved in a contravention, the clause does not result in a person involved in a contravention being personally liable to remedy the effects of the contravention. For example, where a company has failed to pay, or had underpaid an employee wages under a fair work instrument, the director is not personally liable to pay that amount to the employee.' Explanatory Memorandum, Fair Work Bill 2008 (Cth) 332 [2177].

<sup>32</sup> But see Helen Anderson and John Howe, 'Making Sense of the Compensation Remedy in Cases of Accessorial Liability under the Fair Work Act' (2012) 36 *Melbourne University Law Review* 335.

<sup>33</sup> See, eg, *Fair Work Ombudsman v Shah* [2014] FCCA 270.

<sup>34</sup> This general power is not necessarily available to eligible State and Territory courts. See FW Act, s 545(3) and *Mildren v Gabbusch* [2014] SAIRC 15.

<sup>35</sup> See, eg, *AFMPIKIU v Beynon* [2013] FCA 390 and *Scotto v Scala Bros Pty Ltd & Anor* [2014] FCCA 2374.

<sup>36</sup> For a recent illustration of this problem, see *Fair Work Ombudsman v Tsurc Pty Ltd & Anor* (No 2) [2015] FCCA 2148.

make it clear that any remedy available under s 545 against the primary contravenor should be equally available against any accessory found to be 'involved in' the contravention under s 550.

A third shortcoming of the civil remedy regime established under the FW Act is that there is no capacity for the regulator (or other interested party, such as a union) to seek an incapacitation order either against the corporate employer or key individuals within the organisation. For example, in other spheres of corporate and workplace regulation, such as occupational health and safety, incapacitation sits at the peak of the pyramid — a sanction which can be achieved by way of an injunction, suspension or withdrawal of an operating licence, suspension of trading, asset seizure or imposing a state-authorised management team. This problem is potentially exacerbated in relation to the FW Act by the fact that there is no licensing regime which applies to employers generally or to specific groups of employers, such as labour hire agencies.<sup>37</sup>

Another way in which incapacitation can be achieved is through disqualification orders – that is, directors or officers found to have contravened the law are disqualified from managing corporations for a period the court considers appropriate.<sup>38</sup> This is a particularly significant omission given that one of the fundamental barriers to effective enforcement is the problem of 'phoenixing'.<sup>39</sup>

The virtual absence of criminal penalties under the FW Act, the difficulties in seeking disqualification orders<sup>40</sup> and the fact that there is no licensing regime which allows for suspension and/or incapacitation makes it much more difficult for the FWO to deter the most recalcitrant and prevent some of the most concerning regulatory behaviour. In light of the Productivity Commission's recommendation that there should be an increase in the maximum penalties in relation to unlawful industrial action,<sup>41</sup> we argue that such an increase is also justified and necessary in relation to all contraventions of civil remedy provisions under the FW Act. As the Productivity Commission rightly points out,

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<sup>37</sup> As noted in the Draft Report, the issue of whether labour hire providers should be licensed is the subject of various and ongoing inquiries at both state and federal level.

<sup>38</sup> This is an order which may be made where a person has breached a civil penalty provision under the Corporations Act 2001 (Cth). In the case of *TWU (NSW) v No Fuss Liquid Waste Pty Ltd* [2011] FCA 982, Flick J found that the general power to 'make any order the court considers appropriate' under s 545 of the FW Act did not extend to a power to disqualify a director.

<sup>39</sup> This is a term generally used to describe those circumstances where a company fails and is unable to pay its debts and/or acts in a manner which is intended to deprive unsecured creditors equal access to the available assets. Within a relatively short period of closing one business, the same directors or officers commence a new business using some or all of the assets of the former, failed business. For a recent discussion of phoenix activities in the employment context, see Helen Anderson, 'Phoenix activity and the recovery of unpaid employee entitlements - 10 years on' (2011) 24 *Australian Journal of Labour Law* 141. See also PricewaterhouseCoopers, 'Phoenix Activity: Sizing the Problem and Matching Solutions' (Report prepared for the Fair Work Ombudsman, June 2012).

<sup>40</sup> Unlike ASIC and the ACCC, the FWO does not currently have any capacity to seek an order disqualifying directors or officeholders from managing corporations for a relevant period in relation to their involvement in particular contraventions. Compare Corporations Act 2001 (Cth) s 206C.

<sup>41</sup> Draft Report, Draft Recommendation 19.6, 700.

determining the appropriate level of penalty in any given case will ultimately be a question determined by the courts taking into account the totality of the circumstances.<sup>42</sup> But elevating the penalty ceiling will mean that more meaningful penalties can be imposed against employers which may be in a position to otherwise absorb the costs or pass them onto customers or consumers.

We also recommend that the FW Act be amended so that:

- any remedy available under s 545 against the primary contravener should be equally available against any accessory who is found to be ‘involved in’ the contravention under s 550; and
- the FWO is authorised to seek disqualification orders, in appropriate circumstances, in relation to individuals found to have contravened the FW Act.

We conclude our comments on the Commission’s discussion of institutions by noting a number of errors in Chapter 3 of the Draft Report that might be usefully rectified in the Final Report. In particular:

- On p. 136, the Draft Report summarises the main functions of the FWO and notes that the agency can ‘seek penalties for breaches (through the Federal Circuit Court and the Federal Court of Australia). It should be noted that the FWO can, and does, also seek penalties for contraventions of civil remedy provisions in the FW Act in eligible State and Territory courts, such as the Magistrates Court of Victoria.<sup>43</sup>
- On pp. 147 and 159, the Draft Report refers to the review of the FWO’s approach to compliance and enforcement undertaken by the Centre for Employment and Labour Relations Law and cites ‘(O’Neill 2012a)’. This citation is not correct. Rather, the relevant report which summarised the preliminary findings of this review and which should be cited at the relevant points is as follows: John Howe, Tess Hardy and Sean Cooney, *The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO’s Activities from 2006-2012* (Centre for Employment and Labour Relations Law, Melbourne Law School, 2014).

### **3. Unfair Dismissal and General Protections**

#### **3.1. General Comments**

We note that the Draft Report assumes that the Unfair Dismissal and General Protections avenues are similar and should be treated in the same way, and that the way in which both should be treated is as set out in the current Unfair Dismissal provisions. We challenge this assumption. In particular, we contend that the General Protections, and especially the adverse action provisions, deal

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<sup>42</sup> See *Australian Ophthalmic Supplies* (2008) 165 FCR 560; and *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383.

<sup>43</sup> FW Act s 539.

with a very different and more complex set of issues than Unfair Dismissal, and should not be 'levelled down' to the same treatment as Unfair Dismissal such as by imposing a cap on damages or being subjected to a very short time limit for bringing a claim. These features tend to unjustifiably deprive individuals of a remedy for suffering a significant legal wrong.

In relation to Unfair Dismissal, we also argue that if reinstatement is no longer to be the primary remedy, the justification for the very short limitation period of 21 days no longer exists and that time limit should be extended to a more reasonable period. The full basis for these arguments is set out below.

### ***3.2. Unfair Dismissal***

#### **Draft Recommendation 5.2: Reducing or Negating the Role of Procedural Fairness**

Draft Recommendation 5.2 deals with the situation where there is a 'valid reason' for termination, but there were defects in the process followed by the employer. It provides that in such circumstances an order for reinstatement or compensation should not be available, but rather the FWC may, at its discretion, either educate the employer or impose a penalty. Unless the penalty is potentially substantial and is received by the claimant, this proposed change is very problematic. A claimant who only wishes to challenge the procedural aspects of their dismissal would be very unlikely to bring a claim in these circumstances. Furthermore, a claimant, who believes they have strong arguments both on 'valid reason' and procedural unfairness, would likely see little advantage in raising arguments of procedural unfairness. Unless there is a real prospect of receiving a substantive outcome in relation to defects in the employer's procedures, it seems highly unlikely to us that a claimant would raise and pursue allegations of procedural unfairness, given the personal stress, time and sometimes legal costs involved in bringing a claim.

