



**Professionals
Australia**

Respect, recognition and reward

Ensuring a balanced workplace relations framework for Australia

**Submission to the Productivity Commission by
Professionals Australia**



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INTRODUCTION

On 19 December 2014, the Australian Government released terms of reference for an inquiry into Australia's workplace relations framework to be conducted by the Productivity Commission.

Through the terms of reference the Productivity Commission was tasked to assess the impact of the workplace relations framework on matters including:

- unemployment, underemployment and job creation;
- fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net;
- small businesses;
- productivity, competitiveness and business investment;
- the ability of business and the labour market to respond appropriately to changing economic conditions;
- patterns of engagement in the labour market;
- the ability for employers to flexibly manage and engage with their employees;
- barriers to bargaining;
- red tape and the compliance burden for employers;
- industrial conflict and days lost due to industrial action; and
- appropriate scope for independent contracting.

On 22 January 2015, the Productivity Commission released five Issues Papers for comment.

Background

Professionals Australia is the trading name of the Association of Professionals Engineers, Scientists and Managers, Australia (APESMA). Professionals Australia is a registered organisation of employees under the *Fair Work (Registered Organisations) Act 2009*.

Professionals Australia welcomes the opportunity to provide a submission to the Inquiry.

Professionals Australia supports the submission which has been made by the Australian Council of Trade Unions (ACTU) on behalf of the union movement. Many of the issues canvassed in the ACTU submission also affect Professionals Australia members.

Professionals Australia's submission will concentrate on matters in the Issues Papers which affect managerial and professional employees in the workplace.

Professionals Australia – “Respect, Recognition and Reward”

Professionals Australia wants to ensure that managers and professionals get the respect, recognition and reward they deserve in the workplace, and to ensure that the voice of our members is heard.

Although Professionals Australia is strictly non-party political, our members are often impacted by political decisions. In this regard, we aim to make sure that members' concerns

are listened to by decision makers across Australia, including industry leaders, senior bureaucrats and politicians.

We advocate strongly for our members to help create a better future for their industry and ultimately their profession and workplace.

Professionals Australia understands that at some point during the course of an employee's career, they are likely need advice to help them to navigate through their circumstances. We seek to provide support, advocacy and advice to a member at every stage of their career.

Profile of Professionals Australia Membership

Professionals Australia represents over 23,000 professional engineers, scientists, managers, veterinarians, surveyors, architects, pharmacists, information technology professionals, interpreters and translators and transport professionals throughout Australia. The precursor of the organisation, the Association of Professional Engineers, Australia (APEA) was formed in 1946. During the 1990's the APEA amalgamated with a number of other organisations representing managerial and professional employees thereby significantly broadening its membership base.

Professionals Australia members are employed in all sectors of the Australian economy. This includes all tiers of government and in a diverse range of industries throughout the private sector including Roads, Rail, Water, Electricity, Information Technology, Telecommunications, Consulting Services, Laboratories, Research, Surveying, Architecture, Retail Pharmacy, Mining, Oil, Collieries, Manufacturing and so on.

Professionals Australia exclusively represents the industrial and professional interests of managerial and professional employees. As the voice of managerial and professional employees in the workplace, Professionals Australia is very conscious of its role in promoting the rights of these employees to be represented and to fully participate in the industrial relations system.

Given its membership base, Professionals Australia believes that it is in a unique position to assist the Productivity Commission with its deliberations.

Characteristics of Professional Employment

Members of Professionals Australia are found in what are known as both "collective" and "non-collective" workplaces.

Collective Workplaces

Collective workplaces are those which are typically covered by enterprise agreements or where the terms and conditions of employment applicable to managerial and professional employees are negotiated on their behalf by Professionals Australia and other registered organisations and represents approximately 53% of our members. Although members in collective workplaces are normally covered by enterprise agreements it is not uncommon (as a condition of employment) for these members to also enter into common law employment contracts with their employer.

Non-collective Workplaces

Members working in what are known as “non-collective” workplaces are usually employed pursuant common law employment contracts which are underpinned by the National Employment Standards (NES) and if applicable, a relevant modern award. These members are often found in very small groups or in many cases, may be the only professional employee in the particular workplace and represents approximately 47% of our members.

Professionals Australia submits that managerial and professional employees can sometimes find it difficult to participate effectively in the workplace relations system. This can be attributed to a lack of basic rights and protections that are afforded to such employees. This is often exacerbated by what is often a significant power imbalance in favour of the employer. This is evident in the negotiation of a common law employment contract, where employers have an almost unfettered discretion to offer employment pursuant to certain terms, so long as they are compliant with the NES and any applicable modern award or enterprise agreement.

Despite the broad coverage provided by modern awards for technology based professionals such as Professional Engineers, Professional Scientists and some Information Technology Professionals there are other professional categories such as Accountants for example and those occupying generalist management positions who are “award free”. Lack of award coverage represents a significant disadvantage to professional and managerial employees. The only protection available for these employees are the legislated minimum entitlements provided by the National Employment Standards (NES) which do not cover the breadth of entitlements provided by the modern award system. In this regard, for many professional employees there are no minimum rates of pay except for the minimum wage which is almost totally irrelevant.

For those professional and managerial employees not covered by modern awards or enterprise agreements and are earning in excess of the high income earners threshold, there is the additional disadvantage of being able to exercise unfair dismissal rights (except in instances where a claim of adverse action can be made).

Ensuring a balanced workplace relations framework for Australia

As noted by the Productivity Commission in Issues Paper 1, there has been a shift in the labour market resulting in a greater demand for professional employees. Statistics demonstrate that 1 in 3 future new jobs will be for professionals.¹ It is in this context that Professionals Australia believes that the capacity of professional employees to be able to exercise meaningful workplace rights both now and in the future in order that they can fully participate in the workplace relations system should be an important focus of this inquiry.

In summary Professionals Australia believes that a balanced workplace relations framework which enhances the full participation of managerial and professional employees should consist of:

¹ Issues Paper 1, page 8.

- A strong legislative framework which promotes good faith collective bargaining with access to “last resort” or “first contract” arbitration of the content of enterprise agreements;
- A strong and viable safety net consisting of modern awards which cover all employees and an expanded National Employment Standards (NES);
- Access to the Fair Work Commission for all employees engaged on common law contracts of employment for a dispute resolution process which is timely, efficient, and cost free.;
- A right for all employees to seek a remedy if they believe that they have been unfairly dismissed;
- A strong and Independent workplace relations tribunal, currently the Fair Work Commission; and
- A strong and well-resourced statutory office that ensures compliance with Australian workplace law, currently the Fair Work Ombudsman.

Appendix B contains the recommendations made by Professionals Australia in this submission.

Professionals Australia’s Workplace Advice and Support Team

As part of the services provided to members, Professionals Australia offers its members access to legal and industrial advice through its Workplace Advice and Support (WAS) Team. This service is nationally coordinated and operates in accordance with a Member Service Charter which sets out members’ rights and obligations.

WAS plays a crucial role in supporting individuals to navigate legal and industrial issues, understand their entitlements and how to enforce such entitlements. On a daily basis Professionals Australia’s lawyers and industrial officers provide advice and dispute resolution services in relation to a diverse range of employment related matters including but not limited to the following:

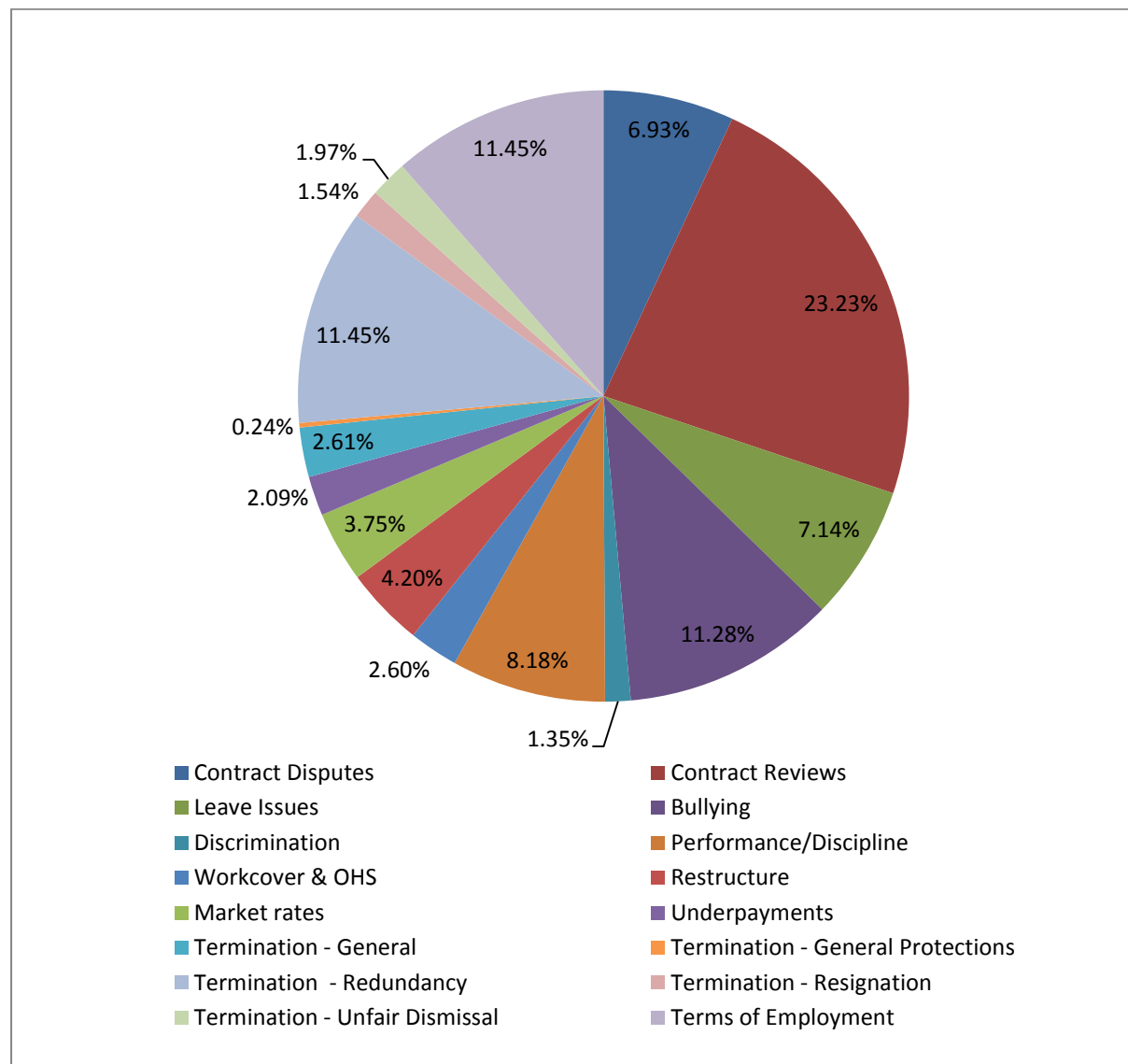
- Termination of employment
- Review of individual common law employment contracts
- Conditions of employment
- Disciplinary issues and performance management
- Workplace bullying and harassment
- Discrimination
- Market Rates Salary information
- Award rates of pay
- Independent Contractors – review of contracts for service
- Restrictive Covenants
- Intellectual Property

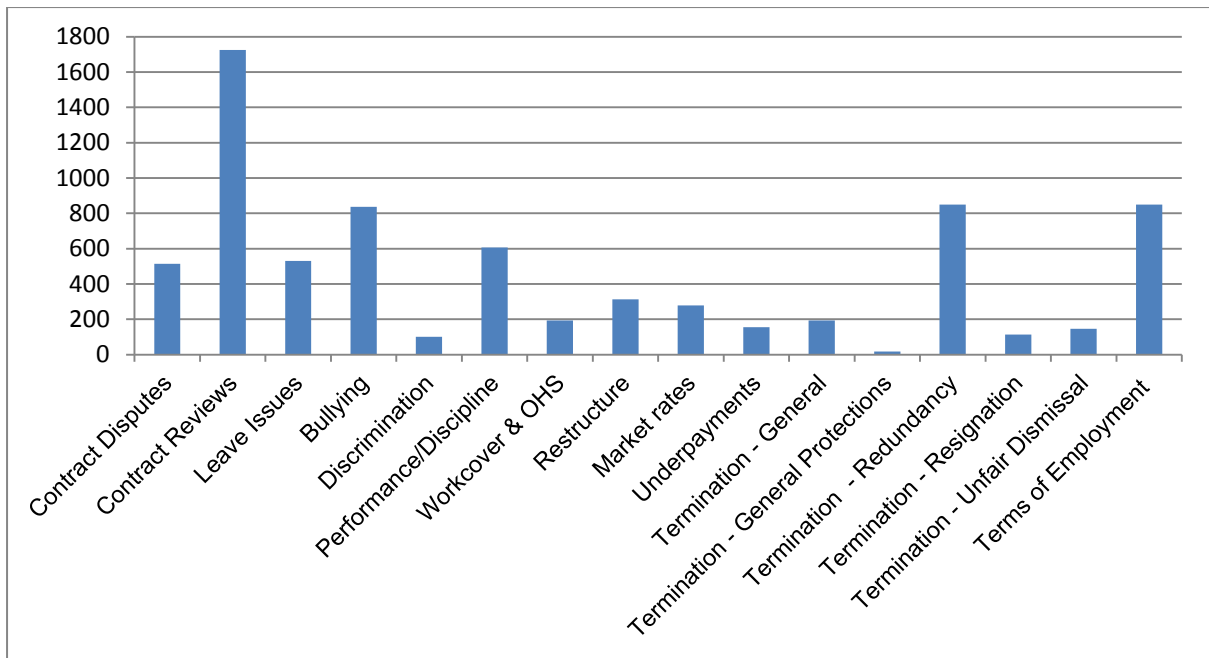
The service provided to members through the WAS Team is highly valued by members. As the service operates on a national scale, there is a need for on-going review of service standards and procedures. The service is also of strategic importance to Professionals Australia in so far as the statistical information which is generated enables the identification

of industrial trends and emerging issues which assists in the Association's overall strategic planning.

