



Workplace Relations Framework
Productivity Commission
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25 September 2015

To whom it may concern

Workplace Relations Framework Inquiry

The Employment Law Centre of Western Australia (Inc) (**ELC**) welcomes the opportunity to make a submission in relation to the Productivity Commission's Draft Report on the Workplace Relations Framework dated August 2015 (the **Draft Report**).

ELC is Western Australia's community legal centre specialising in employment law. It is the only not for profit legal service in Western Australia offering free employment law advice, assistance and representation. ELC assists close to 4,000 callers annually through our telephone Advice Line service and provides approximately 500 of those callers with further assistance. Through these activities, ELC has first-hand experience of the workplace relations framework and an informed perspective on proposals regarding the framework.

Please see our submission below.

Yours faithfully

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1. The structure and scope of this submission

(a) Structure

This submission contains:

- Part 2 – responses to recommendations in the Draft Report;
- Part 3 – responses to information requests by the Productivity Commission; and
- Part 4 – comments in relation to the Draft Report and the Inquiry, general comments and further recommendations (section 4).

(b) Scope

Because of the length of the Draft Report, the limited time provided to make submissions on it, and our limited resources, we have made submissions on selected aspects of the Draft Report.

The fact that we have not made a submission on an aspect of the Draft Report does not indicate that we agree with this aspect of the Draft Report, or that we do not have a view on the issue(s) that it raises.

2. Responses to Productivity Commission's draft recommendations


Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 3: Institutions		
3.3	<p>Appointment of FWC Members</p> <p>The Australian Government should amend the <i>Fair Work Act 2009</i> (Cth) to change the appointment processes for Members of the Fair Work Commission. The amendments would stipulate that:</p> <ul style="list-style-type: none">• an independent expert appointment panel should be established by the Australian Government and state and territory governments• members of the appointment panel should not have had previous direct roles in industrial representation or advocacy	<p>✗ This draft recommendation should not be adopted.</p> <p>The draft recommendation that Members of the Fair Work Commission be appointed by an appointment panel and that members of the appointment panel “should not have had previous direct roles in industrial representation or advocacy”¹ would seem to exclude from the expert appointment panel people who would be well qualified to identify suitable Members of the Fair Work Commission.</p> <p>This draft recommendation seems to be aimed at addressing concerns about “stacked appointments”² of Fair Work Commission Members. However, the Draft Report notes that the existing composition of Fair Work Commission Members is not unbalanced³, and that there is an even divide between appointees with backgrounds assisting employers and those with backgrounds assisting employees.⁴</p> <p>This draft recommendation seems based on the assumption that members of the appointment panel who have an industrial representation or advocacy background are less likely to be impartial. The Draft Report cites no basis for this assumption.</p>


¹ Draft Report, p. 157.

² Draft Report, p. 150.

³ Draft Report, p. 151.

⁴ Ibid.

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Chapter 3: Institutions		
	<ul style="list-style-type: none"> the panel should make a shortlist of suitable candidates for Members of the Fair Work Commission against the criteria in draft recommendation 3.4 the Commonwealth Minister for Employment should select Members of the Fair Work Commission from the panel's shortlist, with appointments then made by the Governor General. 	<p>A better approach to panel selection would be to select appropriately qualified persons, including industrial representatives and advocates where appropriate, but to seek to balance the number of such panel members who have typically acted for employees with those who have typically acted for employers.</p>
3.4	<p>Experience and suitability of FWC Members</p> <p>The Australian Government should amend the <i>Fair Work Act 2009</i> (Cth) to establish separate eligibility criteria for members of the two Divisions of the Fair Work Commission outlined in draft recommendation 3.1.</p> <p>Members of the Minimum Standards Division should have well-developed analytical capabilities and experience in economics, social science,</p>	<p> This draft recommendation should not be adopted.</p> <p>Members of the Tribunal Division must have legal skills and qualifications, in addition to any other expertise. Such Members make decisions that determine the parties' rights and liabilities.</p> <p>Experience working in an ombudsman's office, commercial dispute resolution, economics or professions other than law are unlikely to have the expertise required to properly make such decisions.</p>

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Chapter 3: Institutions		
	<p>commerce or equivalent disciplines.</p> <p>Members of the Tribunal Division Membership should have a broad experience, and be drawn from a range of professions, including (for example) from ombudsman's offices, commercial dispute resolution, law, economics and other relevant professions.</p> <p>A requirement for the Panel and the Minister for Employment respectively is that they be satisfied that a person recommended for appointment would be widely seen as having an unbiased and credible framework for reaching conclusions and determinations in relation to workplace relation matters or other relevant areas.</p>	
3.5	<p>Publication of information about FWC conciliation outcomes and processes and performance review of FWC's conciliation outcomes and processes</p> <p>The Australian Government should require that the Fair Work Commission publish more detailed</p>	<p> This draft recommendation should not be adopted to the extent that it involves commissioning an independent performance review of the Fair Work Commission's conciliation processes and outcomes.</p> <p>We would welcome publication of conciliation outcomes where appropriate, if appropriate steps are taken to de-identify the parties to conciliation, consistent with any confidentiality provisions in any settlement or other agreement which applies to them.</p>

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Chapter 3: Institutions		
	<p>information about conciliation outcomes and processes. In the medium term, it should also commission an independent performance review of the Fair Work Commission's conciliation processes, and the outcomes that result from these processes.</p>	<p>While we see no issue with a performance review of the Fair Work Commission's conciliation processes, we note that we do not see a particular need for such a review.</p> <p>In our view, the Fair Work Commission's existing conciliation processes are generally effective. For example:</p> <ul style="list-style-type: none"> • The majority of unfair dismissal matters are resolved at conciliation – in 2013-14, 79% of unfair dismissal claims were resolved at conciliation.⁵ • Conciliations are generally held soon after the employee has lodged their claim. In 2013-14, the median number of days from lodgement of an unfair dismissal claim to conciliation was 61 days in 90% of matters.⁶ In the same year, the median number of days from lodgement of a general protections claim involving dismissal to conciliation was 59 days in 90% of matters.⁷ • Conciliations are informal (primarily conducted by telephone), which is often to the benefit of employees (who are often unrepresented and may have difficulty preparing for and participating in more formal proceedings). This also helps to manage the cost and time associated with conciliation conferences. <p>However, we note the following issues which should be considered in any review of the conciliation process:</p>

⁵ Fair Work Commission, *Annual Report 2013-2014*, 15 October 2014, p. 41.

⁶ Fair Work Commission, *Annual Report 2013-2014*, 15 October 2014, p. 34.