In short, unless there is an enforcement mechanism attached to the principles of procedural fairness that give claimants a substantive outcome where they successfully establish their claim, they will not seek to enforce those principles. We fear that if the draft recommendation is adopted this would effectively mean that procedural fairness would become a 'dead letter' in the statutory scheme. The scheme would therefore become purely about unfairness in a substantive sense.

The role of procedural fairness in the Unfair Dismissal scheme should not be reduced or negated. From its legislative inception in 1993, the Commonwealth Unfair Dismissal framework has encompassed two intersecting dimensions in the test of 'harsh, unjust or unreasonable'. These are:

- substantive fairness in the sense of a fair ground or reason for the dismissal; and
- procedural fairness where the manner or process is fair.

Substantive fairness is primarily articulated through the statutory concept of 'valid reason' and procedural fairness is currently expressed through the remainder of factors listed in s 387(b)-(g) of the FW Act.

The Commonwealth Unfair Dismissal system has always recognised that substantive fairness and procedural fairness are intertwined. They cannot be separated. The concept of 'valid reason' is interpreted as being a reason that is 'sound, defensible or well-founded' and not 'fanciful'.<sup>44</sup> The surest way for an employer to be confident that a reason for dismissal is 'sound, defensible or well-founded' and not 'fanciful', is to ensure that in coming to its decision to dismiss an employee a fair procedure has been adopted by it. Depending on the particular factual context in question, a fair procedure may involve an investigation into suspected misconduct or lack of performance, a warning to the employee, an explanation to the employee of the specifics of the unsatisfactory performance, and an opportunity for the employee to improve their performance. The specifics of what procedural fairness calls for will be shaped by all the circumstances of the particular situation, including whether the employer has a dedicated HR professional or HR structure in place. Engaging in a fair procedure is the surest way for an employer to be confident that there is indeed a 'valid reason' for dismissal.

The Draft Report articulates a number of reasons why Australia ought to retain an Unfair Dismissal scheme (pp. 214-215). These include the protection of workers from capricious, unreasonable and unjustified actions of employers, especially as dismissal can have a devastating financial and emotional toll on a person, their family and community. A number of other sound reasons are outlined in the Draft Report. A further reason for having an Unfair Dismissal jurisdiction does not clearly appear in the Draft Report. It is to encourage and shape good HR and management practices, particularly in relation to disciplinary and performance issues, and dismissal. The current legislative framework provides a normative statement to employers that they ought to go through a fair procedure in dealing with issues regarding lack of performance or misconduct, and in reaching a decision to dismiss an employee. The list of factors in s 387(b)-(g) provides a guide to organisations of key markers of a fair procedure that their management practices ought to consider and put in place where suitable. Not only is procedural fairness desirable from the employee's perspective, but it has a number of benefits for the employer concerned. First, and as already been identified, due process is the surest way of ensuring that there is a demonstrable, substantively 'valid reason' for the dismissal. Secondly, engaging in due process is likely to reduce the chance that a hasty and unnecessary dismissal will take place in circumstances where a 'cooler head' would determine that dismissal was not warranted. Unnecessary dismissals impose substantial direct and indirect costs on business, including the costs of separation and then recruiting, hiring and inducting a new worker.<sup>45</sup> Alex De Ruyter and Paul Waring have used

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<sup>44</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at 373, widely cited today in FWC decisions.

<sup>45</sup> Richard Johnstone, Richard Mitchell and Julian Reikert, 'Procedural Fairness in Dismissal Cases: What Should Be the Approach in Victoria?' (1991) 4 *Australian Journal of Labour Law* 99 at 117.

organisational justice theory to argue that perceived injustice regarding matters of dismissal can result in reduced performance and commitment by employees to the organisation, in addition to leading to higher levels of labour turnover.<sup>46</sup> In a similar vein, Richard Johnstone et al have written that a dismissal which is based on a substantively fair reason but which lacks procedural fairness 'is of concern to other employees because it reveals to them the inadequacies and unpredictability of the employer's dismissal practices and introduces an unsettling element of chance into their need for job security.'<sup>47</sup> Finally, it seems credible to suppose that an employee who has been afforded a fair process by their employer in the sense of a warning, and a genuine opportunity to answer allegations made against them, is more likely to accept the legitimacy of the dismissal and less likely to challenge it through lodging and pursuing an Unfair Dismissal claim.<sup>48</sup>

In our view the dimensions of substantive fairness and procedural matters are intertwined within good HR and management practice. If one of the aims of the Unfair Dismissal scheme is to encourage and shape good management practices within organisations, which we argue it is, then amending the FW Act to water down the dimension of due process / fair procedure would run counter to that policy objective. It would be a mistake, and unhelpful, to send a message to organisations that they must have a 'valid reason' for dismissal but do not need to follow a fair procedure in reaching the decision to dismiss the employee. Indeed the Draft Report recommends that 'an employee can only receive compensation when they have been dismissed without *reasonable evidence* ...' (emphasis added). This approach may not assist employers. Although it appears simple, the concept of 'reasonable evidence' is open-textured and provides little guidance to employers on how to apply it in practice. 'Reasonable evidence' surely is the outcome of a process conducted by the employer that is reasonable, in the sense of being procedurally fair in investigating the allegation, giving the employee an opportunity to respond and improve their performance, issuing a warning etc. In our view, it is more helpful to spell out to employers that the processes they go through will be assessed as part of the overall assessment of whether the dismissal was 'harsh, unjust or unreasonable', and that they should turn their minds to the factors listed in s 387(b)-(g) of the FW Act.

It is our observation that in cases where there is a valid reason for dismissal, but defects in procedural fairness, the FWC is most likely to order a modest amount of compensation. See eg *Sheng He v Peacock Bros Pty Ltd* [2013] FWC 7541 (cited in the Draft Report), where each applicant who had been unfairly dismissed due to procedural defects was awarded a sum equivalent to 2 weeks of remuneration and superannuation. It seems to us that the current system is working well in

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<sup>46</sup> Alex De Ruyter and Peter Waring, 'Propagating the Unfair Dismissal Myth: Comparative Employment Protection Law Developments in Australia, Italy, South Korea and the United Kingdom' (2004) 10 *International Employment Relations Review* 13 at 28-9. See also Johnstone et al, above n 45, who write that "sound dismissal procedures [are] likely to improve employee morale": p 117.

<sup>47</sup> Johnstone et al, above n 45, 118.

<sup>48</sup> Johnstone et al, above n 45, 117.

allowing sufficient scope for the FWC to craft a suitable order in relation to procedural defects.

#### Time Frame to Lodge a Claim of Unfair Dismissal

When the FW Act was enacted the time frame to lodge an Unfair Dismissal claim with the FWC was 14 days after the dismissal took effect. In January 2013 this was extended to 21 days,<sup>49</sup> following a recommendation of the 2012 Review of the FW Act.<sup>50</sup> The reason for having a relatively short time frame for Unfair Dismissal reflects the view that reinstatement was intended to be the primary remedy in the jurisdiction. In order for reinstatement to remain a viable option in a practical sense, the view was that claims of Unfair Dismissal needed to be brought expeditiously. As noted in the Draft Report, reinstatement ‘occurs rarely in practice.’ (p. 235). In our view this lends support to our argument, developed below in relation to claims brought under the Part 3-1 (General Protections), that the FW Act ought to be amended so that the time frame to bring both an Unfair Dismissal action and a General Protections claim be extended to 60 days after the dismissal took effect.

