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Productivity Commission Inquiry into the Workplace Relations Framework

18 September 2015



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Chamber of Commerce
and Industry

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Summary of Recommendations

Structural reform before institutional reform

The Australian Chamber maintains that reforms of significance to the framework are the priority. The aim must be to reign in confusion arising from the complexity of the current system and reduce reliance on third party interventions in workplace relationships. Creating a framework that achieves this would obviously impact on the role of the Fair Work Commission and the way in which it would be required to exercise its powers. The nature of its subsequent response would guide the extent to which further institutional reform should be pursued.

Public Holiday Substitution

The Australian Chamber recommends that the National Employment Standards be amended to enable an employer and an employee to agree to substitute a public holiday for an alternative day.

Public Holidays and Penalty Rates

The Australian Chamber recommends that the National Employment Standards be amended so that employers are not required to pay for leave or any additional penalty rates for public holidays determined by state and territory Governments with a view to moving toward a nationally consistent maximum number of public holidays. The Australian Chamber recommends that penalty rates in awards for working public holidays in industries that customarily trade on public holidays be reformed.

Preliminary screening processes for unfair dismissal claims

The Australian Chamber agrees that the Australian Government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal cases 'on the papers', prior to the commencement of conciliation; or, alternatively, introduce more merit focused conciliation processes.

Greater access to costs orders and higher filing fees will also help to deter frivolous and vexatious claims lacking in merit.

Changes to unfair dismissal laws to support substance over process

The Australian Government should change the unfair dismissal regime by:

- Making a valid reason a complete defence to an unfair dismissal claim, such that procedural defects in carrying out the termination should not be considered once a valid reason is found.
- Making a complete defence available if an employee was dismissed for the dominant purpose of complying with laws relating to discrimination, sexual harassment, bullying, WHS or any other relevant federal, state or territory law.
- Exempting employers where they are able to establish that the employee's employment was terminated for genuine operational reasons. If this is not accepted, the existing requirement for an employer to consider alternative positions across "associated entities" as part of a "genuine redundancy" should be removed.

Removal of reinstatement as the primary remedy

The Australian Chamber agrees that the Australian Government should remove the emphasis on reinstatement as the primary goal of the unfair dismissal provisions in the *Fair Work Act 2009* (Cth). While reinstatement should remain among the suite of remedies, it should only be ordered if the employer consents.

Small Business Unfair Dismissal Exemption

The Australian Chamber maintains the position that the Australian Government should amend the *Fair Work Act 2009* (Cth) to provide an exemption from the unfair dismissal laws for businesses employing less than 20 employees with casuals engaged on a regular and systematic basis and employees employed by associated entities to be included in the headcount.

Repeal of General Protections Regime

The Australian Chamber maintains the position that Australian Government should repeal the general protections laws and reinstate the pre-*Fair Work Act 2009* (Cth) freedom of association protections and unlawful termination provisions.

Cap on damages for general protections claims, exclusion of frivolous and vexatious claims and collection of more information

The Australian Chamber supports the following draft recommendations of the Productivity Commission as interim measures pending substantive reform:

- The Australian Government should introduce a cap on compensation for claims lodged

under Part 3-1 of the *Fair Work Act 2009* (Cth).

- The Australian Government should amend Part 3-1 of the *Fair Work Act 2009* (Cth) to introduce exclusions for complaints that are frivolous and vexatious.
- The Australian Government should amend Schedule 5.2 of the *Fair Work Regulations 2009* (Cth) to require the Fair Work Commission to report more information about general protections matters. Adequate resourcing should be provided to the Fair Work Commission to improve its data collection and processes in this area.

Reframing the objects of minimum wage setting

The Australian Chamber recommends that the objects underpinning minimum wage setting be reframed to better take into consideration the broad range of stakeholders impacted by minimum wage setting decisions including the unemployed, underemployed, small business employers, young people and those who are most vulnerable in the labour market.

This is consistent with the Australian Chamber's previously expressed view that the process of minimum wage setting should provide a genuine safety net which is appropriately balanced.

Variations in award wages in exceptional circumstances

The Australian Chamber agrees that the Australian Government should amend the *Fair Work Act 2009* (Cth) so that the Fair Work Commission is empowered to make temporary variations in the awards in exceptional circumstances after an annual wage review has been completed.

Review of apprentice and traineeship arrangements

The Australian Chamber agrees that the Australian Government should commission a comprehensive review into Australia's apprenticeship and traineeship arrangements. The review should include, but not be limited to, an assessment of:

- the role of the current system within the broader set of arrangements for skill formation;
- the structure of awards for apprentices and trainees, including junior and adult training wages and the adoption of competency-based pay progression;
- the factors that affect the supply and demand for apprenticeships and traineeships, including the appropriate design and level of government, employer and employee incentives.

Rationalisation of award content in transitioning to a simple safety net of minimum standards

The Australian Chamber maintains that there is a strong case for the rationalisation and redesign of the current system to make it more appropriate for application by small business. This should include reframing the objects of modern awards to ensure that they do not exist as a barrier to the efficient structuring of working arrangements at the workplace level, penalty rate reform and the rationalisation of award content with a view to moving toward codification of minimum standards that are non-prescriptive and easy to understand and which apply as a foundation for agreement making.

Penalty rate reform

The Australian Chamber supports the Productivity Commission recommendation that Sunday penalty rates for cafes, hospitality, entertainment, restaurants and retailing be aligned with Saturday rates as an interim measure.

The long term object of the system should be to move toward an environment where wages and conditions are overwhelmingly set by workplace bargaining, either collectively or individually, underpinned by a sustainable and effective safety of minimum wages and conditions.

In working toward this longer term policy objective the objects of the *Fair Work Act 2009* (Cth) and awards should be reframed to require special consideration of the need to ensure that penalty rates applying to businesses that ordinarily trade during non-standard times (such as evenings, weekends and public holidays) do not negatively impact employment opportunities in those sectors.

Preferred hours clauses

The Australian Chamber supports the inclusion of preferred hours clauses in awards and agreements and recommends express clarification within the *Fair Work Act 2009* (Cth) that non-monetary benefits and voluntary/preferred hours arrangements can pass any test underpinning agreements.

Substance over procedure in agreement making

The Australian Chamber agrees that the Australian Government should amend Division 4 of Part 2-4 of the *Fair Work Act 2009* (Cth) to:

- allow the Fair Work Commission wider discretion to approve an agreement without amendment or undertaking as long as it is satisfied that the employees were not likely to have been placed at a disadvantage because of the unmet requirement;
- extend the scope of this discretion to include any unmet requirements or defects relating to the issuing or content of a notice of employee representational rights.

Requirement to discuss productivity

The Australian Chamber supports the amendments proposed within the *Fair Work (Bargaining Processes) Bill 2014* which includes the needs to discuss productivity improvements during bargaining and maintains its position that applicants for a protected action ballot must be required to demonstrate that they are meeting all Good Faith Bargaining obligations.

Broadening the scope of Individual Flexibility Arrangements

The Australian Chamber agrees that the Australian Government should amend s. 203 of the *Fair Work Act 2009* (Cth) to require enterprise flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in the model flexibility term, along with any additional matters agreed by the parties. Enterprise agreements should not be able to restrict the terms of individual flexibility arrangements.

Extension of enterprise agreement terms and enhancement to greenfields agreement making

The Australian Chamber agrees that the Government should amend s. 186(5) of the *Fair Work Act 2009* (Cth) to allow an enterprise agreement to specify a nominal expiry date that:

- can be up to five years after the day on which the Fair Work Commission approves the agreement, or
- matches the life of a greenfields project.

The Australian Chamber also supports the Productivity Commission's draft recommendations which seek to address circumstances where negotiations for a greenfields agreement have not been completed within three months and implement a requirement for parties to bargain in good faith.

However beyond these changes, employers should also have the ability to implement employer- employee greenfields agreements as a part of a full suite of bargaining options.

Replacement of the ‘Better Off Overall Test’ with a global no-disadvantage test

The Australian Chamber supports the principle of reintroducing a global no-disadvantage test to replace the ‘Better Off Overall Test’.

However the Australian Chamber maintains the view that the modern awards exist as an overly complex, prescriptive and costly foundation for bargaining. In the longer term, assessment of agreements against a reformed safety net comprised of legislated minimum standards and award rates of pay would provide a more suitable, flexible and sustainable platform for small business bargaining.

Removal of the default position of the union as bargaining representative

Part 2-4 of the *Fair Work Act 2009* (Cth) should be amended to remove unions being a “default” bargaining representative and union officials should not be allowed to be appointed in person unless their employing union has constitutional coverage of the work under the proposed enterprise agreement.

Enhancements to Individual Flexibility Arrangements

The Australian Chamber supports the extension of the maximum term of an individual flexibility arrangement and assessment of the arrangement against a new ‘no-disadvantage test’

Reintroduction of a full suite of agreement making options

The Australian Chamber recommends the reintroduction of statutory individual agreements to promote greater choice and flexibility among a full suite of agreement options, including:

- Registered individual agreements;
- Employer-employee enterprise agreements;
- Employer-union enterprise agreements;
- Employer greenfield enterprise agreements;
- Employer-union greenfield enterprise agreements.

Prevention of ‘strike first bargain later’ tactics

The Australian Chamber agrees that the Australian Government should amend s. 443 of the *Fair Work Act 2009* (Cth), clarifying that the Fair Work Commission should only grant a protected action ballot order to employees once it is satisfied that enterprise bargaining has commenced, either by mutual consent or by a Majority Support Determination.

Addressing aborted industrial action

The Australian Chamber agrees that:

- The Australian Government should amend the *Fair Work Act 2009* (Cth) so that where a group of employees have withdrawn notice of industrial action, employers that have implemented a reasonable contingency plan in response to the notice of industrial action may stand down the relevant employees, without pay, for the duration of the employer’s contingency response.
- The Australian Government should amend the *Fair Work Act 2009* (Cth) to grant the Fair Work Commission the discretion to withhold a protected action ballot order for up to 90 days, where it is satisfied that the group of employees has previously used repeated withdrawals of protected action, without the agreement of the employer, as an industrial tactic.

Suspending and terminating industrial action

The Australian Chamber agrees that the Australian Government should amend s. 423(2) of the *Fair Work Act 2009* (Cth) such that the Fair Work Commission may suspend or terminate industrial action where it is causing, or threatening to cause, significant economic harm to the employer **or** the employees who will be covered by the agreement, rather than both parties (as is currently the case).

Further changes should be considered to lower the bar to the taking of protected industrial action given that the meaning of ‘significant economic harm’ has been construed to mean that such action can only be ceased in extreme circumstances.

Increasing penalties for unlawful industrial action

The Australian Government should increase the maximum ceiling of penalties for unlawful industrial action to a level that allows federal law courts the discretion to impose penalties that can better reflect the high costs that such actions can inflict on employers and the community.

Restoring balance to right of entry laws

The Australian Chamber recommends that the provisions providing for right of entry be amended so that they reflect the pre-*Fair Work Act 2009* (Cth) rules and restrictions. The position of the Australian Chamber is that right of entry entitlements should be limited to those rights contained within statute.

Prohibition of terms that restrict the engagement of independent contractors, labour hire and casual worker or regulate their engagement

The Australian Chamber agrees that terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the *Fair Work Act 2009* (Cth).

Reinstate former longstanding transfer of business provisions

The Australian Chamber recommends that the existing transfer of business rules should be re-aligned with the former longstanding provisions under the *Workplace Relations Act 1996* (Cth) and there should be a maximum time limit for transferring industrial instruments.

Secondary Boycotts

The Australian Chamber maintains its position in relation to secondary boycotts as set out in its submission to the Competition Policy Review Panel.

The Australian Chamber submits that the secondary boycott provisions should remain in the *Competition and Consumer Act 2010* (Cth) as the penalties associated with non-compliance and the breadth of the ACCC's powers likely serves as a necessary deterrent for unions contemplating secondary boycotts.

The Australian Chamber also maintains the view that:

- the secondary boycott provisions are overly complex and can be simplified;
- the ACCC needs to strengthen its approach to enforcement;
- the Fair Work Building and Construction or Australian Building and Construction Commission should have shared jurisdiction to enforce these matters.

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1 Introduction

The Australian Chamber of Commerce and Industry (Australian Chamber) made detailed submissions to the Productivity Commission inquiry into the workplace relations framework in March 2015. We were guided by the Productivity Commission's statement that its task involved going "*beyond evaluating the current system to consider the type of system that might best suit the Australian community over the longer term*".¹

The Australian Chamber supports several statements of principles in the Productivity Commission's draft report (Draft Report). However, we believe that many recommendations could have gone further.

For example, the Australian Chamber endorses the following principles articulated by the Productivity Commission:

- "The *Fair Work Act 2009* (Cth) and sometimes the FWC can give too much weight to procedure and too little to substance, leading to compliance costs and, in some cases, poor outcomes";²
- It is not only the direct participants in the system who have a stake in it. For example, "...the choices of people to become self-employed are strongly influenced by the alternative wages and conditions that they could receive by being an employee. There are also more than 700 000 unemployed whose job prospects are affected by the system..."³
- "People are confused by the system, and some parties that should have a bigger voice in it – consumers, the unemployed and underemployed – have marginal influence. There are unquestionable inefficiencies, remnant unfairness, some mischief and absurd anachronisms....In this messy context, there is an understandable tendency to imagine that there must be a much neater and coherent system, and that it would be desirable to start with a clean slate."⁴

The Australian Chamber disagrees with the Productivity Commission's conclusion that:

*Despite sometimes significant problems and an assortment of peculiarities, Australia's workplace relations system is not systemically dysfunctional. It needs repair not replacement.*⁵

The Australian Chamber believes there are aspects of the system requiring more fundamental reform and supports the statement of Productivity Commission Chairman Peter Harris in a speech to CEDA on 14 August 2015:

That is not to say that we would start from here, if we were designing a workplace relations system. We would not.