⁷ Fair Work Commission, *Annual Report 2013-2014*, 15 October 2014, p. 36.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 3: Institutions		
		<ul style="list-style-type: none"> • The range of compensation outcomes from conciliation processes. We have encountered a number of clients who have accepted relatively low sums in settlement of their claims at conciliation. • The conduct of conciliators in advising employees on the merits of their claims and/or the amount for which employees should settle their claims. We have received some negative feedback from clients on the advice that they have received from conciliators on the merits of their claim or the amount that they should settle for. We have dealt with one matter where a conciliator advised a client that she was not eligible to bring a claim, when in fact she was. • The repercussions of employers not attending conciliations. Some employers do not attend compulsory conciliations, leaving the employee with no opportunity to attempt to resolve the claim at any early stage. Consideration should be given to compliance measures requiring employers to attend compulsory conciliations. • Creating a record of any breaches of the <i>Fair Work Act 2009</i> (Cth) (Fair Work Act) which are established at conciliation. We have encountered employers who have repeatedly settled employee claims at conciliation. Creating a record of any established breach of the Fair Work Act would allow the Fair Work Ombudsman (FWO) to identify patterns of non-compliance across employers and industries, and to take steps to encourage and assist future compliance.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 4: National Employment Standards		
4.1	<p>Amend modern awards to allow for substitution of public holidays</p> <p>The Fair Work Commission should, as a part of the current four yearly review of modern awards, give effect to s. 115(3) of the <i>Fair Work Act 2009</i> (Cth) by incorporating terms that permit an employer and an employee to agree to substitute a public holiday for an alternative day into all modern awards.</p>	<p>✗ This draft recommendation should not be adopted.</p> <p>If this recommendation were implemented, employees may feel compelled to agree to substitute public holidays with alternative days where their employer asks them to do so. This is a particular risk for low paid, unskilled employees who comprise a large part of our client base, who may not know that they can decline such a request, or who may feel disempowered to do so.</p> <p>There are social benefits associated with the majority of the population sharing a common public holiday. The Draft Report notes that:</p> <ul style="list-style-type: none"> • “For some people, the common timing of public holidays provides people with a greater opportunity to share their time off with their partners and children;”⁸ • “There is also empirical evidence that more shared days of leisure enrich the relationships of people with their friends and acquaintances, which then improves the quality of leisure on other days, such as weekends;”⁹

⁸ Draft Report, p. 184.

⁹ Draft Report, p. 184, which cites Joachim Merz and Lars Osberg, *Keeping in Touch: A Benefit of Public Holidays*, Discussion Paper No. 2089, Germany, April 2006.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 4: National Employment Standards		
		<ul style="list-style-type: none"> • “Public holidays can yield community benefits by enabling coordinated social activities, particularly on days of genuine cultural or spiritual significance.”¹⁰ <p>We note that a number of Australian public holidays (e.g. Australia Day, Christmas, Boxing Day) are recognised as having national significance and the dates on which these holidays fall are central to the enjoyment of the holiday.</p> <p>The Draft Report states that allowing swapping of public holidays would allow employees greater flexibility to take time off at a time that suits them.¹¹ Employees already have flexibility in choosing when to take their annual leave. We do not consider that any benefit to be gained through this potential flexibility would outweigh the potential disadvantage to employees in being requested to take public holidays on alternative working days.</p> <p>If implemented, this recommendation would allow employers a greater ability to have employees work public holidays and would reduce the number of employees who are able to enjoy public holidays at the same time, on the designated day. This would represent a fundamental change in Australian workplace holiday arrangements, and could lead to the erosion of public holidays.</p>

¹⁰ Draft Report, p. 163.

¹¹ Draft Report, pp. 184-186.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 4: National Employment Standards		
4.2	<p>No public holiday leave or penalty rates for newly designated State and Territory public holidays</p> <p>The Australian Government should amend the National Employment Standards so that employers are not required to pay for leave or any additional penalty rates for any newly designated state and territory public holidays.</p>	<p>✗ This draft recommendation should not be adopted.</p> <p>We do not see the rationale for this proposal.</p> <p>If this draft recommendation were adopted, in Western Australia, State system employees (approximately 22% - 36% of the workforce¹²) would enjoy State public holidays, but national system employees (approximately 64% - 78% of the workforce¹³) would not. This seems potentially confusing for employers and employees, and undesirable.</p> <p>We note that the States and Territories do not often gazette new public holidays. In the last forty years, the ACT gazetted one new holiday (Family & Community Day), Victoria has created one new holiday (Grand Final Eve) and South Australia has created two part-day holidays (Christmas Eve and New Year's Eve from 7pm to midnight).</p>

¹² Department of Commerce, *State Industrial Relations Coverage in WA: How many employees are covered?* (16 May 2014) https://www.commerce.wa.gov.au/sites/default/files/atoms/files/minister_for_commerce_submission_attachment_b_state_industrial_relations_coverage_in_wa.pdf at 18 September 2015.

¹³ Department of Commerce, *State Industrial Relations Coverage in WA: How many employees are covered?* (16 May 2014) https://www.commerce.wa.gov.au/sites/default/files/atoms/files/minister_for_commerce_submission_attachment_b_state_industrial_relations_coverage_in_wa.pdf at 18 September 2015.

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Chapter 4: National Employment Standards		
		<p>As discussed above, there are social benefits associated with the majority of the population having a day off at the same time (refer to our comments in relation to draft recommendation 4.1), and these should be taken into account in any decision to limit new State and Territory public holidays to employees who are outside the federal system of workplace relations.</p>
4.3	<p>Examine whether to extend 20 days of paid annual leave</p> <p>Periodically, the Australian, state and territory governments should jointly examine whether there are any grounds for extending the existing 20 days of paid annual leave in the National Employment Standards, with a cash out option for any additional leave where that suits the employer and employee. Such an extension should not be implemented in the near future, and if ultimately implemented, should be achieved</p>	<p><input checked="" type="checkbox"/> We support this draft recommendation, with the following amendments:</p> <ul style="list-style-type: none"> • extending annual leave entitlements in the near future should not be ruled out; and • extending annual leave entitlements should not be conditional on a wage increase trade-off. <p>We do not see any reason to rule out implementing this proposal in the near future.</p> <p>Additionally, we support a broader review of the entitlement to annual leave in Australia. As noted in the Draft Report, several other countries</p>

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Chapter 4: National Employment Standards		
	through a negotiated trade-off between wage increases and extra paid leave.	<p>have higher annual leave entitlements than Australia. Sweden and Austria each have 25 days of annual leave.¹⁴ We think any review should thoroughly consider the potential advantages in increasing the minimum annual leave entitlement in Australia, including productivity gains, and health, family and social improvements.</p> <p>If additional paid annual leave was provided in exchange for limits on minimum wage increases, this could potentially prejudice casual employees, who could not access annual leave entitlements, and whose wage rates are assessed with reference to the minimum wage.</p>

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 5: Unfair dismissal		
5.1	Consider unfair dismissal applications on the papers or introduce “more merit focused” conciliation processes	<p>✗ This draft recommendation should not be adopted.</p> <p>It is convenient to divide this recommendation up into its two parts –</p> <p>(a) Considering unfair dismissal applications on the papers</p>

¹⁴ Draft Report, p. 194.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 5: Unfair dismissal		
	<p>The Australian Government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal applications 'on the papers', prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation processes.</p>	<p>We note that this draft recommendation appears to have originated from the submission by the Catholic Commission for Employment Relations (CCER).¹⁵</p> <p>There is a slight difference in terminology used by CCER and the Productivity Commission – the CCER refers to the conciliator or member being required to “summarily dismiss”¹⁶ an unfair dismissal application prior to conciliation where satisfied that the case was without sufficient merit, whereas draft recommendation 5.1 refers to the Fair Work Commission being able to “consider” the application.</p> <p>Given the origin of the draft recommendation, we have assumed that the Productivity Commission intended the word “consider” to mean “summarily dismiss” or “determine”.</p> <p>It is not appropriate for unfair dismissal applications to be determined on the papers. Many employees who make unfair dismissal claims are unrepresented and may have difficulty setting out the basis for their claim in writing.</p> <p>Many employees do not take legal advice before lodging their claims. The short limitation period for dismissal based claims (21 days) in many cases makes this difficult.</p>

¹⁵ Catholic Commission for Employment Relations, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework (Submission 99), March 2015.