#### Draft Recommendation 5.3: Remove Reinstatement as the Primary Remedy

As reinstatement is rarely ordered following a successful Unfair Dismissal claim, we agree with draft recommendation 5.3 that the FW Act ought to be amended to remove reinstatement as the primary remedy.

### **3.3. General Protections**

#### Draft Recommendation 6.2: The requirement for a complaint to be made in good faith

The Draft Report refers to stakeholders’ concerns that claims made under s 341(1)(c) of the FW Act ought to be made in good faith and not for an ulterior purpose. The Draft Report suggests that the FW Act should be amended to require that complaints be made in good faith and for the FWC to assess this via a preliminary interview with the claimant before the claim can proceed and prior to convening a conciliation conference between the parties.

We note that the requirement for complaints under s 341(1)(c) to be made in good faith has previously been considered by the Federal Court in *Shea v TRUenergy Services Pty Ltd* (No 6) [2014] FCA 271.

In that decision Justice Dodds-Streeton determined that for a complaint to fall within the scope of the general protections it must be made in good faith. Her Honour relevantly determined:

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<sup>49</sup> FW Act s 394(2)(a). The current 21 day time frame can only be extended in “exceptional circumstances”: FW Act s 394(3). The amendment from 14 to 21 days was made by the Fair Work Amendment Act 2012 (Cth).

<sup>50</sup> R McCallum, M Moore & J Edwards, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, 2012, recommendation 40, p 224.



While the factual basis of a complaint need not be 'true' or capable of ultimate substantiation, in my view, the grievance must at least be genuinely held and, where it takes the form of an accusation of fault, the claimant must believe it to be valid. The exercise of the workplace right constituted by the making of a complaint is not within the scope of statutory protection if it is made without good faith or for an ulterior purpose, extraneous to that for which the statutory protection was conferred.<sup>51</sup>

It would, therefore, appear to be unnecessary to amend the FW Act to include an explicit direction for a complaint under s 341(1)(c) to be made in good faith.

Furthermore, the Draft Report does not provide data on how many complaints have not been made in good faith, to date, or the extent to which this issue has placed a burden on the system. It is doubtful, however, whether the time required to conduct preliminary interviews for all claims arising under s 341(1)(c) would outweigh the benefit of addressing a potentially small number of claims where the complaint was not made in good faith.

In our view, it is more appropriate to address the issue of whether a complaint was made in good faith at the conciliation conference involving both parties. If, at the conference, the FWC considers that the complaint is not made in good faith, it can take steps such as to:

- make a recommendation or express an opinion about this issue;<sup>52</sup> or
- advise the parties that it considers, taking into account all the materials before it, that a general protections court application in relation to the dispute would not have a reasonable prospect of success.<sup>53</sup>

#### Draft Recommendation 6.4: Imposing a Cap on Compensation for Part 3-1 General Protections Claims

The Draft Report notes that whilst Unfair Dismissal provides capped compensation, orders of compensation under Part 3-1 are not capped. The Draft Report suggests that in the context of termination of employment, this feature of Part 3-1 provides an incentive for claimants to confect a General Protections claim in preference to pursuing an Unfair Dismissal claim.

Draft recommendation 6.4 suggests the introduction of a cap on compensation for General Protections claims lodged under Part 3-1. In our view this draft recommendation is based on a misunderstanding of the different conceptual basis of compensation in Unfair Dismissal law compared to General Protections. Our view is that there should not be a cap imposed on compensation for contravention of Part 3-1.

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<sup>51</sup> At [621]. See also *Heathcote v University of Sydney* [2014] FCCA 613 (14 November 2014) at [53].

<sup>52</sup> See FW Act s 595(2)(b).

<sup>53</sup> See FW Act s 375.

The Draft Report appears to assume that the Unfair Dismissal and General Protections avenues are largely similar and should be treated in the same way, and it proposes that the current Unfair Dismissal model should apply to both avenues. We contend that the two avenues have different aims, involve legal issues of different types and complexities, and protect different interests. These differences justify different approaches to damages and to the time limits set by the FW Act.

A General Protections claim can cover a much wider range of conduct and longer time period than an Unfair Dismissal claim. The General Protections and, specifically, the adverse action provisions, deal with a more technical legal and complex set of issues than Unfair Dismissal. If the General Protections are 'levelled down' to the same treatment as Unfair Dismissal (by imposing a cap on damages or retaining a very short time limit for bringing a claim) this could operate to deprive individuals of a remedy for a significant legal wrong. It should only be done if specifically justified as necessary to serve an important end. The FW Act should not set up unnecessary barriers to allowing individuals who have suffered a legal wrong to obtain redress. Instead, as with anti-discrimination law, compensation should be available for the harm the claimant has suffered. It should not be limited in a way that suits the different purpose of an Unfair Dismissal claim.

In the Unfair Dismissal regime compensation is largely based on the remuneration that the employee would have earned had he or she not been dismissed, less any wages they have earned in other work or could have reasonably earned. Other matters such as length of service and any misconduct by the worker are given lesser weight.<sup>54</sup> As noted in the Draft Report, the amount of compensation ordered is not related to the seriousness of the employer's unfairness, or the psychological or emotional effects of the dismissal on the particular employee. The FW Act provides that 'shock, distress or humiliation' caused by the manner of dismissal are irrelevant to the calculation of compensation for Unfair Dismissal.<sup>55</sup>

In contrast, the Federal Court and Federal Circuit Court can make any order that the court considers appropriate following a contravention of the Part 3-1 General Protections.<sup>56</sup> Compensation is typically ordered. Compensation in relation to Part 3-1 General Protections has a different character to compensation in relation to Unfair Dismissal. Compensation in relation to Part 3-1 may relate to a dismissal, but it also applies in relation to a wide range of conduct that contravenes Part 3-1 during the work relationship, and in some instances prior to the relationship commencing. For example, it might apply to

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<sup>54</sup> See FW Act s 392(2); *Sprigg v Paul's Licensed Festival Supermarket* (1988) 88 IR 21, which continues to be relied upon under the FW Act, see eg, *Haigh v Bradken Resources Pty Ltd* [2014] FWC 236; *Bowden v Ottrey Homes Cobram and District Retirement Villages Inc* (2013) 229 IR 6. The calculation also allows for a deduction for contingencies and the impact of taxation. Compensation orders for unfair dismissal are subject to a cap under the FW Act s 392(5).

<sup>55</sup> FW Act s 392(4).

<sup>56</sup> FW Act s 545(1).

the actual terms and conditions during the continuance of an employment relationship, a decision to suspend or demote the employee, the allocation of shifts, a decision not to offer the employee a training opportunity, in addition to dismissing the employee. Claims might allege issues of trade union victimisation because the employee has exercised a workplace right, coercion or misrepresentation, or discrimination on grounds such as race, sex and disability. Compensation is ordered to recompense the claimant for loss that they have suffered because of the contravention of Part 3-1.<sup>57</sup> The aim of compensation is 'to provide a monetary sum to put the employee in the position he or she would have been in if the employer had ... not contravened the [FW Act].'<sup>58</sup> Depending on the circumstances that might include both economic loss for the economic consequences caused by the contravention, including for example, lost remuneration arising out of a dismissal, as well as compensation for non-economic loss for distress, hurt and humiliation.<sup>59</sup>

Notably the Commonwealth anti-discrimination statutes do not impose caps on compensation.<sup>60</sup> Imposing a cap on claims brought under Part 3-1, including those that are brought under the list of discrimination grounds in the FW Act s 351(1), would place Part 3-1 of the FW Act out of step with Commonwealth anti-discrimination law.