Since the WAS Team became operational in 2009, assistance has been provided in over 8,500 matters. A summary of matters where a high volume of requests for assistance are sought from members are detailed in the diagrams below.

This submission will draw upon the evidence collected by the WAS Team including case studies and the experience of team members.





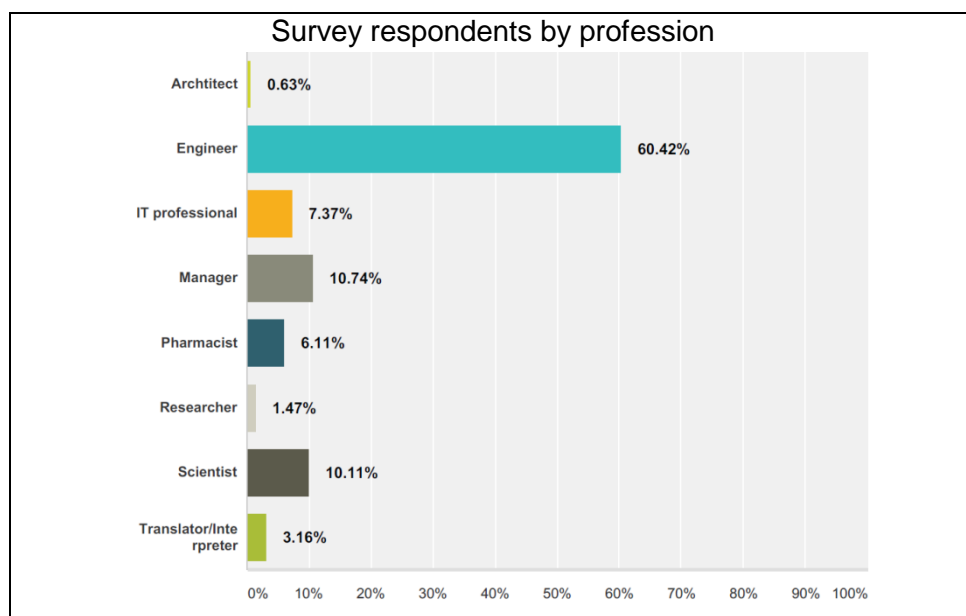
Evidence Based Survey of Members

In addition and as a part of the preparation of the Association's submission to the Inquiry a survey of Professionals Australia members was recently conducted. This survey primarily focuses on the lived experience of members in respect of individual bargaining and the results of this survey have yielded some valuable data.

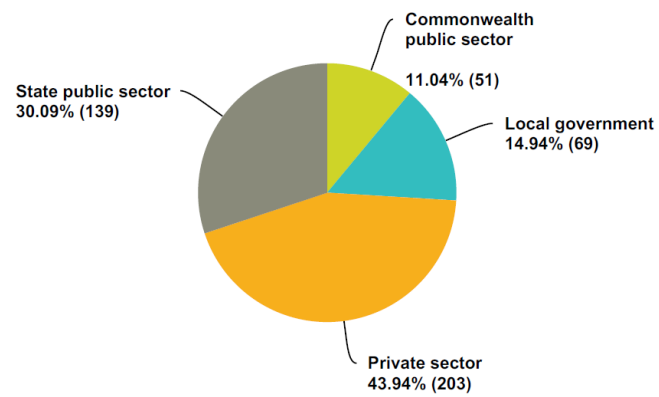
The survey had a total of 514 respondents and a copy of the survey questions is attached as Appendix "A".

Set out below is information on the survey respondents by profession, employment sector and salary range.

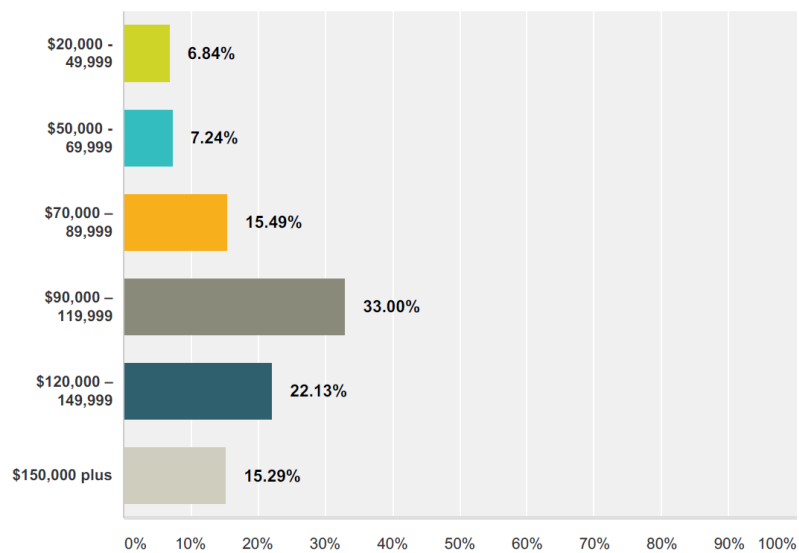
Demographics of survey respondents



Survey respondents by employment sector



Survey respondents by salary range



ISSUES PAPER 2: SAFETY NETS

2.3 National Employment Standards

As previously mentioned a limited number of professional and some managerial employees have coverage under modern awards and enterprise agreements and therefore rely solely on the NES to underpin their common law employment contracts. In this regard, Professionals Australia believes that it is essential that the NES is maintained as a strong and viable safety net and where necessary extended.

Hours of Work

One of the most significant industrial issues raised by managerial and professional employees relates to their hours of work.

Under the NES, an employer cannot request that a full time employee work more than 38 hours per week, unless the additional hours are reasonable. Despite that the NES states, the experience of Professionals Australia is that there appears to be an expectation that managerial and professional employees will work in excess of 38 hours per week. Additional hours are often worked as a product of the workplace culture. However, this is not always the case. Professionals Australia's Workplace Advice and Support Team have come across several incidents where employers stipulate in common law employment contracts that in addition to working 38 hours per week, managers and professionals are also expected to work a stipulated amount of additional hours consistently.

An example of this trend is illustrated below.

Case study – variation to ordinary hours of work – undermining the NES

An employer sought to vary the ordinary working hours of its employees from 37.5 hours per weeks plus reasonable additional hours to 40 hours per week (consisting of 38 ordinary hours 2 reasonable additional hours per week), without an increase in remuneration. The employer held the view that the salaries paid to employees were well above the minimum rates provided in the relevant modern awards, therefore there would be no additional entitlement for compensation for additional hours worked.

In correspondence issued to employees and through communication with Professionals Australia, the employer stated the reason for the change in working hours was the need to be competitive in the current economic climate and therefore it was necessary to increase productivity by increasing employee hours of work.

Despite not wishing to provide employees with additional remuneration, the employer did undertake to proportionately increase any accrued leave which would result in any leave accrued on the previous basis of 7.5 hours per day being increased to 8 hours per day.

In order to finalise the variation, the employer sought issued a letter for staff to sign which stated:

"We request your acceptance by signing below and returning this to our People

Team by 7 October, in order to take effect in timesheets and records commencing 20 October.

We will follow up with you if we have not received your acceptance by that date. This may involve an individual discussion regarding your circumstances and flexibility needs in order to adopt this change. Following this discussion, should you not accept the change you will remain on your current conditions.”

Professionals Australia members in this workplace reported that they were being called into one-on-one meetings with their managers and being told that there was an expectation that they would agree to the 40 hour week. It was also reported to Professionals Australia that employees felt compelled to agree to the 40 hour out of concern that it would adversely affect their future relationship with their employer if they did not.

Professionals Australia considers that the practice outlined in the above example is in breach of the NES and defeats the concept of ordinary hours of work. This is because the stipulated additional hours essentially become ordinary hours of work, because the employee must work them.

The issue is complicated by virtue of the fact that many managerial and professional employees are in receipt of annualised salaries which comprehend the working of a certain amount of additional hours which are rarely specified. Modern Awards covering professional employees often provide for this type of arrangement and it can often depend on individual circumstances as to whether the employee has been adequately compensated.

Professionals Australia considers that some employers are taking advantage of the fact that there is no legislative definition of what constitutes “reasonable” additional hours. Instead section 62(3) of the *Fair Work Act 2009* (Cth) lists a number of factors which must be taken into consideration when determining whether additional hours are reasonable. Whilst this is a practical approach to what can be a complicated issue and the outcome of a test case which was subsequently reflected in legislation, Professionals Australia submits that the concept of “ordinary hours” needs to be clarified.

Professionals Australia Recommendation 1 – NES Maximum hours of work

As a minimum, Professionals Australia seeks that an amendment should be made to the *Fair Work Act 2009* (Cth) to avoid any doubt over how the maximum hours of work provision was intended to operate. Professionals Australia suggests that section 62(3) of the Act should be varied to include an additional provision to the effect that ‘an employer cannot require that a specified number of additional hours be worked on an ongoing basis’.

Professionals Australia considers that such an amendment will emphasise the importance of legislation stipulating 38 hours as the maximum number of ordinary hours that should be required to be worked by an employee per week.

Extending the NES

Long Service Leave

Professionals Australia notes that the Productivity Commission queries whether a uniform long service leave entitlement should be included in the NES. Given the multiplicity and complex nature of state and industry based long service leave arrangements, Professionals Australia does not believe that a uniform long service leave entitlement is practical. Professionals Australia considers that there should be no diminution of the range of long service leave entitlements which currently apply to different categories of employees.

Extension of NES Hours of Work Provision

Professionals Australia's preferred position is that all employees should be covered by the modern award system. However in the absence of award coverage for all employees, Professionals Australia considers that changes could be made to the NES to provide non-award covered employees with similar entitlements found in modern awards in regard to hours of work related matters such as compensation for overtime, call-backs and shift work arrangements.

Compensation for overtime, call-backs and shift work arrangements

As mentioned above Professionals Australia believes that there is a significant gap in so far as the NES does not provide for compensation for:

- Time worked regularly in excess of ordinary hours of duty;
- Time worked on call-backs; or
- Time spent standing by in readiness for a call back; or
- Shift work arrangements

In modern awards covering managerial and professional employees there is a degree of flexibility regarding, compensation for work exceeding ordinary hours of work. Relevant provisions can include:

- Granting special additional leave;
- Granting special additional remuneration;
- A factor to determine annual remuneration; or
- Granting a special allowance or loading.

Professionals Australia stresses that there must be safeguards to ensure that compensation can be reviewed and is adequate and as a general proposition, Professionals Australia considers that if compensation is paid as part of an annualised salary, there should be a mechanism where upon the request of an employee, an employer is required specify the amount paid as compensation which will enable an employee to determine whether compensation is adequate.

Professionals Australia Recommendation 2 – Compensation for overtime, call-backs and shift work in the NES

Professionals Australia considers that the inclusion of compensation for overtime, call-backs and shift work arrangements into the NES will complement the current NES Hours of Work provision.

Proposed legislative changes to the NES

Professionals Australia notes that the Fair Work Amendment Bill 2014 ('the Bill') which is currently before the Senate is seeking to clarify the entitlement to annual leave loading in the NES.

During the review of the Fair Work Act in 2012, the Review Panel noted that annual leave loading was originally provided to compensate employees for the notional loss of overtime earnings whilst on leave.

Section 90(2) of the *Fair Work Act* 2009 (Cth) provides that if on termination an employee has a period of accrued annual leave, the employer must pay an employee the amount that would have been payable to the employee had the employee taken the accrued leave. This section is perceived to be inconsistent with the longstanding provision prior to the Fair Work Act where annual leave loading was not payable on termination unless expressly provided for in an industrial instrument.² The Bill is seeking to reinstate this position.

Professionals Australia supports the view previously expressed by the ACTU in a submission made to the Senate Committee on Education and Employment regarding the Bill. Professionals Australia reiterates the view that 'there should be no penalty or detriment for an employee who has not taken their paid annual leave during their employment when their employment ends. The Bill creates an incentive for employers to deny, either overtly or covertly, an employee their full entitlement to paid annual leave during employment so that upon the termination of the employee's employment the cost of the annual leave is less than if the employee had taken it while employed. This incentive runs directly contrary to the recognised industrial merit and purpose of annual leave, being that the provision of rest and recreation time to workers benefits those workers as well as their employers.'³

Enforcement of the NES – Dispute Resolution

Professionals Australia considers that 'enforcement of compliance with minimum standards is a critical element of any effective labour regulation regime'.⁴ It is recognised that trade unions have a pre-eminent role in the enforcement of minimum labour standards.⁵ If an employer breaches their obligations under the NES, an employee may be forced to engage in litigation in the Federal Court of Australia or Federal Circuit Court of Australia to assert and claim any owed entitlement/s.

² Explanatory Memorandum to the Fair Work Act Amendment Bill 2014.

³ ACTU 'Submission to the Senate Committee on Education and Employment regarding the Fair Work Amendment Bill 2014' (2014), page 6 (available here:

<http://www.actu.org.au/Publications/Submissions/ACTUSubmissiontotheSenateInquiryintotheFairWorkAmendmentBill2014.aspx>)

⁴ Landau, Cooney, Hardy and Howe 'Trade Unions and the Enforcement of Minimum Employment Standards in Australia' (2004) Melbourne Law School, 4.

⁵ Ibid.

Professionals Australia believes that this process is particularly burdensome, time consuming and confrontational and can have the result of employees electing not to proceed with their claim. It is the experience of Professionals Australia's Workplace Advice and Support Team that managerial and professional employees often demonstrate a reluctance to enforce their rights due to fears of damaging the relationship with their employer.

Professionals Australia Recommendation 3 – Fair Work Commission and the NES

Whilst Professionals Australia acknowledges that the Fair Work Ombudsman does prosecute employers for breaches of the NES, Professionals Australia submits that there needs to be an efficient, timely and cost effective mechanism in which employees can claim entitlements under the NES without needing to proceed to litigation.

Professionals Australia considers that as the specialist workplace relations tribunal, the Fair Work Commission should have its jurisdiction extended and be able to make orders for compliance with the NES and payment of any unpaid NES entitlements.

