



Productivity Commission — Workplace Relations Framework
Submission from the Government of South Australia
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Executive Summary

The Government of South Australia welcomes this opportunity to provide a submission to the Productivity Commission's inquiry into the workplace relations framework (the Inquiry). It notes the Australian Government's objectives in commissioning the Inquiry '*are to examine the current operation of the Fair Work laws and identify future options to improve the laws bearing in mind the need to ensure workers are protected and the need for business to be able to grow, prosper and employ.*'¹

Following South Australia's referral of certain industrial relations powers to the Commonwealth², this State's private sector workforce (in effect the majority of employers and employees in South Australia) is part of the national workplace relations system and therefore covered by the laws that are the subject of this Inquiry. The local government sector and the South Australian public sector, including prescribed Government Business Enterprises, remain part of the South Australian industrial relations system and are covered by the *Fair Work Act 1994* (SA).

As a referring State, the Government of South Australia was closely involved in the development of the current workplace relations framework and was pivotal in identifying the fundamental workplace relations principles which provide the foundations of that framework.

These fundamental principles are:

- a strong, simple and enforceable safety net of minimum standards;
- genuine rights and responsibilities to ensure fairness, choice and representation at work, including the freedom to choose whether or not to join and be represented by a union or participate in collective activities;
- collective bargaining at the enterprise level with no provision for individual statutory agreements;
- fair and effective remedies available through an independent umpire;
- protection from unfair dismissal;
- an independent tribunal system; and
- an independent authority able to assist employers and employees within a national workplace relations system³.

The *Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector* (the IGA) acknowledges that the national workplace relations system will be built on these principles⁴. South Australia's referral legislation provides for the termination of the referral if these principles are breached⁵.

¹ Terms of Reference, Workplace Relations Framework, 19 December 2014
(www.ministers.employment.gov.au)

² *Fair Work (Commonwealth Powers) Act 2009* (SA)

³ Section 30B(9), *FW Act 2009* (Cth)

⁴ Clause 1.2, *Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector*, 25 September 2009.

⁵ *Fair Work (Commonwealth Powers) Act 2009* (SA), section 9(2)

The Government of South Australia considers that these fundamental principles remain valid within any discussion of improving the national workplace relations framework, particularly in the context of changes to the global economy and contemporary work practices.

The most recent review of the *Fair Work Act 2009* (Cth) (FW Act) undertaken in 2011/12 by a three member review panel⁶ found that the current workplace relations framework is fundamentally sound. The review panel found that the fair work legislation is operating broadly as intended and the effects of the fair work legislation have been broadly consistent with the objects set out in section 3 of the FW Act.⁷

Most of the amendments recommended by that review have been implemented.

A core objective in establishing a national workplace relations system was to remove complexity and duplication and to ensure that Australian workers and employers were subject to consistent workplace laws irrespective of geographic location or type of business.

Prior to the introduction of the fair work laws, workers and employers had to consider often highly complex legal definitions while assessing their rights and obligations.

Any return to a system where workers and employers face different minimum standards depending on where they work, the size or location of their business or the sector within which they work represents a significant step backwards.

The Government of South Australia considers that a national workplace relations framework should establish

- a safety net of minimum standards that apply to all workers and employers;
- an institutional framework for the administration of the workplace laws which includes an independent tribunal, a regulator with strong compliance and enforcement powers and an industrial court;
- a framework for collective bargaining,
- a framework dealing with general protections such as freedom of association, protection from discrimination, unlawful termination and sham contracting arrangements;
- clear rules about right of entry and industrial action; and
- protection against unfair dismissal.

Part One of this submission considers how the current framework is operating, assesses whether it delivers on the fundamental workplace relations principles in practice, and analyses the core elements of the framework. It also makes some suggestions for improvement.

Part Two of the submission deals specifically with questions raised in the Inquiry's Issues Papers.

The Government of South Australia reserves its right to make further submission as the Inquiry progresses.

⁶ Dr John Edwards, Professor Emeritus Ron McCallum AO and the Hon Michael Moore

⁷ *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (2012)

PART ONE

General comments on the workplace relations framework

The Government of South Australia continues to support a national workplace relations framework that is built on the fundamental workplace relations principles provided for in Part 1-3, Division 2A, section 30B(9) of the *Fair Work Act 2009* (Cth) (the FW Act). It is crucial that the framework continues to reflect those principles into the future.

The Government of South Australia considers that the FW Act continues to meet its key object provided for in section 3:

“to provide a balanced framework for co-operative and productive workplace relations that promotes national economic prosperity and social inclusion for all”.

It also considers that the current framework provides the flexibility for employers and workers to deal with changing economic conditions and work patterns.

The Safety Net

South Australia referred industrial relations powers on the basis that the national workplace relations framework would provide for a strong, simple and enforceable safety net of minimum employment standards. Currently that safety net is established through

- the National Employment Standards
- modern awards; and
- a national minimum wage

It is the strong view of the Government of South Australia that this safety net should be maintained and that there should be no capacity to undermine it.

National Employment Standards

The Government of South Australia supports the continuation of the National Employment Standards (NES). The following comments are provided for the Productivity Commission’s consideration.

- ***Requests for Flexible Working Arrangements (Part 2-2, Division 4)***

The Government of South Australia notes that the right to request flexible working arrangements (RTR) under the FW Act has been expanded to a much broader range of employees, including carers. However, there still appears to be a lack of awareness of this right.

The Government of South Australia was an industry partner in two evaluations⁸ conducted by the Centre for Work and Life at the University of South Australia, which compared national data from the Australian Work and Life Index (AWALI) with the numbers of requests in Australia for flexible working arrangements in 2009, 2012 and 2014.

In 2012, more than two years after its introduction, the majority of employees (69.8%) surveyed were not aware of their right to request flexible working arrangements⁹. In 2014, the majority of employees (57.4%) surveyed were still not aware of this right.¹⁰

Additionally, the percentage of surveyed employees making requests for flexible work arrangements stayed relatively constant at approximately 20% from 2009 to 2014¹¹. A majority of requests for flexible working arrangements in 2012 (61.9 per cent) were approved, which is comparable to 2009 (68.8 per cent), prior to the implementation of the RTR.¹² The majority of requests in 2014 (64.3 per cent) were also approved.¹³

The General Manager, Fair Work Australia (FWA), employee survey 2012 (FWA Survey)¹⁴ found that a majority of employees surveyed (52%) were not aware of the RTR.¹⁵ Further, it found that five per cent of employers surveyed reported that a request for flexible working arrangements had been received since 1 January 2010.¹⁶ Ninety one per cent of employers granted requests without variation.¹⁷

Decisions to reject requests for flexible working arrangements under the NES are not subject to review by an independent body. The Government of South Australia suggests that an independent body, such as Fair Work Australia, could provide conciliation in right to request disputes and manage procedural breaches. The New Zealand *Employment Relations (Flexible Working Arrangements) Amendment Act 2007* provides a useful model for providing appeal rights against procedural breaches in relation to requests for flexible working arrangements.

⁸ Natalie Skinner and Barbara Pocock, *The Persistent Challenge: Living, Working and Caring in Australia in 2014*, Centre for Work and Life, University of South Australia

Natalie Skinner, Claire Hutchison and Barbara Pocock, *The Big Squeeze: Work, Home and Care in 2012*, Centre for Work and Life, University of South Australia

⁹ Natalie Skinner, Claire Hutchison and Barbara Pocock, *The Big Squeeze: Work, Home and Care in 2012*, Centre for Work and Life, University of South Australia, page 61

¹⁰ Natalie Skinner and Barbara Pocock, *The Persistent Challenge: Living, Working and Caring in Australia in 2014*, Centre for Work and Life, University of South Australia, page 39

¹¹ Ibid, page 40

¹² Natalie Skinner, Claire Hutchison and Barbara Pocock, *The Big Squeeze: Work, Home and Care in 2012*, Centre for Work and Life, University of South Australia, page 72

¹³ Natalie Skinner and Barbara Pocock, *The Persistent Challenge: Living, Working and Caring in Australia in 2014*, Centre for Work and Life, University of South Australia, page 46

¹⁴ Bernadette O'Neill, *General Manager's report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave 2009–2012*, November 2012

¹⁵ Ibid, page 30

¹⁶ Ibid, page 34

¹⁷ Ibid, page 47

- ***Long Service Leave (Part 2-2, Division 9)***

The objective of establishing a nationally harmonised long service leave (LSL) NES has not been achieved. The Government of South Australia continues to be supportive of the concept of nationally consistent long service leave entitlements, provided that they do not involve a reduction in the basic entitlements provided in the South Australian legislation.