¹⁶ Catholic Commission for Employment Relations, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework (Submission 99), March 2015, p. 35.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 5: Unfair dismissal		
		<p>In our experience, many employees find it difficult to set out their claims in writing without assistance from a lawyer, and find it easier to explain their position over the phone or in person. This is often particularly the case for employees with literacy issues, employees from non-English speaking backgrounds (as alluded to in the Draft Report¹⁷) and employees with disabilities.</p> <p>It would only be appropriate for legal claims to be determined on the papers where both sides are represented, and even then, this may not be appropriate in all cases.</p> <p>If unfair dismissal applications were determined on the papers, this would seriously disadvantage vulnerable employees and substantially compromise access to justice for unfair dismissal matters.</p> <p>As noted above, the Productivity Commission appears to have taken this draft recommendation from the submission by the Catholic Commission for Employment Relations (CCER). However, the CCER itself states that “[i]f in practice this results in otherwise valid claims being dismissed on the papers for lack of quality written expression, then this is not the intention and may require more detailed consideration.”¹⁸</p> <p>Based on our experience, providing advice and assistance to thousands of vulnerable employees for more than 14 years, we consider that</p>

¹⁷ Draft Report, p. 232.

¹⁸ Catholic Commission for Employment Relations, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework (Submission 99), March 2015.

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Chapter 5: Unfair dismissal		
		<p>providing the Fair Work Commission with the ability to determine unfair dismissal applications on the papers would result in a risk of otherwise valid claims being dismissed or undervalued for lack of quality written expression.</p> <p>In our view, this draft recommendation should be rejected.</p> <p>(b) Introducing more merit focused conciliation processes</p> <p>It is unclear exactly what is meant by the draft recommendation that the Australian government introduce “more merit focused conciliation processes for unfair dismissal”, as suggested by the CCER¹⁹ and adopted by the Productivity Commission in the Draft Report.</p> <p>What is clear, however, is that this draft recommendation is misconceived for at least three key reasons, as set out below. As such, this draft recommendation should be rejected.</p> <p><i>No evidence has been provided that there are large numbers of unmeritorious claims</i></p> <p>First, this recommendation appears to be based on the assumption that large numbers of unmeritorious unfair dismissal claims are made in the Fair Work Commission each year. However, no evidence has been provided to support this assertion.</p>

¹⁹ See Draft Report, p. 232.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 5: Unfair dismissal		
		<p>The CCER states that “it is reasonable to conclude that of the 79% of total cases settled at conciliation last financial year, a not insignificant proportion were meritless, without reasonable prospects of success, or vexatious”²⁰, but provides no basis for having reached this conclusion.</p> <p>Similarly, the Draft Report does not provide any data on unmeritorious unfair dismissal claims.</p> <p>The assertion that large numbers of unmeritorious unfair dismissal claims are being made in the Fair Work Commission each year is not consistent with our experience and is not supported by the available data from the Fair Work Commission. For example, in 2013-14, of the total number of unfair dismissal applications lodged that year, only 6.8% were dismissed.²¹</p> <p><i>There are already numerous filters to reduce or eliminate meritless claims</i></p> <p>To the extent that this draft recommendation is based on the premise that there is a “lack of a filter to reduce or eliminate meritless applications”²², we note that there are numerous filters under the Fair Work Act to reduce</p>

²⁰ Catholic Commission for Employment Relations, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework (Submission 99), March 2015, p. 34.

²¹ Fair Work Commission, *Annual Report 2013-14*, p. 42. Note that this figure is based on a comparison of the total number of unfair dismissal applications in 2013-14 with the total number of unfair dismissal application that were dismissed in that financial year. Presumably some of the unfair dismissal applications that were dismissed in 2013-14 had been lodged in 2012-13, however this is the best estimate that can be obtained of the percentage of claims dismissed in a particular financial year.

²² Catholic Commission for Employment Relations, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework (Submission 99), March 2015, p.34.

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Chapter 5: Unfair dismissal		
		<p>or eliminate meritless unfair dismissal claims. For example:</p> <ul style="list-style-type: none"> • An employer can raise jurisdictional objections in its initial response to the claim – e.g. that: <ul style="list-style-type: none"> ○ the employer is not a national system employer; ○ the claim was not lodged within the limitation period; ○ the employee has not met the 6 or 12 month qualifying period; ○ the employee is over the high income threshold; ○ the employee was not dismissed, but actually resigned; or ○ the dismissal was a case of genuine redundancy; • The Fair Work Commission has the power to hold a hearing²³ and <i>must</i> hold a conference or a hearing where jurisdictional matters (such as those above) are in dispute²⁴ – this would typically occur prior to the conciliation being held if the employer raises a jurisdictional objection in its initial response; • The Fair Work Commission must consider jurisdictional matters (such as those above) before considering the merits of the unfair dismissal claim more generally;²⁵ • The Fair Work Commission can dismiss claims that are frivolous, vexatious or have no reasonable prospects of success;²⁶

²³ Fair Work Act s 399.

²⁴ Fair Work Act s 397.

²⁵ Fair Work Act s 396.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 5: Unfair dismissal		
		<ul style="list-style-type: none"> • The Fair Work Commission can dismiss claims where the applicant fails to attend a conference or a hearing, fails to comply with a direction by the Fair Work Commission, or fails to discontinue an application after a settlement has been agreed;²⁷ • The Fair Work Commission can order costs where a claim is made vexatiously, without reasonable cause, or where it should have been reasonably apparent that the claim had no reasonable prospect of success;²⁸ and • The Fair Work Commission can order costs where the applicant caused the employer to incur costs because of an unreasonable act or omission.²⁹ <p>The Fair Work Commission has a broad range of powers to identify and eliminate unmeritorious unfair dismissal claims. There is no need for further measures directed at this aim, and it would be unnecessary and inappropriate to complicate the conciliation process by requiring a detailed consideration of the merits of the claim.</p> <p><i>The purpose of conciliation is not to examine the merits of the claim</i></p> <p>This draft recommendation reveals a misunderstanding about the nature</p>

²⁶ Fair Work Act s 587.

²⁷ Fair Work Act s 399A.

²⁸ Fair Work Act s 611.

²⁹ Fair Work Act s 400A.