In our initial submission, the Australian Chamber emphasised that we cannot simply look at what we have but must instead look for what we need. In advocating this, the Australian Chamber does

¹ Issues Paper 1: Context, p.2.

² Productivity Commission, *Workplace Relations Framework, Draft Report*, August 2015, p. 3 (hereafter cited as 'Draft Report').

³ *ibid*, p. 6.

⁴ *ibid*, p. 8.

⁵ *ibid*, p. 45.

not seek a completely deregulated system. The inclusion of employee protections and a safety net of terms and conditions of employment are supported.

However the system is unnecessarily adversarial. This detracts from the reality that the system's stakeholders share aims that underpin national prosperity and living standards.

The Productivity Commission has stated:

*An improved workplace framework must involve decision making that is not unnecessarily beholden to precedent or to dated labour market structures. It must rely much more on evidence as a basis for its future direction, including information on the relevance of new developments in labour relations.*⁶

The Australian Chamber agrees, but it is reasonable to query and “re-investigate” prevailing views⁷ rather than simply assuming the past is innocent unless found guilty.⁸ The Productivity Commission has recognised the wisdom of this approach. Aspects of the system that contribute to the inefficiency, unfairness and absurdity ought not be preserved simply because they have always been there.

The Productivity Commission observed that:

*In its roughly 900 pages, the Fair Work Act covers most aspects of the way in which parties should deal with each other in their employment relations, and in setting a variety of minimum standards. An extensive body of common law sits beside the statutory framework.*⁹

The workplace relations framework is overly complex. This inquiry has presented an opportunity to consider the extent to which aspects of the system impose on the relationship between employee and employer. Any recommendation to continue such an aspect should depend on the extent that such imposition is proven to be necessary and effective.

The Australian Chamber is encouraged that many of our suggested reforms have been reflected in draft recommendations. As to the draft recommendations:

- We support the recommendation that Sunday **penalty rates** for cafes, hospitality, entertainment, restaurants and retailing be aligned with Saturday rates.
- We are pleased the Productivity Commission has identified areas where the system could be more flexible. This includes incorporating award terms that permit an employer and employees to agree to **substitute a public holiday** for an alternative day and exploring the use of **preferred hours clauses**.
- The proposals to make bargaining more accessible for small businesses, including by addressing problems associated with **Individual Flexibility Agreements** made under the current laws are welcome.
- We support the **reintroduction** of a global **no-disadvantage test** to replace the ‘Better Off Overall Test’.

⁶ Draft Report, p. 5.

⁷ *ibid*, p. 144.

⁸ *ibid*, p. 11.

⁹ *ibid*, p. 8.

- We endorse the exploration of a new type of **Enterprise Contract** because it could offer a viable alternative for SMEs, provided it is not layered with prescription and compliance obligations.
- We welcome recommendations to limit the capacity of agreements to restrict the use of **flexible forms of labour**, which the Productivity Commission has noted are in spirit contrary to competition laws.
- There are sensible changes dealing with industrial action, including the **prevention of ‘strike first bargain later’ tactics, harsher penalties for unlawful industrial action** (commensurate with the significant damage it causes to the enterprise concerned and the broader economy) and **stand downs** in cases of aborted action.
- The recommended shift in focus to **substance over process** in key areas such as **unfair dismissal claims and enterprise agreement making** is sensible and entirely justifiable. This answers key concerns raised by the Australian Chamber and we are pleased that many of our suggested reforms for the unfair dismissal laws are in the draft recommendations.
- The recommended **cap on damages for the general protections regime** is supported but our objection to the existence of the regime remains.

The Australian Chamber believes that aspects of the system still need to be challenged, including:

- The continuation of **modern awards** in their current form. The creation of a Minimum Standards Division within the Fair Work Commission and suggestion that it review and vary awards has merit, but the Australian Chamber advocates a simplified and more flexible safety net achieved via a period of transition. In the interim, changes to the legislative framework will be required to underpin its functioning. For example, the Australian Chamber strongly supports broader penalty rate reform that includes other industries and public holidays however the framework must provide an effective mechanism for such reform.
- The principles underpinning **minimum wage setting**. Minimum wages must function as a genuine safety net that includes consideration of the interests of the unemployed and underemployed.
- The absence of an **unfair dismissal exemption** for small business. The Australian Chamber will continue to advocate for an exemption from the unfair dismissal laws for SMEs with fewer than 20 employees because there must be greater encouragement to hire our youth, unskilled workers and long-term unemployed.
- The **general protections laws**, which are overly broad, confusing and duplicative, should be repealed and the pre-*Fair Work Act 2009* (Cth) freedom of association protections and unlawful termination provisions restored.
- The regulation of **workplace bullying** in the workplace relations framework. Workplace bullying must be condemned and prevented but there is already a work health and safety regulatory regime in place to respond to workplace bullying. Repealing the additional, overlapping workplace relations regime will remove complexity and confusion.
- The **absence of bargaining options** within the framework. The option of an enterprise contract is worth exploring but must be part of a **broad suite of agreement making**

options that include individual statutory agreements, employer-employee enterprise agreements and employer greenfield agreements.

- The **right of entry** rules. A return to the 2007 rules is required.
- The **standards underpinning a global no-disadvantage test** must be rationalised. In particular, common standards should be reflected in legislated minimum standards and to the extent that awards are to continue to apply, they should be limited to industry specific content and should not address matters contained within legislated minimum standards.

In summary, the Australian Chamber believes Australia must continue to strive for “*the type of system that might best suit the Australian community over the longer term*”.¹⁰ Despite the absence of some of our fundamental reform proposals from the recommendations, we have not abandoned them. The Australian Chamber will continue to advocate for their adoption. In the interim we endorse a number of recommendations in the Draft Report that would improve the workplace relations framework.

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

2 Institutions

2.1 Fair Work Ombudsman

In evaluating the Fair Work Ombudsman (FWO), the conclusion of the Productivity Commission in the Draft Report is that ‘there is no evident need for changes’¹¹. The Australian Chamber’s view remains that if the workplace relations framework is simplified and streamlined in the ways in which we proposed in our initial submission, the FWO’s role can transform to one primarily concerned with compliance and enforcement, with the current educative function becoming less necessary over time.

The Australian Chamber called out the complexities of the system extensively in its initial system and also noted the FWO’s acknowledgement of the system’s complexity providing the following extracts from an address made in 2014:

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

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

...

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

¹⁰ Issues Paper 1: Context, p.1.

¹¹ Draft Report page 147.

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

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

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

...
If we can decrease complexity then this reduces the red tape you have to grapple with.
There is a clear productivity benefit.¹²

The way in which the regulation is delivered and enforced should also be appropriate to the circumstances of small business. A Productivity Commission report entitled 'Regulator Engagement with Small Business' arose from a research study to benchmark the extent to which the different approaches to regulator engagement with small business have the potential to affect the costs (including time and effort) incurred by these businesses.

This report acknowledged that there is a broad spectrum of regulations at multiple levels of government and that "[f]or some small businesses, compliance necessitates the diversion of a substantial proportion of productive business time and modifications to their production or service delivery processes in ways that are uncertain to deliver improvements in regulatory outcomes".¹³ In an economy in which we are highly dependent on small business growth to diversify our sources of economic activity and income streams, this is an unsatisfactory outcome.

The Productivity Commission found that small business especially value:

- *compliance requirements that are straightforward to find, understand and implement — this necessitates brevity, clarity and accessibility in the communication of compliance obligations and reporting requirements that are consistent with existing business approaches*
- *in the regulator's approach to compliance management and enforcement, a demonstrated capacity and willingness by regulators to:*
 - *be flexible and proportionate in their enforcement, with a consistent focus on outcomes*
 - *minimise unnecessary compliance and reporting costs imposed on small business, including the cumulative burden derived from engagement with multiple regulators*
 - *understand the needs and constraints of small business generally and those specific to their business or industry.¹⁴*

¹² Fair Work Ombudsman (Natalie James), Speech for the National Small Business Summit: FWO's Deal with Small Business, 8 August 2014, Melbourne.

¹³ Productivity Commission 2013, *Regulator Engagement with Small Business*, Research Report, Canberra, p. 3.

¹⁴ *ibid*, p. 38.

While the Productivity Commission also identified that such small businesses value ‘compliance requirements that are straightforward to find, understand and implement’, it is apparent that much of the workplace relations framework has not been designed with these principles in mind which presents significant barriers for the 93% of Australian businesses employing between 1-19 employees.

The Productivity Commission also considered the profile of person behind a small business with statistical information indicating that the typical owner is ‘likely to have completed secondary school or a trade qualification but often have not undertaken formal management training and tend not to use a business plan’.¹⁵ Migrant small business owners were also identified as a significant group at 27 per cent.¹⁶ More recent data indicates this figure is climbing and now sits at around 29 per cent.

The Productivity Commission has also identified:

If the nature of businesses regulated is not adequately considered in the design of the regulation, then the regulator may be limited to adopting a ‘one size fits all approach’ and regulate all businesses identically (NSW Small Business Commissioner, sub. 12; Tasmanian Small Business Council, sub. 13; Department of Industry, Innovation, Science and Tertiary Education (DIISRTE), sub. 18). Such an approach would only be efficient if compliance costs are low and/or the consequences of non-compliance are minimal for all regulated businesses.¹⁷

The workplace relations framework in its current form is not adequately designed for the employers it seeks to regulate (with the vast majority of them employing fewer than 20 employees). It is costly to comply with and the consequences of non-compliance are significant. Many of the business owners to which it relates do not have adequate technical or language skills to understand it. It is an example of regulation that is not efficient, is overwhelming and complex and this creates a disincentive to employment.

The relative ease associated with navigating a less complex system where workplace relations regulation is contained in fewer sources can be observed by comparing the New Zealand Ministry of Business, Innovation & Employment’s ‘New Zealand at Work’ website (<http://employment.govt.nz/er/>) and the tools set out in that website with the Fair Work Ombudsman’s website.

A simplified and streamlined system will deliver productivity benefits and will better support compliance outcomes.

2.2 Fair Work Commission

The Productivity Commission focussed on the **Fair Work Commission (FWC)** in the Draft Report. In our initial submission, the Australian Chamber:

- expressed support for a continuing role for the FWC;
- acknowledged that the FWC has a constructive role to play in settling disputes;

¹⁵ Productivity Commission 2013, *Regulator Engagement with Small Business*, Research Report, Canberra, p. 31.

¹⁶ *ibid*, p. 32.

¹⁷ *ibid*, pp. 44-45.

- acknowledged that the FWC's role is defined by parliament and submitted that it is required to fulfil its obligations, such as determining minimum wages and reviewing Modern Awards, in accordance with the provisions of the Act; and
- submitted that if various Australian Chamber recommendations requiring amendment of the Act were implemented, it would be incumbent on the FWC to then discharge its functions having regard to the amended provisions.

The Productivity Commission has suggested that the FWC requires reform, advocating 'better governance practices are essential for a body with determinative powers on economically important matters operating in a politically sensitive and highly technical area'.¹⁸ Five reforms are proposed.

2.3 Australian Chamber Response to Draft Recommendation 3.1

The Productivity Commission has made the following draft recommendation:

DRAFT RECOMMENDATION 3.1

The Australian Government should amend the Fair Work Act 2009 (Cth) to establish a Minimum Standards Division as part of the Fair Work Commission. This Division would have responsibility for minimum wages and modern awards. All other functions of the Fair Work Commission should remain in a Tribunal Division.

The Australian Chamber included a number of recommendations in relation to minimum wages and modern awards in our initial submission. For instance, we recommended the objects of the workplace relations framework be reformed, so the system can deliver:

- labour market flexibility;
- productivity-oriented wage determination;
- decentralisation;
- freedom of choice;
- an enterprise emphasis;
- individualised approaches; and
- a reduction in complexity.¹⁹

The Australian Chamber also expressed the view that key considerations in setting minimum wages should include '*the protection of jobs and helping the unemployed to be competitive in the labour market*' and that the '*focus of minimum wage determinations should be directed to the impact on employers and employees (as well as those seeking employment)*'.²⁰ We therefore submitted that the objects of minimum wage setting should be reframed so that the process provides for a genuine safety net which is appropriately balanced and underpinned by a reframed set of minimum wage objectives, which include the promotion of youth employment and the scope to accommodate industry and regional differentials.²¹

¹⁸ Draft Report, p.12

¹⁹ The Australian Chamber of Commerce and Industry Initial Submission, p 30.

²⁰ Ibid., p. 52.

²¹ Ibid., p. 57.

As regards Modern Awards, the Australian Chamber's primary position was that the required reform was a move to a safety net '*focussed on simplicity and productivity based bargaining*'²² that would comprise:

- A set of legislated minimum standards reflected in a Minimum Conditions of Employment Act (or equivalent).
- A national minimum wage and industry rates of pay retained from awards, adjusted annually by the independent wage setting body.
- Other award conditions, where agreed.
- A full suite of agreement making options assessed against the legislated minimum standards and either industry pay rates retained from awards or the national minimum wage (for roles falling outside award classifications), as the case may be.