2.4 The award system and flexibility

The discussion in the Issues Paper 2 under the heading "The award system and flexibility" is very limited in its scope. An underlying assumption appears to be that awards inhibit flexibility in that they "complicate human resource management". In addition there are questions about their "efficiency and regulatory burden". Further, the paper queries whether there are arguments for further changes including amongst other things "the reliance instead on the other safety nets in the WR system (potentially supplemented by the addition of some other basic provisions in the NES)". The paper suggests that the "choice among these options" depends amongst other things on the "appropriate role of awards in a decentralised WR system that emphasises enterprise bargaining and allows for individual arrangements". It should be acknowledged that in outlining what it saw as the "positive functions" of awards the paper refers to the fact that awards "address the power imbalance that may occur between employers and some employees when negotiating individual arrangements. This observation is consistent with the Association's experience and the results of the recent survey which is dealt elsewhere in this submission.

Notwithstanding the move towards a more decentralised industrial relations system the current framework of modern awards continue to play a very important role as part of a viable safety net for employees.

The Role of Modern Awards

Awards covering professional employees have traditionally played a very important role in the reinforcement of professional identity in the workplace. This has been achieved in a number of ways including the following;

1. **Qualifications**

Qualifications for entry into professions are linked to the relevant professional body and not determined by the industrial parties. This is particularly important for the definition of professional employment and in addition takes on further significance where there is limited statutory registration. In the case of Professional Engineering for example, Engineers Australia the professional body for Professional Engineering is the accreditation body for Professional Engineering courses. This is reflected in the Professional Employees Award 2010, as to be eligible to be classified as a Professional Engineer an employee as set out in Clause 3.2 of the Award must fulfil the requirements of a Graduate Engineer as follows;

*“**Graduate Engineer** means a person who is the holder of a university degree (four or five year course) recognised by Engineers Australia ...”*

Depending on the particular discipline awards covering professional employees will have similar provisions which cross-reference to the relevant professional body.

2. **Skills based Classification Structure**

Like other modern award, awards covering professionals contain skills based classification structures. In the case of technology based professionals, the classification structures typically provide for 4 levels based on levels of responsibilities and provide for a career path from the graduate entry level at Level 1 through to management within a professional context, at Level 4. In addition to setting a minimum standard these classification structures are also used as a basis of classification structures for enterprise agreements. In addition in some awards such as the Pharmacy Industry Award 2010 and the Architects Award 2010, the awards go a step further to provide a formal link between study/training as a preparation for career entry. In this regard, both the Pharmacy Industry Award 2010 and the Architects Award 2010 provide minimum wages for students undertaking formal work experience whilst completing the relevant study.

3. **Minimum Rates of Pay**

Awards also contain minimum rates of pay. The current pay structures in awards were originally based on the alignment of award rates of pay established in accordance with the Structural Efficiency Principle which arose out of the 1989 National Wage Case Decision. The pay rates for virtually all classifications in awards were set as a percentage of the pay rate for the Metal Industry Tradesperson. For instance the pay rate for a Graduate Professional Engineer was set at 130% of that established for the Metal Industry Tradesperson; Level 2 – Experienced Engineer at 160%; Level 3 – Professional at 180% and Level 4 - Professional at 210%. Unfortunately as a consequence of awarding of “flat money” as opposed to percentage increases to award rates which took place over a 20 year period until this practice was reversed by the Minimum Wage Panel in its 2011-2012 Decision resulted in a serious compression of relativities which significantly reduced the value of those rates.

4. **Underpinning Individual Bargaining**

Awards also fulfil the very important role of the underpinning of individual bargaining.

Professionals Australia estimates that approximately 47% of its members are employed in what are termed “non-collective” workplaces. For these employees, salaries and conditions of employment are regulated by the relevant modern award and the NES. For these employees the modern awards provide a very important safety net for the negotiation of common law employment contracts. In this regard and due to the nature of the employment of managers and professionals the relevant awards are usually less prescriptive than for other categories of employees and therefore gives rise to the ability for employer and employee to negotiate certain terms of employment. For instance the Professional Employees Modern Award at Clause 18 provides for the payment for time worked regularly in excess of ordinary hours of duty. However Clause 18.3 provides for flexible compensation which may include;

“(a) granting special additional leave;

(b) granting special additional remuneration;

(c) taking this factor into account in the fixation of annual remuneration; or

(d) granting a special allowance or loading.”

In addition, in Clause 18.4 there is a provision for an annual review to ensure that the compensation is set at an appropriate level.

Whilst there is flexibility in the operation of what is primarily a facilitate provision there is a process for negotiation notwithstanding the shortcomings which are inherent in the individual bargaining process. This “right to bargain” in modern awards is important to the extent as it can contribute towards a fairer bargaining process for employees.

5. Competition on non-wage items

The award system also creates an incentive for employers to compete on matters ultimately critical to achieving higher productivity. By creating a minimal level playing field on wages, employers need to compete on other factors such as service standards and quality; innovation and efficiency. Without an underpinning award system, an incentive is created to compete by ratcheting down wage costs and conditions, driving a competitive spiral. This action of an individual organisation makes commercial sense in the short run, but the paradox occurs for the industry and ultimately the economy as a whole.

Modern Awards for Professionals

Professionals Australia has a direct interest in a diverse range of modern awards. These include;

- Professional Employees Award 2010;
- Pharmacy Industry Award 2010;
- Architects Award 2010;
- Animal Care and Veterinary Services Award 2010;

- Surveying Award 2010;
- Hydrocarbon Field Geologists Award 2010;
- Health Professionals and Support Services Award 2010;
- Airport Employees Award 2010;
- Water Industry Award 2010;
- Local Government Industry Award 2010;
- State Government Agencies Administration Award 2010; and
- Electrical Power Industry Award 2010.

In addition Professionals Australia has been directly involved in the negotiation of single enterprise awards such as the recently completed award for Telstra.

The Modern Awards Objective

The importance and utility of the modern award system is highlighted by the modern awards objective contained in Section 143 of the *Fair Work Act* 2009 (Cth). The modern award must provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- “(a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.”

Professionals Australia believes that objectives are balanced and take into consideration the needs of employees, employers and the community at large.

Employers and the modern award system

The experience of Professionals Australia’s Workplace Advice and Support (WAS) Team is that many employers are ignorant of award coverage for their professional employees.

One of the most popular services provided by the WAS Team for its members are employment contract reviews. As a result, Association staff are exposed to a diverse range

of common law contracts and are able identify common trends. One trend is that members are often provided with a common law employment contract which makes no reference to any specific modern award or refers to an employee's entitlements under an "industrial instrument" as being incorporated into an annualised salary. In this regard many employers believe that they can then essentially ignore the existence of industrial awards and accordingly do not take the time to understand even their most basic obligations. One example where this becomes apparent is that under Clause 11.6 of the Professional Employee Award 2010 which requires that an employee must be informed by their employer of their responsibility level per the Schedule B – Classification Structure and Definitions. The experience of the WAS Team reports is that it is extremely rare for an employer to name the modern award applicable to the employee, let alone inform the employee of what responsibility level is applicable to them.

Issues Paper 2 suggests that the award system 'complicates human resource management' and may 'reduce the capacity of businesses to adapt' when faced with multiple awards.⁶ Professionals Australia considers that employers need to educate themselves to ensure that they are award compliant and rejects arguments that suggest that the modern award system provides unnecessary regulation and is burdensome on employers. In fact, Professionals Australia notes that most modern awards have been simplified and standardised in order that they are easy to understand. Awards applying to professional employees in particular, have traditionally been less prescriptive and therefore can hardly be said to impose a regulatory burden. Professionals Australia considers that employer ignorance regarding their obligations to employees highlights the importance of the minimum entitlements contained in modern awards and the role they play in ensuring a fair safety net.

4 Yearly Review of Modern Awards

Professionals Australia is heavily involved in the 4 yearly review of modern awards which is currently being undertaken by the Fair Work Commission. The Association opposes changes to modern awards that may result in either reduced award coverage or a reduction of entitlements provided by awards.

Professionals Australia considers that the 4 yearly review process serves a positive function to ensure that at the very least there is a process to ensure that all awards are reviewed and kept current. However, the Association does submit that this process is very resource intensive for both employer and employee organisations and the Association believes that it should be easier to vary or make a modern award outside the statutory review process. The statutory review process could then become the vehicle in order to examine minimum award rates generally in order to ensure that they were set at a realistic level based on average earnings throughout industry.

⁶ Issues Paper 2, pg 12.

Consolidation of Modern Awards

Professionals Australia is opposed to any proposals that the modern award system should be further consolidated and simplified particularly if in the process employees lose the right to award protection.

The current modern award system is the result of a modernisation process which began in March 2008. On 1 January 2010, the current award system became operational and saw 1500 awards consolidated to 122 modern awards. As a result of the consolidation there was a loss of common rule of IT Professionals in Victoria and the Australian Capital Territory coverage which had hitherto existed under the Information Technology Industry (Professional Employees) Award 2003. The current award, the Professional Employees Award 2010 provides that award coverage for IT Professionals is limited to those employees working for employers who are “principally engaged” in the information technology industry, which significantly diminished award coverage for many IT professionals. This has resulted in the removal of award protection from many IT Professionals employed in the private sector.

2.5 Penalty Rates

Professionals Australia is totally opposed to proposed reductions to penalty rates. Of all Professionals Australia members, Pharmacists employed under the Pharmacy Industry Award 2010 are one of the groups which would be directly impacted if the reduction as part of the 4 year review of modern awards was to be successful. Professionals Australia notes the comments by the Federal Government that the issue of penalty rates is a matter to be determined by the Fair Work Commission. In this regard the upholding penalty rates paid to Pharmacists required to work unsociable hours is a high priority for Professionals Australia.

ISSUES PAPER 3: BARGAINING

As previously mentioned Professionals Australia is heavily involved in representing managerial and professional employees in both collective and individual bargaining.

Issues Paper 3 notes that the Productivity Commission's approach to bargaining will be to test alternative bargaining arrangements against the objectives and design criteria identified in Issues Paper 1 being that the:

“overarching concern will be the extent to which bargaining arrangements allow employees and employers to genuinely craft arrangements suited to them – a broad issue for stakeholders in this inquiry”.

Collective Bargaining

The right to bargain both collectively and individually is a key issue for both managerial and professional employees. Professionals Australia submits that the “right to bargain” only has meaning if the underlying power imbalances are acknowledged and there are legislative arrangements in place that facilitate meaningful participation in the negotiation process. This particular perspective is acknowledged in Issue Paper 1 where it is stated:

“The Commission's approach recognises the social as well as the economic aspects wellbeing; and in the case of an inquiry into workplace relations, the concepts of fairness and equitable treatment, the balance of negotiating strength and the ability of parties to remain well-informed and able to manage their own interests effectively are clearly relevant, albeit sometimes difficult to balance.”

Collective Bargaining - Managerial and Professional Employees

It is estimated that currently approximately 53% of Professionals Australia members have their terms and conditions of employment regulated by enterprise agreements. Allowing for the breadth of coverage of some enterprise agreements, Professionals Australia has been successful in negotiating terms and conditions of employment which provide regulation of the salaries and conditions of employment for managerial and professional employees whilst providing where relevant, sufficient flexibility.

This “flexibility” is manifested in a number of ways. For instance whilst standard provisions in agreements covering basic conditions of employment such as various types of leave and redundancy etc. apply to all employees other provisions can and are tailored to take account of the nature of the employment of managerial and professional employees. An example of this is in the method used for the remuneration of overtime. It is common for managers and professionals to be paid annualised salaries rather than penalty rates. In addition, and particularly for senior staff there may be provisions for performance pay and other like arrangements instead of guaranteed salary increases. The key safeguard for such arrangements is that the framework in which this flexibility operates is negotiated collectively, with managers and professionals viewed as employees with rights.

Another example of the flexibility which applies to managers and professionals is in the negotiation of individual common law employment contracts. As previously stated, it is not uncommon for managers and professionals covered by enterprise agreements to also enter into common law contracts in respect of additional matters. These additional matters can include for example clauses covering such topics as the provision of motor vehicles and intellectual property rights.

Additional flexibility can also be achieved to a limited extent through the use of Individual Flexibility Arrangements (IFA's). However, and as discussed elsewhere this is the least preferred option for employers.

The Right to Bargain

It is submitted by Professionals Australia that in the absence of a strong legislative framework that facilitates participation that only a relatively few managerial and professional employees will be in a position to *"genuinely craft arrangements suited to them"*.

One of the key features underlying the *Fair Work Act 2009* (Cth) and which is strongly supported by Professionals Australia is that all employees have the right to collectively bargain and that enterprise agreements are the primary industrial instrument. Prior to the introduction of the Fair Work Act and under Work Choices, collective bargaining did not enjoy the same status and the role of Fair Work Australia in facilitating bargaining was severely restricted. Employers for various reasons including ideological factors could simply refuse to bargain and this in particular affected managerial and professional employees. Employees who were excluded from the bargaining process in this manner had little recourse unless they took protected industrial action. This limited option adversely impacted managerial and professional employees who in the main do not necessarily want to proceed down this path but who still wanted to have a collective voice regarding their terms and conditions of their employment.

Key Elements of Collective Bargaining

Overall, Professionals Australia considers that there are a number of key elements that should be in place to support a fair system of Collective Bargaining.

These include:

- A strong and viable safety net of the NES and Modern Awards setting out basic conditions of employment applicable for all employees.
- A requirement to Bargain in Good Faith.
- The capacity for "last resort" or "first contract" arbitration of the content of enterprise agreements by the Fair Work Commission.

3.2 Types of enterprise bargaining and their key processes

Joint Bargaining

In the view of Professionals Australia the current bargaining provisions as contained in the *Fair Work Act 2009* (Cth) do not adequately cater for circumstances where there has been

contracting out and this has posed significant difficulties for the collective bargaining process. Service providers in a range of industries are in a highly competitive environment and their capacity to enter into fair and reasonable enterprise agreements has been adversely affected. Professionals Australia along with most unions have experienced the negative consequences of this type of arrangement. These negative consequences for managerial and professional employees can include poor service delivery which can adversely impact on the community.

An example involving Translators and Interpreters (TI's) is articulated below.

Case study – Translators and Interpreters

Translators and Interpreters (TI's) are engaged as both independent contractors and also employees. Typically the average TI performs translation and interpreting assignments for several labour hire agencies who provide these services to support important functions such as the courts and the legal system, human services sector, health sector and the immigration sector. These are areas where high professional standards are essential. If not lives may be endangered, there may be miscarriages of justice and a failure to access government programmes due to misunderstanding or protection visas wrongly granted, refused or cancelled.