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Chapter 5: Unfair dismissal		
		<p>of alternative dispute processes such as conciliation.</p> <p>The CCER, in explaining why, in its view, it is necessary to introduce a “more merit-focused conciliation process”, states that “[w]hile the extent and quality of the discourse about the respective merits of a case can differ depending on the conciliator, in many cases we have observed that merits are only referred to in passing, and this is not sufficient to avoid what in effect is a ‘free-kick’ at settlement for the applicant.”³⁰</p> <p>The purpose of conciliation is not for the Fair Work Commission to consider, or decide on, the merits of the claim; the purpose is to determine whether the employer and the employee can resolve the claim at an early stage.³¹ This is standard practice in conciliations and mediations, which are now used widely by courts and tribunals as an alternative dispute resolution process.</p> <p>Both the employee and the employer have the opportunity to settle a matter at conciliation. It is odd to suggest that the employee gets a “free-kick” or some opportunity not given to the employer. If the employer does not wish to settle the claim at conciliation, there is nothing compelling the employer to settle. The merits of a claim are just one factor in the parties’ decision whether to settle at conciliation.</p> <p><i>Other reasons for this draft recommendation not to be adopted</i></p>

³⁰ Catholic Commission for Employment Relations, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework (Submission 99), March 2015, p. 34.

³¹ See e.g. National Alternative Dispute Resolution Advisory Council, Commonwealth of Australia, *Your Guide to Dispute Resolution*, 2012, pp. 18-19, <<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx>> at 18 September 2015.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 5: Unfair dismissal		
		<p>As discussed above, the stated reasons for introducing this draft recommendation are misconceived and not based on evidence.</p> <p>Additionally, this draft recommendation, if implemented, could actually increase the cost and amount of time the Fair Work Commission spends dealing with individual unfair dismissal claims, since it would increase the requirement for preliminary processes. This would result in reduced efficiency in unfair dismissal matters specifically and in Fair Work Commission proceedings generally.</p> <p><i>Other alternatives to deal with the perceived problem</i></p> <p><u><i>Early access to legal advice</i></u></p> <p>The best way to prevent unmeritorious unfair dismissal claims is to ensure that employees have early access to legal advice.</p> <p>In our experience, it is rare for an employee to lodge a claim after having been advised that their claim lacks merit. Similarly, as noted in our initial submission, we have found that clients are generally receptive to legal advice that they discontinue their claims.³²</p> <p>Funding employment law advice services (such as ELC) would assist to ensure that employees have access to legal advice on unfair dismissal, and are less likely to make an unmeritorious claim. This is consistent with the Productivity Commission's recent recommendation in its inquiry into</p>

³² Employment Law Centre, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework (Submission 89), 12 March 2015, p. 33.

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Chapter 5: Unfair dismissal		
		<p>Access to Justice Arrangements that the Australian, State and Territory governments should provide approximately \$200 million in additional funding for civil legal assistance services.³³</p> <p><u>Longer limitation period</u></p> <p>Another measure that would reduce the likelihood of unmeritorious unfair dismissal claims is to extend the limitation period for unfair dismissal claims.</p> <p>As noted in our initial submission, the existing limitation period of 21 days is short, particularly when compared to other comparable Organisation for Economic Cooperation and Development (OECD) countries.³⁴</p> <p>Extending the limitation period would give employees a greater window to obtain advice and to properly craft any claim, and would reduce any likelihood of employees filing a claim to preserve their limitation period. We recommend that the limitation period be 90 days, to bring Australia into line with other comparable OECD countries, as set out in our initial submission to the Inquiry.³⁵</p>

³³ Productivity Commission, *Access to Justice Arrangements: Final Report* (Report No. 72), 5 September 2014, recommendation 21.4 (see e.g. p. 63).

³⁴ Employment Law Centre, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework (Submission 89), 12 March 2015, pp. 17-19.

³⁵ Employment Law Centre, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework, 12 March 2015, p. 19.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 5: Unfair dismissal		
5.2	<p>Remove the right to seek reinstatement or compensation where dismissal procedurally unfair</p> <p>The Australian Government should change the penalty regime for unfair dismissal cases so that:</p> <ul style="list-style-type: none"> • an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct • procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or financial penalties. 	<p>✗ This draft recommendation should not be adopted.</p> <p>Removing an employee's right to seek reinstatement or compensation where the dismissal was procedurally unfair is a significant departure from existing unfair dismissal laws, which should be rejected.</p> <p>The Draft Report appears to underestimate greatly the importance of procedural fairness. Procedural fairness is a central feature of the Australian legal system.</p> <p>A right to procedural fairness and to seek reinstatement or compensation for a denial of procedural fairness has existed in unfair dismissal legislation for more than 20 years federally and for more than 40 years in some States.³⁶</p> <p>The Work Choices reforms in 2006 did not go so far as to remove the right to procedural fairness or the right to seek reinstatement or compensation due to a lack of procedural fairness.³⁷</p> <p>Most other comparable OECD countries protect an employee's right to procedural fairness in unfair dismissal matters (for example, by providing a right to a warning, a right to reasons for the dismissal, and a right to an opportunity to respond).³⁸</p>

³⁶ Andrew Stewart, *Stewart's Guide to Employment Law*, (5th ed, 2015), pp. 364-365. See also *Industrial Relations Act 1988* (Cth) ss 170DB-170DE.

³⁷ *Workplace Relations Act 1996* (Cth) s 652(3)(b)–(f), s 654(3), (4) and (7).

³⁸ See e.g. *Equality of Opportunity Act* (France), *Dismissal Protection Act* (Germany), *Employment Contracts Act 1970* (Sweden), *Employment Rights Act 1996* (UK).

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Chapter 5: Unfair dismissal		
		<p>The Draft Report does not provide any sound justification for proposing such a radical departure from existing unfair dismissal laws.</p> <p>The Draft Report reveals that the number of unfair dismissal claims made each year is small in proportional terms – in 2012-13, only 0.18% of employed persons made an unfair dismissal claim against their employers.³⁹</p> <p>The Draft Report also finds that:</p> <ul style="list-style-type: none"> • “unfair dismissal laws are unlikely to play a major role in the hiring and firing decisions of firms”,⁴⁰ • “Australia currently has a relatively low rank [internationally] regarding the level of procedural inconvenience attached to its dismissal laws”,⁴¹ and • “Australia’s unfair dismissal arrangements are unlikely to have significant negative impacts on medium to large businesses”.⁴² <p>In these circumstances, it is hard to understand why the Draft Report proposes such a radical change to existing unfair dismissal laws,</p>

³⁹ Draft Report, p.212.

⁴⁰ Draft Report, p. 216.

⁴¹ Draft Report, p. 218.

⁴² Draft Report, p. 228.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 5: Unfair dismissal		
		<p>particularly given that the Productivity Commission expresses the view that there is no need for fundamental change to unfair dismissal laws.⁴³</p> <p>If this draft recommendation were implemented, it would significantly prejudice employees.</p> <p>For example, an employee could be dismissed on the spot without being given a reason for dismissal, an opportunity to respond or an opportunity to explain their side of the story. In this situation, the employee would have no right to seek reinstatement or compensation for lost wages.</p> <p>The alternative remedies of “counselling and education of the employer” and financial penalties (only where the employer is a repeat offender) would be inadequate. The prospect of counselling and education is unlikely to deter employers from dismissing employees using an unfair process, and would not adequately address the impact of the unfair dismissal on the employee.</p> <p>As noted in ELC's initial submission to the inquiry into the Workplace Relations Framework (Inquiry), the impacts of unfair dismissal on the individual employee are often significant.⁴⁴</p>

⁴³ Draft Report, p.199.