It was acknowledged that may be merit in introducing such reform via a transitional period. As such, some interim reforms involving Modern Awards were also advocated, namely:

- the objects of modern awards being reframed to ensure that they do not exist as a barrier to the efficient structuring of working arrangements at the workplace level; and
- further rationalisation of award content so that they come to merely set out simple minimum standards appropriate to the industries/occupations that they cover.²³

Against this background and subject to appropriate accommodation of the Australian Chamber's recommendations regarding the setting of minimum wages, the modern awards objective and award content, the Australian Chamber could support the establishment of the Minimum Standards Division as part of the Fair Work Commission, to undertake the annual wage review and make award determinations, as proposed in Draft Recommendation 3.1.

The Australian Chamber believes there is merit in injecting a greater reliance on the use of the social science disciplines of economics, social science and commerce into wage setting and while the process of award modernisation undertaken to date has been significant for its consolidation of awards, there is still room for further rationalisation and simplification of the content of the 122 Modern Awards.

The adoption of Draft Recommendation 3.1 would represent change that is more incremental than revolutionary. This is because:

- the Act currently allows for the appointment of Expert Panel members to carry out the annual wage review;²⁴
- qualifications Expert Panel Members must currently hold (knowledge of, or experience in economics, social policy, business, industry or commerce, finance, investment management or superannuation²⁵) accord with the qualifications the Productivity Commission has suggested that members of the Minimum Standards Division should hold (economics, social science and commerce²⁶); and

²² Ibid., p. 88.

²³ | The Australian Chamber of Commerce and Industry Initial Submission, p. 48.

²⁴ *Fair Work Act 2009* (Cth), s.617.

²⁵ *Fair Work Act 2009* (Cth), s.627(4).

²⁶ Draft Report, p. 149.

- a specialist body has previously been charged with the responsibility for adjusting the minimum wage and award rates of pay.²⁷

There are alternative reforms that could deliver an outcome not dissimilar to Draft Recommendation 3.1, including amending s.617 of the FW Act to expand the functions that can be performed by Expert panels so that they include responsibility for Modern Awards and to restrict the membership of Full Benches with responsibility for minimum wages²⁸ and Modern Awards to Expert Panel members only.

2.4 Australian Chamber Response to Draft Recommendation 3.2

The Productivity Commission has made the following draft recommendation:

DRAFT RECOMMENDATION 3.2

The Australian Government should amend s. 629 of the Fair Work Act 2009 (Cth) to stipulate that new appointments of the President, Vice Presidents, Deputy Presidents and Commissioners of the Fair Work Commission be for periods of five years, with the possibility of reappointment at the end of this period, subject to a merit-based performance review undertaken jointly by an independent expert appointment panel and (excepting with regard to their own appointment) the President.

Current non-judicial Members should also be subject to a performance review based on the duration of their current appointment. Existing Members with five or more years of service would be subject to review within three years from the commencement of these appointment processes with reviews to be staggered to reduce disruption. Non-judicial Members with fewer than five years of service would be reviewed at between three to five years, depending on the date of their appointment.

Assuming that Draft Recommendation 3.1 is adopted, the Australian Chamber is prepared to endorse the possibility of fixed terms for members of the proposed Minimum Standards Division. This is because as things currently stand, Expert Panel Members contributing to annual wage reviews hold office for a period not exceeding 5 years.²⁹ It should also be noted that when the Australian Fair Pay Commission existed, its Chair held office for a period not exceeding 5 years,³⁰ while its Commissioners held office for periods not exceeding 4 years.³¹

However the Australian Chamber does not however agree with the imposition of 5 year terms for other members of the FWC.

2.5 The FWC as a quasi-judicial body

It is accepted by the Productivity Commission in the Draft Report that the FWC exercises quasi-judicial functions.³² The characteristics of a quasi-judicial body were considered in 1989 during a

²⁷ The Australian Fair Pay Commission established by s. 22 of the *Workplace Relations Act 1996* (Cth) (Repealed).

²⁸ see *Fair Work Act 2009* (Cth), s.620.

²⁹ *Fair Work Act 2009* (Cth), s.629(4).

³⁰ *Workplace Relations Act 1996* (Cth) (Repealed), s.29(2).

³¹ *Workplace Relations Act 1996* (Cth) (Repealed), 38(2)

³² Draft Report, p. 132.

parliamentary inquiry conducted by the Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals, which concluded:

*The Committee has adopted the view put to it in several submissions – a view which is accepted by the courts – that bodies which may be required by statute, or by practice, to act in a judicial manner (i.e. ‘as if’ the body was judicial) may accurately be described as ‘quasi-judicial’.*³³

It is therefore appropriate to examine the principles that should govern the tenure of office of quasi-judicial appointees to tribunals.

The Committee’s terms of reference were to inquire into and report on the principles that should govern the tenure of office of quasi-judicial and other appointees to Commonwealth tribunals and in particular whether the provisions of sections 24 and 28 of the then *Industrial Relations Act 1988* (Cth) provided proper and adequate provisions for the tenure of office of Presidential Members and Commissioners of the Australian Industrial Relations Commission (**AIRC**). Relevantly, these sections provided:

Section 24 Removal of Presidential Member from Office

24 The Governor-General may remove a Presidential Member from office on an address praying for removal on the grounds of proved misbehaviour or incapacity being presented to the Governor-General by both Houses of the Parliament in the same session.

Section 28 Removal of Appointment of Commissioner

28(1) [Proved misbehaviour] The Governor-General may remove a Commissioner from office on an address praying for removal on the grounds of proved misbehaviour or incapacity being presented to the Governor-General by both Houses of the Parliament in the same session.

28(2) [Grounds for termination] The Governor General shall terminate the appointment of a Commissioner who:

- a) becomes bankrupt, applies to take the benefit of a law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment or remuneration for their benefit;*
- b) is absent from duty, except on leave of absence granted by the President, for 14 consecutive days or 28 days in any 12 months; or*
- c) engages in paid employment outside the duties of office in contravention of section 25.*

The Committee concluded that those sections made proper and adequate provision for the tenure of office of Presidential members and Commissioners of the AIRC³⁴. The thrust of these sections is maintained in the Act, although with the exception of the President, there is no longer a distinction between Presidential Members and Commissioners.

2.6 Principles that should govern tenure

³³ Report of the Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals-November 1989, p. 21 at para 3.10.

³⁴ *ibid* at para 6.33.

During the course of that inquiry, there were submissions that the tenure of appointees to tribunals had been made equivalent to judicial tenure because such appointees were expected by parliament, and by those appearing before such tribunals, to exercise demonstrable autonomy and independence in their decisions. One of the reasons this independence was said to be necessary was that the decisions of such tribunals were not subject to review except on questions of law and might have important economic and policy implications for government.³⁵

It was also submitted to the Committee that section 72 type tenure³⁶ was essential for full-time members of peak tribunals to ensure properly qualified and experienced appointees would be carrying out the work, particularly when the tribunals were not, except on questions of law, subject to appeal.³⁷

The Committee was prepared to conclude that in order to perform their functions, quasi-judicial tribunals needed to be able to attract and have appointed to them people of superior talent and integrity. Further, to ensure that they would not be influenced in their decisions by outside or irrelevant considerations, they should not be in any way influenced by the government of the day or any alternative government.³⁸

Of relevance to Draft Recommendation 3.2, the Committee concluded that an adequate term of office should be provided, such that for the senior members of tribunals exercising quasi-judicial functions, the term was appropriately until a retiring age of 65 or 70 while other members should be appointed for a reasonable period of time, the suggestion being 7 years.³⁹

2.7 The Australian Chamber's view

The Australian Chamber's predecessor organisation, the Confederation of Australian Industry made this submission to the Committee in 1989:

'in our view it is desirable that the present link between section 72 of the Federal Constitution relating to holders of judicial office and the provisions of the Industrial Relations Act 1988 relating to members of the commission is retained. The arguments for tenure for both would appear to be very similar and there would in our view be no good reason to change one in the absence of change of the other'.⁴⁰

The Australian Chamber continues to hold this view. We also maintain that the principles outlined by the Committee and its conclusions (see above) still hold and that there is a clear distinction to be made between the FWC exercising quasi-judicial powers and tribunals that conduct administrative reviews. The Australian Chamber does not agree that the FWC can be compared with the ACCC but acknowledges the Productivity Commission holds a different view.

³⁵ Report of the Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals-November 1989, p. 21 at para 3.40.

³⁶ The tenure granted to the Judiciary pursuant to Section 72 of the Constitution.

³⁷ Report of the Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals-November 1989, p. 27 at paragraph 3.26.

³⁸ *ibid.*, p. 38 at para 4.18.

³⁹ *ibid.*, p. 39 at para 4.19.

⁴⁰ *ibid.*, p. 56.

The independence of FWC members required to act in a quasi-judicial manner remains paramount for a range of important reasons:

- the exercise of duties of a quasi-judicial nature involves resolving difficult and often highly contentious questions of policy, fact and law. This is particularly the case as far as the FW Act and the workplace relations framework is concerned.
- concern about re-appointment, either by a Government of the day or an Opposition aspiring to govern, should never become a factor in decision making.
- in order to attract the highest calibre of candidates for these offices, security of tenure must be offered. Requiring office-holders to re-apply for their jobs every five years would act as a powerful disincentive.
- convention weighs against former members appearing before the body upon which he or she served and this would make FWC appointments with 5-year terms unattractive to potential candidates working in the jurisdiction who are not nearing retirement age.

The Australian Chamber does not support the proposed *‘merit-based performance review undertaken jointly by an independent expert appointment panel and (excepting with regard to their own appointment) the President’*. The Australian Chamber is not convinced that the proposed expert appointment panel members could be qualified to assess a tribunal member exercising quasi-judicial functions given the recommendation is that such panel members ‘should have experience in senior executive selection’ but precludes them from having had roles in industrial representation or advocacy. If expert appointment panel members are all but prohibited from having knowledge about the workplace relations framework or the jurisdiction of the FWC, how could they conduct best practice merit-based performance reviews that carry serious implications for the individuals concerned?

The proposal to include the FWC President on the review panel would place the President in an unenviable position. As things currently stand, the President has the power to give directions to FWC members (s. 82 of the FW Act), decides who sits on a Full Benches (s. 618(2)) and Expert Panels (s. 620(2)) and otherwise holds responsibility for the way in which the FWC performs its functions and exercises its powers (s. 581). Having allocated the work, the President would have far more developed impressions of a FWC member’s performance and capabilities than other members of a review panel. He or she would become the most influential figure in the review process and this has the potential to create a very challenging dynamic for both the President and the FWC members in between performance reviews. A perception could arise that he or she is able to determine the fate of his or her fellow FWC members. The Australian Chamber cautions against imposing this sort of pressure on the working environment of President and his or her colleagues. It could expose the office of President to partisan political attacks.

2.8 Different status of current members

The Productivity Commission proposal seems to have drawn a distinction between FWC members who are judicial officers and those who are not.

Pursuant to section 9(2) of the *Industrial Relations Act 1988*, all Presidential members of the AIRC had the same rank, status and precedence as a Judge. Section 9(2) was retained in the *Workplace Relations Act 1996* and then as section 63(2) in the *WorkChoices* legislation. Transitional

provisions appear to have further preserved this protection for the Presidential members of the AIRC who were appointed firstly to Fair Work Australia and then the FWC. It would appear to flow from this that in addition to the President, there are 10 current members of the FWC holding the status of a judicial officer and yet in the Draft Report, it is suggested there are only 4 current members of the FWC, including the President, who are judicial officers⁴¹, although apart from the President, it is not made clear who the other three members are.

The FW Act denies Deputy Presidents appointed after its commencement of the status of judicial officer and only bestows the status of a Judge on the President⁴². This was outlined in the Explanatory Memorandum to the *Fair Work Bill 2008* at paragraph 2409 as follows:

Deputy Presidents will not be entitled to be styled as a judge and have the same rank and status as a judge by virtue of their appointment to FWA. However, appointment to FWA will not affect the rank, status or entitlements of any member who is a judge (see clause 630). This is consistent with creating a modern institution that moves away from the formal and adversarial processes of the past.

This provided no meaningful explanation for the change in status and it is difficult to reconcile with the ongoing requirement for Deputy Presidents to exercise quasi-judicial functions. It has created a situation where some members exercising quasi-judicial powers have security and others do not.

Whether it is 4 members or the more likely 11 members of the now 43-member FWC⁴³ who retain the status of a judicial officer, Recommendation 3.2 proposes the imposition of performance review on non-judicial Members only. A reading of pages 154-155 of the Draft Report appears to suggest that the Productivity Commission proposes to expose three quarters of the FWC's current membership to fixed terms and performance reviews but not impose there on the remaining quarter. Those who are immune are the longest serving members, which is somewhat surprising given the Productivity Commission's implied criticism of long serving members on page 152 of the Draft Report. This outcome would create an inequitable working environment for current FWC members and introduce an undesirable dynamic whereby some members would continue to be able to discharge their duties without exposure to the political pressure associated with a reappointment process while others wouldn't.

The Productivity Commission states on page 156 of the Draft Report that '*the goal of these new arrangements is actually to shore up independence from government of the FWC, not to undermine it.*' The Australian Chamber does not see things this way.

It is unclear how:

- exposing only some of the members of the FWC who took office on the basis of a retirement age of 65;
- to potentially career-ending performance reviews;
- via an as yet undefined performance management process;

⁴¹ Draft Report page 154.

⁴² *Fair Work Act 2009* (Cth), s.629A.

⁴³ as at 18 September 2015.

- conducted by their President and a panel of recruitment executives appointed by Government

will serve to shore up their independence.