In recent years Professionals Australia has worked very closely with the Translating and Interpreting Industry and has documented the existing problems in the publication *“The Case For Change: Consequences and costs of failures in the Translating and interpreting industry”*.

Professionals Australia also conducted a survey of TI's which was published as *“Lost in Translation: Barriers to building a sustainable translating and interpreting industry”*.

Some of the key findings of the survey were as follows:

- 87% indicated that incomes not keeping pace with inflation was a significant concern;
- 86% were concerned about the “deprofessionalisation” of the industry;
- Almost a third indicated that they intended to leave the profession in the next 5 years; and
- 57% said that they thought the industry was becoming less attractive.

Due to the highly competitive nature of the industry and the engagement of TI's on short term contracts the labour hire agencies are essentially involved in a “race to the bottom”.

By way of elaboration, Professionals Australia more recently surveyed more than 900 translators and interpreters across the country. In the 2011 ABS census, 4,731 individuals nominated either translating or interpreting as their primary job. This means that almost 20% of the entire workforce responded to our survey. Key indicators suggest that the unsustainability of the workforce is creating an industry crisis.

Firstly, the workforce is ageing and those practitioners leaving the workforce are not being replaced by a new generation. We see that 48.5% of the workforce is already older than 51 years. Alarming only 7.6% of the workforce is below 30 years of age.

Age	%
30 years or younger	7.6%

31 – 40	19.4%
41 – 50	24.4%
51 – 60	26.6%
61 or older	21.9%

We also see that the women (64%) make up the majority of the workforce. We found that 59.5% of the interpreting workforce earns less than \$20,000 and only 7.2% earn above \$60,000.

Wage rate	%
\$0	19.0%
\$1 - \$9,999	23.6%
\$10,000 - \$19,999	16.9%
\$20,000 - \$29,999	10.2%
\$30,000 - \$39,999	10.0%
\$40,000 - \$49,999	8.5%
\$50,000 - \$59,999	4.4%
\$60,000 or more	7.2%

These findings are supported by data from the 2011 Census that show the average annual salary for an interpreter is \$25,544 and \$31,931 for a translator. To earn this salary the practitioner works on average 24 hours a week despite the vast majority of the workforce wishing to work more.

Anecdotally, we know there are highly-qualified individuals who, first and foremost, see themselves as interpreters who cannot make a living wage. These individuals have shifted across to work in hospitality, and other service industries.

Broadly speaking, we can surmise that the average practitioner is a woman in her late forties earning less than the full time minimum wage.

These wage rates are incredibly low. The median annualised earnings make interpreters and translators the lowest-paid skilled profession. The combination of the average rates and their overall earning capacity makes them lower paid than most unskilled labour.

The industry expects a practitioner to be accredited through NAATI, a rigorous government-managed testing process. Alongside this accreditation process, a large proportion of practitioners also have vocational or tertiary qualifications.

The future is highly uncertain with only 7.6% of the workforce under the age of 30. The industry is certainly not on track to replenish itself when experiencing natural turnover. The

issue is compounded by a large proportion of the industry already being at retirement age. The current workforce is feeling the strain. More than half (55%) of practitioners believe the industry is less attractive to enter now than when they did and almost a fifth (19.2%) are planning on leaving the industry. More than a third (36.9%) do not feel positive about their role as an interpreter in the next twelve months.

The survey found that the industry has an ageing workforce. A large proportion of the workforce indicated that it was unhappy and actively looking to move into new industries. This is compounded by the fact that there is a financial disincentive for new entrants to join the industry; the same disincentive is pushing the existing workforce out.

Most alarmingly, as Melbourne's CALD community grows, our language services workforce is set to contract. By 2040, more than 70% of the current workforce will be retired and on current profiling they will not be replaced by a new generation.

If the status quo is maintained, the workforce will collapse and the critical work conducted by these people will be left either undone or undertaken by non-accredited workers, leaving the government and community to bear the social and economic risks and costs that follow.

As the principal funding bodies which in the main are federal and state governments are not involved in the process it is extremely difficult to negotiate enterprise agreements which could contribute to a solution to the overall problem. Accordingly it is difficult to envisage the serious difficulties faced by employers and employees alike ever being addressed through the existing bargaining rules.

In the light of experience including the example of the Translating and Interpreting Industry as outlined above Professionals Australia believes that the capacity to negotiate enterprise agreements with both the labour hire agency and the host business would be an important reform. This would enable negotiations around salaries and conditions of employment, including such matters as professional development and the attraction and retention of staff to involve all those who have a direct interest in the desired outcomes.

Professionals Australia Recommendation 4 – Joint Enterprise Bargaining

Joint enterprise bargaining could operate depending on the circumstances in respect of both single enterprise and multi-employer agreements. However in many instances it may be more appropriate for an industry approach.

There would be a need to identify the employer(s) and host employer(s). A procedure could be established whereby the Fair Work Commission upon application could issue a Determination to this effect. A "host employer" would be the entity which has engaged a contractor to perform a function or service.

Following the identification of "employer(s)" and "host employer(s)" normal bargaining rules would apply.

Agreements need to make employees 'better off overall'

Enterprise agreements typically cover more than one category of employees. This is often reflected in provisions in agreements and in different modern awards which apply to different categories of employees. If the focus shifts to the option of "collective welfare improvement"

as outlined in the Issues Paper it is difficult to understand the practical outcome of this approach. For instance would only one modern award be used for the BOOT. Would this award be the most minimalist? Would the modern award covering the majority of employees be used for the BOOT and so on?

Good faith bargaining

Overall the legislative requirements requiring bargaining in good faith has enabled employees including managerial and professional employees to be able to bargain if they so choose. This has to some extent redressed the power imbalance which exists between employers and employees and has assisted in facilitating the negotiation process.

Since the introduction of Good Faith Bargaining Decisions made by the Fair Work Commission and the Federal Court in the interpretation of section 228 of the *Fair Work Act* 2009 (Cth) have done much to clarify the limits under the current provisions. One such recent case has involved the Collieries Staff Division of Professionals Australia in *APESMA v Peabody Energy Coal Ltd.* (*'Peabody'*)⁷

In *Peabody*, the company had originally refused to negotiate an enterprise agreement preferring instead that the employees remain on individual contracts. Following the granting of an Application for a Majority Support Determination negotiations were commenced but after several meetings the company refused to meet for further discussions. To try and facilitate the process of agreement making the Association had put forward a revised proposal which had conceded matters raised by the company during the negotiations which had taken place. In accordance with s.229 of the Act bargaining orders were sought to deal with what was considered to be “surface bargaining” on the part of the company. Initially the Association’s application was rejected by Senior Deputy President Hamberger who did not agree that there was any benefit in further negotiations. However on appeal a Full Bench of the Fair Work Commission ruled that Peabody Coal had an obligation to meet and discuss the Association’s revised proposal and explain whether the proposal or a modified form of it might be acceptable to it. The Bench stopped short of saying that the company would be obliged to accept the proposed agreement only that it needed to put forward its own “genuine proposal”.

This particular decision follows on from the Federal Court Decision in *Endeavour Coal Pty Ltd v APESMA*⁸ where the Court held that a bargaining representative may be held to have fallen short of the good faith bargaining requirements of the Act if there is a failure to put forward for consideration a proposal or a counter-proposal or suggested terms which may be acceptable.

However, notwithstanding the latest decision in *Peabody*, current legislation does not require negotiating parties to actually conclude an Agreement which according to Professionals Australia remains a major flaw in the legislation. The Association, in previous submissions, has advocated “last resort” or “first contract arbitration”.

For instance the adoption of “first contract arbitration” would be very useful in assisting the parties to embed within the enterprise a culture of mutual co-operation.

⁷ C2014/1776.

⁸ [2012] FCA 764.

Professionals Australia Recommendation 5 – Workplace Determinations

In order to facilitate the making of enterprise agreements it is recommended that Part 2-5 – Workplace Determinations of the *Fair Work Act* 2009 (Cth) be amended to allow the Fair Work Commission to make a Workplace Determination in circumstances where one or more employee bargaining representatives were genuinely seeking to reach agreement regarding the terms and conditions of an enterprise agreement but where such agreement was being unreasonably withheld.

Individual Bargaining

3.4 Individual arrangements outside enterprise agreements

As outlined earlier in this submission the issue of individual bargaining is one of significant interest for Professionals Australia. This is because for managerial and professional employees in the private sector, a large majority rely on individual bargaining through common law contracts as the basis for negotiating their salaries and conditions of employment. Further a growing number of managers and professionals employed in the public sector are entering into common law employment contracts which supplement coverage or “sit on top of” enterprise agreements.

Professionals Australia members who have entered into common law contracts are usually employed pursuant to one of the following arrangements:

- A common law employment contract that is underpinned by the NES;
- A common law contract which is underpinned by the NES and a modern award.
- A common law contract which is underpinned by an enterprise agreement.

Generally the power relationship which forms the backdrop for the negotiation of common law contracts is heavily weighted in favour of the employer. In this regard, the existence of a viable safety net whether it be the NES, modern award or enterprise agreement is essential for these employees.

Member Survey

As mentioned in the Introduction to this submission the Association has conducted a survey of its members which has yielded valuable data on their experiences with individual bargaining.

Common law employment contract as a “safety net”

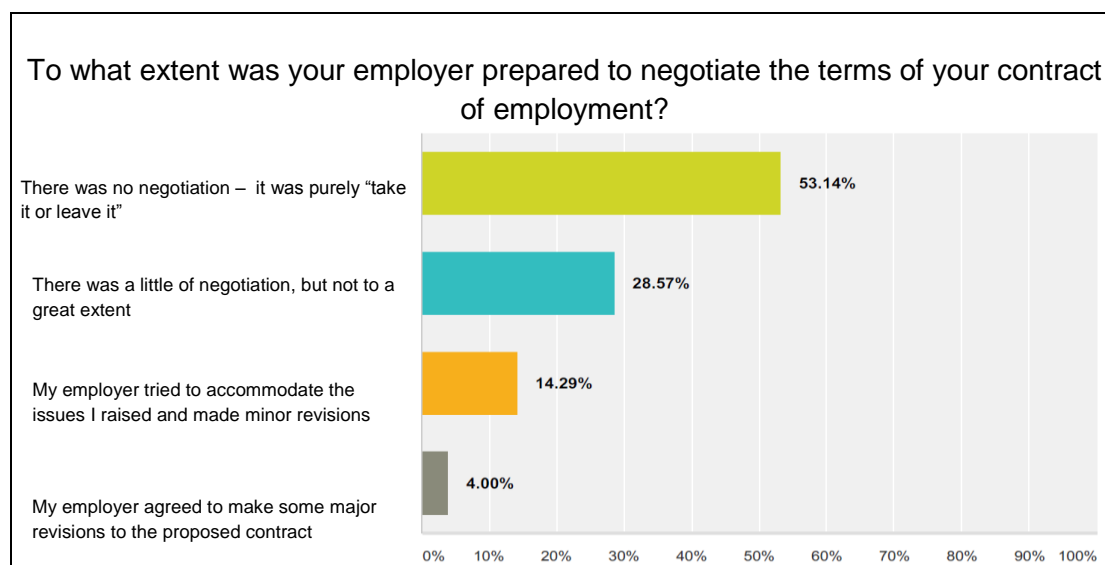
Generally speaking, the terms in which common law contracts are offered Professionals Australia members are worded in favour of the employer.

Professionals Australia reiterates that bargaining is an important element of the relationship between employers and employees. However, as previously stated in this submission bargaining power between an employer and employee is not equal and is heavily dependent on the willingness of an employer to engage in bargaining.

To this end, Professionals Australia believes that is little evidence to suggest that common law contracts are negotiated with equal bargaining power. As the table below shows nearly

82% of employees indicated that there was little or no negotiation over the terms of their contract.

There is a widespread view amongst members that some employers are not willing to engage in bargaining terms of a common law contract on the basis that if a prospective employee will not accept the terms of the contract (including remuneration), that another prospective employee will.



By way of further elaboration the following comments from survey participants are a good summary of reality of the workplace for many managerial and professional employees:

“When accepting a new job the employer has all the bargaining power when someone is unemployed or working in a non-career role until they ‘land’ that position. It would be good to have some regulation that balances the power for the employee – such that a ‘letter of offer’ is prima facie intention to employ. This way the ‘employee-elect’ has some status for negotiation or to bring in an agent to do so, on their behalf.”

“It is important to involve employees in discussions about their pay and conditions. Many decisions are made unilaterally by employers”

Professionals Australia believes that this is strong evidence that employers do not wish to engage in genuine bargaining with employees and rather wish to dictate the terms and conditions upon which employment is offered.