The current NES was intended to be a transitional arrangement until an agreed national standard could be achieved. Part- 2-2, Division 9 continues to preserve the long service leave entitlements of pre-modernised awards and certain agreements. The Government of South Australia has consistently recommended that the LSL NES should be simplified to reference each state and territory's LSL legislation (in the case of South Australia, the *Long Service Leave Act 1987* (SA) and the *Construction Industry Long Service Act 1987* (SA)). This would remove the current complexity and ensure that employers only need to manage a single set of long service leave obligations in each jurisdiction.

- ***Fair Work Information Statement (Part 2-2, Division 12)***

The Fair Work Information Statement has been recognised as a valuable resource for workers when they first take up employment. It is particularly important for vulnerable workers, including young workers who are new to the workforce.

The Government of South Australia notes that the Fair Work Review Panel in 2012, recognised the value of workers improving their knowledge of their wages and conditions under the FW Act when weighing the merits of providing the Fair Work Information Statement to new employees against the associated costs for employers: “*the benefits of improving employees’ understanding of their rights under the FW Act clearly outweigh these costs.*”¹⁸

The Government of South Australia suggests that the statement could be improved by requiring it to provide specific information on the applicable modern award and/or collective agreement covering the worker and the applicable rate of pay under that award/agreement.

Minimum Wages

The Government of South Australia considers that the setting of a national minimum wage and statutory arrangements for determining increases to the minimum award wage and award wages in general, should remain as a key fundamental principle in any workplace relations framework.

It continues to support a minimum wage system that involves an ‘independent umpire’ in determining increases to minimum wages with an award system that operates within a framework of statutory minimum conditions of employment.

¹⁸ Australian Government “*Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*” (2012), page 104

The current model of a minimum wage fixing system that considers the views of a wide range of stakeholders and makes increases to minimum wages that are:

- fair but moderate - by being broadly in line with inflation and cognisant of economic conditions; and
- predictable - by being awarded annually with a reasonable period of notice prior to the date of effect.

is working well and it ensures that minimum wages (and conditions) in modern awards are maintained at a level where they provide not only a relevant safety net for agreement free employees, but continue to act as a relevant benchmark to underpin enterprise bargaining.

Failure to regularly adjust minimum wages (and conditions) would render the safety net irrelevant, both as a benchmark for bargaining, and as a minimum standard.

There also appears to be no definitive empirical research that disputes the notion that employment growth can coexist with moderate increases in minimum wages. In fact, a fair and decent minimum wage is seen to provide adequate employment incentives and opportunities for people to engage in work, particularly those who are currently unemployed.

The Government of South Australia notes the comments of Bray¹⁹ (ANU Research Fellow) where he stresses the importance of maintaining a minimum wage as part of a coherent set of economic and social policies:

- It provides protection against exploitation for particularly vulnerable groups in the community, especially those with very poor bargaining power and information asymmetries, including barriers such as poor English language skills.
- When set at or below the market equilibrium it can have positive impacts on employment in the face of the presence of monopsonies.
- A minimum wage provides an important benchmark in the setting of rates of income support. (That is, in the absence of a minimum wage there is no 'floor' to the wages and hence any potential rate at which income support is provided may be higher than wages.)
- To the extent in work benefits are provided by government it controls the ability of employers to exploit these by cutting wages.

Recently released Australian Bureau of Statistics (ABS) data from the Employee Earning and Hours (EEH) survey²⁰ provides the latest estimates of the number of employees that are award reliant. The ABS classifies employees as 'award only' if they are paid at the rate of pay specified in the award, and are not paid more than that rate of pay.

The EEH survey data indicates that 18.8% of Australia's workforce (1,860,700 out of 9,898,900 employees) are classified as award only with a higher ratio of 21% in the private sector.

¹⁹ Bray, JB. 2013, *Reflections on the Evolution of the Minimum Wage in Australia: Options for the Future*, Research School of Economics, Australian National University

²⁰ ABS, Catalogue no. 6306.0 - *Employee Earnings and Hours (EEH)*, Australia, May 2014

In South Australia, 15.8% of employees are paid award only.²¹ This is down more than 4% from the previous EEH survey²², which could be attributed to a 4.5% increase²³ (43.0% to 47.5%) for those that are paid in accordance with a Collective Agreement.

Further to this data, the 2013 Award Reliance Research Report²⁴ (the Report) examined award reliance in the non-public sector. This report defines 'award reliance' consistent with the 'award only' category featured in the ABS EEH survey.

The Report found that 22% of South Australian non-public sector employees and 19% nationally were award reliant i.e. had their pay set at exactly the award rate²⁵.

Both sets of data highlights that a significant amount of Australians rely on the minimum wages provided by awards.

Of further significance, the Report revealed that modern awards are used as the basis for setting rates of pay for far more employees than just low-wage employees on minimum rates. In addition, the use of modern awards to guide pay-setting decisions is not narrowly confined to just the award-reliant organisations and their employees. More than one-third (36%) of Australia's non-public sector organisations, that were not award-reliant, still referred to pay rates in awards as a benchmark despite not paying any of their employees at exactly the award rate. Also, 30% of award-reliant organisations, still passed on annual wage review increases to their over-award employees.

The recently released *Australian Workplace Relations Study – First Findings Report*, shows that almost two-thirds (64.7%) of enterprises reported using an award-based method of setting pay for at least one employee in their business. Award-based includes arrangements where the award is used as a guide for pay setting or pay is set at exactly the award rate.

The ABS and other research data demonstrates the reliance on and acceptance that many employers have for the minimum wage decision making processes used by the Expert Panel of the FWC.

Within this context, the Government of South Australia also rejects the concept of different wage outcomes based upon particular circumstances in each industry or region. A core objective in establishing a national workplace relations system was to remove complexity and duplication and to ensure that Australian workers and employers were subject to consistent workplace laws irrespective of geographic location or size of business.

Within this context, the Government of South Australia notes the comments of the Productivity Commission where it highlights that the doctrine of 'equal pay for work of equal value' has been embedded in Australia since the mid-1970s (Issues Paper 2, page 2). This is a fundamental principle that should not be undermined.

²¹ ABS, Catalogue no. 6306.0 - *EEH, Australia, May 2014*

²² ABS, Catalogue no. 6306.0 - *EEH, Australia, May 2012*

²³ ABS, Catalogue no. 6306.0 - *EEH, Australia, May 2014*

²⁴ Wright S and Buchanan J (2013) *Award reliance*, Research Report 6/2013, Fair Work Commission

²⁵ Ibid

The Modern Award System

The Government of South Australia considers that the current modern award system is operating well.

The modern award system has been established with the flexibility to evolve as working environments change over time.

A legislative system where workers and employers, through their representatives, work with an independent tribunal to set appropriate conditions remains an efficient way of regulating workplace relations in this country.

The Government of South Australia notes that the industrial parties are well placed to raise any issues or concerns with the current system and any recommendations for improvement in its day to day operations.

Penalty Rates

The modern award system provides statutory minimum conditions of employment for specific industries and occupations that have been established by the relevant industrial parties and the 'independent umpire' through negotiation, conciliation and, if required, arbitration. These conditions include penalty rates.

Penalty rates supplement base wage rates and they are an important component of the income of award-reliant workers. Many of these workers are the lower paid and use the opportunity to work for penalty rates to top up their wages to a reasonable level.