⁴⁴ Employment Law Centre, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework (Submission 89), 12 March 2015, pp. 27-29.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 5: Unfair dismissal		
5.3	<p>Remove emphasis on reinstatement as primary goal</p> <p>The Australian Government should remove the emphasis on reinstatement as the <i>primary</i> goal of the unfair dismissal provisions in the <i>Fair Work Act 2009</i> (Cth).</p>	<p><input checked="" type="checkbox"/> This draft recommendation should be adopted.</p> <p>In our experience, the majority of employees who are unfairly dismissed do not wish to be reinstated because they feel that the employment relationship has already broken down to too great an extent.</p> <p>Generally employees seek other remedies such as compensation for lost wages, an apology, a written reference or a statement of service.</p> <p>Similarly, in the majority of unfair dismissal cases that we have dealt with, the employer has not been willing to reinstate the employee but was open to other remedies.</p> <p>We support removing the emphasis on reinstatement as the primary goal of the unfair dismissal provisions, as long as this does not result in reduced potential compensation outcomes for claimants.</p>
5.4	<p>Remove reliance on Small Business Fair Dismissal Code</p> <p>Conditional on implementation of the other recommended changes to the unfair dismissal system within this report, the Australian Government should remove the (partial) reliance on the Small Business Fair Dismissal Code within the <i>Fair Work Act 2009</i> (Cth).</p>	<p><input checked="" type="checkbox"/> This draft recommendation should be adopted. However, it should not be conditional on implementation of the other recommended changes to the unfair dismissal system.</p> <p>In our view, there is no need for there to be a separate Small Business Fair Dismissal Code as it largely duplicates the unfair dismissal provisions of the Fair Work Act.</p>

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 6: The General Protections		
6.2	<p>Complaints in relation to employment – more clearly define how exercise of workplace right applies, introduce a good faith requirement and require Fair Work Commission to decide whether complaint has been made in good faith</p> <p>The Australian Government should modify s. 341 of the <i>Fair Work Act 2009</i> (Cth), which deals with the meaning and application of a workplace right.</p> <ul style="list-style-type: none"> Modified provisions should more clearly define how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment. The FW Act should also require that complaints are made in good faith; and that the Fair Work Commission must decide this via a preliminary 	<p>✗ This draft recommendation should not be adopted.</p> <p>It is convenient to divide this recommendation up into its three key parts:</p> <p>(a) More clearly define how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment</p> <p>The Draft Report does not explain what is intended in order to more clearly define how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment. It does not explain what situations this recommendation is intended to address, or what is meant by the phrase "indirectly related to the person's employment".</p> <p>Further, no explanation is given as to why an amended definition of workplace right is considered to be necessary in these circumstances.</p> <p>However, based on the commentary in Chapter 6 of the Draft Report, it appears that the intention is that the definition of a workplace right would be narrowed,⁴⁵ and that this is necessary in light of:</p> <ul style="list-style-type: none"> the "significant increase in general protections claims",⁴⁶ and the perceived breadth of section 341 of the Fair Work Act.⁴⁷

⁴⁵ The Draft Report refers to "tightening up arrangements regarding a workplace right", and states that "the definition of a workplace right and aspects of the associated provisions result in a very broad range of potential applications." – see p. 262.

⁴⁶ Draft Report, p. 263.

⁴⁷ Draft Report, p. 262.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 5: Unfair dismissal		
	<p>interview with the complainant before the action can proceed and prior to the convening of any conference involving both parties.</p>	<p>We address these issues below.</p> <p>Increased numbers of general protections claims</p> <p>Table 6.1 in the Draft Report indicates that the number of general protections claims based on dismissal has increased from 1,188 in 2009-10 to 2,879 in 2013-14, and the number of general protections claims based on adverse action other than dismissal has increased from 254 in 2009-10 to 779 in 2013-14.⁴⁸</p> <p>In our view, by far the most likely reason for the increase in general protections claims since 2009-10 is that the general protections provisions were only introduced for the first time on 1 July 2009 – it is likely to have taken some time for awareness and understanding of the general protections provisions to filter through.</p> <p>The Draft Report acknowledges that this could be the reason for the rise in such claims,⁴⁹ yet then seems to accept the submission that “general protections [are] being used as a ‘stalking horse’ to launch dubious, but costly and time-consuming cases.”⁵⁰</p> <p>The Draft Report cites no evidence to support the claim that “dubious, costly and time-consuming” general protections claims are being made.</p>

⁴⁸ Draft Report, p. 250.

⁴⁹ Draft Report, p. 259.

⁵⁰ Draft Report, p. 259.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 5: Unfair dismissal		
		<p>In our view, this is not a sound basis for modifying the workplace rights provisions of the Fair Work Act.</p> <p>Additionally, as noted in the Draft Report, the figures provided by the Fair Work Commission do not contain a breakdown of the basis for the general protections claim, and do not specify how many of these claims alleged that the employer took adverse action because the employee exercised a workplace right to make a complaint or inquiry which was indirectly related to the person's employment.</p> <p>There is therefore no factual basis for relying on the increased numbers of general protections claims as a rationale for amending the workplace rights provisions as proposed.</p> <p>Finally, we note that even though the number of general protections claims has increased over time, the number of claims is low as a percentage of the workforce. In 2013-14, 0.03% of employed persons made a general protections claim.⁵¹</p> <p>Perceived breadth of section 341</p> <p>The Draft Report states in several places that the workplace right provisions are very broad.⁵² The Draft Report cites a comment from Creighton and Stewart that this part of the Fair Work Act:</p> <p>“...opens up the possibility that an employee who makes any</p>

⁵¹ Based on data in Fair Work Commission, *Annual Report 2013 – 2014*, p. 37 and Australian Bureau of Statistics, *6202.0 - Labour Force, Australia*, June 2014.

⁵² Draft Report, p. 262.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 5: Unfair dismissal		
		<p>complaint or inquiry to <i>any</i> body or person about any matter relating to their employment, even if the 'matter' does not pertain to a workplace law or workplace instrument" [emphasis in Draft Report].⁵³</p> <p>We note that the meaning of this provision is limited by other provisions of the Fair Work Act. An employee only has a claim if the employer has taken adverse action against them <i>because</i> they made a particular complaint or inquiry. This is inevitably linked to employment and no further narrowing of this right is required.</p> <p>In relation to the comment from Creighton and Stewart that the complaint or inquiry may be made "about any matter relating to their employment, even if the matter does not pertain to a workplace law or workplace instrument"⁵⁴, we note that if the complaint or inquiry could only be made in relation to a workplace law or workplace instrument, this would make the complaint or inquiry provision far more limited in scope and would largely be covered by other provisions (e.g. sections 341(1)(a) and (b)).</p> <p>(b) Introduce a requirement that complaints be made in good faith</p> <p>The proposal that a complaint must be made in good faith seems to be based on the notion that significant numbers of general protections claims are not made in good faith. However, the Draft Report does not provide any evidence that this is an issue.</p>

⁵³ Breen Creighton and Andrew Stewart, *Labour Law* (5th ed, 2010), cited in Draft Report, p. 262.