Anecdotal evidence from the survey has further endorsed this view with one respondent stating:

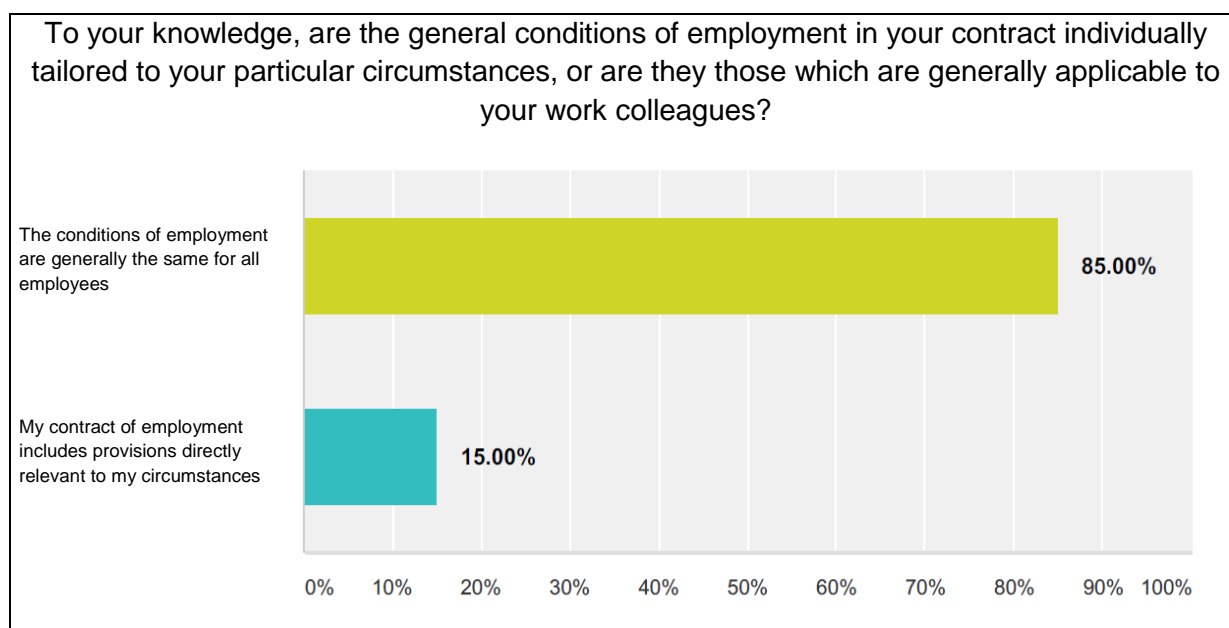
“Large organisations do not negotiate with individuals. Common agreements are used to streamline administration and avoid negotiation with individuals and such individuals setting higher employment standards to which other staff will aspire and will request”

It should be noted that in some cases, common law employment contracts do confer benefits on employees that are not included in modern awards and enterprise agreements. These

include such benefits as the provision of bonuses or use of a motor vehicle. In addition there are circumstances where a particular skill may be in short supply or where an individual is “head–hunted” whereby “market forces” assist in redressing the power imbalance which usually exists.

Common law employment contracts – “individually tailored”

There is little evidence to suggest that individual common law contracts lead to more flexible working arrangements. Generally speaking, common law contracts are standardised across an enterprise, as shown by the survey findings below.



A “safety net” for employers

In the view of Professionals Australia a common law employment contract is more likely to act as a “safety net” for employers.

It has been understood that ‘a contract of employment is a special form of contract which differs in quite significant ways from other forms of contract as it involves an explicit obligation on the part of employees to provide faithful service, and to obey lawful and reasonable orders’.⁹ This is unsurprising given that historically, the relationship between employer and employee was that of master and servant.

In modern times, the relationship of master and servant still very much exists with an increasing number of obligations imposed on employees as a condition of employment. Common obligations incorporated into common law contracts concern confidentiality, intellectual property, restraint of trade and conflict of interest.

Below is a typical clause taken from a sample contract provided to Professionals Australia’s Workplace Advice and Support Team which outlines the obligations the employee owed to their employer.

⁹ Pittard, MJ, Naughton RB ‘Australian Labour Law: Text, Cases & Commentary’ 5th Edition (2010) Lexis Nexis Butterworths, page 86.

The Employee must at all times during the Employment:

- (a) Show the utmost good faith and devote the whole of the Employee's working time and attention to the business of the Company;*
- (b) Act in the best interests of the Company at all times;*
- (c) Use the Employee's best endeavours to promote the development, profitability, interests and welfare of the Company;*
- (d) Honestly, faithfully and diligently obey and perform all lawful orders and instructions of the Company or to the person to whom the Employee reports;*
- (e) Honestly, faithfully and diligently perform the duties and exercise the powers which from time to time may be assigned to the Employee by the Company or by the person to whom the Employee reports; and*
- (f) Keep the terms of the Employee's remuneration confidential.*

As mentioned above Professionals Australia considers that these obligations are worded in such a way to create a legal safety net for an employer and are used to exercise power over employees. In addition to imposing strict contractual obligations against employees, employers will often refer to various policies that they will seek to enforce against the employee however, the reverse rarely applies.

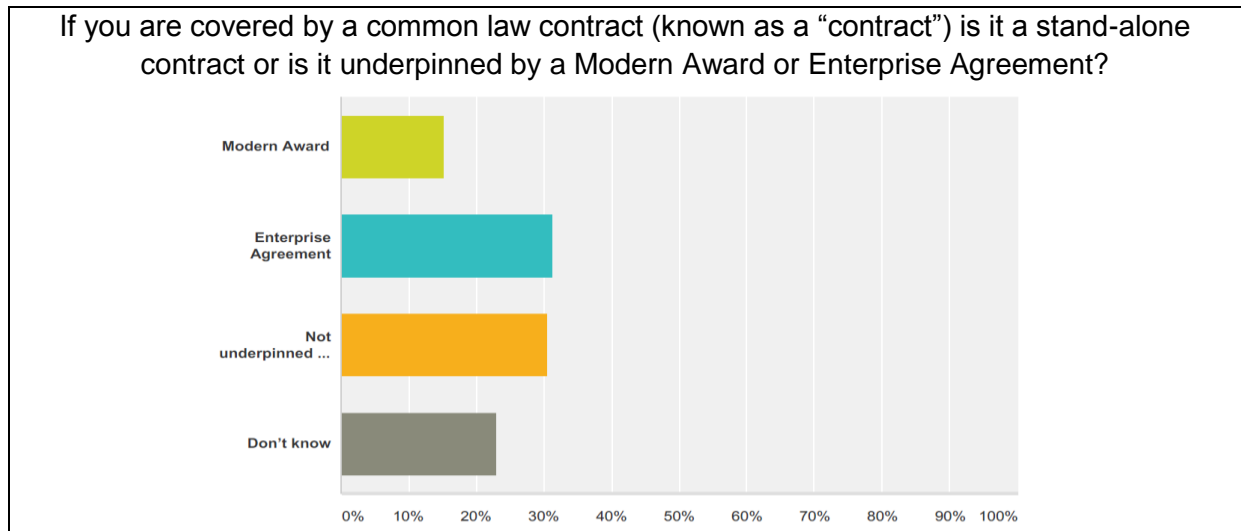
It is often the case that employers have the ability to vary policies at their discretion. This often becomes an issue for Professionals Australia members when a benefit they were receiving pursuant to a policy is suddenly changed without consultation with employees. Professionals Australia considers that this practice is demonstrative of the power imbalance between employer and employee, particularly since employees are not able to enforce policies against their employer.

Whilst there are many obligations explicitly incorporated into employment contracts, there are also terms that may be implied by necessity or by fact. Such terms include the implied duty of good faith and implied duty of cooperation, both of which put a positive duty on employers and employees to act in good faith and to cooperate. The level of protection available to employees seeking to rely on these terms is an area that is constantly being tested. Most recently the implied term of mutual trust and confidence was in the spotlight in the case of the *Commonwealth Bank v Barker*¹⁰ where the High Court of Australia held that the term was not implied into Australian employment contracts. The court considered that '*contracts of employment [were] not rendered futile because of the absence of a term to this effect. To the contrary, it would not be possible for all employers to give effect to such a term. This tells against the application of such a requirement as a universal rule. It cannot be said to be "necessary"*'.¹¹ For employers, the High Court's decision provided relief as the term would have meant that employers could not act in a way in a manner likely to destroy or seriously damage the relationship of confidence and trust between an employer and employee. Whilst Professionals Australia was disappointed with the decision, the decision did not give employers an unfettered discretion to act in a way which indicates a lack of trust and confidence.

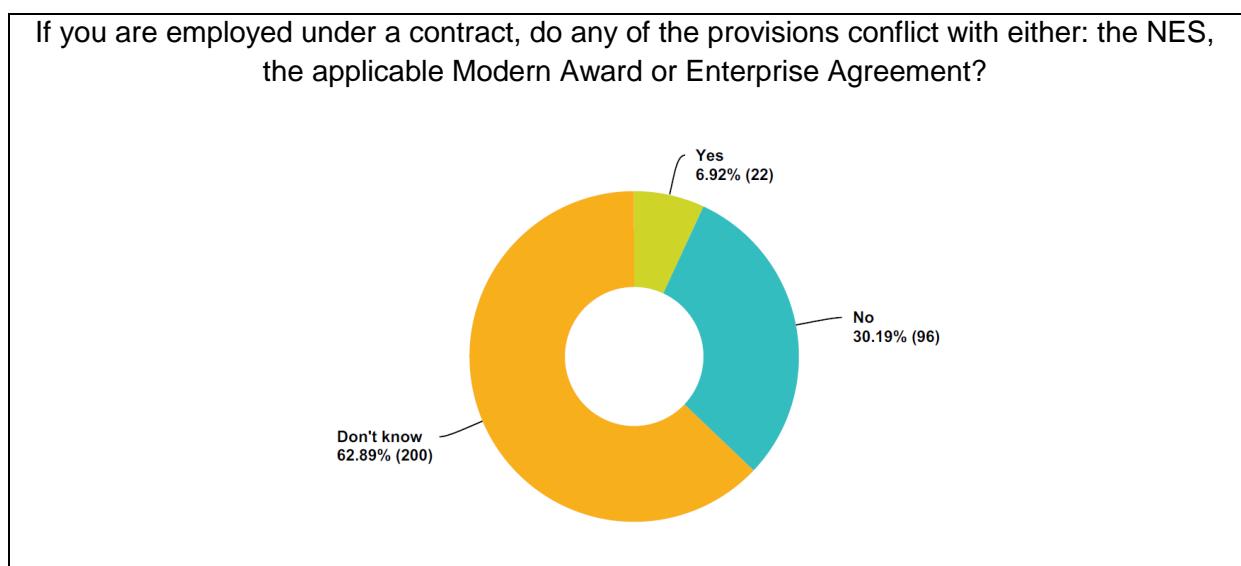
¹⁰ [2014] HCA 32.

¹¹ Ibid at 108.

It is also unfortunately the case that many employees do not have sufficient knowledge of their minimum employment entitlements which has the consequence of increasing their vulnerability and susceptibility to unfair employment terms. This is evident in the survey as over 20% of respondents did not know whether their common law employment contract was a stand-alone contract or underpinned by an award or enterprise agreement.



In addition nearly 63% of those surveyed didn't know whether their common law employment contract conflicted with applicable industrial instruments.



By contrast nearly 70% of survey respondents “were confident that your employer understands their legal obligations under the law”.

Professionals Australia considers that to some extent these survey finding demonstrates that employees accept employment contracts on the basis that they believe their employer understands their employees correct entitlements.

Using common law employment contracts to undermine Modern Awards

As mentioned earlier in this submission, Professionals Australia believes that it is not an uncommon practice for employers to use common law contracts to attempt to contract out of their award obligations.

For instance, some employers take a view that the payment in excess of award minimum wages, usually in the form of an annualised salary, means that they are absolved from other monetary obligations under the award. This is sometimes taken to the extent of attempting to offset future award entitlements.

An example of a standard clause taken from a contract provided to Professionals Australia's Workplace Advice and Support Team states as follows:

'Your salary has been set specifically having regard to any and all entitlements that may apply now, or in the future, under an industrial award or instrument, including reasonable additional hours, shift penalties, overtime, annual leave loading and allowances.

You agree that [employer name omitted] may apply any over award salary or remuneration in satisfaction of its obligation to provide such award payments'

Or another example:

"To the extent that the employee's salary and other benefits exceed the Employee's entitlements under the Award or pursuant to the [Fair Work] Act, the Company may offset against this amount any future increases in rates and allowances contained in the Award or pursuant to the Act."

Professionals Australia believes that this practice demonstrates that employers do not necessarily offer employees arrangements where they will be better off overall if they are wishing to apply current over award payments to a future entitlement with an unknown quantum.

Another approach which is sometimes relied upon is to rely on a misinterpretation of a standard provision in all modern awards which using Clause 2.2 of the Professional Employees Award as an example states that:

"The monetary obligations imposed on employers by this award may be absorbed into overaward payments. Nothing in this award requires an employer to maintain or increase any overaward payment."

This clause originally inserted into modern awards as a transitional clause and is the subject of consideration during the current review of modern awards in order to clarify its operation.

In addition some employers erroneously believe that a common law employment contract displaces the relevant modern award.

Modern Awards – Facilitation of Individual Bargaining

As referred to previously, modern awards covering managerial and professional employees while generally more flexible than other awards nevertheless provide a relevant framework for individual bargaining.

For instance, in the case of annual leave, Clause 19.2(b) of the Professional Employees Award 2010 states that:

Where an employee is in receipt of remuneration from their employer which is related to their annual leave loading and which is established as being of equivalent value to or greater value than the loading provided by this clause, no further entitlement will accrue. Where the benefit is of a lesser value than equivalent value then the employer must make up the benefit to that value.

Professionals Australia considers that an employer should only be able to rely on this clause when they have notified the employee in writing that their remuneration includes annual leave loading. Further Professionals Australia believes that it is when an employee is notified it is necessary for the employer to specify the relevant quantum.

Another example is compensation for overtime and related matters which is the primary reason for the existence of annualised salaries.

Clause 18 of the Professional Employees Award 2010 states that:

18.2 Employers will compensate for:

- a) Time worked regularly in excess of ordinary hours of duty;*
- b) Time worked on call-backs;*
- c) Time spent standing by in readiness for a call-back;*
- d) Time spent carrying out professional engineering duties or professional scientific/information technology duties outside of the ordinary hours of duty over the phone or via remote access arrangements; or*
- e) Time worked on afternoon, night or weekend shifts.*

18.3 Compensation may include:

- a) Granting special additional leave;*
- b) Granting special additional remuneration;*
- c) Taking this factor into account in the fixation of annual remuneration; or*
- d) Granting a special allowance or loading*

Provided that, where relevant, such compensation or remuneration will include consideration of the penalty rate or equivalent and the conditions as applicable from time to time to the majority of employees employed in a particular establishment in which the employee is employed.

18.4 The compensation and/or remuneration will be reviewed annually to ensure that it is set at an appropriate level having regard to the factors listed in this clause.

3.5 Resolving disputes over terms and conditions

Employees covered by an enterprise agreement or modern award are able to resolve disputes over employment terms and conditions by following the dispute resolution procedures contained in the agreement or award, which ultimately can see the matter being referred to the Fair Work Commission. In the case of modern award disputes procedures and in the case of most disputes procedures contained in enterprise agreements disputes are usually restricted to matters contained in those industrial instruments.