Where they were not previously exposed, they would now be. The Australian Chamber cannot see how a mandatory review process for a tribunal that operates in the most highly charged political context of any in Australia that would effectively controlled by Governments of the day would not undermine the independence of members.

The Australian Chamber does not support 5-year terms for FWC members (Expert Panel Members excepted) or performance reviews that could result in the termination of a FWC member.

The Australian Chamber does however see some merit in consideration being given to appointing FWC members to specialist roles for a fixed term during the course of their tenure. This would facilitate turnover in certain key roles, such as the setting of the minimum wage or the review of Modern Awards, while preserving the independence of FWC members.

2.9 Australian Chamber Response to Draft Recommendation 3.3

The Productivity Commission has made the following draft recommendation:

DRAFT RECOMMENDATION 3.3

The Australian Government should amend the Fair Work Act 2009 (Cth) to change the appointment processes for Members of the Fair Work Commission. The amendments would stipulate that:

- *an independent expert appointment panel should be established by the Australian Government and state and territory governments*
- *members of the appointment panel should not have had previous direct roles in industrial representation or advocacy*
- *the panel should make a shortlist of suitable candidates for Members of the Fair Work Commission against the criteria in draft recommendation 3.4*

the Commonwealth Minister for Employment should select Members of the Fair Work Commission from the panel's shortlist, with appointments then made by the Governor General.

The Australian Chamber does not support Draft Recommendation 3.3. As outlined above, the Australian Chamber rejects the proposition that having had roles in industrial representation or advocacy or possessing knowledge about the workplace relations framework and the jurisdiction of FWC members should render an individual unsuitable to suggest candidates for appointment. To the contrary, the Australian Chamber regards such qualifications as very valuable.

Draft Recommendation 3.3 bears some resemblance to the appointment process promised by the previous Government in its *Forward with Fairness Policy Implementation Plan*, which provided:

'...the Minister responsible for Employment and Industrial Relations will only be able to make an appointment after completing the following processes.

The shortlist of candidates will be scrutinised by a panel comprising:

- *a senior official from the Department of Employment and Industrial Relations (who will chair the panel);*
- *a senior official from the Australian Public Service Commission; and*
- *a senior official from each State (and Territory) Department of Industrial Relations that wishes to participate.*

The Minister will be required to consult with the opposition spokesperson for industrial relations and the head of Fair Work Australia prior to making any decision about appointments to recommend to Cabinet.⁴⁴

With that conceptually similar model appointment process yielding just 2 new FWC members from an employer background out of at least 26 new primary appointments made by the Rudd/Gillard Government, the Australian Chamber and its members does not share the confidence of the Productivity Commission that the process it sets out in Figure 3.5 of the Draft Report is the answer.

The Australia Chamber rejects the characterisation of the current composition of the FWC offered by Stewart, Gahan, McCrystal and Chapman in their initial submission to the Productivity Commission⁴⁵, noting their admission that their breakdown was derived from a 'crude' approach. The Australian Chamber believes that characterising the background of FWC members via the categories of Union, Employer, Barristers/Lawyers and Public Service/Statutory bodies, is a more useful way to drive a balance of backgrounds. The perspective that will have been obtained from having been a member of the legal profession will differ from that obtained from having been employed in the private sector or by an employer association and will differ again from the perspective derived from a public sector background. The differences between private and public sector backgrounds are obvious.

While Stewart, Gahan, McCrystal and Chapman did concede the propensity of previous Labor Governments to appoint members from a union background, they proceeded to justify this by asserting that this '*just corrected an imbalance left by the previous Coalition government lead by John Howard*⁴⁶', citing former Prime Minister Gillard as their authority, without acknowledging that there were then just 2 new FWC members from an employer background amongst the 26 new primary appointments of the Rudd/Gillard Government.

In any event, their assertion is a weak one because it simply views the appointments of the Howard Government to the AIRC in isolation and does not include an assessment of the composition of the AIRC in November 2007 when the Howard Government lost office. If they considered the composition of the 55-member AIRC in March 1996, when the Howard Government took office, they would perhaps be moved to acknowledge that the Howard Government inherited an 'imbalance' left by the Keating Government. A review of the relevant Annual Reports of the Australian Conciliation & Arbitration Commission and the AIRC, which recorded the background of

⁴⁴ Forward With Fairness – Policy implementation Plan, p. 25.

⁴⁵ Draft Report – Figure 3.4, p. 151.

⁴⁶ *Labour Regulation: Is There a Case for Major Reform?*—Stewart, Gahan, McCrystal and Chapman- March 2015 at pp. 14 & 15.

each appointee prior to assuming office, reveals that the composition of the AIRC in March 1996 was as follows:

Union Background	26	47.2%
Employer background	15	27.2%
Barristers/Lawyers	7	12.7%
Public service/Government Statutory body	6	11%
Academic	1	2%

An explanation for this composition can be found in a breakdown of the pre-appointment backgrounds of the 29 Keating Government appointees (1991-96), details of which are recorded in the Annual Reports of the AIRC relevant to that period:

Union Background	13
Employer background	6
Barristers/Lawyers	6
Public service/Government Statutory body	4

Relevantly, the Productivity Commission reproduced a quote from the *Sydney Morning Herald* in 1994 in Box 3.6 on page 150 of the Draft Report:

The federal government must take much of the blame for the Commission's current problems. For some years now its appointments to the Commission have been biased in favour of the trade union movement, thus destroying the balance which had previously been so important in maintaining the Commission's credibility.

Appointments should remain with the Government of the day but the cycle of accusations and counter-accusations of 'stacking' can be arrested if political parties of both persuasions accept the need to make appointments that produce a Tribunal that is balanced. Once balance is achieved, it must be maintained.

2.10 Australian Chamber Response to Draft Recommendations 3.4 and 3.5

The Productivity Commission has made the following draft recommendation:

DRAFT RECOMMENDATION 3.4

The Australian Government should amend the Fair Work Act 2009 (Cth) to establish separate eligibility criteria for members of the two Divisions of the Fair Work Commission outlined in draft recommendation 3.1.

Members of the Minimum Standards Division should have well-developed analytical capabilities and experience in economics, social science, commerce or equivalent disciplines.

Members of the Tribunal Division Membership should have a broad experience, and be drawn from a range of professions, including (for example) from ombudsman's offices, commercial dispute resolution, law, economics and other relevant professions.

A requirement for the Panel and the Minister for Employment respectively is that they be satisfied that a person recommended for appointment would be widely seen as having an unbiased and credible framework for reaching conclusions and determinations in relation to workplace relation matters or other relevant areas.

As stated previously, the Australian Chamber conditionally supports the establishment of a Minimum Standards Division and has noted that the proposed competencies of members are compatible with those Expert Panel Members must currently hold (knowledge of, or experience in economics, social policy, business, industry or commerce, finance, investment management or superannuation).⁴⁷ In each case, the eligibility criteria seem appropriate.

As to the eligibility criteria for Tribunal Division members, the Australian Chamber does not understand why the Productivity Commission has excluded practitioners who have worked within the jurisdiction. Practitioners who have had roles in industrial representation or advocacy and possessing knowledge about the workplace relations framework and the jurisdiction of the FWC are excluded regardless of the value of their experience and knowledge.

Possessing relevant experience and knowledge is surely a core requirement for dispute resolution experts. Being a subject matter expert brings credibility and helps command respect where contentious matters are in issue. These qualities have proven decisive time and time again when the FWC has been called upon to settle disputes. It is an inescapable feature of the Fair Work jurisdiction that the overwhelming majority of practitioners work predominantly, to the point of exclusively, for one side. Excluding them altogether would rob the FWC of those competent and experienced operators held in high regard across the divide.

In any event, where s. 627 of the Act is already broad enough to cover the skill sets promoted by the Productivity Commission, the Australian Chamber is not convinced Draft Recommendation 3.4 is necessary.

The Productivity Commission has also made the following draft recommendation:

DRAFT RECOMMENDATION 3.5

The Australian Government should require that the Fair Work Commission publish more detailed information about conciliation outcomes and processes. In the medium term, it should also commission an independent performance review of the Fair Work Commission's conciliation processes, and the outcomes that result from these processes.

The Australian Chamber has no objection to Draft Recommendation 3.5. Information of this nature could usefully inform the ongoing policy debate.

2.11 Concluding Comments

The Productivity Commission has described the workplace relations framework as a “busy institutional space”⁴⁸ and has observed:

The regulatory arrangements have grown from a limited Commonwealth role in dispute settlement one hundred years ago to a position today where the Commonwealth through its

⁴⁷ Fair Work Act 2009 (Cth), s.627(4).

⁴⁸ Draft Report, p. 8.

statutory bodies regulates the bulk of industrial awards, rests minimum wages, mediates disputes, provides information, registers agreements, checks compliance with the law and adjudicates on key matters of WR law.⁴⁹

The Productivity Commission also notes that:

The performance of Australia's workplace relations system relies strongly on the capabilities and functioning of its main institutions. Discretion and judgment exercised by competent and independent bodies are as critical as statute in an efficient and fair system.⁵⁰

The Australian Chamber's consistent view has been that in the context of the current system, the discretion and judgement exercised by the institutions has a critical impact on the system's functioning and regardless of who it is sitting on the FWC, they have a duty to discharge their functions in accordance with the statute.

Whereas the Productivity Commission proposes significant reform to the FWC rather than exploring a new appeals mechanism comprehensively canvassed by the Australian Mines & Metals Association (AMMA), it proposes less fundamental reform to the parts of the statute that guide the exercise of some of its most significant functions.

Structural reform before institutional reform

The Australian Chamber maintains that reforms of significance to the framework are the priority. The aim must be to reign in confusion arising from the complexity of the current system and reduce reliance on third party interventions in workplace relationships. Creating a framework that achieves this would obviously impact on the role of the Fair Work Commission and the way in which it would be required to exercise its powers. The nature of its subsequent response would guide the extent to which further institutional reform should be pursued.

3 National Employment Standards

3.1 Introduction

The Australian Chamber supports a legislated set of minimum standards.

The Productivity Commission has not critiqued the existing elements of the National Employment Standards (NES) however in the Australian Chamber's view some immediate changes to the NES are required. As noted in the Australian Chamber's initial submission to this inquiry, during the Post Implementation Review of the FW Act in 2012 (PIR), ACCI called for a number specific changes to the NES, in the context of the current legislated framework, including amendments to permit the averaging of hours for up to 52 weeks by agreement, to make clear that annual leave entitlements on termination be calculated on the "base rate of pay" as per the former standard; to ensure that the small business redundancy exemption in the NES cannot be undermined by a contrary

⁴⁹ Draft Report, p. 8.

⁵⁰ Draft Report, p. 10.

provision contained in an award and to clarify that leave (paid or unpaid) does not accrue when an employee is receiving workers' compensation.

The Australian Chamber's initial submission to this inquiry also explained that aspects of the NES are overly prescriptive.

3.2 Public holidays

The Productivity Commission has made the following draft recommendation:

DRAFT RECOMMENDATION 4.1

Fair Work Commission should, as a part of the current four yearly review of modern awards, give effect to s. 115(3) of the Fair Work Act 2009 (Cth) by incorporating terms that permit an employer and an employee to agree to substitute a public holiday for an alternative day into all modern awards.

The Productivity Commission has stated that:

The main rationale for paid for paid leave on specially designated days is that there is some genuine social benefit associated with widespread community engagement in events, especially on days of cultural or spiritual significance.⁵¹

The Productivity Commission also notes that “[p]ublic holidays that affirm important cultural beliefs may help bind communities together”.⁵² In considering the relevance of public holidays in promoting social cohesion, it is worthwhile examining the existing public holidays and their purpose. Public holidays vary in number and purpose between states and territories in accordance with government policy. There are eight national public holidays prescribed by the FW Act, being:

1. New Years' Day (1 January)
2. Australia Day (26 January)
3. Good Friday
4. Easter Monday
5. Anzac Day (25 April)
6. Queen's Birthday
7. Christmas Day (25 December)
8. Boxing Day (26 December)

Beyond these national days, state and territory governments declare public holidays for a range of different purposes and while public holidays in each state will vary in number from year to year due to the practices of declaring additional public holidays where public holidays fall on a weekend and due to varying government policy, an analysis of public holidays in 2015 shows the following:

- Victoria: 14 days will be observed as public holidays following the Victorian Government's announcement that it will create a new 'Friday Before the AFL Grand Final' holiday and observe Easter Sunday as a public holiday. Among the additional holidays are Melbourne

⁵¹ Draft Report, p. 183.

⁵² Draft Report, p. 183.

- Cup Day, Labour Day, Saturday after Good Friday, and an additional day on 28 December because Boxing Day falls on a Saturday;
- New South Wales: 12 days (or 13 for banks and certain financial institutions) will be observed, including Easter Saturday, Easter Sunday, Bank Holiday (3 August), Labour Day, and an additional day on 28 December (because Boxing Day falls on a Saturday);
 - Australian Capital Territory: 12 days will be observed for private sector employees with Canberra Day (9 March), Easter Saturday, Family and Community Day (28 September) and an additional day on 28 December (because Boxing Day falls on a Saturday) observed as public holidays (additional days apply to public sector employees);
 - Queensland: 12 days plus regional holidays⁵³ including Easter Saturday, Royal Queensland Show (Brisbane area), Labour Day and an additional day on 28 December (because Boxing Day falls on a Saturday). Show holidays are also public holidays appointed in districts throughout Queensland in relation to annual agricultural, horticultural or industrial shows;
 - South Australia: 11 days plus two evenings including Adelaide Cup Day (9 March), the Saturday after Good Friday, Labour Day (5 October), 28 December (because Boxing Day/Proclamation Day falls on a Saturday) Christmas Eve (from 7pm to midnight) and New Year's Eve (from 7pm to midnight);
 - Northern Territory: 11 days across the Territory, including Easter Saturday, May Day and Picnic Day in addition to show days applying in Borroloola, Alice Springs Tennant Creek, Katherine and Darwin;
 - Tasmania: 11 days including Royal Hobart Regatta (9 February) in some parts of the state or Recreation Day (2 November) in others, Eight Hours Day (9 March), Easter Tuesday (in some awards and agreements), 28 December (because Boxing Day falls on a Saturday);
 - Western Australia: 11 days will be observed as public holidays. Beyond the holidays prescribed in the National Employment Standards, Western Australia Day (1 June), Labour Day and an additional day on 28 December (because Boxing Day falls on a Saturday) will be observed as public holidays.