⁵⁴ *Ibid.*

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 5: Unfair dismissal		
		<p>Many of our clients are reluctant to make a complaint, even regarding issues such as non-payment, underpayment, sexual harassment, discrimination and bullying, because they do not want to damage the employment relationship.</p> <p>Introducing a good faith requirement would introduce an unnecessary level of complexity in the general protections process. "Good faith" would need to be interpreted with reference to previous case-law, which would be a time-consuming and complex exercise.</p> <p>(c) Require the Fair Work Commission to decide whether a complaint was made in good faith before the action can proceed and prior to convening a conference</p> <p>Please refer to our comments above under point (b). Please refer also to our comments in relation to draft recommendation 5.3.</p>
6.3	<p>Exclusions for frivolous or vexatious complaints</p> <p>The Australian Government should amend Part 3-1 of the <i>Fair Work Act 2009</i> (Cth) to introduce exclusions for complaints that are frivolous and vexatious.</p>	<p>✗ This draft recommendation should not be adopted.</p> <p>It is not appropriate to amend the general protections provisions to exclude frivolous and vexatious complaints.</p> <p>This would require considerations of the merits of any claim at various stages during the claim process, rendering general protections proceedings more complex, time-consuming and costly, without producing any net benefit.</p> <p>There are already numerous mechanisms in the Fair Work Act which</p>

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 5: Unfair dismissal		
		<p>discourage or prevent frivolous or vexatious general protections claims from proceeding.</p> <p>For example:</p> <ul style="list-style-type: none"> • If the Fair Work Commission considers that a general protections claim would not have a reasonable prospect of success, it must advise the parties accordingly;⁵⁵ • The Fair Work Commission has the power to order costs where: <ul style="list-style-type: none"> ○ a claim is made vexatiously, without reasonable cause, or where it should have been reasonably apparent that the claim had no reasonable prospect of success;⁵⁶ ○ the applicant caused the employer to incur costs because of an unreasonable act or omission;⁵⁷ • Similarly, the Federal Circuit Court and the Federal Court can order costs where: <ul style="list-style-type: none"> ○ the claim was made vexatiously or without reasonable cause;⁵⁸

⁵⁵ Fair Work Act s 375.

⁵⁶ Fair Work Act s 611(2).

⁵⁷ Fair Work Act s 375B(1).


⁵⁸ Fair Work Act s 570(2)(a).

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 5: Unfair dismissal		
		<ul style="list-style-type: none"> ○ the Court is satisfied that the party's unreasonable act or omission caused the other party to incur costs;⁵⁹ or ○ the Court is satisfied that: <ul style="list-style-type: none"> ▪ the party unreasonable refused to participate in a matter before the Fair Work Commission; and ▪ the matter arose from the same facts as the proceedings before the Court.⁶⁰ <p>As discussed above in relation to draft recommendation 6.2, the Draft Report provides no evidence to support the claim that "general protections [are] being used as a 'stalking horse' to launch dubious, but costly and time-consuming cases."⁶¹</p> <p>The Draft Report provides no basis for amending the general protections provisions in the manner proposed.</p>

⁵⁹ Fair Work Act s 570(2)(b).

⁶⁰ Fair Work Act s 570(2)(c).

⁶¹ Draft Report, p. 259.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 5: Unfair dismissal		
6.4	<p>Compensation cap</p> <p>The Australian Government should introduce a cap on compensation for claims lodged under Part 3-1 of the <i>Fair Work Act 2009</i> (Cth).</p>	<p> This draft recommendation should not be adopted.</p> <p>As noted in our initial submission,⁶² general protections matters involve serious breaches of the Fair Work Act, where an employer engages in unlawful behaviour. The general protections provisions deal with situations, for example, where an employee is dismissed because of his or her race, ethnicity, sex or pregnancy, or is dismissed because he or she took sick leave.</p> <p>There is no cap on compensation for comparable claims made under federal discrimination laws in the Federal Court or Federal Circuit Court⁶³; the principles used to assess damages in discrimination matters are generally based on tort principles,⁶⁴ i.e. the damages should put the applicant in the position he or she would have been in but for the unlawful discrimination⁶⁵. In these circumstances, it is not appropriate to impose a compensation cap on general protections claims.</p> <p>We note that the rationale for this recommendation seems at least in part to make the compensation available in general protections matters consistent with that available in unfair dismissal matters.⁶⁶</p>

⁶² Employment Law Centre, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework (Submission 89), 12 March 2015, p. 43.

⁶³ Such as the *Age Discrimination Act 2004* (Cth), the *Sex Discrimination Act 1984* (Cth), or the *Disability Discrimination Act 1992* (Cth).

⁶⁴ *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217.

⁶⁵ *Haines v Bendall* (1991) 172 CLR 60 at 63.

⁶⁶ The Draft Report states at page 263 that “[a]s the general protections offer an appeals avenue for applicants above the high-income, and have been harmonised recently with Part 3-2 [the unfair dismissal part] regarding lodgement timeframes, inclusion of similar capping arrangements for claims pursued under Part 3-1 is justified.” [emphasis in bold added].

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 5: Unfair dismissal		
		<p>As discussed in our initial submission,⁶⁷ we consider that the compensation cap in unfair dismissal claims under the Fair Work Act should also be removed.</p> <p>In other OECD countries, there is either no cap, or a higher cap on compensation for unfair dismissal matters (as is the case in Canada⁶⁸ and New Zealand⁶⁹).</p> <p>For example, in Sweden, the maximum damages increases substantially where the employee has been working for the employer for more than 6 months, with the applicable unfair dismissal compensation cap being:</p> <ul style="list-style-type: none"> • 6 months' pay for less than 6 months employment; • 16 months' pay for less than five years of employment; • 24 months' pay for at least five years but less than ten years employment; and • 32 months' pay for ten or more years of employment.⁷⁰

⁶⁷ Employment Law Centre, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework (Submission 89), 12 March 2015, pp. 26-27.

⁶⁸ *Canada Labour Code*, RSC 1985, c L-2, s242(4).

⁶⁹ *Employment Relations Act 2000* (NZ) s123.