The content of most Modern Awards (including penalty rates in several awards) is currently being dealt with by the 4-Yearly Review of Modern Awards. The Government of South Australia considers that this Review and future considerations of award matters by the FWC remains the appropriate mechanism for determining the basic conditions of employment for an industry or occupation group. This system has proven capable of adapting to changing operating environments over many years.

The Government of South Australia reinforces its support for the payment of penalty rates as contemplated by the modern award objective (section 134 of the FW Act) to provide suitable remuneration for those working overtime or working unsociable, irregular or unpredictable hours.

Individual Flexibility Arrangements

The Government of South Australia notes the proposed amendments in the *Fair Work Amendment Bill 2014* (the Bill) regarding individual flexibility arrangements (IFA). It is particularly concerned that the addition of a note at the end of subsection 144(4) which states

that benefits other than an entitlement to a payment of money may be taken into account for the purposes of paragraph (c) (the better off overall test) could negatively impact some workers.

A significant issue for employees would be ascertaining if they will in fact be better off overall when offered a particular non-monetary benefit instead of a monetary benefit under an IFA. The amendments will require workers to sign that they have agreed to the fact that they are better off as a result of the IFA and this will provide a defence to employers if there is a challenge to the IFA. Compounding these concerns is the fact that there is no independent scrutiny of IFAs when they are made to ensure that they pass the better off overall test.

The Bill's explanatory memorandum suggests that the Bill responds to recommendations from the Post-Implementation Review of the *Fair Work Act*. Significantly, however, that review made it clear that it would only recommend non-monetary benefits as part of IFAs if *'the value of the monetary benefit foregone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate'*.²⁶

IFAs have the potential to provide increased flexibility to workers and employers to meet the changing needs of the modern workplace. However, it is important that the system of entering into IFAs is transparent and fair and that IFAs are not used to undermine the safety net of conditions contained in the NES, modern awards and the minimum wage.

The Institutional Framework

The Government of South Australia considers that the Fair Work Commission, the Fair Work Ombudsman and the Fair Work Division of the Federal Circuit Court are fulfilling important roles in providing the institutional framework to support the national workplace relations system. It maintains its view that the Fair Work Ombudsman should be the regulator for all workplaces and that separate regulators should not be established to deal with specific industries.

The Collective Bargaining Framework

The Government of South Australia reinforces its support for collective bargaining with no provision for individual statutory agreements as a fundamental cornerstone of any workplace relations framework. It considers that the current system of collective bargaining is working well in that it provides, promotes and encourages an enterprise bargaining environment for the industrial parties to negotiate enterprise agreements in good faith that equitably balance the increased productivity needs of employers with reasonable increases in employee's wages and conditions.

It notes that the industrial parties will be able to offer specific detailed views on the day to day operation of these provisions and any suggested areas of improvement.

²⁶ Australian Government *"Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation"* (2012), page 22

General Protections

The Government of South Australia remains supportive of the provisions dealing with adverse action contained in Part 3-1 of the FW Act and their broad application and considers that they are crucial to the promotion of fairness and representation at work. They should remain as an integral part of any national workplace relations scheme.

Anti-bullying Laws – A New Addition to the Workplace Relations Framework

Anti-bullying provisions were introduced into the FW Act in January 2014 (sections 789FA – 789FI).

The introduction of anti-bullying provisions into the fair work legislation came about as a result of a Commonwealth House of Representatives Standing Committee on Education and Employment (the Committee) national inquiry into workplace bullying.

The national inquiry provided an opportunity for all jurisdictions to look at the way workplace bullying is addressed and whether improvements could be made to the system of laws that operated nationally and at a jurisdictional level.

The Government of South Australia and South Australia's work health and safety regulator, SafeWork SA provided submissions to the national inquiry.

The Government of South Australia's submission identified a legislative gap within the context of affording protection to the classes of workers who are most vulnerable to becoming victims of workplace bullying. In particular, it identified that further protection needed to be afforded to the young workers who are the most susceptible to experiencing bullying at their workplaces.

The anti-bullying provisions of the FW Act go a long way to addressing this legislative gap.

The anti-bullying provisions of the FW Act allow a worker in a constitutionally-covered business who reasonably believes that he or she has been bullied at work to apply to the FWC for an order to stop the bullying.

Under the FW Act's anti-bullying protections, a constitutionally-covered business includes:

- a constitutional corporation;
- the Commonwealth;
- a Commonwealth authority;
- a body corporate incorporated in a Territory; or
- a business or undertaking that is conducted principally in a Territory.

South Australia supports the additional level of protection offered to workers of constitutionally covered businesses by the FW Act's anti-bullying laws.

Workplace bullying is also covered under individual jurisdictions' work health and safety (WHS) laws. Under the model WHS legislation (which is in operation in most states and territories) a person conducting a business or undertaking (PCBU) has the primary duty of care pursuant to section 19 of the model Work Health and Safety Act (the WHS Act) to ensure, so far as is reasonably practicable, that workers are not exposed to health and safety risks arising from the conduct of the business or undertaking.

The WHS Act defines 'health' as meaning physical and psychological health, and is supported by guidance material prepared at a national level by Safe Work Australia. This includes a *Guide on Preventing and Responding to Workplace Bullying*, which provides information for PCBUs on how to manage the risks of workplace bullying as part of meeting their duties under the work health and safety laws; and *Dealing with Workplace Bullying - a Worker's Guide*, which is designed to help workers determine if workplace bullying is occurring and how the matter may be resolved.

SafeWork SA responds to workplace bullying complaints under the *Work Health and Safety Act 2012* (SA). Between 4 December 2012 and 4 December 2013, prior to the introduction of the anti-bullying provisions in the FW Act, SafeWork SA received approximately 144 bullying complaints. Very few complaints were made by workers who were still employed in the workplace where the alleged bullying occurred (anecdotally, less than 5%).

In 2014, following the introduction of the FW Act anti-bullying provision, SafeWork SA received approximately 105 complaints relating to bullying. If the nature of the complaint is deemed to meet the requirements of the FW Act, complainants are encouraged to lodge an application with the FWC for an order to stop bullying.

South Australia notes that some stakeholders view the existing arrangements as confusing, complex for workers and employers alike and duplicative with other measures, including other legislation that targets bullying. Others note that the FW Act provisions only apply to constitutional corporations and this adds to the confusion. Arguably these provisions should apply to all workers in the national workplace relations system.

One way to reduce complexity would be to broaden the scope of the anti-bullying provisions by using the definition of 'national system employee' and 'national system employer', as provided in sections 13 and 14 of the FW Act to ensure that those workers who are in the national workplace relations system as a result of state referrals can also access these anti-bullying protections.

This would ensure that workers and employers would not have to undertake complex legal assessments to work out if they are covered by the anti-bullying legislation.

Protection against Unfair Dismissal

Part 3.2 of the *FW Act 2009* (Cth) (the FW Act) provides the framework for dealing with unfair dismissal. This framework includes establishing when a person is protected from unfair dismissal, outlining the elements that make up an unfair dismissal, the remedies available and the procedural aspects for those remedies.

The framework includes provisions covering:

- applicant eligibility criteria
- a time limit to make an application
- application fee
- voluntary and informal conciliation prior to conferences or hearings
- cost orders against either or both parties and their representatives
- initial matters to consider before the merits of the case are considered
- appeal process.

The *Fair Work Amendment Act 2012* was enacted to address concerns outlined in the Review of the FW Act 2010 including:

- expanding the eligibility criteria
- the concept of 'go away' money
- vexatious and frivolous complaints
- time limit for applying.

The amendments extended the time limit for making applications from 14 days to 21 days and expanded the Fair Work Commission's (FWC) powers to dismiss applications and to make orders against a party for costs incurred by another party, including the applicant and their representatives.

These amendments were designed to better balance the right of an employee to bring an unfair dismissal claim against the right of an employer to only be required to respond to genuine claims, and to ensure that Fair Work Australia (now the Fair Work Commission) has the power to deal with unreasonable conduct in relation to a claim²⁷.