#### Time Frame to Lodge a General Protections Claim

The time limit for claimants to lodge a General Protections claim involving a dismissal with the FWC is 21 days after the dismissal took effect.<sup>61</sup> This is the same time limit as for an Unfair Dismissal application. When the FW Act was enacted the time limit for bringing a General Protections claim was 60 days, but this was shortened to 21 days in January 2013 in order to bring it into line with the time limit for Unfair Dismissal.<sup>62</sup> This amendment was in response to a view that the differential time limits for the two types of claims encouraged applicants (who were out of time to bring an Unfair Dismissal application) to lodge a General Protections claim, in circumstances where the grievance was more appropriately pursued as Unfair Dismissal than a contravention of the General Protections in Part 3-1.

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<sup>57</sup> See FW Act s 545(2)(b).

<sup>58</sup> *Sagona v R & C Piccoli Investments Pty Ltd* [2014] FCCA 875 at [351].

<sup>59</sup> See *ALEA v International Aviation Service Assistance Pty Ltd* [2011] FCA 333 at [426]-[450]; *Kassis v Republic of Lebanon* [2014] FCCA 155 at [97]; *Sagona v R & C Piccoli Investments Pty Ltd* [2014] FCCA 875 at [351]-[359].

<sup>60</sup> By anti-discrimination statutes we mean the Racial Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth); Disability Discrimination Act 1992 (Cth); Age Discrimination Act 2004 (Cth); Australian Human Rights Commission Act 1986 (Cth).

<sup>61</sup> FW Act s 394(2)(a). This can only be extended in 'exceptional circumstances': s 366(2). The 21 day time limit does not apply where an Inspector of the Fair Work Ombudsman initiates the claim: *Fair Work Ombudsman v Wongtas Pty Ltd* (2011) 195 FCR 55.

<sup>62</sup> This amendment was recommended in McCallum, Moore & Edwards, above n 50, recommendation 49, p 245. The amendment from 60 to 21 days was made by the Fair Work Amendment Act 2012 (Cth).

In our view 21 days is not a sufficient span of time for a claimant to consider the merits of their situation, seek out and receive legal advice, make the complex decisions on whether to bring a legal action, and if so, which type of claim to bring, and then to action that decision by lodging the appropriate form or documentation with the correct body. This is particularly so in relation to the circumstance of dismissal, where the worker may be experiencing shock, distress and financial hardship having just lost their job.

Law reform developments in relation to time limits under Commonwealth anti-discrimination law are instructive on the question of the appropriate time limits for Unfair Dismissal and General Protections claims. Generally speaking claimants have 12 months to lodge a claim with the Australian Human Rights Commission ('AHRC') relating to a breach of Commonwealth anti-discrimination legislation.<sup>63</sup> The AHRC attempts to conciliate the complaint but if those attempts are not successful then the AHRC terminates the complaint. Until 2009 the legislative framework provided that the claimant then had 28 days to decide whether to lodge an application with either the Federal Court or (now) the Federal Circuit Court.

In 2004 the Productivity Commission conducted an inquiry into the Disability Discrimination Act 1992 (Cth) ('DDA'), including examining the time limits. Persuasive arguments were made to the inquiry that 28 days was an insufficient amount of time for the claimant to seek out and obtain legal advice and support (which may involve a legal aid application), weigh up all the pros and cons of pursuing a legal action under the DDA, and then to reach a decision and action it. Employers argued their need to limit the period of uncertainty regarding whether a legal action would be taken against them. The Productivity Commission made a finding that the then 28 day limit 'is too short and has caused problems for complainants that outweigh the benefits of greater certainty for respondents'.<sup>64</sup> The Commission recommended that claimants should be allowed up to 60 days to lodge an application relating to unlawful disability discrimination with the Federal Court or (the now) Federal Circuit Court.<sup>65</sup> In 2009 the Commonwealth legislative framework was amended to increase this time limit from 28 days to 60 days.<sup>66</sup>

The adverse action provisions are the primary avenue in workplace law for all employees to pursue their rights. This includes employees who are in categories of disadvantage, such as those who have a disability, and those who are non-English speaking. For such employees, justice requires that they have adequate (but not excessive) time to seek advice and make the correct choice of action.

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<sup>63</sup> See Australian Human Rights Commission Act 1986 (Cth) s 46PH(1)(b) which gives the President of the Commission power to terminate a complaint that was lodged more than 12 months after the alleged unlawful discrimination took place.

<sup>64</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992*, Productivity Commission Inquiry Report, Volume 1: Chapters (Report No 30, 30 April 2004), Finding 13.11, pp 390-1.

<sup>65</sup> *Ibid* at 391.

<sup>66</sup> Australian Human Rights Commission Act 1986 (Cth) s 46PO(2). The section includes the possibility of an extension of time on the 60 days. The amending legislation was the Disability Discrimination and Other Human Rights Legislation Amendment Act 2009 (Cth).

While finality and clarity are important for employers, we contend that the 21 day time limit under the FW Act is unnecessary and can operate unfairly with respect to employees, and particularly those experiencing a disadvantage. Deciding whether to take action under the General Protections provisions involves assessing a wider range of factors and is much more complex than deciding whether to pursue an Unfair Dismissal claim. Potential claimants who have been dismissed face a larger set of decisions regarding their options under the FW Act than do claimants under the DDA that the Productivity Commission considered in 2004. The only decision that the claimants under the DDA were making was whether or not to pursue their claim to court, or drop it. Potential claimants under the FW Act are at an earlier stage of their grievance, and so face a broader and more complex range of decisions. Decisions include: Will they initiate a legal claim regarding their dismissal, or walk away? If they do decide to lodge a legal claim, will they lodge it in the Unfair Dismissal jurisdiction, or as a General Protections application, or under a Commonwealth or State anti-discrimination statute, or possibly as a wrongful dismissal action at common law? These are complex decisions which can have important ramifications for whether the claimant receives redress in relation to the harm they suffered.<sup>67</sup> If they make the wrong choice at the outset, they may find alternative avenues closed off, either completely by legislation or due to expired time limits, and be left with no redress for a legal wrong for reasons that have nothing to do with the merits of their case. Twenty-one days is an unrealistic time frame to impose on a claimant. It makes it difficult to obtain expert advice and give due consideration to that advice and the choices to be made, for all employees but especially those in disadvantaged categories. This complexity makes the short time limit inappropriate for General Protections claims. It may lead to the hasty lodgment of claims that are not well thought-through or clearly articulated. Such an outcome is in neither the claimant's interests, nor the interests of the employer.

These reasons, including the needs of employees in disadvantaged categories, also apply in the context of Unfair Dismissal claims. Since the Commission proposes to remove the primacy of reinstatement as a remedy in Unfair Dismissal, the need to deal with matters very urgently in the interests of successful reinstatement no longer requires a very short time limit.

We submit that the time limit for bringing either a General Protections claim or an Unfair Dismissal claim ought to each be a maximum of 60 days (with the ability to extend for exceptional circumstances). This allows sufficient time for the claimant to consider their options and make a well-informed and considered decision. This is ultimately in the interests of both the claimant and the employer. The time limit for bringing the two types of claim under the FW Act should be the same. As has been the experience in the past if the two time limits are not aligned this may result in applicants lodging in a jurisdiction, which

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<sup>67</sup> The legislation contains complex provisions designed to prevent multiple claims in relation to the same behaviour. See eg, FW Act ss 725-732; Australian Human Rights Commission Act 1986 (Cth) s 46PH(1)(d)-(g); Equal Opportunity Act 2010 (Vic) s 116(b)-(d); Victorian Civil and Administrative Tribunal Act 1988 (Vic) s 77.

remains available to them in terms of time limit, but that is not the most appropriate forum for their grievance.