As noted by the Australian Chamber in its initial submission, our society is becoming increasingly secular and less religious.⁵⁴ The number of people attending church fell from 44 per cent in 1950 to 17 per cent in 2007, only half of church attenders are employed and young people are even less likely to go to church with 15-19 year olds making up less than 6 per cent of church attenders and 20-29 year olds making up only 9 per cent of church attenders. Young adults in 2011 were more than twice as likely as those in 1976 to have no religion (29 % compared to 12%). There are also around 6.6 million residents born outside Australia, making Australia an ethnically and culturally diverse country.⁵⁵

While some public holidays will remain days of cultural and historical significance for many Australians, the purpose underpinning public holidays will be of varying significance for Australians in the modern economy. The Productivity Commission has observed that “many people treat *some*

⁵³ See Queensland Government website: <http://www.qld.gov.au/recreation/travel/holidays/show/>

⁵⁴ Australian Chamber of Commerce and Industry, *Initial Submission to Productivity Commission Inquiry into the Workplace Relations Framework*, March 2011, p. 61

⁵⁵ 3412.0 – Migration, Australia, 2013–14". Australian Bureau of Statistics, 29 January 2015.

national public holidays as just normal days off, which throws into doubt their community function”.⁵⁶ Indeed, as noted by the Productivity Commission, there are other means of achieving community coordination on days and at events that are not observed as public holidays (Chinese New Year, the Sydney Gay and Lesbian Mardi Gras and National Tree Day cited as examples)⁵⁷

Public holidays impose a significant economic cost and must be limited in number. As such it is impossible to comprehensively capture all days of significance to the diverse Australian population within the public holiday structure. However the Productivity Commission has noted that many awards contain clauses which enable substitution of public holidays for alternative days that better suit individual circumstances.

The Australian Chamber considers that there is merit in enabling parties to reach agreement to substitute a public holiday to another day where thus is in the parties’ mutual interests. Such capacity will have particular utility for employers that ordinarily trade on a public holiday, will encourage some businesses to open on days that they otherwise have not and will provide benefits to employees who attach greater significance to social, religious and/or cultural participation outside of those days currently reflected within the public holiday structure. However, in line with the Australian Chamber’s view that nationally consistent standards are best contained in legislated standards and the awards addressing only industry specific content, an amendment to the NES may be the best way to achieve substitution in a nationally consistent fashion

Public Holiday Substitution

The Australian Chamber recommends that the National Employment Standards be amended to enable an employer and an employee to agree to substitute a public holiday for an alternative day.

Additional days declared as public holidays where a public holiday falls on a weekend have created contention. In response to legislative change in the Australian Capital Territory where substitute public holidays would be declared if New Year’s Day, Christmas Day or Boxing Day fall on a Saturday or Sunday, the General Manager of the Australian Hotels Association ACT stated:

Not content with having the most public holidays, the ACT Government is now looking to go further by declaring Easter Sunday a holiday, making up to 16 gazetted public holidays.

...

Making matters worse, the ACT’s newly-appointed Workplace Minister is also considering introducing an extra public holiday on Anzac Day where it falls on a Sunday. Where will it end?

...

In opposing these changes, the AHA ACT highlighted an industry survey that found almost 60 per cent of Canberra’s accommodation hotels closed outlets or reduced services over Easter 2014 because of penalty rates.⁵⁸

⁵⁶ Draft Report, p. 163.

⁵⁷ Draft Report, p. 183.

⁵⁸The Sydney Morning Herald, ‘The Real Cost of Penalty Rates’, Brad Watts, 7 October 2014:
<http://www.smh.com.au/comment/the-real-cost-of-another-public-holiday-in-canberra-20141006-10qs42.html>

A media release issued by Australian Hotels Association ACT had indicated that the comprehensive survey of its members AHA ACT members found:

- “Almost 60 per cent of Canberra’s accommodation hotels closed outlets or reduced guest services over Easter because of penalty rates”;
- “Around 72 per cent of businesses said closing/reducing services for public holidays negatively impacted guest services customer perceptions”.⁵⁹

The practice of promising additional public holidays as a part of pre-election platforms is economically irresponsible and needs to be addressed. As noted by the Productivity Commission “[d]eclaring additional days as public holidays may be electorally popular, but the costs are not insignificant”.⁶⁰ The Victorian Government recent made pre-election commitment to declare Easter Sunday and the Friday before the AFL Grand Final as public holidays. A regulatory impact statement in relation to the additional public holidays is required by the *Subordinate Legislation Act 1994* and was prepared by PricewaterhouseCoopers Australia. Among the findings were the following:

- “The lost production (or economic cost) from the new public holidays is estimated to be between **\$717 million** and **\$898 million** annually”;
- “The new public holidays would also result in increased wage payments of between **\$252 million** and **\$286 million** annually to those people who work on public holidays”;
- “Overall, the estimated costs of the new public holidays outweigh the quantified benefits...”⁶¹

As noted by the Victorian Employers Chamber of Commerce and Industry (VECCI) in response to the Victorian Government’s recent regulatory impact statement:

*The analysis shows categorically that the introduction of the new public holidays will cost the Victorian economy up to \$898 million per year in lost production while also increasing wage costs by up to \$286 million per year due to the payment of penalty rates. This is particularly irresponsible at a time when Victorian unemployment has been persistently high, the economic outlook is uncertain and the economy continues to experience significant structural change.*⁶²

Industry associations in the services sectors also raised concerns, including the Australian Hotels Association (Victoria) which suggested negative impacts on both employment and service levels:

*The direct costs to Victoria’s pub and accommodation sector of the additional public holidays are significant, particularly having regard to 275% penalty rate applying to casual workers on public holidays. Many hospitality businesses will choose to close or reduce service on the public holidays. A significant number of casual employees who are available and want to work will not be rostered for the day.*⁶³

⁵⁹ Australian Hotels Association ACT, “Public holidays to harm hospitality over Easter”, 3 April 2015:

<http://www.actaha.org.au/?media=public-holidays-to-harm-hospitality-over-easter>

⁶⁰ Draft Report, p. 191.

⁶¹ PricewaterhouseCoopers for the Department of Economic Development, Jobs, Transport and Resources, *Regulatory Impact Statement on proposed new public holidays in Victoria*, July 2015, p. ii.

⁶² VECCI, *Submission Regarding Regulatory Impact Statement on Proposed New Public Holidays*, July 2015.

⁶³ Australian Hotels Association (Victoria), *Submission Regarding Regulatory Impact Statement on Proposed New Public Holidays*, July 2015.

The Australian Retailers Association stated:

Many retailers have indicated the increased wages cost will stop them from opening, and there will be no wages transfer through higher penalty rates being paid or the traditional net benefit from tourism during AFL Friday as workers and businesses abandon Melbourne CBD to stay at home. Without that trade and the higher costs, ARA's Victorian members have indicated they simply will not open stores leaving tourists visiting for the football no shopping options.

...

Additional wages for the retail, accommodation, food services and recreation industries are estimated to cost small business owners \$105 million for the two holidays, as wages can be 50 per cent higher on Easter Sunday and 150 per cent higher on Grand Final Eve. Retailers face the difficult choice between remaining open and paying incredibly high penalty rates, or closing and losing sales or production.

The Productivity Commission has made the following draft recommendation:

DRAFT RECOMMENDATION 4.2

The Australian Government should amend the National Employment Standards so that employers are not required to pay for leave or any additional penalty rates for any newly designed state and territory public holidays.

The Australian Chamber considers that such a recommendation is a step in the right direction given the costly impacts that additional gazettal of public holidays and the high penalty rates in many impacted industries that are attached to trading on public holidays. As the Australian Chamber highlighted in its initial submission, a minimum payment at the rate of double time and a half for people working in service sectors which are expected to trade on public holidays such as retail, hospitality and leisure and tourism related sectors does not distinguish these industries from those that do not ordinarily trade on public holidays. While we note that reform of weekend penalty rates has been recommended by this inquiry, public holiday penalty rates must also be appropriate to the circumstances of the industry and the enterprises operating in that industry.

When considering the eight national public holidays set out in the NES in conjunction with the state declared public holidays and substituted public holidays, the entitlements to a day off without loss of pay in Australia are amongst the highest in world. An analysis of OECD countries also demonstrates that the compensation payable for employees working on a public holiday also exceeds most international standards. Of note, the independent panel responsible for the 2012 post-implementation review of the FW Act recommended that the number of public holidays under the NES on which penalty rates are payable be limited to a nationally consistent number of 11.

Public Holidays and Penalty Rates

The Australian Chamber recommends that the National Employment Standards be amended so that employers are not required to pay for leave or any additional penalty rates for public holidays determined by state and territory Governments with a view to moving toward a nationally consistent maximum number of public holidays. The Australian Chamber recommends that penalty rates in awards for working public holidays in industries that

customarily trade on public holidays be reformed.

3.3 Annual leave

The Productivity Commission has made the following draft recommendation:

DRAFT RECOMMENDATION 4.3

Periodically, the Australian, state and territory governments should jointly examine whether there are any grounds for extending the existing 20 days of paid annual leave in the National Employment Standards, with a cash out option for any additional leave where that suits the employer and employee. Such an extension should not be implemented in the near future, and if ultimately implemented, should be achieved through a negotiated tradeoff between wage increases and extra paid leave.

Increasing entitlements to paid time off has financial implications for employers and broader economic impacts. The Productivity Commission has suggested that “on average, the cost of a worker taking an extra day away from work as a part of an increased annual or sick leave entitlement is around 0.5 per cent of that worker’s annual input.”⁶⁴

When considered together with the public holiday structure, Australia has among the highest entitlements in the world in terms of paid time off. Increasing paid time off will only drive up the costs of employment and doing business in Australia and is not a measure supported by the Australian Chamber. While the Productivity Commission has suggested that any extension of paid leave should (if implemented) be achieved through a negotiated tradeoff between wage increases and extra paid leave.⁶⁵ However it should be remembered that the FW Act does not prevent the making of agreements in relation to purchased leave and while evidence has suggested limited take-up of these arrangements, these would provide a better option for facilitating additional time out of the workplace as they can be facilitated by agreements that are appropriate for the workplace and the individual.

3.4 Casual loading

The Productivity Commission has made the following request:

Information request: *The Productivity Commission seeks information on whether it would be practical for casual workers to be able to exchange part of their loading for additional entitlements (for example personal or carer’s leave) if they so wish, and whether such a mechanism would be worthwhile.*

The Australian Chamber considers that such an approach may raise practical difficulties. Casual employment enables employees to work and be engaged on an as needs basis without being locked into fixed working patterns which may not suit their changing personal priorities or the demands of the business. While casual employees do not receive paid leave entitlements, they are compensated for this with a loading. Forgoing part of their loading for additional entitlements would

⁶⁴ Draft Report, p. 168.

⁶⁵ Draft Report, p. 195.

raise some practical issues around how leave is accrued and when it would be taken in the absence of fixed working patterns.

While there may be a case for enabling permanent employees to cash out portions of their leave by agreement without materially altering the nature of the relationship, enabling casual employees to cash out their loading to obtain the benefits of permanent employees could create confusion around the nature of the relationship and what other rights and entitlements arise from it.

3.5 Concluding comments

The Productivity Commission has elected not to critique the existence of the NES or most of the current elements.⁶⁶ The Australian Chamber appreciates that this inquiry is not a drafting exercise and is focussed on policy relevant to a system of workplace relations that would suit Australia in the longer term. However it should not be overlooked that important changes to the NES are required as articulated in the Australian Chamber's initial submission and submissions made during the 2012 post-implementation review of the FW Act.

4 Unfair dismissal

The Productivity Commission has observed that:

The most problematic aspect of the current legislation is that an employee who has clearly breached the normal expectations of appropriate work behaviour may nevertheless be deemed to have been unfairly dismissed because of procedural lapses by the employer. For example, in one case a business dismissed two employees after they assaulted their supervisor. The FWC concluded that their physical assault was a valid reason for dismissal, but that the employer's failure to follow certain procedures meant that the dismissals were unjust, unreasonable and therefore unfair.⁶⁷

Changes to the unfair dismissal provisions of the FW Act are required to prevent such absurd outcomes and the Productivity Commission has suggested that "further incremental reform is needed to":

- *prevent spurious cases from resulting in financial settlement, by introducing more effective upfront filters that focus on the merits of claims*
- *not favour form over substance, by changing the penalty regime to ensure that procedural errors alone are not sufficient to award compensation or restore employment in what would otherwise be regarded as a fair dismissal*
- *reform the governance of the FWC and some aspects of its conciliation and arbitration processes.⁶⁸*

The Australian Chamber supports these principles and the substance of the draft recommendations made by the Productivity Commission on the basis that they represent

⁶⁶ Draft Report, p. 23.