The Government of South Australia would not support any further limits on the eligibility criteria for workers making a claim of unfair dismissal particularly any changes that limit eligibility by the number of workers employed by a business as was seen under the Work Choices legislation.

The Government of South Australia supports:

- access to the tribunal where conciliation has not resolved the case
- the current time limits
- the current eligibility criteria.

²⁷ Fair Work Amendment Bill 2012, Second Reading Speech

Right of Entry and Industrial Action

Right of Entry

The Government of South Australia continues to support union officials having the right to enter a workplace for industrial purposes, and considers that the existing rights of entry provisions in Part 3-4 of the FW Act sufficiently balance the interests of employees and employers.

The existing framework provides a sufficient level of regulation and there are adequate statutory processes and penalties in place to deal with any disputes that may arise about the exercise or purported exercise of a right of entry.

While the FW Act does not create the right of entry for WHS purposes, section 494 of the *FW Act* provides special conditions for exercising union right of entry under a 'state or territory occupational health and safety law'. These conditions predominantly mirror those contained in the national model Work Health and Safety Act.

The duplication of right of entry provisions across two different pieces of legislation is unnecessary and creates confusion particularly as most states and territories are operating under harmonised WHS laws which were enacted since the FW Act came into operation. As such, the Government of South Australia suggests that Part 3-4, Division 3 is a duplication of right of entry procedures under state WHS laws and recommends that it be removed.

The Government of South Australia also submits that regulation of right of entry provisions should be the same for all industries.

It is understood that when the *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014* (the Code) commences, it will set out the standard of workplace relations conduct expected from contractors who perform Australian Government funded building work. The re-established Australian Building and Construction Commission will be responsible for administering the Code, including regulation of right of entry provisions.

This separation of regulation across workers and industries has the potential to not only create further confusion in this area, but may result in disputes being treated, and provisions applied, differently, leading to inconsistent outcomes.

Industrial Action

In its submission to the 2012 Post-Implementation Review of the FW Act, the Government of South Australia raised concerns about the use of employer response actions (lockouts) during disputes in the context of enterprise bargaining.

In 2011, Qantas made the decision to lock out its employees (resulting in the entire Qantas mainline fleet being grounded) in response to a series of disputes between the airline and a number of trade unions during bargaining for new enterprise agreements. Following an application by the then Federal Minister for Workplace Relations, Fair Work Australia (as the

Fair Work Commission was then known), terminated the industrial action on 31 October 2011 pursuant to section 424 of the FW Act:

In this case the primary consideration, however, as required by s.424(1), is the effect of the protected action on the wider aviation and tourism industries. We have decided that in the particular circumstances of this case, which on the evidence include the particular vulnerability of the tourism industry to uncertainty, suspension will not provide sufficient protection against the risk of significant damage to the tourism industry and aviation in particular ... For these reasons we have decided to terminate protected industrial action in relation to each of the proposed enterprise agreements immediately.²⁸

Section 424 of the FW Act allows for the suspension or termination of protected industrial action where there is a threat to cause significant damage to the Australian economy or an important part of it.

Any amendments that may be considered regarding industrial action should enhance the capacity for genuine good faith bargaining. The Government of South Australia suggests that section 424 be reviewed to consider the issue of 'self-inflicted' economic damage, particularly in the broader context of encouraging good faith bargaining.

Other Workplace Relations Issues

Interaction with State and Territory Laws

South Australia's referral of certain industrial relations powers to the Commonwealth was predicated on the understanding that certain key elements would be maintained in the state jurisdiction, including:

- the local government sector and the South Australian public sector, including prescribed Government Business Enterprises (GBEs); and
- currently certain state-based laws would be excluded from the coverage of the FW Act, as provided by section 27.

Under South Australia's current referral arrangements, South Australia's private sector workforce is part of the national workplace relations system and therefore covered by the FW Act, while the local government sector and the South Australian public sector, including prescribed Government Business Enterprises (GBEs), remain part of the South Australian industrial relations system and are covered by the *Fair Work Act 1994* (SA).

The South Australian Government supports this current arrangement, noting that in South Australia the referral has addressed any overlap of federal and state workplace relations laws, and rectified any uncertainty associated with coverage for the private sector, local government and state-owned corporations.

²⁸ *Minister of Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWA FB 7444

In particular, the South Australian Government notes that the principal objectives of delivering a uniform national workplace relations system were to achieve nationally consistent workplace relations laws for the private sector, to reduce complexity and duplication and to provide certainty of coverage to private sector employers and workers; but also recognised the rights of states to manage their own workforces in the manner that they chose, and specifically allowed states to exclude public sector and local government employees from the scope of the national system.

- ***Non-Excluded Matters***

Where the FW Act applies to a national system employer, it generally does so to the exclusion of State and Territory industrial laws. However, this is subject to certain exceptions, as provided by section 27 of the FW Act. Hence, state and territory laws on non-excluded matters, such as WHS, training matters, workers compensation, discrimination, outworkers, child labour and the declaration, prescription or substitution of public holidays apply to national system employers and employees otherwise covered by the FW Act. Further, section 29 provides that where a state or territory law covers a non-excluded matter, that law will generally prevail over anything contrary in a federal award or enterprise agreement.

Under South Australia's *Training and Skills Development Act 2008* grievances and disputes between apprentices / trainees and employers are heard by the Industrial Relations Commission of South Australia which has proven to be a very efficient and effective body for dispute resolution. In addition, the Training and Skills Commission (the Commission), Training Advocate or a person authorised by the Commission or Training Advocate has the right to enter and inspect employer premises, question any person in relation to the employment of an apprentice/trainee and require the production of any record or document required to be kept under the state training legislation. These powers support the effective regulation of apprenticeship and traineeship in South Australia.

The Government of South Australia submits that this arrangement should be retained as it continues to provide certainty and clarity for both employers and employees about industrial matters that are within the scope of the FW Act and those industrial matters that are covered by state or territory laws.

As noted above, one area that does require further clarification is the duplication of right of entry provisions for WHS purposes in the FW Act and the WHS Act. South Australia submits that right of entry for WHS purposes should be dealt with under state and territory WHS legislation, rather than under the FW Act.

The Government of South Australia also notes that in the last FW Act Review, conducted in 2011/12, the Panel recommended that section 130 of the FW Act should be amended to provide that employees do not accrue annual leave while absent from work and in receipt of workers' compensation payments. In response to the Panel's recommendation, the Australian Government has introduced a proposed amendment to the FW Act to remove section 130(2) so

that an employee cannot take or accrue any type of leave while he or she is absent from work and is receiving workers' compensation²⁹. The Government of South Australia strongly opposes this proposal as its implementation would negatively impact on some of the most vulnerable people in our communities while overriding South Australia's new return to work laws³⁰. Further, it creates jurisdictional confusion and undermines the principal that workers compensation laws are a non-excluded matter under the FW Act, and therefore should only be covered by state or territory laws.

- **Public Holidays**

Historically, public holidays have been created by state and territory laws and in conjunction with industrial instruments the observance of those days have been regulated by providing employees' entitlements to time off (paid or unpaid), or rights to penalty rates to compensate employees who worked on public holidays. Traditionally, the flexibility of the award system enabled those rights to be tailored to accommodate the different working patterns experienced by particular occupational groups.

The FW Act, which legislates for a minimum standard relating to public holidays, has confirmed that the state's role is now limited to identifying public holidays to be observed in addition to, or in substitute for, those days already listed in FW Act, under the NES public holiday minimum standard³¹. Any obligations and entitlements, including entitlements to penalty rates of pay on public holidays are now determined by federal modern awards and enterprise agreements, at least to the extent that they affect the rights and entitlements of national system employers and employees. South Australia supports this arrangement as it continues to allow the states and territories to create public holidays on days, or part-days, of particular cultural, religious, historical or social significance to their local communities.