#### **4. Industrial Disputes and Rights of Entry**

This part of the submission relates to Chapter 19 of the Draft Report, on industrial disputes and right of entry.

##### ***4.1. Draft Recommendation 19.6: Increasing the Maximum Penalties for Unlawful Industrial Action***

It is not entirely clear why the Commission has proposed to increase the maximum penalties for unlawful industrial action, but not for other contraventions of the FW Act. As discussed in Section 2.2 above, we believe that increased penalties should be considered in relation to all civil remedy provisions under the Act.

##### ***4.2. Draft Recommendation 19.8: Limiting Union Right of Entry***

We appreciate that the Commission has sought to confine its recommendations in relation to union right of entry to measures that are intended to limit what is described as misuse of these provisions by employers and unions for ‘strategic reasons’ and to minimise excessive disruptions to business. However we believe the Commission should be cautious to ensure that in seeking to address concerns by certain stakeholders in specific industries, it does not recommend reforms to the legislative or institutional framework that have the potential to impact negatively upon worker and union rights across the broader economy. In particular, we believe that notwithstanding the decline in union density, unions continue to play a critical regulatory role in terms of compliance and enforcement and this role should not be underplayed or diminished in favour of the regulator.

Trade unions can play a role in assisting and supporting individual workers, including both members and non-members, who may have the legal right to enforce their own entitlements, but who may not be aware of their rights or how to enforce them, find the costs associated with pursuing their claims through the courts prohibitive (especially where they are seeking to recover relatively small sums) or be reluctant to enforce their rights for fear of employer reprisal and retribution.<sup>68</sup> Among the potential benefits that trade unions specifically can bring to compliance frameworks include greater capacity to monitor employer compliance with labour standards and to reach workers, as a result of their presence in workplaces (through their members, delegates and organisers);

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<sup>68</sup> See further Christopher Arup and Carolyn Sutherland, ‘The Recovery of Wages: Legal Services and Access to Justice’ (2009) 35(1) *Monash University Law Review* 96; Miles Goodwin and Glenda Maconachie, ‘Victimisation, Inspection and Workers’ Entitlements: Lessons Not Learnt?’ (Paper presented at the Asia-Pacific Economic and Business History Conference, Melbourne, 13-15 February 2008).

independence from employers and government;<sup>69</sup> and expertise in workplace matters as well as the industries and sectors in which they operate.<sup>70</sup> The compliance and enforcement roles performed by unions may benefit not only those workers who rely on these minimum employment standards, but also the integrity of the regime of labor regulation and its capacity to achieve broader social objectives such as the promotion of fairness in the labor market.<sup>71</sup>

Recent research by several of the Centre's members has provided insight into the extent to which, and how, trade unions continue to perform monitoring and enforcement roles in Australian workplaces.<sup>72</sup> This research, based on case studies of five trade unions of various sizes and in various industries, confirmed that while trade unions may go about the task of enforcement differently than in the past, securing employer compliance with minimum employment standards continues to constitute a critically important union function. It also continues to take up a significant proportion of unions' time and resources. It also found that some trade unions have developed sophisticated, creative and effective enforcement strategies for monitoring and securing compliance with minimum standards that are responsive to the characteristics and dynamics of the industries in which they work.

The Draft Report notes that if 'an employee representative suspects that an employer is breaching the FW Act or relevant WHS regulations following a discussion with their members, they should (and already do) refer the grounds for their suspicion to the FWO or the relevant work safety authority.'<sup>73</sup> This statement does not accurately reflect the fact that, in many instances, unions will themselves take steps to ensure that civil remedy provisions are respected and upheld. Unions routinely promote and ensure compliance with the FW Act, modern awards and enterprise agreements, through initiating discussions with employers (on behalf of their members), notifying a dispute to the FWC, or by bringing enforcement proceedings under the FW Act.<sup>74</sup> Indeed, unions have been instrumental in bringing important test cases in situations or circumstances where the regulator has not been so inclined for various reasons.<sup>75</sup>

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<sup>69</sup> Foreign workers, particularly those on restricted work visas, may be justifiably afraid of raising their complaint with a government agency – particularly where they may be in breach of their visa conditions. See Stephen Clibborn, 'Why Undocumented Workers Should Have Workplace Rights' (2015) 26(3) *Economic and Labour Relations Review* 1

<sup>70</sup> Tess Hardy, 'Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards' (2011) 22(3) *Economic and Labour Relations Review* 117, 121-4; Cynthia Estlund, 'Rebuilding the Law of the Workplace in the Era of Self-Regulation' (2005) 105 *Columbia Law Review* 319.

<sup>71</sup> Peter Sheldon & Michael Quinlan, *Minimum Labour Standards and Their Enforcement*, 22 *ECON. & L. REL. REV.* 1 (2011).

<sup>72</sup> For the preliminary findings of this study, see Ingrid Landau, Sean Cooney, Tess Hardy & John Howe, 'Trade Unions and the Enforcement of Minimum Employment Standards in Australia', Research Report, Centre for Employment and Labour Relations Law, 2014.

<sup>73</sup> Draft Report, 161.

<sup>74</sup> Unions do not generally have standing to prosecute breaches under the work health and safety legislation.

<sup>75</sup> It may be that the FWO has determined that pursuing the matter is not in the public interest or they have taken a narrower view of certain provisions than the relevant union. For example,

In light of these considerations, we are concerned that further restricting rights of entry in the way proposed may impede the capacity of unions to perform their roles. We do not believe the proposal adequately accounts for the fact that many workplaces have high rates of employee turnover and/or transient workforces. These are often the same workplaces that are characterised by insecure work – that is, workers who are often employed through labour hire agencies and/or on a casual basis. These are precisely the type of precarious workers who need more support from unions (not less). We believe that a preferable way in which to deal with some of the problems identified in the Draft Report would be by ensuring the FWC has adequate scope to deal with any disputes concerned with rights of entry.

Indeed, while the FW Act eased many of the restrictions on right of entry introduced by Work Choices,<sup>76</sup> and recognises ‘the role employee organisations play in enforcement, particularly in relation to the safety net and instruments that apply to them’,<sup>77</sup> it continues to impose numerous restrictions on the capacity of unions to enter workplaces. Some of these requirements may operate to significantly limit the capacity of unions to perform monitoring and enforcement roles. For example, s 518 of the FW Act still requires the relevant entry notice to specify ‘to whom the suspected contravention or contraventions relate’.<sup>78</sup> This makes it very difficult for unions to investigate confidential complaints made by employees or access the necessary records to ascertain whether a breach of the FW Act has occurred. In instances where a worker who makes a complaint wishes to remain anonymous throughout the investigation, then unions generally have little choice but to refer these matters to the FWO for further investigation. In comparison to unions, FW Inspectors can exercise inspection powers without needing to name the person to whom the inspection relates. Rather than restricting union rights of entry, as the Draft Report suggests, we believe that there are good grounds for ensuring that union rights of entry are expanded in a way that does not compromise their ability to fulfill critical compliance and enforcement functions.

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some unions have been more willing than the FWO to explore the extent to which accessories can be liable for compensatory orders under ss 545 and 550. See section [x] below.

<sup>76</sup> See Colin Fenwick and John Howe, ‘Union Security After Work Choices’ in in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009).

<sup>77</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth), 326.