⁶⁷ Draft Report, p. 28.

⁶⁸ Draft Report, p. 199.

“incremental reform” and are consistent with the Australian Chamber’s suggestion in its initial submission that the following measures are worthy of consideration:

- *Making a valid reason a complete defence to an unfair dismissal claim, such that procedural defects in carrying out the termination should not be considered once a valid reason is found.*
- *Making a complete defence available if an employee was dismissed for the dominant purpose of complying with laws relating to discrimination, sexual harassment, bullying, WHS or any other relevant federal, state or territory law.*
- *Exempting employers where they are able to establish that the employee’s employment was terminated for genuine operational reasons. If this is not accepted, the existing requirement for an employer to consider alternative positions across “associated entities” as part of a “genuine redundancy” should be removed.*
- *Reinstatement no longer being the primary remedy and only to be ordered if the employer consents.*
- *Measures that create reasonable barriers to entry so as to deter frivolous and vexatious claims lacking in merit, such as higher filing fees, greater access to costs orders or preliminary screening processes designed to filter out speculative claims.*⁶⁹

As outlined below however, the Australian also maintains its primary position of an exemption from the unfair dismissal laws for businesses employing less than 20 employees.

The Productivity Commission has made the following draft recommendation

DRAFT RECOMMENDATION 5.1

The Australian Government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal applications ‘on the papers’, prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation processes.

The Australian Chamber dealt extensively with the costs that employers incur when defending unfair dismissal claims. In particular, research from 2005 was cited that put the cost of defending a claim up to and including conciliation at approximately \$13,000, while a 2012 case study estimated the cost in the vicinity of \$15,000-\$20,000⁷⁰. For SMEs, these sums are not insignificant.

The option to conduct an assessment of the merits ‘on the papers’ will be appropriate for cases where the material filed by the parties is relatively clear and developed. Even if such an assessment does not stimulate the resolution of the dispute, the respective parties will at least be more focussed going into a subsequent conciliation conference.

As the Australian Chamber canvassed in our initial submission, it is the desire to avoid further cost, stress, time and inconvenience that puts employers in the frame of mind where they settle and the merit of the respective positions of the parties is pushed to the side⁷¹. If there is to be any improvement in the level of confidence stakeholders have in the unfair dismissal laws, the process

⁶⁹ Australian Chamber of Commerce and Industry, Initial Submission, p. 127.

⁷⁰ Ibid., at page 118.

⁷¹ Ibid., at page 120.

has to leave both parties more satisfied that the merits of their position (or lack thereof) have materially influenced the outcome.

The Australian Chamber regards the suggestions in Draft Recommendation 5.1 as the sort of 'preliminary screening processes' we have advocated and we therefore support them. We are also supportive of the Productivity Commission's suggestions regarding costs in its 'redesigned merit focused conciliation process' outlined in Figure 5.7 on page 234 of the Draft Report.

We believe that the Productivity Commission's suggestions could be strengthened and made more effective if the FWC was also given the powers to dismiss unfair dismissal powers 'on the papers' in the manner contemplated by the proposed amendments in Part 9 of Schedule 1 of the *Fair Work Amendment Bill 2014*. In essence, these would enable the FWC to dismiss an application based on an assessment 'on the papers', without a hearing or conducting a conciliation conference.

As there has been a substantial increase in the number of unfair dismissal claims since the passage of the FW Act, a more robust screening processes will help to filter unmeritorious claims early in the process.

The Australian Chamber supports draft recommendation 5.1 as set out below:

Preliminary screening processes for unfair dismissal claims

The Australian Chamber agrees that the Australian Government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal cases 'on the papers', prior to the commencement of conciliation; or, alternatively, introduce more merit focused conciliation processes.

Greater access to costs orders and higher filing fees will also help to deter frivolous and vexatious claims lacking in merit.

The Productivity Commission has sought views on possible changes to lodgement fees for unfair dismissal claims.⁷² The Australian Chamber has expressed support for higher filing fees in its initial submission⁷³ and maintains the view that this will assist in deterring frivolous and vexatious claims lacking in merit.

As outlined above, the Australian Chamber recommended in its initial submission that consideration be given to higher filing fees. While s.395(2)(c) of the FW Act and Regulation 3.07, which empower the FWC to waive the application fee if it is satisfied that the person making an application will suffer serious hardship if required to pay the fee remain in force, there is scope to raise the lodgement fee.

With costs not following the event and being awarded as an exception rather than the rule and the prevalence of 'go away money', any insistence that the current \$68.60 filing fee acts as a barrier for would-be unfair dismissal applicants is not sustainable.

⁷² Draft Report, p. 231.

⁷³ Australian Chamber of Commerce and Industry, Initial Submission, p. 127.

The Australian Chamber therefore believes the two-tiered approach suggested by the Productivity Commission has some merit, particularly an additional fee for cases proceeding to arbitration.

The Productivity Commission has also made the following recommendation:

DRAFT RECOMMENDATION 5.2

The Australian Government should change the penalty regime for unfair dismissal cases so that:

- *an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct*
- *procedural errors by an employer should not result in reinstatement of compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer or financial penalties.*⁷⁴

The Australian Chamber addressed the manner in which issues of process and other considerations have come to trump a valid reason for termination in our initial submission⁷⁵ and we made reference to over 50 cases in which a termination was held to have been harsh, unjust or unreasonable despite findings of a valid reason to termination.

Our primary position remains that a valid reason should be a complete defence to an unfair dismissal claim so we support the measures proposed in Draft Recommendation 5.2 that would place some reasonable limits on the awarding of compensation.

The Australian Chamber's support for this recommendation however does not extend to the imposition of penalties for procedural breaches. As noted in the Australian Chamber's initial submission, there are costs associated in the management of termination in both contested and uncontested claims⁷⁶ and the cost, time, inconvenience and stress of legal proceedings already create a consequence that is disproportionate to the procedural deficiency that may have resulted in a claim. The desire to avoid incurring such costs in the future will be a driver of improved performance going forward so financial penalties are not warranted.

Changes to unfair dismissal laws to support substance over process

The Australian Government should change the unfair dismissal regime by:

- Making a valid reason a complete defence to an unfair dismissal claim, such that procedural defects in carrying out the termination should not be considered once a valid reason is found.
- Making a complete defence available if an employee was dismissed for the dominant purpose of complying with laws relating to discrimination, sexual harassment, bullying, WHS or any other relevant federal, state or territory law.
- Exempting employers where they are able to establish that the employee's employment was terminated for genuine operational reasons. If this is not accepted, the existing

⁷⁴ Draft Report, p. 233.

⁷⁵ Australian Chamber of Commerce and Industry, Initial Submission, pp. 115-117.

⁷⁶ *ibid.*, p. 109.

requirement for an employer to consider alternative positions across “associated entities” as part of a “genuine redundancy” should be removed.

4.1 Should reinstatement be the favoured remedy?

The Productivity Commission has made the following draft recommendation:

DRAFT RECOMMENDATION 5.3

The Australian Government should remove the emphasis on reinstatement as the primary goal of the unfair dismissal provisions in the Fair Work Act 2009 (Cth).

The FW Act’s elevation of reinstatement to the status of primary remedy has not removed the dynamic of ‘go away’ money and the Productivity Commission accurately described some of the primary issues with its appropriateness in the Draft Report at page 235:

‘The low level of reinstatement is hardly surprising given that the trust that is central to a harmonious and productive employment relationship is irremediably destroyed at the end of most unfair dismissal cases. It may also be more difficult in practice to reinstate an employee into a small business than a larger firm.’

The Australian Chamber acknowledges that workplace relationships are likely to be damaged at the conclusion of unfair dismissal claims, often making the goal of reinstatement an unrealistic one for employers seeking to ensure harmonious and productive working environments. Consistent with its recommendations made in its initial submission, the Australian Chamber supports this recommendation.

Removal of reinstatement as the primary remedy

The Australian Chamber agrees that the Australian Government should remove the emphasis on reinstatement as the primary goal of the unfair dismissal provisions in the *Fair Work Act 2009 (Cth)*. While reinstatement should remain among the suite of remedies, it should only be ordered if the employer consents.

4.2 Small business

The Productivity Commission has made the following draft recommendation:

DRAFT RECOMMENDATION 5.4

Conditional on implementation of the other recommended changes to the unfair dismissal system within this report, the Australian Government should remove the (partial) reliance on the Small Business Fair Dismissal Code within the Fair Work Act 2009 (Cth).

The Australian Chamber acknowledges that the Small Business Fair Dismissal Code is flawed because an unfair dismissal claim will still proceed where an employer seeks to rely on compliance with it or where compliance is disputed. While this situation persists, it has no value. As noted in the Australian Chamber’s initial submission, about a quarter of unfair dismissal claims conciliated

involved a business with less than 20 employees.⁷⁷ The Australian Chamber maintains its primary position that an exemption from unfair dismissal laws is required for businesses employing less than 20 employees.

Small Business Unfair Dismissal Exemption

The Australian Chamber maintains the position that the Australian Government should amend the *Fair Work Act 2009* (Cth) to provide an exemption from the unfair dismissal laws for businesses employing less than 20 employees with casuals engaged on a regular and systematic basis and employees employed by associated entities to be included in the headcount.

The Productivity Commission has acknowledged that excessive barriers to hiring and firing can pose barriers to people with less certain productivity such as unskilled workers and those with long periods of unemployment⁷⁸ however has arrived at the interim finding that unfair dismissal laws are unlikely to play a major role in the hiring and firing decisions of Australian firms.⁷⁹

The Australian Chamber does not accept the proposition of the Productivity Commission at page 236 of the Draft Report which appears to suggest that denying small businesses an exemption from the unfair dismissal laws will help them because there will be fewer exceptions to the rules. Further, to rule out an exemption on the basis that it will create a 'growth trap' for small businesses is a dilemma that the Australian Chamber believes is best left to small businesses to grapple with. It cannot be assumed that every small business will want to grow beyond 20 employees.

The Australian Chamber does not accept these interim findings and maintains the view that behavioural economics has a significant impact on hiring and firing decisions, particularly for small and medium sized employees who are less able to absorb the risk of a poor recruitment decision. As noted in the Australian Chamber's initial submission, the unfair dismissal laws have the effect that:

- recruitment and selection decisions are being influenced, resulting in less permanent employment;
- some types of job applicants are likely to be employed based on a perception that they have a heightened risk profile (e.g. those who are unemployed);
- employees will be more likely to be dismissed during the probationary period which can reduce the employee's future work prospects.⁸⁰

As noted in the Australian Chamber's initial submission, Harding (2002) found that:

UFD laws have resulted in large and intended changes in the recruitment and staff management procedures of small and medium sized businesses; some 69.8 per cent of firms said that the UFD laws had had some influence on their business' procedures (see Table 9) while 51.6 per cent of businesses reported that the laws had influenced their procedures for

⁷⁷ Australian Chamber of Commerce and Industry, Initial Submission, p. 109.

⁷⁸ Draft Report, p. 113.

⁷⁹ Draft Report, p. 216.

⁸⁰ Australian Chamber of Commerce and Industry, Initial Submission, p. 109.

dealing with workers whose performance is unsatisfactory (see Table 11). These changes are in the direction of what might be described as more formal and arguably fairer and more transparent human resource management procedures and practices (see Table 12).

These intended changes in human resource management procedures also have a number of unintended effects on firm behaviour that must be weighed against the intended effects in any assessment of the UFD laws. Some 47.9 per cent of small businesses reported that their recruitment and selection decisions are influenced by the UFD laws (see Table 13). These changes, more details of which are in Table 14, involve the following:

- *11.6 per cent of businesses reported greater use of fixed term contracts;*
- *1.3 per cent reported that they employ more casuals and fewer permanent staff;*
- *20.7 per cent reported that they employ more family and friends; and*
- *26.6 per cent reported use of longer probationary periods.*

The strongest effect on recruitment and selection decisions, however, was that 39.5 per cent of businesses reported that the UFD laws meant that there were certain types of job applicant that their business was less likely to hire (see Table 14). The types of job applicant disadvantaged by the UFD laws are: a person who has changed jobs a lot for no apparent reason (35.1 per cent of businesses); a person who is currently unemployed (15.9 per cent of businesses); a job applicant who has been unemployed for more than one year (27.4 per cent of businesses); a person who has been unemployed for more than two years (30.3 per cent of businesses) (see Table 15).

Some 44.3 per cent of respondents reported that reported that the UFD laws make the management of their workforce more difficult than it would otherwise be (see Table 16). The nature of those adverse effects are as follows: 38.9 per cent reported reduced authority over their workforce; 40.8 per cent of businesses reported that because of UFD laws it takes longer to resolve issues associated with poor performance; 37.9 per cent of businesses reported that poor performance by one worker is more likely to adversely affect the performance of other workers; and 38.3 per cent of businesses reported that more formality in dealing with workers makes communication between management and employees more difficult. See Table 17.⁸¹

Additionally, small businesses have less capacity to dedicate significant time and resources to poorly performing or behaving employees and the impact that such employees have in a small business environment is more acutely felt due to the more intimate nature of the workforce and more limited capacity to share the burden created by the employee. Small businesses need greater confidence to take risks in hiring decisions as well as to address the performance and behaviour and a small business exemption will help to provide this.

⁸¹ Harding, D., 'The effect of unfair dismissal laws on small and medium sized businesses', Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, 29 October 2002. p.iv & v.