The dispute resolution procedure contained in modern awards is limited to conciliation and unless agreed between the parties the Fair Work Commission cannot determine the matter. Whilst parties are encouraged to seek to resolve the dispute during mediation or conciliation, an inability to pursue arbitration without consent, limits the capacity to resolve disputes.

In respect of individual bargaining, it is important to note that in some Australian jurisdictions, there is capacity for a third party to review contracts in order to determine their validity. Under Section 106 of the NSW *Industrial Relations Act 1996*, the NSW Industrial Commission has the power to declare void or vary a contract if it is unfair or harsh or unconscionable. However, as correctly identified by the Productivity Commission, currently there is no jurisdiction for the Fair Work Commission to deal with disputes arising out of employment contracts.¹² Rather claims can only be pursued through courts with jurisdiction to award common law remedies when a term of the contract has been breached. An example is outlined below.

Case study – unilateral variation to common law employment contract

- In late 1999 /early 2000, there was a transfer of business from Employer A to Employer B. This resulted in employees of Employer A being moved to Employer B.
- At the time of the transfer, transferring Employer A employees received written confirmation that it was Employer B's intention to keep the generous redundancy policy that Employer A had.
- In 2001, Employer B tried to change the redundancy policy and a dispute was notified by APESMA and the AMWU. Before the need for arbitration, the parties reached an agreement where Employer B agreed not to change the redundancy policy. However, Employer B noted that it would revisit the issue in future.
- In late 2014, Employer B once again sought to change the redundancy policy.
- Professionals Australia has been liaising with Employer B and has argued that because the generous redundancy entitlements have been in place for affected employees for such a long time, these could be seen as being incorporated into the employees' contracts (as an implied term of the contract). Further that, the affected employees may be able to take action for breach of implied contract (civil action in Court) if redundancy eventuates and Employer A's redundancy policy is

¹² Issues Paper 3, pg 17.

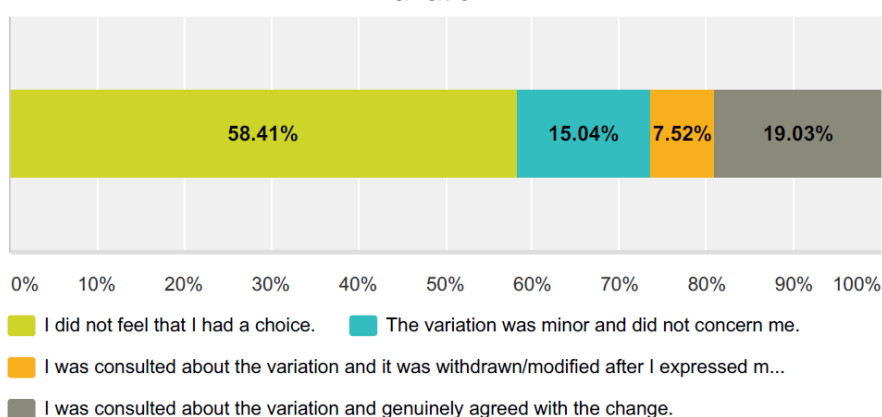
not applied.

- However Employer “B” has subsequently decided to proceed with reduced redundancy entitlements and have requested employees to sign a Deed Of Release which would prevent the taking of action for implied breach of contract in the future.

Professionals Australia submits that this situation is demonstrably unfair.

Evidence from the survey shows that a high percentage of respondents have been subjected to a variation to their contract of employment where they felt they did not have a choice but to accept the variation. It is a telling reflection on the negotiation process that only 7.2% of survey respondents were successful in either having the proposed change withdrawn or modified.

Has your contract of employment been varied by your employer and did you agree with the variation?



Professionals Australia Recommendation 6: Dispute Resolution – Unfair common law employment contracts

Professionals Australia submits that the Fair Work Act should be amended to provide that all common law employment contracts should be required to contain a dispute resolution clause to provide a process in which disputes arising from terms of employment to be resolved with ultimate access to the Fair Work Commission.

Upon application by the employee The Fair Work Commission should be able to prevent a unilateral alteration to a common law contract of employment and have the power to declare a provision of a contract to be “unfair, harsh or unconscionable”

Professionals Australia considers that the ability to resolve disputes relating to contractual terms in an expeditious manner would result in a much fairer process.

Individual Flexibility Arrangements (IFA)

As outlined above Individual Flexibility Arrangements (IFAs) are not the preferred instrument used by employers when bargaining on an individual basis with their managerial and professional employees.

IFA Shortcomings

Whilst Professionals Australia has some concerns regarding shortcomings of IFAs, IFAs are preferred over common law employment contracts as they contain important legislative safeguards.

As noted by the ACTU, “unions did not support the introduction of IFAs, notwithstanding the formal safeguards that accompanied them. Over time, it has become apparent that in spite of these safeguards there is some evidence that IFAs are being used in a similar fashion to AWAs – that is, to drive down wages and conditions and exploit vulnerable individuals”.¹³ Professionals Australia submits that such agreements should be subject to the scrutiny of a third party such as the Fair Work Commission.

IFAs – Non- Monetary Benefits

Professionals Australia notes that Fair Work Amendment Bill 2014 is seeking to stipulate that non-monetary benefits can be taken into account in determining whether an employee is better off over all. The Association is strongly opposed to the ability to use non-monetary benefits to offset the better off overall test. Professionals Australia considers that it is difficult to quantify a non-monetary benefit and believes that if this amendment of the *Fair Work Act* 2009 (Cth) was to pass and become law, that employees may be significantly disadvantaged, to the extent that employers will try to trade off entitlements for non-monetary benefits that employees already receive.

Employer use of IFAs

As detailed above, it is the experience of Professionals Australia that employers prefer to utilise common law contracts, on the basis that employers do not wish to genuinely bargain with their managerial and professional employees.

Another reason for employer reluctance to enter into formal IFAs is fear that an employee will seek to terminate the agreement if they become aware or believe that their employer is not offering them an arrangement that leaves them better off overall.

IFA – Notice Provisions

Professionals Australia acknowledges that currently that an IFA made under a modern award can be unilaterally terminated with 13 weeks' notice whereas an IFA made under an enterprise agreement requires 28 days' notice to terminate.

It is submitted that if IFAs which are intended to be mutually beneficial for both parties are no longer meeting their objectives, then the parties should be able to terminate the agreement expeditiously. This is a particularly important right given that the content of any such

¹³ ACTU 'Submission to the Senate Committee on Education and Employment regarding the Fair Work Amendment Bill 2014' (2014), page 14 (available here: <http://www.actu.org.au/Publications/Submissions/ACTUSubmissiontotheSenateInquiryintotheFairWorkAmendmentBill2014.aspx>)

agreements are not subject to external scrutiny.¹⁴ In this regard it is submitted that the current notice periods are more than adequate and any extension would unfairly impact on employees.

¹⁴ ACTU 'Submission to the Senate Committee on Education and Employment regarding the Fair Work Amendment Bill 2014' (2014), page 18 (available here: <http://www.actu.org.au/Publications/Submissions/ACTUSubmissiontotheSenateInquiryintotheFairWorkAmendmentBill2014.aspx>)

ISSUES PAPER 4: EMPLOYEE PROTECTIONS

4.2 Unfair Dismissal

Section 381 of the *Fair Work Act 2009* (Cth) states that the objective of the unfair dismissal process is to:

- *to establish a framework for dealing with unfair dismissal that balances:*
 - *the needs of business (including small business); and*
 - *the needs of employees; and*
- *to establish procedures for dealing with unfair dismissal that:*
 - *are quick, flexible and informal; and*
 - *address the needs of employers and employees; and*
- *to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.*

Professionals Australia submits that the unfair dismissal process is an essential part of the Australian workplace relations framework as it provides recourse for employees who have been unfairly dismissed.

The experience of Professionals Australia's Workplace Advice and Support (WAS) Team is that the procedures dealing with unfair dismissal meet the objectives of being quick, flexible and informal. Generally speaking, most of the unfair dismissal cases brought by Professionals Australia members are settled at conciliation which prevents the need for the matter to be arbitrated.

In terms of remedies, it is rare for reinstatement or re-employment to occur. It is also the experience of Professionals Australia that employers have a strong preference for monetary compensation.

The tests

Section 385 of the FW Act states that a person has been unfairly dismissed if the Fair Work Commission is satisfied that:

- the person has been dismissed; and
- the dismissal was harsh, unjust or unreasonable; and
- the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- the dismissal was not a case of genuine redundancy.

Professionals Australia submits that these tests are appropriate for the purposes of determining whether conduct is unfair on the basis that they strike a balance between the interests of businesses and the rights employees have to fair treatment.

Professionals Australia does not consider that exemptions are appropriate as all employees should have the right to seek redress for unfair dismissal.

Small Business Unfair Dismissal Code

Professionals Australia considers that all employers, regardless of size need to be held accountable for unfair dismissal and in this regard does not support the Small Business Fair Dismissal Code being lowered.

Level of Compensation

Generally speaking an employer will not reinstate a dismissed employer unless ordered to so by the Fair Work Commission. As such, employers have used payment under the cap as a way to avoid unfair dismissal matters proceeding to arbitration where there is a possibility that if the dismissal is found to be unfair that the dismissed employee may seek reinstatement.

Professionals Australia considers that the amount payable under the compensation cap is not of a comparable value to reinstatement.

In many cases, employers will upon dismissing an employee make an ex-gratia payment (on top of any applicable redundancy payment) in order to avoid any unfair dismissal proceeding being brought against them. Sometimes the ex-gratia payment will bring the total termination payment (which includes notice) close to the unfair dismissal compensation cap. The employee is then in a position where they need to determine whether they reject the ex-gratia payment on the basis that they could get more compensation by lodging an unfair dismissal claim. In most cases, Professionals Australia's Workplace Advice Team will strongly recommend that an employee accept an ex-gratia payment on the basis that there is no guarantee that they will receive any compensation after pursuing an unfair dismissal remedy. In this regard most members do not wish to run the risk of getting no compensation and therefore choose to accept the ex-gratia payment.

Professionals Australia Recommendation 7 – Unfair Dismissal compensation cap

Professionals Australia submits that the compensation cap should be abolished or at least increased to up to 12 months' pay in order for employers to be forced to seriously consider reinstating a dismissed employee.

So called “go away” money

Statistics demonstrate that the majority of unfair dismissal matters settle at conciliation. Professionals Australia considers this is mainly due to the risk of proceeding to arbitration and the uncertainty regarding the outcome.

As discussed above, the compensation cap provides an element of certainty to both employers and employees as 26 weeks' pay (capped on the basis of the High Income Earner's threshold) and is the maximum that an employee can gain from pursuing unfair dismissal. In this regard, the reference to 'go away' money trivialises what is in actual fact a judgement call whereby both parties assess their prospects of success.

If an employee was to reject a reasonable settlement offer and the Fair Work Commission awarded less compensation than was offered at settlement, the employer could seek a cost against the employee. In this regard, the risk of a costs order is often a reason why an employee will accept 'go away' money instead of pursuing their matter to arbitration as they could end up worse off.

Impact of Unfair Dismissal on Managerial and Professional Employees

Section 382 (b)(iii) of the *Fair Work Act 2009* (Cth) excludes any person from protection from unfair dismissal whose employment remuneration is not less than the “high income threshold”. Because professional employees are typically paid an ‘all inclusive’ annualised salary the operation of section 382 (b)(iii) of the Act adversely impacts many of our members by precluding them from the unfair dismissal jurisdiction. Employees whose remuneration is made up of base salary plus allowances and payments for overtime (for example), can be earning in excess of the high income threshold but still maintain protection from unfair dismissal.

Professionals Australia has become aware of a practice that is being increasingly utilised by employers of professional employees to include a term into the employee’s employment contract that fulfils the requirements of section 328 of the *Fair Work Act 2009* (Cth). The inclusion of such a term ensures the employee will not be award covered at any time the employee’s salary is in excess of the high income threshold. It has been the experience of Professionals Australia’s WAS team that employees have no understanding of the ramifications of signing an employment contract that contains such a term, in particular that the existence of the term will mean the employee will no longer have access to the Act’s unfair dismissal jurisdiction.

Professionals Australia Recommendation 8 – Unfair dismissal rights for professional and managerial employees

Professionals Australia submits that all employees, regardless of their remuneration, are entitled to be treated with respect and a “fair go all round”, and most importantly be awarded appropriate remedies in the event of being unfairly dismissed. For this reason it is our submission that sections 382 and 328 of the *Fair Work Act 2009* (Cth) should receive appropriate amendments to ensure that professional and managerial employees are no longer adversely discriminated against because of their remuneration structure and denied protection from unfair dismissal.

Professionals Australia submits that managerial and professional employees are especially vulnerable to unfair dismissal. It is the experience of Professionals Australia’s WAS Team that there is the lack of natural justice that is often provided to members who are perceived as lacking a collective voice and basic rights. The majority of professional employees have always enjoyed the right to seek relief when they feel that they have been unfairly dismissed by virtue of being classified in accordance with an award. However, the situation for managerial employees who are above the income threshold and who are not managing in their capacity as technology based professionals is very different. Effectively as this group is in most instances not covered by an award classification they are effectively outside the industrial relations system.

Section 390(1)(a) of the *Fair Work Act* 2009 (Cth) provides that the Commission may only order a person's reinstatement or compensation if they are protected from unfair dismissal. To attain this protection, the employee must have completed: a minimum employment period prescribed by section 383 of the Act (6 months for a large business employer employing over 15 full-time equivalent staff and 12 months for a small business employer employing less than 15 full-time equivalent staff).

Professionals Australia is concerned about the lack of natural justice and vulnerability experienced by probationary employees under the current unfair dismissal framework. It is the experience of Professionals Australia's WAS Team that employers have simply terminated employees during their probationary period, leaving the employee with no recourse. Professionals Australia considers that terminating an employee during probation can be classified as harsh, unjust or unreasonable for the purposes of section 385 of the *Fair Work Act* 2009 (Cth) and therefore protection from unfair dismissal should be afforded to those employees.

Given many employees leave secured jobs or enter obligations on the basis of their employment; it seems unconscionable that they could be discarded for no reason. It is hard to imagine any other contractual situation where such a situation could arise for no cause.