⁷⁰ *Employment Protection Act* (1982:80) s39.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 9: Variations in uniform minimum wages		
9.2	<p>Review into apprenticeship and traineeship arrangements</p> <p>The Australian Government should commission a comprehensive review into Australia's apprenticeship and traineeship arrangements. The review should include, but not be limited to, an assessment of:</p> <ul style="list-style-type: none"> • the role of the current system within the broader set of arrangements for skill formation • the structure of awards for apprentices and trainees, including junior and adult training wages and the adoption of competency-based pay progression • the factors that affect the supply and demand for apprenticeships and traineeships, including the appropriate design and level of government, employer and employee incentives. 	<p><input checked="" type="checkbox"/> This draft recommendation should be adopted, subject to the following comments.</p> <p>We agree that it would be useful for the Australian government to commission a comprehensive review into Australia's apprenticeship and traineeship arrangements.</p> <p>In addition to the issues mentioned in draft recommendation 9.2, any review should address whether existing workplace protections for apprentices and trainees are adequate.</p> <p>In our experience, apprentices and trainees are particularly vulnerable to exploitation and the workplace relations system leaves apprentices and trainees with more limited access to workplace protections than other employees.</p>

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 14: Regulated weekend penalty rates for the hospitality, entertainment, retail, restaurants and café industries		
14.1	<p>Reduce Sunday penalty rates for hospitality, entertainment, retail, restaurants and café industries</p> <p>Sunday penalty rates that are not part of overtime or shift work should be set at Saturday rates for the hospitality, entertainment, retail, restaurants and cafe industries.</p> <p>Weekend penalty rates should be set to achieve greater consistency between the hospitality, entertainment, retail, restaurants and cafe industries, but without the expectation of a single rate across all of them.</p> <p>Unless there is a clear rationale for departing from this principle, weekend penalty rates for casuals in these</p>	<p>✗ This draft recommendation should not be adopted.</p> <p>As stated in our initial submission, penalty rates are an essential part of the existing workplace relations framework.⁷¹ They should be retained and not reduced.</p> <p>Employees who work weekends, public holidays and hours that are unsocial, irregular or unpredictable (particularly on Sundays) should be compensated for working those hours in the form of penalty rates, as contemplated in the modern awards objective in the Fair Work Act.⁷²</p> <p>We strongly disagree with the contention that “the social rationale for penalty rates has declined as weekends have increasingly lost their historically special character as days of rest for some people, and as community and consumer expectations about buying goods and services have shifted in Australia towards a 24/7 economy.”⁷³</p> <p>Employees who work in industries where penalty rates are commonplace – such as retail, hospitality, manufacturing and utilities industries – are typically low paid and rely on penalty rates as a substantial component of their overall earnings.⁷⁴ A reduction in penalty rates would likely have a</p>

⁷¹ Employment Law Centre, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework (Submission 89), 12 March 2015, p. 15.

⁷² FW Act s 134(1)(da).

⁷³ Productivity Commission, *Workplace Relations Framework: Safety Nets*, Issues Paper No 2 (January 2015) p. 14.

⁷⁴ Tony Daly, 'Evenings, nights and weekends: Working unsocial hours and penalty rates' (Report, Centre of Work + Life, University of South Australia, October 2014) 11, 12, 18 and 19; The McKell Institute, 'The Economic Impact of Penalty Rate Cuts on Rural NSW: A Retail Industry Case Study' (Discussion Report, 2014) 17.


Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 14: Regulated weekend penalty rates for the hospitality, entertainment, retail, restaurants and café industries		
	industries should be set so that they provide neutral incentives to employ casuals over permanent employees.	<p>disproportionate effect on women and rural and regional workers, who are more likely to rely on penalty rates to meet their household expenses.⁷⁵</p> <p>Further, employers have provided limited evidence that penalty rates have had the negative effects claimed, such as causing them to employ fewer workers on a Sunday. In the Fair Work Commission's 2013 penalty rates decision, the Commission noted the "significant evidentiary gap in the cases put [by employers]" .⁷⁶</p> <p>The Fair Work Commission stated that "[i]t is particularly telling that there is no reliable evidence regarding the impact of the differing Sunday (or other) penalties when applied upon actual employer behaviour and practice." ⁷⁷</p> <p>The Fair Work Commission continued: "[t]here is also no reliable evidence about the impact of the existing differential Saturday and Sunday penalties upon employment patterns, operational decisions and business performance." ⁷⁸</p> <p>We note the proposal to set weekend penalty rates for casuals in these industries so that "they provide neutral incentives to employ casual employees over permanent employees." To the extent that this would require a reduction in casual employees' penalty rates to the level</p>

⁷⁵ Tony Daly, 'Evenings, nights and weekends: Working unsocial hours and penalty rates (Report, Centre of Work + Life, University of South Australia, October 2014) p.18 and 19.

⁷⁶ *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635, [234].

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 14: Regulated weekend penalty rates for the hospitality, entertainment, retail, restaurants and café industries		
		<p>applicable to permanent employees, we strongly oppose this suggestion.</p> <p>Permanent employees receive a range of benefits not provided to casuals, including annual leave, personal leave, and protection from unfair dismissal. Reducing or removing casual penalty rates to permanent employee level would significantly disadvantage casual employees.</p>
14.2	<p>Introduce reduced penalty rates for Sundays in award review process</p> <p>The Fair Work Commission should, as part of its current award review process, introduce new regulated penalty rates as set out in draft recommendation 14.1 in one step, but with one year's advance notice.</p>	<p> This draft recommendation should not be adopted.</p> <p>Please refer to our discussion above in relation to draft recommendation 14.1.</p>

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 21: Migrant workers		
21.1	<p>Additional resourcing of FWO to investigate underpayment of migrant workers and additional penalties for employers</p> <p>The Fair Work Ombudsman should be given additional resources for investigation and audits of employers suspected of underpaying migrant workers (including those in breach of the <i>Migration Act 1958</i> (Cth)).</p> <p>The Migration Act should be amended so that employers can be fined by at least the value of any unpaid wages and conditions to migrants working in breach of the Migration Act, in addition to the existing penalties under the Act.</p>	<p>✓ This draft recommendation should be adopted, subject to the following comments.</p> <p>In addition to adding further penalties into the <i>Migration Act 1958</i> (Cth) (Migration Act), the Fair Work Act should be amended to clarify that migrant workers are entitled to the same workplace rights and conditions as other employees, regardless of whether they are working in breach of the Migration Act.</p> <p>We agree with the Productivity Commission's comments in Chapter 21 of the Draft Report that:</p> <ul style="list-style-type: none"> • "Migrant workers are more vulnerable to underpayment and other breaches of the <i>Fair Work Act 2009</i> (Cth) (FW Act) because they are more likely to be unaware of their workplace rights, have limited English language skills, and lack support networks",⁷⁹ and • "Migrants working in breach of the <i>Migration Act 1958</i> (Cth) are particularly vulnerable".⁸⁰ <p>These comments are consistent with our experience assisting migrant workers, as we discussed in evidence given at the recent Senate Inquiry</p>

⁷⁹ Draft Report, p. 741.

⁸⁰ Draft Report, p. 741.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 21: Migrant workers		
		<p>into the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders.⁸¹</p> <p>These observations are also consistent with data about the number of complaints to the Fair Work Ombudsman from visa holders.⁸²</p> <p>Migrant workers are vulnerable to underpayment and other breaches of employment legislation, and to more extreme forms of exploitation, such as human trafficking and forced labour.</p> <p>If Australia's workplace laws do not adequately protect migrant workers' rights, this allows employers to exploit such workers and could contribute to increased instances of human trafficking and slavery in Australia.⁸³</p> <p>In relation to the comments in the Draft Report that migrants working in breach of the Migration Act "receive no protections under the FW Act"⁸⁴, we agree that such workers should be covered by the Fair Work Act, and any necessary changes should be made to ensure this.</p> <p>For these reasons, we support increased measures to discourage employers from exploiting migrant workers, including those proposed in draft recommendation 21.1, namely –</p>

⁸¹ Evidence to the Senate Education and Employment References Committee, Parliament of Australia, Canberra, 10 July 2015
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommsen%2F137b7fd2-2199-47da-8d8a-bace63238850%2F0003;query=Id%3A%22committees%2Fcommsen%2F137b7fd2-2199-47da-8d8a-bace63238850%2F0004%22> (Jessica Smith).