The Australian Chamber canvassed these issues extensively in our initial submission at pages 108-127 and as far as small businesses are concerned, it is worth repeating some of the points we made at pages 109-110:

- *'Go away money' is an entrenched part of the system. Three quarters of matters conciliated settle with a monetary payment and 80 per cent of employers are influenced by the desire to avoid the cost, time, inconvenience or stress of further legal proceedings in choosing to settle rather than proceeding to an arbitrated outcome. Employers make commercial decisions to dispense with applications rather than incur further expenditure defending a claim.*
- *Apart from the actual cost of managing difficult or poor performing employees, there are costs associated in the management of the termination in both contested and uncontested contexts.*
- *Behavioural economics can impact on the way in which the unfair dismissal laws weigh on employers' minds. The unfair dismissal laws impacts operate to reduce fairness and equity in the following ways:*
 - *recruitment and selection decisions are being influenced, resulting in greater use of fixed term contracts, the employment of more casuals, family and friends and fewer permanent staff and the adoption of longer probationary periods;*
 - *there are certain types of job applicants less likely to be employed including candidates who have changed jobs a lot for no apparent reason, or who are currently unemployed or who are long-term unemployed;*
 - *employees who do not appear to be a good fit with a new employer are more likely to be dismissed during the probationary period. This in turn might have the effect of reducing the employee's chance of securing future work because of the disincentive to hire candidates with a history of changing jobs several times for no apparent reason;*
 - *the laws make it less likely that an SME will hire long-term unemployed candidates;*
 - *the increased formality and written documentation that is required by the laws may disadvantage employees more suited to less formal supervision or less literate than average.*
- *The impact of unfair dismissal laws on workforce management and culture materialises in reduced management authority, more time spent in resolving performance issues, poor performing employees having a corrosive impact on others and greater formality leading to difficulties in communication between management and employees.*
- *It has previously been estimated that the existence of the unfair dismissal laws had increased business costs, with the lower bound of estimates putting the total at \$1.3 billion per annum and have reduced employment by at least 0.46 percent (about 46,000 persons).*

The experience in Germany suggests that a small business exemption can operate acceptably. As Freyens noted in his submission to the Productivity Commission, Germany has long exempted its smallest businesses from any coverage by unfair dismissal laws. The original exemption for employers with less than 5 employees has been progressively expanded to employers with 10 or

less employees in 2004⁸² and then more recently, as noted by Freyens, to employers with less than 15 employees.

5 General protections

The Australian Chamber noted that prior to the FW Act, there was a comprehensive range of protections available covering unlawful termination, freedom of association and the taking of industrial action. However the introduction of the general protections regime has disturbed this balance and there has been strong growth in these types of claims which are too easily made without merit and costly to defend.

The Australian Chamber maintains that the strong growth rate in relation to general protections claims is likely attributable to the following characteristics of the general protections provisions:

- They cover a broader range of workplace rights than were available under either the 1993 system or the *Workplace Relations Act 1996* (Cth);
- They are available to a broader pool of people (employees, contractors and prospective employees);
- They are more attractive in terms of remedies (e.g. uncapped compensation); and
- They give claimants encouragement, due to the burden of proof imposed on employers/prospective employers (i.e. it is presumed that the employer/prospective employer/principal/prospective principal has taken the alleged action in breach, unless he or she proves otherwise).

In relation to this latter aspect, the Productivity Commission has suggested that “[s]ince employees cannot be in a position to acquire the information to prove intent, there is reasonable justification for such a reverse onus”.⁸³ The Australian Chamber rejects this proposition. If an employee believes that they have been subjected to adverse action by their employer on account of them exercising a workplace right it is reasonable to require an employee to demonstrate why they believe this is the case. The reverse onus of proof has the effect of encouraging unmeritorious claims which will require an employer to direct resources to the task of demonstrating this.

As noted in the Australian Chamber’s initial submission, the Explanatory Memorandum gave no insight as to why it was considered necessary to change the longstanding burden of proof in relation to existing protections against discriminatory conduct. While the general protections regime has introduced a new layer of anti-discrimination regulation, the reverse onus of proof with in the FW Act’s general protections regime is in contrast to Federal and State anti-discrimination laws that have required ‘direct’ or ‘indirect’ discrimination to be established.

The Australian Chamber had offered a number of reform suggestions in relation to the general protections regime including:

- limiting the general protections framework to unlawful termination provisions only;

⁸² Baker & McKenzie, *Worldwide Guide to Termination, Employment Discrimination, and Workplace Harassment Laws* - 2009 edition at p.151.

⁸³ Draft Report, p. 29.

- removing the reverse onus of proof;
- reinstating the former, pre-Fair Work Act 'Freedom of Association' protections;
- imposing higher barriers to entry such as increased filing fees for applications and caps on compensation.⁸⁴

However the Productivity Commission has instead made following recommendations:

DRAFT RECOMMENDATION 6.1

The Australian Government should amend the Fair Work Act 2009 (Cth) to formally align the discovery processes used in general protections cases with those provided in the Federal Court's Rules and Practice Note CM5..

DRAFT RECOMMENDATION 6.2

The Australian Government should modify s. 341 of the Fair Work Act 2009 (Cth) which deals with the meaning and application of a workplace right.

- *Modified provisions should more clearly define how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment.*
- *The FW Act should also require that complaints are made in good faith, and that the Fair Work Commission must decide this via a preliminary interview with the complainant before the action can proceed and prior to the convening of any conference involving both parties.*

DRAFT RECOMMENDATION 6.3

The Australian Government should amend Part 3-1 of the Fair Work Act 2009 (Cth) to introduce exclusions for complaints that are frivolous and vexatious.

While tightening the discovery processes in relation to claims, more clearly defining a workplace right and introducing a pre-screening process in relation to claims may provide some incremental improvement in the management of these claims, in the Australian Chamber's view, they do not go far enough to address the problems associated with the general protections regime. The Productivity Commission has suggested that it is useful to return to first principles and consider what the general protections are trying to achieve.⁸⁵ The Australian Chamber agrees and notes that the regime, introduced in the absence of a Regulation Impact Statement, has not lived up to the promise of promoting fairness and representation at the workplace,

...through streamlined and simple general protections dealing with workplace and industrial rights, including the rights to freedom of association and protection against discrimination, unlawful termination and sham arrangements...⁸⁶

Scaling back the general protections regime and reverting to the previous suite of rights would be more effective in restoring balance and provide reasonable relief to employers while not depriving employees of fundamental protections.

⁸⁴ Australian Chamber of Commerce and Industry, Initial Submission, pp. 145 -146.

⁸⁵ Draft Report, p. 264.

⁸⁶ Explanatory Memorandum, *Fair Work Bill 2008* (Cth), p. ii.

Repeal of General Protections Regime

The Australian Chamber maintains the position that Australian Government should repeal the general protections laws and reinstate the pre-*Fair Work Act 2009* (Cth) freedom of association protections and unlawful termination provisions.

The Productivity Commission has also made three additional recommendations (Draft Recommendations 6.3, 6.4 and 6.5) which, in the context of the current general protections regime are supported as interim measures with a view to implementing the Australian Chamber's primary recommendation as reflected above.

Cap on damages for general protections claims, exclusion of frivolous and vexatious claims and collection of more information

The Australian Chamber supports the following draft recommendations of the Productivity Commission as interim measures pending substantive reform:

- The Australian Government should introduce a cap on compensation for claims lodged under Part 3-1 of the *Fair Work Act 2009* (Cth).
- The Australian Government should amend Part 3-1 of the *Fair Work Act 2009* (Cth) to introduce exclusions for complaints that are frivolous and vexatious.
- The Australian Government should amend Schedule 5.2 of the *Fair Work Regulations 2009* (Cth) to require the Fair Work Commission to report more information about general protections matters. Adequate resourcing should be provided to the Fair Work Commission to improve its data collection and processes in this area.

6 Anti-bullying

The Productivity Commission has identified that a post-implementation review of the anti-bullying provisions is scheduled providing an opportunity to assess the operation of the jurisdiction. The Australian Chamber will be making submissions to that inquiry however its primary position is established.

The Australian Chamber identified the following impacts and concerns in its initial submission:

- having to navigate complex regulatory framework arising from the workplace relations framework and work health and safety laws;
- a widening exposure to potential claims;
- the cost in time and money of managing this exposure, responding to allegations and claims and defending applications (whether or not workplace bullying or meritorious);
- the possibility of facing multiple investigatory and adjudicative processes arising out of the same set of circumstances; and
- the possible impact on managerial prerogative including where bullying allegations arise during a performance management process.

While the Australia Chamber condemns serious misconduct in the workplace such as threats of or actual violence, intimidation, harassment or workplace bullying and supports workplace based activities to prevent and manage any issues, the anti-bullying provisions of the FW Act introduced further regulation where regulation and protection already existed. The Australian Chamber's primary position is that workplace bullying is more appropriately addressed as a work health and safety issue within the work health and safety regime.

7 Minimum wages

The Productivity Commission has observed that:

Minimum wages were developed at a time when it was typically only a man who worked in a household and when the social welfare system was weakly developed – both of which have now changed.⁸⁷

This raises the question of what the minimum wage should now be doing and the Australian Chamber challenges the inference that it should have a 're-distributional' goal.⁸⁸ The Australian Chamber agrees with the Productivity Commission's statement that "improved social and economic inclusion requires more than a single policy, which is why governments should seek use minimum wages as part of a policy suite".⁸⁹ Equity is best addressed through mechanisms such as the taxation and social security systems as opposed to through the wage setting system.

The Productivity Commission has noted that some economics have suggested that minimum wages may actually have the effect of widening earnings and income equality due to disemployment effects and has quoted Wooden (2010) in this regard who was also quoted in the Australian Chamber's submission as follows:

Minimum wage rises benefit low-paid workers at the expense of the unemployed. Any action that increases the cost of hiring low-wage labour reduces the likelihood of those without jobs finding one in the future. Moreover, it is the long-term unemployed who's employment chances are most damaged. This seems very unfair. And it certainly doesn't promote social inclusion through greater workforce participation [...] The decision looks even more unfair once you realise that many low paid workers do not live in poor households, and that a low-paid worker has a much better chance of getting a better paid job than someone who doesn't have a job at all.⁹⁰

The Australian Chamber's primary position is that minimum wage setting must provide a genuine safety net which is appropriately balanced. Consistent with the Productivity Commission's view that consumer's, the unemployed and underemployed should have a bigger voice in the system⁹¹, minimum wage setting should be sensitive to the impact of increases on the cost of living and key considerations should be the protection of jobs in the labour market and promoting employment of youth and those who are vulnerable in the labour market.

⁸⁷ Draft Report, p. 17.

⁸⁸ *ibid.*, p. 17.

⁸⁹ *ibid.*, p. 18.

⁹⁰ Wooden, M. "A hole in the safety net", *The Australian Financial Review*, 9 June 2010.

⁹¹ Draft Report, p. 8.

The Productivity Commission has suggested that employment impacts should be a key focus of minimum wage setting⁹² and the Australian Chamber agrees. Participation in paid work is critical to maintaining adequate living standards and to prevent poverty and social exclusion and it the minimum wage must not be set at a rate too high so as to negatively impact employment outcomes. The Productivity Commission has observed that “for many people, minimum wage jobs are a temporary part of their working lives, and indeed such jobs can be a ‘stepping stone’ into the world of work and higher paid jobs later”.⁹³ This is ratified by the Productivity Commission’s analysis of minimum wage reliance which demonstrates higher rates of minimum wage reliance among employees aged less than 20 years relative to other groups.⁹⁴ Policy settings should not take away these stepping stones and exacerbate the risk of unemployment for those most vulnerable in the labour market. The Australian Chamber has made clear that it does not aspire for Australia to be a low wage economy. Australian Chamber policies have consistently promoted increased wages and improved living conditions via measures that will grow Australia’s national prosperity. However it is critical that minimum wage growth does not go unchecked.

The Productivity Commission has stated:

*Given the highly adverse outcomes of unemployment for people’s wellbeing, whenever the economy is weakening (as appears to be the case now), there are grounds for the FWC to temporarily adopt a conservative approach to minimum wage setting.*⁹⁵

The Australian Chamber agrees that dampened economic growth and uncertainty warrant a cautious approach to wage setting.

We note the following draft recommendation has been made by the Productivity Commission:

DRAFT RECOMMENDATION 8.1

In making its annual national wage decision, the Fair Work Commission should broaden its analytical framework to systematically consider the risks of unexpected variations in economic circumstances on employment and the living standards of the low paid.

While we support the need to exercise caution in wage setting during times of economic instability, we are concerned that this recommendation is not sufficiently framed to address the interests of key stakeholders within the framework including the unemployed, underemployed and those in the labour market who are most acutely impacted by softening economic conditions.

The Australian Chamber considers that a reframing of the minimum wage setting principles to better reflect these interests is required and if the principles do not reflect the needs of the unemployed, underemployed, those most vulnerable in the labour market and the system of minimum wage setting will fail as a safety net. The Australian Chamber supports the vesting of the role of minimum wage setting within a Minimum Standards Division of the Fair Work Commission so that the task of wage setting receives appropriate economic analysis. This accords with the following comments made by the Productivity Commission has noted that:

⁹² Draft Report, p. 330.

⁹³ *ibid.*, p. 14.

⁹⁴ *ibid.*, p.315.

⁹⁵ *ibid.*, p. 15.

Wage determination is inherently an economic, statistical and social matter that needs to give most weight to new evidence on the consequences of regulatory choices in contemporary society...