Professionals Australia Recommendation 9: Unfair Dismissal rights for employees serving probationary periods

Professionals Australia believes that the *Fair Work Act* 2009 (Cth) should be amended to provide some protection for employees serving probationary periods from being terminated simply because they are serving the probation period and the Act allows such arbitrary termination. Professionals Australia considers that if an issue arises that is likely to result in a decision to terminate employee's employment, probationary employees must be advised in advance and given the opportunity to improve performance in accordance with the principles of procedural fairness, natural justice and the opportunity to respond.

Grounds for Unfair Dismissal

The experience of Professionals Australia's WAS Team is that unfair dismissal is asserted on the grounds of the dismissal being a result of lack of process or non-genuine redundancy.

Professionals Australia considers that there is no particular ground in which cases are most likely to succeed as the facts of each case are likely to differ.

4.3 Anti-Bullying Jurisdiction

Professionals Australia considers that workplace bullying is a serious issue facing employers and employees and therefore welcomed the introduction of the Fair Work Commission's anti-bullying jurisdiction. Professionals Australia believes that professional and managerial employees are often isolated in the workplace which makes them vulnerable to bullying.

Before the jurisdiction became operational there was a lot of concern that the Fair Work Commission would be overloaded with applications to stop bullying and as a result many employers undertook to ensure that they had vigorous internal processes to deal with claims of bullying made by employees.

Since the anti-bullying jurisdiction become operational on 1 January 2014, Professionals Australia has only assisted a limited number of members to make applications. Professionals Australia submits that the low uptake of the jurisdiction in general can be attributed in part to employers having a preference to resolving these matters internally.

Whilst the primary purpose of the anti-bullying jurisdiction is to stop the bullying from occurring, it is the view of Professionals Australia that the jurisdiction has had the unintended consequence of employers seeking to resolve bullying allegations by seeking to amicably terminate employment with the employee with payment of some sort of ex-gratia payment.

ISSUES PAPER 5: OTHER WORKPLACE RELATIONS ISSUES

5.6 Alternative forms of employment

Professionals Australia's view is that the diversification of forms of employment is a complex issue which seriously impacts workers, contractors, families, communities and businesses, and requires careful analysis and policy development.

This section of the submission highlights some of the major workplace relations issues for independent contractors and labour hire workers.

Independent Contractors

Professionals Australia recognises, as acknowledged by the International Labour Organisation (ILO), that independent contractors are governed by commercial law, while employees are governed by industrial law. We recognise independent contractors' freedom to operate in the manner they choose where genuine choices exist. We recognise independent contracting as a wholly legitimate form of engagement where fair contract terms are in place, and the right of business to engage contractors to meet workflow peaks, overcome skills gaps and provide flexibility in their labour force where a permanent workforce is unavailable for this purpose. We also concur with the ILO which noted that while genuine commercial and independent contracting arrangements should not be interfered with, there is a need for mechanisms to ensure that persons within disguised employment relationships have access to the protections they are due at the national level (*ILO, The Scope of the Employment Relationship, Report V, 2003*).

In line with our contemporary approach to representing the diverse interests of our membership, supporting workplace flexibility and acknowledging the legitimacy of alternative forms of engagement, Professionals Australia provides information, legal and insurance services to around 2,000 contractors through our Contractors and Consultants special interest group.¹⁵

Services include:

- advice on business start-up and managing the transition from employee to consultant;
- review of members' contracts for service by in-house lawyers;
- access to discounted professional indemnity insurance;
- information on the Alienation of Personal Services Income tax rules;
- guidance on working through a labour hire agency as a contractor; and
- a professional development scholarship to assist with expanding and updating skills in the absence of a formalised and permanent employee/employer relationship.

There are two areas we would like to highlight in relation to independent contracting – sham contracting and unfair contract terms.

¹⁵ <http://www.professionalsaustralia.org.au/contractors-consultants/>

Sham contracting

Our first major area of concern is sham contracting – the misclassification of workers as contractors who, when assessed against the common law test of employee, are likely to be more appropriately classified as employees. Sham contracting denies workers their workplace rights and entitlements. This includes avoiding employment costs such as workers' compensation, professional indemnity insurance, leave entitlements, plant/equipment costs (because independent contractors generally supply their own tools and equipment), PAYG tax, superannuation, payroll tax, redundancy entitlements and unfair dismissal claims. Professionals Australia is opposed to labour market deregulation which allows unscrupulous employers to contrive to place segments of workers outside the framework of standard employment protections, rights and benefits.

Particularly in highly-competitive industries with low barriers to new entrants to the field, unscrupulous employers may attempt to aggressively minimise labour expenses and potentially contravene workplace laws. Those who avoid obligatory rates of pay and other entitlements gain an unfair competitive advantage and compromise the level playing field created by a system of basic employment entitlements in conjunction with mechanisms to provide equivalent rights and protections for contractors.

Professionals Australia recognises the changing employment landscape and supports the use of independent contractors for those who are informed about their options and choose to operate under these arrangements whether it be to disperse specialist skills, to cope with peak workloads, or to undertake work which is not of a permanent ongoing nature. We will however continue to oppose the use of contractors where genuine choice does not exist, where individuals are not informed about the consequences of changed work arrangements, where contractors are engaged under less favourable pay and terms than equivalent employees or where the pay and conditions of permanent employees are threatened or undermined.

Professionals Australia Recommendation 10 - Addressing sham contracting

“Jump up” clauses

Jump up” clauses in agreements are clauses which require the employer to afford contractors the same terms and conditions as employees. They are an important mechanism for securing equivalent pay and conditions for contractors and ensuring their engagement does not undermine the pay, conditions and security of employment of the permanent workforce. Under the Fair Work Act, clauses which qualify or restrict the employer engaging contractors are not permitted. However terms that require the employer to consult before engaging contractors and that require the employer to afford contractors the same terms and conditions as employees are permitted. This is a critical mechanism for providing equivalent rights and protections for independent contractors and for protecting the integrity and security of employment of the permanent workforce. Jump up clauses in conjunction with strong sham contracting penalties in the Fair Work Act are fundamental to protecting workers from employers who attempt to use sham contracting arrangements. On this basis, we hold the strong view that these consultation and jump up clauses should continue to be retained as permitted matters.

Clarity around employee/contractor status

Professionals Australia supports the recommendation coming out of the recent Board of Taxation report "Tax Impediments for Small Business"¹⁶ that the ATO should review its employee/contractor tool.

Professionals Australia considers that a tool which assists employers and independent contractors work their way through the complexity around the multi-factor test determining employee/contractor status which applies at common law would be useful. At present, the most succinct summary of the multi-factor test is in a Fair Work Australia Full Bench decision - Jiang Shen Cai trading as *French Accent v Michael Anthony Do Rozario*¹⁷ – this decision is faithful to all the federal authorities. Such a tool would assist employers genuinely trying to engage workers correctly; it will of course not assist where employers recklessly and/or intentionally misclassify employees as contractors.

Note about creating a definition of independent contractor

Professionals Australia notes that, because of the complexity of the multi-factor test used to determine employee/contractor status and the different definitions and deeming provisions for different purposes across different jurisdictions, we do not see it as feasible to create a statutory definition of an independent contractor. We also note that as much as engaging clients may insist that a decision made by individuals to provide their labour as self-employed persons should be sufficient to be classified as an independent contractor, we disagree with this in the strongest possible terms. Our view is that the various indicia of employee/contractor status at common law should remain the fundamental test of employee/contractor status.

Unfair contract terms

For independent contractors, the terms of engagement or contract for service with a client is the most critical piece of documentation they will need to draw up. For a commercial contract to be legally enforceable, the principles of contract law require that an offer be made and accepted, and contain sufficient detail to make it clear what is being offered and on what terms. A well-drafted contract is an important risk management device for each of the contracting parties. Providing a written description of the services the contractor is engaged to perform, the results to be achieved, how much and on what terms payment will be made, the extent of the contractor's liability and when and how the contract will end, forms a legal contract to fall back on if either party does not hold up their end of the deal.

Contracts can however be a significant source of exposure if they fail to adequately define the limitations and scope of the services to be provided, or fairly and proportionately allocate risk. Unfair terms can arise as a result of the relative imbalance in the bargaining positions of the principal and the independent contractor being engaged.

Professionals Australia's second main area of concern in relation to independent contracting is therefore the area of unfair contracts arising from the differential bargaining positions of the contracting parties.

¹⁶ Australian Government, Board of Taxation, Tax Impediments for Small Business, August 2014, Recommendation 4.3, p.92. Available at http://taxboard.gov.au/content/reviews_and_consultations/impediments_facing_small_business/report/downloads/taximpediments_report.pdf

¹⁷ [2011] FWAFB 8307

More specifically, the Association has concerns in the following areas:

1. the lack of protection for independent contractors against outer-limit contracts which purport to be fixed-term contracts;
2. the lack of opportunity to negotiate mutually agreed terms for those offered contracts on a "take it or leave it" basis;
3. the lack of protection for those contractors paid less and engaged under conditions less favourable than if they were employed under the relevant Award or Agreement;
4. the lack of protection for independent contractors against contracts that unfairly divert risk and professional liability to the contractor; and
5. the lack of protection for contractors where the client attempts to contract out of their proportionate liability obligations.

1. *Lack of protection for independent contractors against outer-limit contracts which purport to be fixed-term contracts*

Even where it is stated that a contract is for a particular term, a client or agency's right to terminate at their discretion or convenience means that the contract is not a fixed-term contract but effectively an outer-limit contract. This means that if terminated prior to the conclusion of the stated term, the contractor has no entitlement to damages for the unexpired balance of the contract. Where there is no provision entitling the contractor to terminate the contract, the contractor effectively has no rights at all under the terms of the contract in relation to termination. This also means that in the event that the contractor is unable to fulfil the obligations under the contract, the other party is able to claim damages for the lost balance of the contract, especially where there is no provision for substitution or a sub-contractor to be brought in to complete the work.

This form of contract is not uncommon and demonstrates the significant imbalance in the parties' rights and obligations arising under the contract; such terms are not reasonably necessary to protect the legitimate interests of the party that would be advantaged by the term.

2. *Lack of opportunity to negotiate mutually agreed terms for those offered contracts on a "take it or leave it" basis*

Professionals Australia's experience with many contractors considering an engagement as an independent contractor is that:

- contracts are often prepared by a client prior to any discussion relating to the engagement commences; and
- the contractor is often required to accept or reject the terms on a "take it or leave it" basis.

There is currently little alternative for contractors who are offered a contract on a "take it or leave it" basis other than to do just that. Such contracts reflect the agency and/or client's preferences but take no account of those of the contractor.

Again, this practice is widespread and demonstrates the substantial imbalance in the parties' rights and obligations; non-negotiable terms are not reasonably necessary to protect the interests of the client, and often cause financial and/or non-financial detriment to the independent contractor being offered the contract.

3. *Lack of protection for those contractors paid less than if they were employed under the relevant Award or Agreement*

In November 2009, the Industrial Court of NSW ordered Australia Post to pay \$72,450 plus \$9,100 in superannuation payments to contractor Gregory Cartaar after finding the contract under which he was engaged was unfair. Justice Kavanagh found that had Mr. Cartaar been engaged as an employee, he would have earned \$130,240 over three years rather than the \$66,790 he was paid.

Contract law which states that contractors will be engaged under terms no less favourable overall than those covering employees doing the same work provides a disincentive for unscrupulous employers engaging independent contractors to reduce costs and avoid their employment obligations.

The Cartaar unfair contract ruling is just one of many which highlights the disadvantage at which independent contractors often operate relative to their employee counterparts.

The situation is even more critical for some, for example in the case of Translators and Interpreters, for whom there is either limited or no industrial regulation or recourse in the event of terms of engagement which undermine existing standards. When engaged as independent contractors, they fall outside the protections of the Fair Work Act and National Employment Standards while also having limited power to negotiate fair contract terms due to the profound differential in bargaining power between labour hire/booking agencies and the individuals they engage.

4. *Lack of protection for independent contractors against contracts that unfairly divert risk and professional liability to the contractor*

Unscrupulous employers can also use contracting arrangements as a means of unfairly diverting risk and liability. As project work remains intermittent and there is pressure on fees and profit margins, project managers are looking to minimise costs and a key way of doing this is by diverting risk onto consultants. It is critical at all times, but particularly so in the post-GFC climate, to ensure consultants have documentation in place which protects their interests, fairly allocates risk, protects their assets and ensures that liability in the contract is proportionate in nature, that is, each party will be liable for their own losses and their own negligence. A significant potential exposure for independent contractors in consultancy roles exists where this does not occur.

5. *Lack of protection for contractors where the client attempts to contract out of their proportionate liability obligations*

A loophole allowing for parties to contract out of their proportionate liability obligations has been a significant issue for the consulting engineering industry in

the past leading to unsustainably high insurance premiums and inability to insure against risk in some areas.

Professionals Australia Recommendation 11 - unfair contract terms

Extending unfair contract term protections under the Trade Practices Act to small business

In March 2010, Federal Parliament passed amendments to the *Trade Practices Act* to protect consumers from unfair contracts. Professionals Australia supports the extension of unfair contract term protections to small business as a practical way of dealing with the range of unfair contract terms which can be imposed on independent contractors.

Addressing contracting out of proportionate liability obligations

Professionals Australia holds the view that opt-out provisions which allow for parties to contract out of proportionate liability obligations should be prohibited on a nationally consistent basis and that the application of proportionate liability legislation should be monitored and reviewed on a regular basis across jurisdictions. This is critical to protecting independent contractors from being subject to unfair risk and liability, ensuring the availability and affordability of insurance for consulting engineers, and the viability and sustainability of professional engineering in Australia.

We also support the development of government-funded information on fair and proportionate risk allocation in contracts for service for micro-businesses and penalties for organisations which attempt to contract out of proportionate liability obligations.

ACCC provision for collective bargaining for contractors

This mechanism was put in place in recognition of the differential bargaining power of engaging clients and independent contractors. It is our view that the mechanism providing for collective bargaining by the ACCC is lengthy and complex and should be reviewed and streamlined to ensure more timely evaluation of the case for collective representation of current and future contractors. Once in place, there should be an obligation on the parties to bargain in good faith.