<sup>78</sup> FW Act, s 481. In particular, s 481(3) provides that: ‘The permit holder must reasonably suspect that the contravention has occurred or is occurring. The burden of proving that the suspicion is reasonable lies on the person asserting the fact.’ A note to this section makes clear that ‘[a] permit holder who seeks to exercise rights under this Part without reasonably suspecting that a contravention has occurred, or is occurring, is liable to be penalised under subsection 503(1) (which deals with misrepresentations about things authorised by this Part).



## 5. Alternative Forms of Employment

### 5.1 Sham Contracting Provisions

The sham contracting provisions of the FW Act are fundamental to ensuring that employees are able to enjoy the benefits of minimum standards in relation to pay, working hours and leave (as well as superannuation and workers' compensation). Notwithstanding the importance of these provisions, and the fact that there is now some evidence to suggest that sham contracting is a significant problem (in at least some industries),<sup>79</sup> it appears that the sham contracting provisions of the FW Act have not yet given rise to many decided cases.

The apparent reluctance to bring a legal challenge under these provisions may reflect some of the key difficulties identified in the Draft Report, including the fact that the 'recklessness' defence is relatively generous and somewhat ambiguous.<sup>80</sup> We believe that replacing the 'recklessness' defence with a 'reasonableness defence' as recommended in previous reviews and by other commentators will provide an appropriate and justified shift in emphasis. This shift is perhaps more pressing in light of a somewhat restrictive interpretation of the sham contracting provisions adopted in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*.<sup>81</sup>

In this case, which is currently on appeal to the High Court,<sup>82</sup> the Full Court of the Federal Court found that Quest South Perth Pty Ltd ('Quest') and Contracting Solutions Pty Ltd ('Contracting Solutions') did not breach s 357 of the FW Act when it moved two housekeepers originally employed by Quest onto Odco-style independent contractor arrangements orchestrated by Contracting Solutions.

The plurality of the Full Federal Court found that to be actionable under s 357, the relevant representation:

- needed to mischaracterise the contract as a contract for services made between the employee and the employer;
- must be directed at the contract made between the employer and employee and not simply relating to the status of the employee.<sup>83</sup>

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<sup>79</sup> See, eg, Fair Work Building and Construction, 'Working Arrangements in the Building and Construction Industry' (Research Report, 21 December 2012). See also Fair Work Ombudsman, *Sham Contracting and the Misclassification of Workers in the Cleaning Services, Hair and Beauty and Call Centre Industries* (Report on the Preliminary Outcomes of the Fair Work Ombudsman Sham Contracting Operational Intervention, November 2011).

<sup>80</sup> Andrew Stewart and Cameron Roles, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25 *Australian Journal of Labour Law* 258. See also Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 235.

<sup>81</sup> [2015] FCAFC 37 (North and Bromberg JJ). While Barker J also dismissed the appeal, his Honour entered a separate judgment.

<sup>82</sup> *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd & Ors* (No. P16 of 2015). See also 'High Court to hear FWO challenge to sham contracting ruling', *Workplace Express*, 14 August 2015.

<sup>83</sup> *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37.

This decision reveals a potential loophole in the application of s 357 to triangular work relationships which may mean that the sham contracting provisions can be readily circumvented through third party contracting arrangements. To the extent that the High Court does not address this issue in the meantime, this loophole should be closed in order to maintain the overall integrity of the workplace relations system.

## **5.2 Statutory Definition of Employment**

The Draft Report acknowledges that one of the challenges of enforcing the sham contracting provisions is the underlying uncertainty associated with the common law distinction between a contract of service and a contract for services. However, the Draft Report goes on to identify a number of difficulties with introducing a statutory definition of employment. In particular, the Draft Report observes that one problem with seeking to statutorily define ‘inherently ambiguous employment relationships’<sup>84</sup> is that:

once they are formally elaborated in legislation, loopholes invariably are found and exploited...Workers and employers who are intent on disguising an employment relationship as independent contracting may shape their arrangements to meet the criteria in the legislation.<sup>85</sup>

In our view, it is difficult to sustain the argument that the current common law approach avoids the pitfalls associated with a statutory definition of employment.<sup>86</sup> Rather, it seems that the ongoing uncertainty of the common law definition of employment can be equally exploited by parties seeking to disguise their working relationship (i.e. by manipulating key features of their relationship) in order to avoid regulatory intervention. Indeed, the difficulties of the current common law test have been brought into sharp relief by the recent decisions, and contrasting approaches, of the Full Court of the Federal Court.<sup>87</sup> The fact that an employee must proceed to an appellate court in order to definitively determine whether they are an employee or independent contractor is clearly inefficient and wholly unsatisfactory.

The proposal previously put forward by Andrew Stewart and Cameron Roles effectively addresses some of the potential problems identified in the Draft Report.<sup>88</sup> In particular, Stewart and Roles propose that the term ‘employee’ should be redefined under key statutes so that workers cannot be treated as contractors unless they are genuinely running their own business.<sup>89</sup> It also sets

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<sup>84</sup> Draft Report, 726.

<sup>85</sup> Draft Report, 726-7.

<sup>86</sup> Draft Report, 727.

<sup>87</sup> *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82; *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146; *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37. Cf Jessup J in *Tattsbet Ltd v Morrow* [2015] FCAFC 62.

<sup>88</sup> See Stewart and Roles, above n 79.

<sup>89</sup> In particular, a key component of the statutory definition proposed by Stewart and Roles is a ‘presumption that a person who contracts to work for another does so as an employee, unless it can be shown that the other party is a client or customer of a business genuinely carried on by

out a number of set criteria which should be considered by the court in determining this question. To a large extent these factors reflect definitive elements of the existing common law, multi-factoral test.<sup>90</sup> Their proposal is appealing insofar that the use of statutory presumptions, together with the application of statutory interpretation principles, may lead to greater certainty on the question of when a worker is likely to be properly classified as an employee (as opposed to an independent contractor). As the Draft Report correctly points out, greater certainty on the question of whether a worker is an employee may provide 'a better basis for efficient enforcement (thereby creating stronger incentives to avoid sham arrangements) and reduce the risk of inadvertent errors.'<sup>91</sup> Further, Stewart and Roles argue that:

A new definition of employment should not be seen as a threat by those promoting genuine independent contracting. Persons or entities genuinely conducting their own enterprises would be left untouched. What our proposal would do is make it harder for persons performing work in employee-like relationships to be disguised as independent contractors.<sup>92</sup>

Given that the workplace relations regulatory framework often pivots on the definition of 'employee', and in light of the inherent uncertainties which are now faced by workers and those that engage them, we urge the Productivity Commission to reconsider the potential benefits associated with a statutory definition of employment.

## **6. Mandatory Consultation Terms in Enterprise Agreements**

This part of the submission responds to the Draft Report at pp. 566 – 568 regarding the mandatory consultation term about major workplace change and change to ordinary hours of work in enterprise agreements. We support the retention and improvement of the model term. We respond to criticisms of the consultation term supported by the Productivity Commission, identify problems with the model term and recommend a solution, and outline the justifications for legislation supporting formal consultation.

### **6.1 The 'Right to Agree on Changes'**

The Draft Report quotes with approval the following submission from the Australasian Railway Association ('ARA'):

the requirement to include a term about consultation on roster changes provides leverage for employee bargaining representatives to negotiate terms that further entrench the right of employees and unions to agree on any changes to rosters before they are implemented.<sup>93</sup>

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the worker.' In applying this presumption, the court must have regard to the practical reality of the relationship, not just the express terms of any written contract that exists between the parties. Stewart and Roles, above n 79.