Within this context, in 2012, the Government of South Australia, through the *Statutes Amendment (Shop Trading and Holidays) Act 2012 (SA)*, amended the *Holidays Act 1910 (SA)* to create two part-day public holidays from 7:00 pm to 12 midnight on Christmas Eve and New Year's Eve, in recognition that these times of the year have special community significance. The creation of part-day public holidays and the associated link to the NES means that workers in South Australia are able to access their industrial entitlements on those part days³².

The NES public holiday standard allows employees to reasonably refuse to work on a public holiday³³ and guarantees that an employer must pay the base rate of pay for employee's ordinary hours of work if an employee is absent from work because of a public holiday. Alternatively, if the worker chooses to work, he or she will be entitled to public holiday penalty rates as per the applicable award or enterprise agreement.

²⁹ Clause 5, *Fair Work Amendment Bill 2014 (Cth)*

³⁰ Section 50(2), *Return to Work Act 2014 (SA)*

³¹ Section 27(2), *Fair Work Act 2009 (Cth)*

³² It is noted that state industrial relations system employees are also entitled to public holiday penalty rates at these times as per the applicable state award or enterprise agreement.

³³ Section 114, *Fair Work Act 2009 (Cth)*

Critically, the NES provides that in addition to the eight public holidays listed in section 115 of the FW Act, the meaning of public holiday includes any day, or part-day, declared or prescribed by or under a State or Territory law, other than a day or part-day excluded by the FW Regulations³⁴.

Part-day public holidays are observed across a number of jurisdictions, including South Australia, and regional New South Wales. It is important that the NES continues to refer to those public holidays and part day public holidays that are legislated through state laws.

Similarly, South Australia does not support the recommendation put forward in the last review of the FW Act, which recommended that the number of public holidays on which workers receive penalty rates should be limited to a national standard of eleven days. This would negatively impact on the industrial entitlements of South Australian workers, with the greatest impact on low paid workers. Public holidays are celebrations of significant days and workers required to work at these special times deserve to be remunerated accordingly.

Employer Exclusions from the National System

During the development of the FW Act the Australian Government recognised that certain entities are integral to state, territory and local government administration and thus agreed that the employment relationships of these entities may be more appropriately regulated by states and territories. Accordingly, Part 1-2, Division 3, section 14(2) of the FW Act allows for a state or territory to declare that an employer is not a national system employer. A written endorsement by the Minister administering the FW Act must then be issued for the exclusion to take effect (section 14(4)(a)).

Certainty of jurisdictional coverage is essential for employers and employees. Yet the current endorsement process for exclusion has the potential to create situations where a new entity meets the criteria for exclusion but cannot operate outside of the national workplace relations system until the Commonwealth Minister administering the FW Act has provided endorsement. South Australia's experience has shown that this process can be lengthy, involving considerable consultation and paperwork between the Commonwealth and various state Government departments.

This issue was previously raised in the South Australian Government's submission to the *Post-Implementation Review of the Fair Work Act 2009 (Cth)* but has not yet been addressed. The Government of South Australia proposes that the exclusion process be simplified by amending the FW Act to reverse the onus regarding exclusion. It is suggested that the requirement for a Commonwealth Ministerial endorsement be substituted with a provision which allows the Commonwealth Minister to reject a state or territory exclusion within a specified time period. This arrangement would reduce the time required for exclusions and would provide greater certainty of coverage to employers establishing new entities which meet the exclusion criteria.

³⁴ Section 115(1)(b), *Fair Work Act 2009 (Cth)*

PART TWO

The Government of South Australia's response to the specific questions raised in the Inquiry's Issue Papers.

Note: The Government of South Australia recognises that the industrial parties and other interested groups will be better placed to answer some of the specific questions raised in the Issues Papers. Therefore, it has not provided answers to all of the questions raised.

Issues Paper 1: The Inquiry in Context

1.1 Scope and aim of the inquiry

The Productivity Commission's task is to assess the performance of the national workplace relations framework and the need for any changes to it, taking into account Australian's future needs and the merits of possible changes. There may well be significant trends, other than those outlined above, that affect the desirable evolution of the WR system. The Commission welcomes views on these. (Page 5)

The Government of South Australia emphasises its support for the current national workplace relations system. As mentioned in Part 1 (Page 5) of its submission, the Government of South Australia considers that the *Fair Work 2009* (FW Act) continues to meet the key object of the Act provided for in section 3:

"to provide a balanced framework for co-operative and productive workplace relations that promotes national economic prosperity and social inclusion for all".

Additionally, the Government of South Australia believes that the current national workplace relations framework ensures that there is a consistent system for all Australians, regarding rights, responsibilities, and pay structures.

The Government of South Australia is opposed to any changes to the national workplace relations framework that compromise the fundamental workplace relations principles under the FW Act. As such the Government of South Australia opposes:

- a system where employers or employees have the option to 'opt out' of the standards provided in the FW Act, and negotiate their own pay and conditions – this is likely to lead to significant imbalances in negotiation power between workers and employers, as well as the potential to create incentives to employ certain sectors of the community over others;
- a system where young workers receive less than the legislated minimum wage for their age;
- where sectors can apply for exemptions from penalty rates; and
- a starting out wage policy that would have the effect of making 16 and 17 year olds on the starting out wage cheaper to employ than most 18 and 19 year olds on the adult minimum wage.

1.2 The stated objectives of Australia's workplace relations system

The Commission encourages stakeholders to give their views on the appropriate objectives of the WR system, how these can be balanced and their capacity to adapt to future structural change and global economic trends. (Pages 7-8)

The Government of South Australia considers the fundamental workplace relations principles which provide the foundation of the current workplace relations framework remain valid within any discussion of improving the framework, particularly in the context of changes to the global economy and contemporary work practices.

The Government of South Australia further considers that the objectives of the current workplace relations system are appropriately diverse, and by providing sufficient flexibility for employers and adequate protection for employees, the current framework offers an appropriate balance to have the capacity to adapt to future structural change and global economic trends. Any changes to the framework need to ensure that the system continues to operate fairly and sustainably and continue to reflect the principles.

1.3 The historical context: how the WR system evolved seems important

Given the weight of history in shaping Australia's current arrangements and its divergence from systems in some other developed countries, a useful question for participants is whether the current system is well suited to contemporary (and evolving) workplace needs for Australia in an increasingly globalised economy. It may be that overseas experiences will guide us. However, it appears there is no single template workplace relations model globally that we can emulate, although the Commission would welcome analysis drawing on the experience of other countries. (Page 10)

See 1.2 above, the current system works well for the Australian context

1.4 What might need to change?

Others paint a more positive picture

The Commission invites participants to submit proposals they consider would improve the operation of the WR system together with supporting evidence and argument. (Pages 14-15)

Throughout this submission, suggestions have been made for improvements. See particularly the discussion of the NES at pages 5-7.

1.5 The Commission's approach

Considerations for assessing policy proposals

The Commission welcomes evidence-based submissions that offer guidance on policy or practical changes to the WR system that improve the wellbeing of the Australian community as a whole — using the above or alternative objectives as the basis for participants' views. (Page 16)

See 1.4 above.

What are the biggest risks from changing the present WR system and how could these be moderated or avoided? What are the likely transitional costs associated with worthwhile reforms? (Page 16)

One of the biggest risks of making significant changes to the current WR system would be the ongoing 'change fatigue' for the many businesses that have had to cope with the high volume of legislative change to labour laws since the 1970s, most significantly over the last ten years.

The basis for South Australia's participation in the national system achieved the key public policy objective of providing certainty for all South Australians regarding their rights and responsibilities in the workplace.

There have been many benefits for South Australians resulting from the referral of industrial relations powers including:

- Businesses no longer have to deal with complex jurisdictional questions about which system of industrial relations they are operating in.
- A streamlined national system has resulted in significant red tape reductions by eliminating regulatory overlap, which has likely lead to greater business and administrative efficiency.
- A single set of general industrial relations laws for the private sector has had a positive impact on employers and employees generally, but particularly on small business, young workers, women, employees with a disability, workers in regional areas, indigenous Australians and workers from culturally and linguistically diverse backgrounds. These were the groups identified by numerous research projects and inquiries to be the most adversely affected by the former Work Choices legislation.