Professionals Australia is of the view that the recommendations set out above in relation to sham contracting and unfair contracts either would or are currently helping address the power differential of parties involved in commercially-based work arrangements and would add to the certainty of genuine commercial relationships. They would support the major contribution of independent contractors to the dispersal of specialist expertise across Australian industry and maximise their contribution to Australia's economic growth, productivity and competitiveness.

Labour Hire

Professionals Australia takes the view that there are both advantages and disadvantages of working in a labour hire arrangement for labour hire workers. Particularly for short-term contracts, the labour hire firm takes responsibility for many of the more expensive and inconvenient aspects of contractor-style engagement such as administration, insurances and recovering unpaid debts from principal employers. Additionally it can be a good way for professionals to broaden their skills base and diversify their client base, and –

acknowledging legitimate restraint clauses on the direct engagement of workers engaged previously via a labour hire firm – it can be a good way to “get a foot in the door” with the principal employer for future direct, permanent employment.

There are three main areas of concern we would like to highlight in relation to labour hire arrangements – employers using these arrangements to divert employment costs and obligations, the lack of opportunity to negotiate fair and mutually-agreed terms and some of the general problems with practices used by labour hire firms.

- ***Engagement via labour hire firm to divert employment costs and obligations***

While Professionals Australia sees mutual advantages in labour hire firms providing a level of flexibility for employers, we strongly object to labour hire arrangements being used as a contrived means of placing segments of workers outside the framework of standard employment protections, rights and benefits. Using the tripartite arrangement in the longer-term allows principals to divert liability for employment costs such as workers’ compensation, leave entitlements and insurances such as professional indemnity cover to the labour hire firm.

Utilising labour hire arrangements can also be a way for employers to divert liability in relation to termination entitlements. It is easy for a principal employer to “dismiss” labour hire employees without a good reason and/or without regard to natural justice or due process because there is no direct employment relationship between the labour hire worker and the principal employer. In these circumstances, the relevant legislation and employment protections do not apply and the labour hire worker is denied access to any unfair dismissal rights.

- ***Lack of opportunity to negotiate fair terms***

As is the case with independent contractors, it is common for professionals to be offered a contract through a labour hire arrangement on a “take it or leave it basis” without the opportunity to negotiate fair terms which suit both parties. This largely reflects the differential bargaining power of the parties.

We make the following additional points about widespread practices in the labour hire industry which disadvantage those working through labour hire arrangements and have implications for workforce development in the longer term.

- ***Problems with practices used labour hire firms***

- **Unfair non-solicitation obligations**

Professionals Australia has found that it is not uncommon for unreasonably lengthy periods of non-solicitation following a period of engagement to be imposed on labour hire workers by a labour hire firm.

- **Lack of transparency around rates**

Many contractors find it frustrating not knowing the rate the principal client pays for the provision of the contractor’s labour - that is, the agency is not transparent about the rate they charge the principal client compared with the rate the contractor receives.

- **Lack of investment in professional development**

Labour hire firms can be reluctant to invest in training and professional development for their employees. In accessing labour hire arrangements, employers effectively buy in the skills needed rather than being prepared to invest in skills development for their own staff and this in turn can have significant implications for workforce development and growing our skills base in the longer-term.

Professionals Australia Recommendation 12: Labour Hire

Professionals Australia believes that measures to address the use of labour hire arrangements to unfairly divert employment costs and obligations, to ensure labour hire workers are afforded the opportunity to negotiate fair arrangements, to ensure mechanisms for reasonable non-solicitation periods, to provide a level of transparency around rates and to ensure labour hire workers are provided with professional development opportunities would help address some of the fundamental problems arising from labour hire arrangements.

Professionals Australia is of the view that labour hire arrangements utilised in the short-term may provide workplace flexibility for engaging organisations and opportunities for labour hire workers. When utilised in the longer-term however, these arrangements can be used by principal employers to avoid their employment obligations and unfairly divert employer responsibility for staff development and liability for employment costs on to the labour hire firm and labour hire worker with significant implications for labour hire workers and the development of the skills base of the professional workforce. In these circumstances, labour hire arrangements should be seen as a regressive loophole in labour regulation rather than a legitimate part of contemporary workplace relations arrangements.

CONCLUSION

As outlined in the introduction to this submission, many of the workplace issues faced by managerial and professional employees are the same or very similar to those for employees in general.

However as highlighted throughout the submission there are some issues that are more likely to affect members of Professionals Australia than perhaps other employee organisations. These issues include:

- A greater reliance by managerial and professional employees on individual bargaining arrangements;
- The need for effective dispute resolution procedures to resolve disputes arising out of individual bargaining;
- The capacity for the Fair Work Commission to arbitrate the content of enterprise agreements;
- The role of the National Employment Standards (NES) for “award free” employees; and
- Issues faced by independent contractors.

The experience of Professionals Australia in representing our members and the evidence based on the survey results outlined in this submission dispels the myth that managerial and professionals find it easy to exercise their rights. This submission demonstrates that managerial and professional employees require an improved framework of workplace rights that provide them with basic protection in the workplace.

Professionals Australia would welcome the opportunity to meet with the Productivity Commission to answer questions and to elaborate further on this submission.

Finally, this submission was prepared by National Industrial Officer/Lawyer Janet Tan and Michael Butler, Director Industrial Relations.

Signed

MICHAEL BUTLER

Director Industrial Relations
Professionals Australia

APPENDIX “A”

Survey Questions

1. What is your profession?
2. In what sector are you employed?
3. What industry are you employed in?
4. Please indicate your annual salary range
5. What are your key concerns about Productivity Commission’s review?
6. If you could give the Productivity Commission one message ahead of their inquiry into workplace relations, what would it be?
7. If you could give our political leaders one message on workplace relations, what would it be?
8. What industrial coverage are you employed under?
9. If you are covered by a common law contract, is it a stand-alone contract, or is it underpinned by a Modern Award or Enterprise Agreement?
10. If you are employed under a contract, do any of the provision conflict with either: the NES, the applicable Modern Award or Enterprise Agreement?
11. To what extent was your employer prepared to negotiate the terms of your contract of employment?
12. To your knowledge, are the general conditions of employment in your contract individually tailored to your particular circumstances, or are they those which are generally applicable to your work colleagues?
13. Has your contract of employment been varied by your employer and did you agree with the variation?
14. Are you confident that your employer understands their legal obligations under workplace relations law?

APPENDIX “B”

Professionals Australia’s Recommendations

Professionals Australia Recommendation 1 - NES Maximum hours of work

As a minimum, Professionals Australia seeks that an amendment should be made to the *Fair Work Act* 2009 (Cth) to avoid any doubt over how the maximum hours of work provision was intended to operate. Professionals Australia suggests that section 62(3) of the Act should be varied to include an additional provision to the effect that ‘an employer cannot require that a specified number of additional hours be worked on an ongoing basis’.

Professionals Australia considers that such an amendment will emphasise the importance of legislation stipulating 38 hours as the maximum number of ordinary hours that should be required to be worked by an employee per week.

Professionals Australia Recommendation 2- Compensation for overtime, call-backs and shift work in the NES

Professionals Australia considers that the inclusion of compensation for overtime, call-backs and shift work arrangements into the NES will complement the current NES Hours of Work provision.

Professionals Australia Recommendation 3 - Fair Work Commission and the NES

Whilst Professionals Australia acknowledges that the Fair Work Ombudsman does prosecute employers for breaches of the NES, Professionals Australia submits that there needs to be an efficient, timely and cost effective mechanism in which employees can claim entitlements under the NES without needing to proceed to litigation.

Professionals Australia considers that as the specialist workplace relations tribunal, the Fair Work Commission should have its jurisdiction extended and be able to make orders for compliance with the NES and payment of any unpaid NES entitlements.

Professionals Australia Recommendation 4 – Joint Enterprise Bargaining

Joint enterprise bargaining could operate depending on the circumstances in respect of both single enterprise and multi-employer agreements. However in many instances it may be more appropriate for an industry approach.

There would be a need to identify the employer(s) and host employer(s). A procedure could be established whereby the Fair Work Commission upon application could issue a Determination to this effect. A “host employer” would be the entity which has engaged a contractor to perform a function or service.

Following the identification of “employer(s)” and “host employer(s)” normal bargaining rules would apply.

Professionals Australia Recommendation 5 – Workplace Determinations

In order to facilitate the making of enterprise agreements it is recommended that Part 2-5 – Workplace Determinations of the *Fair Work Act* 2009 (Cth) be amended to allow the Fair Work Commission to make a Workplace Determination in circumstances where one or more employee bargaining representatives were genuinely seeking to reach agreement regarding the terms and conditions of an enterprise agreement but where such agreement was being unreasonably withheld.

Professionals Australia Recommendation 6: Dispute Resolution – Unfair common law employment contracts

Professionals Australia submits that the Fair Work Act should be amended to provide that all common law employment contracts should be required to contain a dispute resolution clause to provide a process in which disputes arising from terms of employment to be resolved with ultimate access to the Fair Work Commission.

Upon application by the employee The Fair Work Commission should be able to prevent a unilateral alteration to a common law contract of employment and have the power to declare a provision of a contract to be “unfair, harsh or unconscionable”

Professionals Australia considers that the ability to resolve disputes relating to contractual terms in an expeditious manner would result in a much fairer process.

Professionals Australia Recommendation 7 – Unfair Dismissal compensation cap

Professionals Australia submits that the compensation cap should be abolished or at least increased to up to 12 months’ pay in order for employers to be forced to seriously consider reinstating a dismissed employee.

Professionals Australia Recommendation 8 – Unfair dismissal rights for professional and managerial employees

Professionals Australia submits that all employees, regardless of their remuneration, are entitled to be treated with respect and a “fair go all round”, and most importantly be awarded appropriate remedies in the event of being unfairly dismissed. For this reason it is our submission that sections 382 and 328 of the *Fair Work Act* 2009 (Cth) should receive appropriate amendments to ensure that professional and managerial employees are no longer adversely discriminated against because of their remuneration structure and denied protection from unfair dismissal.

Professionals Australia Recommendation 9: Unfair Dismissal rights for employees serving probationary periods

Professionals Australia believes that the *Fair Work Act* 2009 (Cth) should be amended to provide some protection for employees serving probationary periods from being terminated simply because they are serving the probation period and the Act allows such arbitrary termination. Professionals Australia considers that if an issue arises that is likely to result in a decision to terminate employee’s employment, probationary employees must be advised in advance and given the opportunity to improve performance in accordance with the principles of procedural fairness, natural justice and the opportunity to respond.

Professionals Australia Recommendation 10 - Addressing sham contracting

“Jump up” clauses

Jump up” clauses in agreements are clauses which require the employer to afford contractors the same terms and conditions as employees. They are an important mechanism for securing equivalent pay and conditions for contractors and ensuring their engagement does not undermine the pay, conditions and security of employment of the permanent workforce. Under the Fair Work Act, clauses which qualify or restrict the employer engaging contractors are not permitted. However terms that require the employer to consult before engaging contractors and that require the employer to afford contractors the same terms and conditions as employees are permitted. This is a critical mechanism for providing equivalent rights and protections for independent contractors and for protecting the integrity and security of employment of the permanent workforce. Jump up clauses in conjunction with strong sham contracting penalties in the Fair Work Act are fundamental to protecting workers from employers who attempt to use sham contracting arrangements. On this basis, we hold the strong view that these consultation and jump up clauses should continue to be retained as permitted matters.

Clarity around employee/contractor status

Professionals Australia supports the recommendation coming out of the recent Board of Taxation report “Tax Impediments for Small Business”¹⁸ that the ATO should review its employee/contractor tool. A tool which assists employers and independent contractors work their way through the complexity around the multi-factor test determining employee/contractor status which applies at common law would be useful. At present, the most succinct summary of the multi-factor test is in a Fair Work Australia Full Bench decision - Jiang Shen Cai trading as *French Accent v Michael Anthony Do Rozario*¹⁹ – this decision is faithful to all the federal authorities. Such a tool would assist employers genuinely trying to engage workers correctly; it will of course not assist where employers recklessly and/or intentionally misclassify employees as contractors.

Professionals Australia Recommendation 11 - unfair contract terms

Extending unfair contract term protections under the Trade Practices Act to small business

In March 2010, Federal Parliament passed amendments to the *Trade Practices Act* to protect consumers from unfair contracts. Professionals Australia supports the extension of unfair contract term protections to small business as a practical way of dealing with the range of unfair contract terms which can be imposed on independent contractors.

Addressing contracting out of proportionate liability obligations

Professionals Australia holds the view that opt-out provisions which allow for parties to contract out of proportionate liability obligations should be prohibited on a nationally consistent basis and that the application of proportionate liability legislation should be

¹⁸ Australian Government, Board of Taxation, Tax Impediments for Small Business, August 2014, Recommendation 4.3, p.92. Available at http://taxboard.gov.au/content/reviews_and_consultations/impediments_facing_small_business/report/downloads/taximpediments_report.pdf

¹⁹ [2011] FWAFB 8307

monitored and reviewed on a regular basis across jurisdictions. This is critical to protecting independent contractors from being subject to unfair risk and liability, ensuring the availability and affordability of insurance for consulting engineers, and the viability and sustainability of professional engineering in Australia.

We also support the development of government-funded information on fair and proportionate risk allocation in contracts for service for micro-businesses and penalties for organisations which attempt to contract out of proportionate liability obligations.

ACCC provision for collective bargaining for contractors

This mechanism was put in place in recognition of the differential bargaining power of engaging clients and independent contractors. It is our view that the mechanism providing for collective bargaining by the ACCC is lengthy and complex and should be reviewed and streamlined to ensure more timely evaluation of the case for collective representation of current and future contractors. Once in place, there should be an obligation on the parties to bargain in good faith.

Professionals Australia Recommendation 12: Labour Hire

Professionals Australia believes that measures to address the use of labour hire arrangements to unfairly divert employment costs and obligations, to ensure labour hire workers are afforded the opportunity to negotiate fair arrangements, to ensure mechanisms for reasonable non-solicitation periods, to provide a level of transparency around rates and to ensure labour hire workers are provided with professional development opportunities would help address some of the fundamental problems arising from labour hire arrangements.