<sup>90</sup> *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

<sup>91</sup> Draft Report, 725.

<sup>92</sup> Stewart and Roles, above n 79, 159.

<sup>93</sup> Australasian Railway Association, Submission No 155 to Productivity Commission, *Inquiry into the Workplace Relations Framework*, 13 March 2015, 28.

In response, there is no right to agree on changes to rosters or ordinary hours of work required by the mandatory term.<sup>94</sup> Consequently, it is unclear from the submission and the Productivity Commission's report as to how the consultation term could 'further entrench' the right to agree on changes to regular hours of work.

### **6.2 The Use of the Term as an 'Industrial Lever'**

The Draft Report states that 'what is in principle desirable' (presumably the benefits of cooperation) is 'at risk due to process and an emphasis of form over substance', citing as an example a situation in which 'the apparent threat of a 'failure to consult' becomes an industrial lever' (p.567). The Commission again quotes the ARA in relation to fears that employees or their representatives may exploit their rights to consultation:

The requirement for consultation also provides an opportunity for any proposed changes to agreements to be stalled by the invoking of dispute resolution procedures if employees or their representatives take the view that consultation processes have not been strictly followed.<sup>95</sup>

If employers have properly complied with the consultation term, and employees or unions stall agreements by invoking their dispute resolution procedures on the grounds that employers have 'failed to consult', then employers may make an application to a court to enforce compliance with the model consultation term.<sup>96</sup> Concerns about improper use of consultation terms are not per se a sufficient justification for the term's revocation.

### **6.3 Problems with the Model Term**

There is one aspect of the model term that is likely to cause confusion and miscommunication between employers and employees. Under the Fair Work Regulations, the model term applies in two different situations. In regards to a major change likely to have a significant effect on employees a 'definite decision' is required in order for consultation to take place,<sup>97</sup> whereas for proposed changes to rosters or ordinary hours, no definite decision must be made before employees are consulted.<sup>98</sup>

The requirement of a 'definite decision' is intended to protect managerial prerogative to make decisions before consulting employees. However, reference to a 'definite' decision gives rise to more problems than it solves. The precise meaning of a 'definite' decision is difficult to discern for managers. This leads to confusion as to when consultation should occur. The term 'definite' seems antithetical to the very notion of the obligation to consult, which has been held to require 'that a *genuine* opportunity be provided for the affected party to attempt

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<sup>94</sup> FW Act s 205; Fair Work Regulations 2009 (Cth) ('FW Regulations') Schedule 2.3.

<sup>95</sup> Australasian Railway Association, above n 92, 28.

<sup>96</sup> FW Act, s 50 and s 539(2), Item 4.

<sup>97</sup> FW Regulations Sch 2.3 (1)(a).

<sup>98</sup> Ibid (1)(b).

to persuade the decision maker to adopt a different course of action'.<sup>99</sup> The final problem is that the phrase 'definite decision' becomes a point of conflict between employees and managers. Both parties may assume and insist that once a definite decision has been made, that is the final decision.

#### **6.4 The Rejection of the German Model**

The Draft Report recognises that '[i]n many European countries, there are statutory provisions for consultation and it is common for board-level employee representation on company boards' (p.567). It notes the example of Germany, where it has been favourably regarded, but dismisses its model as one that would not translate well to Australia.

At first glance, this comparison is unhelpful as the existing model term does not relate to board-level employee representation. Rather, it is concerned with consultation of employees within enterprises. A relevant comparison is to be found in European laws that require employee information and consultation in national and trans-national enterprises. Thus, the Draft Report overlooks the European Directives which require information and consultation of employees, such as the European Works Council Directives (1994, 1997 and 2009)<sup>100</sup> and the Directive Establishing a General Framework for Informing and Consulting Employees (2002).<sup>101</sup>

European directives are laws that must be implemented in all member states, including the United Kingdom.<sup>102</sup> There are currently 28 member states in the European Union. Member states implementing these measures encompass a very significant variety of industrial relations systems,<sup>103</sup> indicating the applicability of these Directives' consultation measures in Australia.

#### **6.5 The Case in Favour of a Mandatory Term for Workplace Consultation**

We encourage the Commission to take into account the important rationale in favour of legislatively mandated consultation terms. In particular, consultation terms assist managers, employees and trade unions in meeting the challenges posed by constant workplace change, restructuring, redundancies, outsourcing and competitive pressures posed by global competition.

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<sup>99</sup> *Re Consultation Clause* [2013] FWCFB 10165, [35].

<sup>100</sup> *European Parliament and Council (1994) European Works Council, Council Directive 94/45, 1994 OJ (L 254); European Parliament and Council (1997) European Works Council, Council Directive 97/74, 1998 OJ (L 010); and Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the Establishment of a European Works Council or a Procedure in Community-scale undertakings and Community-scale groups of Undertakings for the Purposes of Informing and Consulting Employees [2009] OJ L 122/28.*

<sup>101</sup> *European Parliament and Council (2002) 'A General Framework for Informing and Consulting Employees', Council Directive 2002/14/EC, 2002 OJ (L 080).*

<sup>102</sup> Paul Gollan and Glenn Patmore 'Transporting the European Social Partnership Model to Australia' (2006) 48 *The Journal of Industrial Relations* 217.

<sup>103</sup> There are currently 28 member states in the European Union. Europa, *EU Member Countries* (24 August 2015) Europa European Union <<http://europa.eu/about-eu/countries/member-countries/>>.

As long ago as 1999, the European Commissioner for Employment and Social Affairs, Pádraig Flynn, drew two conclusions from the European experience regarding the process of restructuring:

[First,] that constant industrial change and corporate restructuring is an inevitable part of remaining competitive in the world. The second is that, if this constant industrial change and corporate restructuring is to meet its objective — if it is to be a positive factor in our competitiveness — then it needs to engage the workforce, as an integral and as a *formal part* of that process.<sup>104</sup>

Flynn maintained that if the workforce is not engaged, is not consulted in a formal way, it will create ‘at worst, a culture of conflict, at best a culture of cynicism’.<sup>105</sup> He maintained that to ‘nurture globally productive companies and workforces, we must aspire to quite the opposite effect. We need to create a culture of anticipation, to actively engage the workforce in the process of change’.<sup>106</sup>

The European Works Council Directives seeks to create a positive balance between flexibility and security. According to Flynn, the message is clear:

Mechanisms for proper worker involvement can increase the flexibility of the business environment in which firms operate. And they can offer workers a sense of confidence that they will not emerge as the losers in the restructuring process and that they have a stake in the future of that business.<sup>107</sup>

Importantly, the European Works Council Directives to which Flynn was referring were originally enacted in 1994, and subsequently repealed and re-enacted in 2009 and, in the recital for that re-enactment, Flynn’s sentiments were echoed and approved. As Gollan and Patmore have noted in an earlier submission to the Productivity Commission, the Australian consultation term now lags well behind comparable European laws.<sup>108</sup>

## **7. Meeting Australia’s International Obligations**

This section of the submission addresses Chapter 23 of the Draft Report and those draft recommendations that have implications for Australia’s compliance with its obligations under international law.

We preface our comments by offering a number of clarifications in relation to the ILO’s standard-setting functions and processes that may be useful when preparing the final report.

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<sup>104</sup> Pádraig Flynn, ‘European Works Councils: Practices and Development’ (Speech delivered at the European Commission, Brussels, 28 April 1999).

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> Paul Gollan and Glenn Patmore, No 192 to Productivity Commission, *Submission to the Productivity Commission’s Inquiry into the Workplace Relations Framework 2015*, 13 March 2015, 3.