From a national perspective, the FW Act and the referral of industrial relations powers for the private sector (and in some cases public and/or local government sector) by all States except Western Australia has meant that a large majority of the nation's workforce are covered by one set of industrial relations laws for the first time in Australian industrial relations history.

The introduction of the FW Act still required transitional arrangements, particularly relating to employment conditions in modern awards, however this was a necessary inconvenience for bringing the new national system together in a fair and appropriate manner. Those transitional

arrangements have now ceased therefore a large majority of Australian businesses are operating under one system regardless of borders.

The Government of South Australia echoes the views of the two-year review of the FW Act³⁵ which concluded that the current workplace relations framework is fundamentally sound and that the fair work legislation is operating broadly as intended. The recent comments of Professor Creighton³⁶ are also worth noting:

There is nothing inappropriate in Governments legislating to give effect to their policy agenda – however misguided that agenda may be. What I do suggest, however, is that too many of the changes to our labour laws, especially since the early 1970s, are the product of one or more of:

- *an unthinking assumption that most, if not all, 'problems' in the industrial context can be 'solved' by the enactment of legislation;*
- *demands for short-term solutions to short term problems, without there first being an informed evaluation of whether there really is a 'problem', and of whether it can be dealt with by existing means; and*
- *political opportunism, where governments introduce legislation which they well-know will have little or no practical effect, but which enables the government concerned to claim to have honoured an electoral commitment and/or to have 'done something' about a particular problem.*

Issues Paper 2: Safety Nets

2.2 The Federal minimum wage

What is the appropriate role of minimum wages?

The Commission seeks feedback on the advantages and disadvantages of different approaches for comparing minimum wages across countries, and how such results should be interpreted. (Pages 5-6)

The relevance of much of the research and studies relating to minimum wages across different countries and using them for comparative purposes should be viewed with caution. These are generally directed to the effects of increasing a single minimum wage in circumstances which are quite different to those which characterise the Australian industrial relations systems, including the range of minimum rates at various levels throughout the award system.

³⁵ *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (2012)

³⁶ "Why Can't 'They' Leave Our Labour Laws Alone?" Professor Breen Creighton, RMIT University: Phillipa Weeks Lecture, ANU, October 15, 2014

However, factual data does inform us that countries with the lowest minimum wages currently have the highest unemployment whereas countries with higher minimum wages such as Australia, New Zealand and the Netherlands have relatively low unemployment comparatively.

What is the rationale for the minimum wage in contemporary Australia? How effective is the minimum wage in meeting that rationale? To what degree will the role and effects of the minimum wage change with likely future economic and demographic developments? (Page 6)

See pages 7-9 of submission.

How many people receive the minimum wage (and for how long)? What is the best measure of this share and why? (Page 6)

Recently released Australian Workplace Relations Study (AWRS) data³⁷ indicates that only 0.2% of employees nationally are paid the National Minimum Wage (NMW).

This figure is so low because many low-paid workers are paid the minimum award rate for the classification of work they are performing. These are the approximately one-fifth of the Australian workforce that are deemed to be award-reliant. These workers still rely on the annual review to increase the NMW because that increase “flows on” to rates of pay in modern awards.

The Fair Work Commission’s Expert Panel has consistently stated that an understanding of award reliance is essential to the minimum-wage setting process.

This was again confirmed in the 2013-14 Annual Wage Review decision when the Panel stated:

*“In meeting the requirement to set a level of award wages that is fair and relevant, we must also take into account the relative standard of living of those who are paid award rates. This requirement encompasses all of the award reliant, including those on the highest award classification rates.”*³⁸

Recently released Australian Bureau of Statistics (ABS) data from the Employee Earning and Hours (EEH) survey³⁹ provides the latest estimates of the number of employees that are award reliant. The ABS classifies employees as ‘award only’ if they are paid at the rate of pay specified in the award, and are not paid more than that rate of pay.

In Australia, 18.8% of all employees (1,860,700 out of 9,898,900 employees) are classified as award only.⁴⁰ This compares with 16.1% from the previous ABS survey.⁴¹ Employees paid

³⁷ AWRS2014, Employee Relations Survey and Enterprise Characteristics survey

³⁸ [2014] FWCFB 3500, at para. 393

³⁹ ABS, Catalogue no. 6306.0 - *Employee Earnings and Hours (EEH)*, Australia, May 2014

⁴⁰ Ibid

⁴¹ ABS, Catalogue no. 6306.0 – *EEH*, Australia, May 2012

award only made up 21.0% of employees in the private sector and 9.5% of employees in the public sector.

In South Australia, 15.8% of employees are paid award only.⁴² This is down more than 4% from the previous EEH survey⁴³, which could be attributed to a 4.5% increase⁴⁴ (43.0% to 47.5%) for those that are paid in accordance with a Collective Agreement.

Further to this data, the 2013 Award Reliance Research Report⁴⁵ (the Report) examined award reliance in the non-public sector. This report defines 'award reliance' consistent with the 'award only' category featured in the ABS EEH survey.

The Report found that 22% of South Australian non-public sector employees and 19% nationally were award reliant i.e. had their pay set at exactly the award rate⁴⁶.

Both sets of data highlights that a significant amount of Australians rely on the minimum wages provided by awards.

What are the effects of minimum wages on different households, taking account of direct and indirect wage and price effects, and the tax and social transfer system? (Page 6)

See pages 7-9 of submission.

Are there any issues associated with the special minimum wage rate arrangements that apply to juniors, trainees and apprentices? (Page 6)

The current minimum wage arrangements that apply to juniors, trainees and apprentices either through the National Minimum Wage Order and modern awards is considered to be satisfactory as a minimum safety net.

However, the Government of South Australia supports the removal of restrictions to competency-based wage and training progression from modern awards.

⁴² ABS, Catalogue no. 6306.0 - EEH, Australia, May 2014

⁴³ ABS, Catalogue no. 6306.0 - EEH, Australia, May 2012

⁴⁴ ABS, Catalogue no. 6306.0 - EEH, Australia, May 2014

⁴⁵ Wright S and Buchanan J (2013) *Award reliance*, Research Report 6/2013, Fair Work Commission

⁴⁶ Ibid

What would be the best process for setting the minimum wage, and how (and why) does this vary from the decision-making processes used by the minimum wage Expert Panel of the Fair Work Commission? Are there grounds to vary the criteria used by the Panel? Should the ratio of the minimum wage to median wages change and, if so, in which direction? (Page 6)

The Government of South Australia confirms its satisfaction with the current minimum wage setting system and criteria used by the Expert Panel.

Should there be a process to allow the minimum wage to vary by state and territory or region? If so, on what basis? What would be the effects of such variations at the borders between states or regions? What would be the overall impacts? (Page 6)

The Government of South Australia has been consistent in its view for over a decade that a minimum wage safety net should reflect community standards for decent work, should maintain the real value of minimum wages and address the increasing earnings inequality of the low paid. It maintains that the Fair Work Commission is largely achieving this objective by delivering fair and reasonable wage outcomes for business and employees since its inception in 2009.

South Australia does not support lower minimum wages based on geographic location.

2.3 National Employment Standards

What, if any, particular features of the NES should be changed? (Page 10)

Fair Work Information Statement

As mentioned in Part 1 (page 7) of the South Australian Government submission, the South Australian Government suggests that particular attention should be given to widening the scope of Part 2-2, Division 12 (Fair Work Information Statement) of the Fair Work Act 2009 (FW Act) to include guidance on the applicable modern award for an employee and their rate of pay under that award. Further detail about this recommendation is provided in Part 1 (page 7).

Long Service Leave (LSL)

As detailed in Part 1 (page 7) of the South Australian Government submission, the South Australian Government suggests that the NES providing for LSL (Part 2-2, Division 9 of the FW Act) should be simplified to reference each state and territory's LSL legislation (in the case of South Australia, the *Long Service Leave Act 1987 (SA)* and the *Construction Industry Long Service Act 1987(SA)*). Further detail about this recommendation is provided in Part 1 (page 7).