⁸² Fair Work Ombudsman, *Annual Report 2013-14*, Melbourne, p. 30.

⁸³ See e.g. United Nations, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, preamble.

⁸⁴ Draft Report, p. 741.

Draft recommendation no.	Nature of draft recommendation	ELC's response to the draft recommendation
Chapter 21: Migrant workers		
		<ul style="list-style-type: none"> • providing additional resources to the Fair Work Ombudsman to investigate and audit employers suspected of underpaying migrant workers; and • including penalties in the Migration Act for employers who exploit migrant workers who are working in breach of the Migration Act (referred to below as “undocumented migrant workers”). <p>We would also support measures aimed at allowing migrant workers to recover unpaid wages and seek other forms of redress for breaches of the Fair Work Act and other employment laws, and measures allowing migrant workers to pursue such matters from overseas, or to delay deportation until such matters are resolved, to incentivise them to report such issues.</p> <p>If undocumented migrant workers have no right to recover unpaid wages or other entitlements under Australian workplace laws, they are unlikely to report breaches of workplace laws, particularly when doing so may create a risk of deportation.</p>

3. Response to Productivity Commission's information requests

Below is our response to the information request in the Draft Report regarding unfair dismissal lodgement fees.

(a) Unfair dismissal lodgement fees

<p><i>INFORMATION REQUEST</i></p> <p><i>The Productivity Commission seeks further views on possible changes to lodgement fees for unfair dismissal claims.</i></p>
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Lodgement fees in unfair dismissal matters should not be increased.

Although some employees facing financial hardship may have lodgement fees waived, there are still low income earners who are not able to obtain a fee waiver and must pay a lodgement fee in order to bring a claim.

The requirement to pay a lodgement fee is already a disincentive for some employees to make a claim. If lodgement fees were increased further, this would discourage low income employees from taking action, and would limit access to justice for more vulnerable employees.

4. Other comments in relation to the Draft Report and the Inquiry

(a) General comments about the Draft Report and the Inquiry

We have a number of general comments about the Draft Report and the Inquiry:

- The majority of the draft recommendations address employer concerns. This is partly due to the terms of reference of the Inquiry, but more weight could have been given to employee issues.
- Many of the draft recommendations and other proposals in the Draft Report involve significant, and in some cases fundamental, changes to the existing workplace relations framework, which may adversely impact employees, such as:

Public holidays

- Amending modern awards to allow public holidays to be swapped for other days in all industries (draft recommendation 4.1);
- Removing the right to paid public holiday leave and penalty rates for newly designated State and Territory public holidays (draft recommendation 4.2);

Unfair dismissal

- Allowing the Fair Work Commission to consider unfair dismissal applications on the papers (draft recommendation 5.1);
- Removing the employee's right to seek the two main remedies in an unfair dismissal claim (namely, reinstatement and compensation) where a dismissal is procedurally unfair (draft recommendation 5.2);
- Increasing filing fees for unfair dismissal claims (refer to chapter 5);

General protections

- Introducing a cap on compensation for general protections claims (draft recommendation 6.4); and

Penalty rates

- Reducing Sunday penalty rates for hospitality, entertainment, retail, restaurants and café industries (recommendations 14.1 and 14.2).
- Many of the employer concerns that are addressed in the Draft Report are not supported by evidence – for example, that unmeritorious unfair dismissal claims are an issue, or that it is common practice for employers to resolve unmeritorious unfair dismissal claims at conciliation (both of which are cited in the context of draft recommendations 5.1 and 5.2).
- Many of the draft recommendations propose solutions to perceived problems that are likely to be costly, time-consuming and complex, without questionable net benefit. For example:
 - Introducing a requirement that a complaint or inquiry in relation to employment be made in good faith (in the context of general protections claims) and requiring the Fair Work Commission to decide upfront whether the complaint has been made in good faith (draft recommendation 6.2); and
 - Introducing an exclusion for complaints that are frivolous or vexatious (draft recommendation 6.3).

(b) Errors in the Draft Report about the dual systems of employment law in Western Australia

We wish to correct some of the comments made by the Productivity Commission in the Draft Report about the divide between State and national system employees in Western Australia.

The Draft Report states that in Western Australia, State laws apply only to employees of unincorporated enterprises (see, for example, pages 16, 70, 72, 207, 287 and 647 of the Draft Report).

Note that Western Australian employment laws also apply to any employees who are not employed by:

- a constitutional corporation;
- the Commonwealth;
- a Commonwealth authority;
- an employer that employs flight crew officers, maritime employees or waterside workers in connection with interstate or overseas trade or commerce;
- a body corporate incorporated in a Territory; or
- a person who carries on an activity in a Territory and employs persons in connection with that activity.⁸⁵

Constitutional corporations are “foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth”⁸⁶.

Where an employer is formed in Australia, there are therefore two key questions that must be considered in order to determine whether it is a constitutional corporation:

1) Is the entity incorporated?

and

2) Is the employer a trading or financial corporation? In other words, does the employer engage in substantial or significant trading or financial activities?⁸⁷

It is necessary to consider both limbs of this test. Unincorporated enterprises do not satisfy the first limb of the test and for this reason, do not meet the definition of a constitutional corporation (as noted above).

However, other entities are not constitutional corporations because they do not meet the second limb of the test.

An incorporated entity that does not engage in substantial trading or financial activities is not a constitutional corporation because it cannot be described as a trading or financial corporation. A common example of such an entity is an incorporated not-for-profit organisation that receives government funding as its source of income, and the funding arrangement cannot be characterised as an example of a trading activity (e.g. *Aboriginal Legal Service of Western Australia (Inc) v Lawrence* [No 2] (2008) 37 WAR 450).

The Productivity Commission should correct these errors in its Draft Report and should consider whether these errors have affected its analysis, draft recommendations and findings.

⁸⁵ Fair Work Act s 14(1).

⁸⁶ Fair Work Act s 12; *Australian Constitution*, s 51(xx).

⁸⁷ See e.g. *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282.

(c) Further recommendations

We note that our initial submission to the Inquiry dated 12 March 2015 contained 34 recommendations as to how the existing workplace relations framework could be improved.⁸⁸

These recommendations are mostly unchanged following the release of the Draft Report. The only recommendations that are affected by the content of the Draft Report are our recommendations 19 and 20, which relate to the Small Business Fair Dismissal Code. If the Productivity Commission's draft recommendation 5.4 is not adopted, we suggest that our recommendations 19 and 20 are adopted instead.

⁸⁸ Employment Law Centre, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework (Submission 89), 12 March 2015, pp. 3-7.