First, the Draft Report explains that ‘the ILO operates a tripartite system’ in that it ‘consults with governments, workers and employers as a part of its work’ (p. 761). It is a unique feature of the ILO that standards – whether conventions or recommendations – are drafted on a tripartite basis and may only be adopted by the International Labour Conference, composed of government, employer and worker delegates from the member-states.<sup>109</sup> The tripartism of the ILO thus goes beyond simple consultation and is widely recognised to impart to ILO standards a certain degree of legitimacy and relevance to the real world economy.

Second, the Draft Report describes ILO standards as ‘benchmarks’ and ‘non-binding guidelines’ that ‘assist countries when drafting their labour laws’ (pp. 761-762). This may well be the case with respect to unratified conventions. Where ratified, however, ILO conventions have the same effect as other international treaties. Of course, under Australian law, the act of ratification does not mean that a treaty is automatically incorporated into domestic law. However this does not mean that the Australian Government is not required to align its domestic laws with ratified conventions or other recommendations (p.762). Under international law and under the ILO Constitution, ILO member-states that ratify conventions are obliged to bring their law and practice into conformity with them.<sup>110</sup>

Third, the Draft Report explains that the ILO can request that Australia amend its laws if they breach a ratified convention, but that it has limited power to implement more punitive measures. It is true that the ILO has limited capacity to secure compliance with conventions, relying principally on moral suasion and diplomatic pressure. However this does not mean that there is no significance for Australia in not complying with ILO standards to which it is bound. The ILO’s Committee of Experts on the Application of Conventions and Recommendations (which examines periodic reports submitted by Member States on the measures they have taken to give effect to the provisions of Conventions to which they are party) regularly monitors and reports on Australia’s compliance with ratified ILO conventions. As well as publishing annual commentary, the Committee of Experts’ comments on a country’s non-compliance with a specific convention may form the basis of an examination of the case within the Conference Committee on the Application of Standards, a tripartite standing committee of the annual International Labour Conference. In addition, Australia may be subject to a complaint through one of the ‘special procedures’ such as the tripartite Committee on Freedom of Association. At the very least, these processes have implications for how Australia is perceived within the international community.

It is not the case that the ‘... ILO does not make any requests about unratified conventions or recommendations’ (p.762). Under article 19 of the ILO

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<sup>109</sup> Constitution of the International Labour Organisation, art 19. For the composition of this conference, see art 3.

<sup>110</sup> With respect to ILO conventions, this obligation comes into force twelve months after the relevant instrument has been ratified. See further Virginia Leary, *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems* (Nijhoff The Hague 1982).

Constitution, member-states are obliged to submit reports to the ILO upon request in relation to selected unratified conventions and recommendations and Australia regularly does so. In addition, the Committee on Freedom of Association can examine complaints that ILO member-states have violated the principles of freedom of association, regardless of whether the states have ratified the relevant conventions. Finally, ILO member-states who have not ratified all eight core conventions (and this includes Australia) are subject to regular scrutiny by the ILO by way of the *Follow-Up to the Declaration on Fundamental Principles and Rights at Work, 1998*.

Finally, while it is of course correct that Australia is only bound to comply with those ILO conventions that it has ratified, it is also important to recognise that Australia is obliged to recognise and respect certain principles in its labour laws simply by virtue of being an ILO member-state. Under the terms of the *Declaration on Fundamental Principles and Rights at Work, 1998*, all ILO members are bound to respect and to protect the rights that are protected by the eight core conventions.<sup>111</sup> Freedom of association is also enshrined in the ILO Constitution, and the ILO's Committee on Freedom of Association has emphasised that all member-states are obliged to 'implement and observe' this principle.<sup>112</sup>

On a more general note, we welcome the Commission's recognition that Australia has international obligations that bear upon its workplace relations framework. We have concerns, however, that the Draft Report fails to satisfactorily describe, or engage with, the nature and extent of these obligations.

Chapter 23 focuses overwhelmingly on why the Australian Government may choose to ratify or not ratify an ILO instrument and the framework through which the consideration of whether ratification of a specific instrument is in Australia's national interest occurs (pp. 761-765). This is useful context but it would appear to be secondary to a consideration of the *substance* of Australia's existing obligations or the extent to which certain draft recommendations may have implications for these obligations.<sup>113</sup>

Australia's obligations to respect and protect certain labour rights and standards are significant and arise from a number of multilateral instruments. As the draft report notes (and is further elaborated upon above) some of these obligations

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<sup>111</sup> These eight conventions are the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No.98); the Forced Labour Convention, 1939 (No.29) and the Abolition of Forced Labour convention, 1957 (No.105); the Minimum Age Convention, 1973 (No.138) and the Worst Forms of Child Labour Convention, 1999 (No.182); the Equal Remuneration Convention, 1951 (No.100) and the Discrimination (Employment and Occupation) convention, 1957 (No.111).

<sup>112</sup> International Labour Organisation, *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (4th ed, 1996) [10].

<sup>113</sup> We note here as well the statutory obligation on the Commission to, in performing its functions, have regard to the need for Australia to meet its international obligations: Productivity Commission Act 1998, s. 8(j).



arise by virtue of Australia's membership of the ILO. Australia has also ratified (and is expected to comply with) the 41 ILO Conventions that it has ratified and are in force. Australia also has, however, obligations to respect workers' rights arising from general human rights treaties. These include (but are not limited to) the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights. The UDHR and ICCPR, for example, protects freedom of association, including for trade union purposes (UDHR Arts 20(1) and 23(4); ICCPR Art 22). The ICESCR also protects freedom of association, including the right to strike (Art 8), as well as a number of other workplace rights.

Several recommendations in the Draft Report, if implemented by the Australian Parliament, would take Australian law further from compliance with its international obligations. We can be reasonably confident in saying this on the basis of ILO jurisprudence generally and specifically with respect to Australia, which state the existing position at international law. The recommendations of concern include:

- Draft recommendation 20.1, under which terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, would constitute unlawful terms under the FW Act. This would constitute further restrictions on the rights of the parties to bargain freely, taking Australia further from compliance with the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).<sup>114</sup>
- Those sections of the report which seek input as to possible amendments to ss.423 and 426 of the FW Act so as to effectively 'lower the bar' for the suspension or termination of industrial action. These sections of the Act have already been found by the ILO supervisory bodies to go beyond the permissible restrictions on the right to strike under international law.<sup>115</sup>

The proposal for a new form of statutory contract, the 'Enterprise Contract' which can be dictated by the employer without negotiation or agreement of employees and / or their union may also be inconsistent with Australia's obligations under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No.98). While the precise details of how this contract would work are unclear and so it is difficult to say with any certainty, it would appear that this type of instrument has significant potential to undermine the right of workers to engage in collective bargaining, by enabling employers to

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<sup>114</sup> International Labour Organisation, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (4th ed, 1996) [547] and [556]. See also Committee on Freedom of Association, Report No. 357, June 2010, Case No. 2698 (Australia), [226]-[227] and [229(g)].

<sup>115</sup> See Committee on Freedom of Association, Report No. 357, June 2010, Case No. 2698 (Australia), [224] and [229(e)]. See also CEACR, Observation, Freedom of Association and the Right to Organise Convention, 1948 (No. 87), 99<sup>th</sup> Session, ILC, 2010.

enter into contracts that prevent bargaining and override existing genuine collective agreements. The implications of these 'agreements' for the right of workers to take industrial action is also unclear.

## **8. Enterprise Contracts**

We refer the Commission to the commentary on the Enterprise Contract offered in the Response Submission to this Inquiry by Professor Andrew Stewart, Associate Professor Shae McCrystal and Dr Joanna Howe. We endorse those comments.