2.5 Penalty rates

It should also be recognised that there is already some in-principle flexibility under the modern awards system (and enterprise agreements) for employees and employers to negotiate individual agreements that alter penalty and overtime rates in exchange for other benefits (so long as the employee is better off overall). The Commission is interested in participants' views on the advantages and limitations of such (or other existing) approaches, and whether there could be alternative approaches that are superior. Actual and illustrative case studies involving time-based payments would be helpful. (Page 15)

The South Australian Government has consistently raised concerns about the ability of employers to provide non-monetary benefits to workers in exchange for their giving up legislated minimum monetary entitlements.

What changes, if any, should be made to the modern awards objective in relation to remuneration for non-standard hours of working? (Page 16)

The Government of South Australia reaffirms its support for the penalty rates structure as contemplated by the modern awards objective at section 134 of the FW Act.

What are the long-run effects of penalty rates on consumers and on the prices of goods and services? (Page 16)

The Report into the impact of the introduction of part-day public holidays in South Australia⁴⁷ stated that anecdotal reports included in survey data supplied by Restaurant and Catering SA and the Australian Hotels Association suggest that most businesses opted not to impose an additional surcharge on their consumers, suggesting that this form of impact was small.

Penalty rates have been a feature of all award systems for many years and the prices of good and services set by business will continue to be determined whilst taking into account the cost of running the business, which includes the costs of wages.

To what extent does working on weekends or holidays affect families, employees and the community? Are penalty rates effective at addressing any concerns in this area? (Page 16)

The part-day public holiday report⁴⁸ indicated that 78% of respondents strongly agreed that those working on the two part-day public holidays should be paid penalty rates, and 74% strongly agreed that they should have the right to refuse to work if asked by their employer. This highlights strong community sentiment for workers to be compensated for working at times that are considered unsociable or that impact on a workers ability to engage with family or the community.

⁴⁷ The SA Centre for Economic Studies, *Review of Changes to Holidays Act 1910*; March 2013

⁴⁸ Ibid

Issues Paper 3: The Bargaining Framework

3.1 Bargaining and industrial disputes

An 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. (Page 1)

The Government of South Australia considers that there is adequate flexibility in the current system. It reinforces that a workplace relations system should have a solid foundation of collective bargaining with no provision for individual statutory agreements.

3.2 Types of enterprise bargaining and their key processes

Would there be any advantages or disadvantages to employee groups negotiating a joint agreement with both the labour hire agency and the host business? (Page 3)

Anything that increases worker representation and clarity of wages and conditions would be a positive development.

3.2 Types of enterprise bargaining and their key processes

Restrictions on agreement content

The Commission seeks views from stakeholders about what aspects of the employee/union-employer relationship should be permitted matters under enterprise agreements, and how it would be practically possible to address in legislation any deficiencies from either the employer, employee or union perspective. (Page 4)

The Government of South Australia supports the principle that parties to an enterprise agreement should have the flexibility to include a broad range of matters relevant to their particular workplace.

3.2 Types of enterprise bargaining and their key processes

Requirement to consider productivity improvements

The Commission seeks feedback on practical options in this area, and why they are needed within the current bargaining process. In particular, why are there not already sufficient commercial incentives (and competitive pressures) for parties to improve productivity, either as a commitment under an enterprise agreement or during the normal operation of the enterprise? (Page 6)

There are a number of initiatives to further promote enterprise bargaining.

In 2012 the Fair Work Act Review Panel, in its report, *towards a more productive and equitable workplaces – an evaluation of the Fair Work legislation*⁴⁹, did not recommend any changes to the FW Act, but offered the following recommendation:

The Panel recommends that the role of the Commission institutions be extended to include the active encouragement of more productive workplaces. This activity may, for example, take the form of identifying best-practice productivity enhancing provisions in agreements and making them more widely known to employers and unions, encouraging the development and adoption of model workplace productivity enhancing provisions in agreements, and disseminating information on workplace productivity enhancement through conferences and workshops. The Panel does not consider that amendments to the FW Act are required to implement this recommendation.

Following the publication of this recommendation the Fair Work Commission (Commission) and other institutions have:

- Assisted employers and employees with the production of agreement making guides and bench books to help the parties with the bargaining an approval processes.
- Provided workplace briefings and information by Commission members.
- Facilitated research on agreement making.

3.2 Types of enterprise bargaining and their key processes

Individual Flexibility Arrangements

Are the enforcement arrangements for ensuring IFAs meet the FWA efficient and effective? If not, what are the remedies? (Page 9)

Significantly, there is no scrutiny/formal review of IFAs.

See pages 10-11 of the submission.

⁴⁹ Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation, presented 15 June 2012

3.3 When enterprise bargaining disputes lead to industrial action

Are policy changes for industrial disputes needed?

Given the low current level of disputes, it is an open question whether there is any requirement for changes in the FWA's arrangements for industrial disputes, but the Commission is interested in:

- any appropriate changes to what constitutes protected industrial action under the FWA*
- arrangements that might practically avoid industrial disputes*
- the scope and desirability of creating more graduated options for industrial action beyond lock-outs for employers. Would options like this assist negotiation or increase disputation?*
- whether there are any problems in determining whether tactics in bargaining really amount to industrial action or not*
- any need to change the protected action ballot process*
- the role of the FWC in relation to disputes, especially in relation to cooling off periods and the test that determines whether such a period is justified*
- the prevalence of 'aborted strikes' (the capacity to withdraw notice of industrial action) as a negotiating tool, and the degree to which there is any practical response to this apart from the good faith bargaining requirements of the FWA*
- the degree to which adversarial workplace cultures — rather than bargaining per se — contribute to industrial action, and what could be done to address this*
- the adequacy of enforcement arrangements for disputes*
- the reasons for international variations in industrial action*
- data about the nature of disputes, such as lock-outs and go-slows (as ABS data is limited in its categorisation of disputes)*
- the degree to which working days lost provide an accurate reflection of industrial action.*

(Page 13)

Refer to pages 15-16 of Part One of this submission.

Issues Paper 4: Employee Protections

4.2 Unfair dismissal

Do Australia's unfair dismissal processes achieve their purpose, and if not, what reforms should be adopted, including alternatives (or complements) to unfair dismissal provisions? (Page 3)

The FW Act unfair dismissal laws achieve a reasonable balance between the needs of the business and the needs of the employee. While there were concerns raised by business including those relating to the eligibility criteria, the concept of 'go away' money, vexatious and frivolous complaints and the time limit for applying these were addressed through amendments to the FW Act in 2012. The current data from FWC suggest that the unfair dismissal processes are working well.

Are the tests used by the FWC appropriate for determining whether conduct is unfair, and if not, what would be a workable test? Are the exemptions to unfair dismissal appropriate, and if not, how should they be adapted? (Page 3)

SafeWork SA considers the current provisions outlined in the FW Act and supported by the Small Business Fair Dismissal Code to determine whether a dismissal was unfair are appropriate.

What are the strengths and weaknesses of the Small Business Fair Dismissal Code, and how, if at all, should the Australian Government amend it? Should the employment threshold be maintained, raised or lowered? (Page 3)

The Small Business Fair Dismissal Code (the Code) was developed to support small business comply with their obligations under the FW Act. The Code is a summary of the provisions of the FW Act relevant to small business and includes guidance on what evidence may be required. The Code is adequate in its current form. The Government of South Australia does not support any further limitations on the eligibility criteria for accessing unfair dismissal applications.

A Code Checklist has also been developed to assist small business employers to assess and record their reasons for dismissing an employee. Although the checklist does not mean that the Code has been complied with it can be provided to the FWC as evidence. Where a small business (as defined in the FW Act) employer has complied with the Code a dismissal will be deemed fair.

The employment threshold should be maintained.

In cases where employers are required to pay compensation in lieu of reinstatement, are the current arrangements for a cap on these payments suitable? (Page 3)

As the majority of compensation payments are below \$10000 the data indicates that the current arrangements for a cap on payments is suitable.

The Fair Work Commission Unfair Dismissal Outcomes report 1 July 2013-30 June 2014 (the Outcomes Report) shows that 43% of all applications granted were awarded compensation to the value of less than \$10000; 13% between \$10000 and \$20000; 11% between \$20000 and \$40000; and 5% the maximum amount of \$40000.

Under current or previous arrangements, what evidence is there of the practice of ‘go away money’? Have recent changes, such as those that provide the FWC with expanded powers in relation to costs orders and dismissing applications based on unreasonable behaviour, improved matters? (Page 3)

Cost order provisions have potentially reduced the number of vexatious or frivolous claims.

The Outcomes Report shows that 79% of applications are settled at conciliation with 17% involving only a monetary settlement; 18% a non-monetary settlement only; and 43% a monetary and non-monetary settlement. It should be noted that the data for monetary settlements does not distinguish between the payment of outstanding entitlements and the payment of compensation as part of the settlement.

To reduce the number of ineligible claims proceeding to conciliation, advice from the FWC Registry staff is that it introduced new processes in 2013 including to undertake a general assessment on receipt of a claim and, if appropriate, contact the applicant. If the applicant chooses to proceed the Registry staff may submit a jurisdictional objection. In these cases the application will usually be allocated to a Member for assessment before, rather than after, conciliation.

The Outcomes Report shows that only 16% of applications were granted while 84% were dismissed because the dismissal was found to be fair (15%); an objection was upheld (31%); or other reasons including that the application was frivolous or vexatious or has no reasonable prospect of success (ss. 399A and 587 of the FW Act) (38%).

4.3 Anti-bullying laws — a new addition to the WR framework

To what extent are the anti-bullying provisions of the FWA substitutes for, or complements to, state and federal WHS laws and other provisions of the FWA? What implications do overlaps have for the current arrangements? (Page 5)

South Australia supports the *Fair Work Act 2009* (FW Act) anti-bullying provisions and the immediacy with which the Fair Work Commission (FW Commission) deals with workplace bullying applications.

There is reasonably clear jurisdictional (and operational) distinction between the FW Act (and the FW Commission) and the *Work Health and Safety Act 2012* (SA) (WHS Act) (and SafeWork SA).

SafeWork SA, as the regulator of work health and safety matters in South Australia, deals with allegations of workplace bullying in the context of psychological health and in the context of ensuring compliance with the work health and safety laws, particularly section 19 of the WHS Act – Primary duty of care, whether the worker remains in employment or not.

The FW Commission only deals with applications from workers while they are still employed (in the place where the alleged bullying has been occurring). The FW Commission issues stop bullying orders; however it cannot issue fines or penalties and cannot award financial compensation while the WHS Act makes provisions for imposing penalties for a breach of the WHS Act.

SafeWork SA receives the vast majority of workplace bullying claims through its Help Centre.

The Help Centre's public interactions in relation to bullying complaints include:

- gathering information from the complainant about the nature of the allegations
- discussing whether the allegations meet the definition of workplace bullying and possible actions the person can take
- making the complainant aware of the Fair Work Commission's anti-bullying jurisdiction in circumstances where the employee is in employment in a constitutionally covered business; and
- providing the claimant with information including application forms, website locations and publications.

All matters that fall within SafeWork SA's jurisdiction are referred to its investigation unit for further action.

Activities may include: a case conference; phone calls; worksite visits and evidence collection; and the provision of advice, briefing and information.

In 2014 SafeWork SA dealt with 105 case files involving workplace bullying.

In 2013 SafeWork SA dealt with 144 complaints.

What, if any changes, should occur to the anti-bullying provisions of the FWA or in the processes used to address claims and to communicate with businesses and employees about the measures? (Page 5)

See comments on pages 12-13 relating to the definitions used in the anti-bullying provisions of the FW Act.

Issues Paper 5: Other Workplace Relations Issues

5.5 Public sector workplace relations

How should WR arrangements in state and public services (and any relevant state-owned enterprises) be regulated? In particular, to what extent and why, should WR provisions vary with the public or private status of an enterprise? (Page 9)

Historically, workplace relations is a field in which there has been a long history of interaction between federal and state laws, mainly over the extent to which federal law can regulate areas that have traditionally been subject to state industrial relations regulation.

Prior to 2010, the overlap of federal and state workplace relations legislation created significant jurisdictional and legal uncertainty for employers and employees, as a result of the use of section 51(xx) of the Australian Constitution, commonly referred to as the ‘corporations power’. The corporations power allows the Commonwealth to regulate all employers that are trading, financial or foreign corporations, or that operate in a Territory, as well as its own agencies. One of the primary objectives of the FW System was to rectify any uncertainty associated with coverage for the private sector through state referrals of power.

South Australia’s referral was based on the understanding that it would retain coverage of the local government sector and the South Australian public sector, including Government Business Enterprises (GBEs) except those operating in areas where national competition policy applies.

This decision was made following comprehensive consultation with key stakeholders, including employer representatives, the Local Government Association of SA (LGA), and unions, which showed that a critical issue for all sectors was that South Australia’s participation in the national system would result in jurisdictional certainty for employers and employees.

In addition, there were legal reasons to retain the South Australian public sector within a continuing state system; these are associated with the interaction between State and Commonwealth laws. In particular, for constitutional reasons, Commonwealth laws cannot apply to senior officers in the public service or employees involved in the Parliamentary or law processes.

5.6 Alternative forms of employment

Independent contractors and labour hire

- Sham Contracts

To the extent that the current provisions are insufficient, what changes could be made to strengthen the Act? (Page 12)

State industrial laws traditionally ‘deemed’ certain types of workers to be employees eg outworkers, owner drivers etc. There was also in some states the capacity to deal with unfair contracts.

In what industries is sham contracting most prevalent? Have instances of sham contracting become more or less common over time? How much of sham contracting is deliberate rather than mistaken? (Page 12)

The Fair Work Ombudsman report into sham contracting⁵⁰ indicated that sham contracting was common in the cleaning industry and hair and beauty industries.

5.7 Other elements of the WR framework

Right of entry

Do the existing rights of entry laws sufficiently balance the interests of employees and employers, and if not, what are the appropriate reforms? (Page 15)

As noted in the most recent FW Act Review, a key policy objective of the FW Act was to ‘give effect to important workplace rights that are essential to a functioning democracy’ including ‘the right to representation, information and consultation in the workplace’. These principles are also reflected in the objects of the FW Act which refer to ‘enabling fairness and representation at work’⁵¹.

One of the main motivations for enabling greater rights to union representation in the workplace was to ensure a better balance between the interests of employees to meet with representatives and the rights of employers to conduct their business operations without disruption. This reflected the fact that under the pre 2010 legislation right of entry provisions were considered to have significantly restricted the rights of employees to be represented in the workplace by limiting the circumstances in which right of entry could be exercised, particularly in relation to right of entry for discussion purposes.

As discussed on page 15 of this submission, the Government of South Australia considers that the existing rights of entry provisions in the FW Act sufficiently balance the interests of employees and employers.

5.7 Other elements of the WR framework

Long service leave

If a uniform national standard for long service leave was to be adopted, how should the existing disparities between state and territory laws be resolved? (Page 16)

The South Australian government submits that any national standard for LSL that is adopted, should adopt the entitlement provisions under the *Long Service Leave Act 1987* (SA) (LSL Act).

⁵⁰ Fair Work Ombudsman, *Sham contracting and the misclassification of workers in the cleaning services, hair and beauty and call centre industries*, November 2011

⁵¹ Section 3, *Fair Work Act 2009* (Cth)

The LSL Act provides the most generous basic entitlement of all States relating to LSL (13 weeks paid leave after 10 years of service).

Further, the arrangements facilitated by the *Construction Industry Long Service Leave Act 1987* (SA) (which provides for the same basic entitlement as the LSL Act but is based upon industry rather than single employer service) should be accommodated in any future national standard.