The implication is that the FWC should develop clearer analytical frameworks and proactively undertake its own data collection and systematic high-quality empirical research as the key basis for its award decisions and wage adjustments.⁹⁶

Such analysis should turn itself to the circumstances of award reliant employees and employers and consider the impact of minimum wage increases (including both the national minimum wage and awards) on small businesses, who are more likely to pay minimum wages relative to larger employers and have less capacity to absorb increases in labour costs. Such targeted analysis could be supported by reframing the objects of minimum wage setting to expressly require consideration of the impact of the minimum wages on small businesses and employment outcomes in those businesses.

Reframing the objects of minimum wage setting

The Australian Chamber recommends that the objects underpinning minimum wage setting be reframed to better take into consideration the broad range of stakeholders impacted by minimum wage setting decisions including the unemployed, underemployed, small business employers, young people and those who are most vulnerable in the labour market.

This is consistent with the Australian Chamber's previously expressed view that the process of minimum wage setting should provide a genuine safety net which is appropriately balanced.

The Productivity Commission has suggested that there have been relatively few Australian studies of the impact of minimum wages and those that do exist "are often dated and/or have data or methodological limitations that lessen the weight of their findings".⁹⁷ Notwithstanding this, the Australian Chamber notes the Productivity Commission's observation that "the Australian econometric studies taken together suggest that minimum wages adversely affect employment. This is not surprising given that the Australian minimum wage is high by international standards. The Australian Chamber considers that the negative effects are understated within much of the existing economic analysis and academic literature. A Minimum Standards Division of the Fair Work Commission should turn itself to the task to better understanding the employment effects of increases to the national minimum wage and award wages and this should include analysis specific to small business employment.

7.1 Variations from uniform minimum wages

The Productivity Commission has recommended change to the FW Act to address limitations on the FWC's ability to vary award wages on exceptional circumstances grounds after an annual wage review has been completed (Draft Recommendation 9.1).⁹⁸ The Australian Chamber supports this recommendation as set out below.

⁹⁶ Draft Report, p. 11.

⁹⁷ *ibid.*, p. 299.

⁹⁸ *ibid.*, p. 350.

Variations in award wages in exceptional circumstances

The Australian Chamber agrees that the Australian Government should amend the *Fair Work Act 2009* (Cth) so that the Fair Work Commission is empowered to make temporary variations in the awards in exceptional circumstances after an annual wage review has been completed.

7.2 Wages for junior employees, apprentices and trainees

The Productivity Commission has stated that it:

*is wary about making any precipitate changes to the current system of youth wages if that was to put at risk the employment of more vulnerable people with lower skills. The transition from education to work is one of the critical pathways, and changes that affected employment of the less academically able could have adverse generational impacts.*⁹⁹

The Productivity Commission is right to be cautious and while vocational training should not be stigmatised as a pathway for the less ‘academically able’, it should be acknowledged that traineeships and apprenticeships offer a career pathway for those who do not already possess the skills to enable them to compete in the labour market with those who are already skilled and experienced. Apprentices and trainees are not typically productive in the early years of their training and employers who take on a trainee or apprentice are making an investment in that individual. If the rate of pay for apprentices and trainees is too high, it will make such investment cost prohibitive. Similar principles apply to employees who are gaining entry to the labour market for the first time or have limited skills and experience and as such junior rates play a role in helping young people compete in the labour market.

The Productivity Commission has stated:

*It is notable in the Australian Context that few claim that the wide disparity between junior minimum pay rates (currently starting at around \$6.20 an hour for a person aged below 16 years – or about 40 per cent of the adult rate) should be entirely eliminated. The size of the wage discount has long been justified on the grounds that younger workers have typically lower productivity and would be disadvantaged in labour markets were they paid at the adult rate – a point of consensus among many unions, employers and wage regulators.*¹⁰⁰

If set at too high a rate, the minimum wage applying to young workers will negatively impact their employment outcomes. This acknowledged by the Productivity Commission which has stated:

*In effect, without discounted rates, many young workers would be priced out of the labour market, foregoing the benefits that some early employment, even if on a part-time basis, can bring.*¹⁰¹

Trainees, apprentices and junior employees will become proficient at varying rates and the Productivity Commission has sought information on whether the structure of junior pay rates should

⁹⁹ Draft Report, p. 18.

¹⁰⁰ *ibid.*, p. 306.

¹⁰¹ *ibid.*, p. 356.

be based on a model other than age, such as experience or competency or some combination of these.¹⁰² There is no standardised framework that can be applied in measuring the proficiency of a junior employee in the context of their role and working environment but notwithstanding this, the more skilled and productive a person becomes the more competitive in the labour market they will become and the more motivated an employer will be to retain them. This may result in an employer adopting retention strategies which can include financial and non-financial benefits.

However the system does not need to play an active role in prescribing this outcome and nor should it. In the Australian Chamber's view there are risks associated with moving away from the aged based wage progression model for junior employees and no clear benefits. It is important that wage discounts are used as a means of enticing employers to employ young and unskilled workers and the Australian Chamber also agrees with the Productivity Commission's proposition that:

*Governments should not neglect other policies that are complimentary to minimum wages. These could include measures that improve the employability of less skilled people and wage subsidies, but only where these are designed carefully and properly targeted.*¹⁰³

In 2010, the then Minister for Education appointed an Expert Panel to advise the Government on reform options for the Australian Apprenticeships system. That expert panel found:

*There is currently a lack of integration between the Australian Apprenticeships system and the workplace relations system. We note particularly the inconsistencies in modern awards on a range of issues related to apprenticeship and traineeship wages and conditions. For apprenticeships and traineeships, this includes provision for part-time participation, adult wage rates, allowances and recognition of pre-apprenticeship training. The workplace relations framework needs to complement and support the VET system, be responsive to the needs of industry and encourage the take-up and completion of apprenticeships and traineeships.*¹⁰⁴

Such lack of integration remains and Australian Chamber member, the Housing Industry Association has identified the following areas of tension:

- *[C]hanges to wages and conditions for apprentices (including adult apprentices), trainees and juniors as a direct consequence of award modernisation.*
- *Ways to achieve flexibility with respect to the engagement of junior employees and employees to whom training arrangements apply to ensure that flexible arrangements are available to support their employment and training arrangements. The modern awards and their classification structures should not be used to prevent the development of more relevant and timely training avenues and the development of skills.*
- *Unnecessary procedural complexities and duplication with regard to the interaction between the training contract and industrial relations system, including but not limited to the process for terminating trainees and apprentices.*

¹⁰² Draft Report, p. 359.

¹⁰³ *ibid.*, p. 18.

¹⁰⁴ 'Apprenticeships for the 21st Century Expert Panel Paper, Commonwealth of Australia, January 2011, p. 10

- *A lack of support within Modern Awards to support employment opportunities for young people and people who wish to develop new skills.*¹⁰⁵

The Full Bench of the Fair Work Commission handed down a decision dealing with “apprentices, trainees and juniors” matters on 22 August 2013 as part of the 2 year transitional review of Modern Awards. The decision made significant changes to apprenticeship provisions and its implementation was difficult and contentious. There were a significant number of post-decision proceedings and a number of secondary decisions, including one handed down on 12 March 2014 which finalised competency based wage progression.

The Fair Work Commission decided that:

- the rates of pay for first and second year apprentices should be adjusted to standard percentages;
- special provisions should be made in relation to rates of pay and wage protection for adult apprentices;
- provision should be made for competency based wage progression to be introduced into five modern awards and for consideration to be given to its introduction into other awards;
- adjustments should be made in relation to apprentice conditions of employment including those relating to travel costs, training time, timely payment of training fees, and attendance at training; and
- the model school-based apprentice schedule should be inserted into several modern awards which did not contain it, and the schedule should be varied to provide for competency based wage progression.

There has been a concerning downturn or stagnant growth in apprenticeship and traineeship commencements across the country. While this cannot be attributed solely to the changes to apprentices’ rates because there has been a series of changes to policy, funding and financial incentives which have resulted in a dramatic drop in traineeships and levelling off in apprenticeship commencements, the figures suggest that the new apprentice rates may be contributing to the problem.

The Australian Chamber therefore supports the comprehensive review into Australia’s apprenticeship and traineeship arrangements in the terms suggested in Draft Recommendation 9.2 as reflected below:

Review of apprentice and traineeship arrangements

The Australian Chamber agrees that the Australian Government should commission a comprehensive review into Australia’s apprenticeship and traineeship arrangements. The review should include, but not be limited to, an assessment of:

- the role of the current system within the broader set of arrangements for skill formation;
- the structure of awards for apprentices and trainees, including junior and adult training wages and the adoption of competency-based pay progression;

¹⁰⁵ Housing Industry Association, Submission to the Productivity Commission on the Inquiry into the Workplace Relations Framework, March 2015, p. 27.

- the factors that affect the supply and demand for apprenticeships and traineeships, including the appropriate design and level of government, employer and employee incentives.

8 Measures to complement minimum wages

The Productivity Commission has invited participants' further input on the feasibility, merits and optimum design on an earned income tax credit (EITC) in Australia, what its introduction might mean for future minimum wage determinations and employment outcomes, and in what conditions it would be appropriate to implement such a scheme.¹⁰⁶

An EITC provides top-up payments (or negative income tax) for every dollar earned by low income individuals or households, which are ultimately withdrawn as income increases.

EITCs may have the advantage of:

1. providing incentives for individuals to seek employment;
2. better targeting poverty relative to minimum wages because many minimum wage earners do not live in low income households, which means poverty can be reduced more effectively at a lower cost

However, EITCs also have drawbacks.

1. since EITCs are withdrawn as incomes increase they create higher effective marginal tax rates that discourage increased hours, additional training and workforce participation by secondary income earners (and more targeted versions create higher effective marginal tax rates);
2. the taxes used to fund EITCs have their own economic costs (and less targeted versions with lower effective marginal tax rates require more revenue).

Some also question whether income or household income is the best measure of poverty, given the value of leisure and domestic labour by those not in employment.

One threshold question for the introduction of an EITC are the transitional implications as while there may be potential to combine EITCs and minimum wages, an EITC should not be introduced on top of the existing minimum wage.

The merits of introducing an EITC in Australia is a significant question of policy and the Australian Chamber would recommend that detailed modelling be undertaken to determine whether exploring such a measure was feasible.

9 Awards

The Australian Chamber has consistently expressed concern that the multi-layered and highly regulated approach to minimum wages and conditions via the NES and industry/occupational

¹⁰⁶ Draft Report p. 385.

awards is too complex, lacking in flexibility and a costly foundation for bargaining when assessed against the BOOT.

However the Productivity Commission has stated:

Unlike for the majority of the century of awards, the last three decades have seen the awards system begin to catch up with the flexibility required by the Australian economy. This is perhaps one reason why only a few stakeholders in this inquiry have suggested something approaching radical change to the awards (the notable exceptions being the Business Council of Australia (BCA), the Australian Chamber of Commerce and Industry (ACCI) and Master Builders Australia.¹⁰⁷

The Australian Chamber does not accept that the awards have become more flexible. Problematic award conditions including excessive penalty rates, prescriptive minimum engagement periods and part-time hours clauses continue to restrain businesses from structuring arrangements in the most efficient and productive way and also constrain choice in working arrangements.

The Productivity Commission has stated:

History and precedent play too big a role in some of the FWC's key economic and social functions, particularly award determinations. In effect, the past is assumed innocent unless found guilty, embedding old, but outdated features of the WR system.¹⁰⁸

Such an approach is unsatisfactory and inconsistent with modern approaches to regulation and was inherent in the award modernisation process. While the process of award modernisation reduced the number of awards, the award modernisation request made by the then Minister included the statement that the process was not intended to disadvantage employees or increase costs for employers. This served to constrain the award modernisation process such that it did not effectively revise content to adapt it to the modern context.

Award consolidation has occurred via the award modernisation process however the modern awards have not departed significantly from their pre-modern content and remain as long and complex documents. The regulatory burden of the award system was entrenched and threatens to intensify with each successful union claim for further regulation and prescription. Evidence of this trend can be seen in recent proceedings in relation to the four-yearly review of modern awards in which unions are seeking matters in all 122 modern awards such as:

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

¹⁰⁷ Draft Report p. 402.

¹⁰⁸ *ibid.*, p. 11.

The claims, if awarded, will in fact curtail flexibility currently available in awards by preventing employers from structuring their business arrangements in the most efficient and productive manner and will also increase prescription and intervention in the employment relationship. Such prescription results in additional regulatory and cost imposts for employers in what is already an unduly complex system.

The Productivity Commission has noted that:

...notwithstanding a shift towards enterprise bargaining (and to a lesser extent, individual arrangements), Australia appears to give more weight than other Anglo-Saxon countries to elaborate rules about WR processes and, most particularly, to the centralised determination of minimum wages and conditions for many employees. This then requires a complex legal and institutional architecture that is distinctive to Australia.¹⁰⁹

This ‘complex legal and institutional architecture’ is particularly problematic for small businesses whose needs are not properly reflected in the design of awards. The impact of such regulation upon small business must be considered. Small business owners already struggle to navigate the complex dual-layered safety net of NES and awards. In a study commissioned by the FWC to elicit insights from small businesses with between 1 and 19 employees that are end-users of the awards (FWC Small Business Study), the following findings emerged as identified in the Australian Chamber’s initial submission:

- the ‘layout of modern awards elicited negative sentiment and was considered daunting’;¹¹⁰
- the awards ‘were seen as difficult to use, but in-line with their low expectations of a government, regulatory/policy document, i.e. complex and challenging’;¹¹¹
- the awards were considered to be ‘convoluted’, ‘complex’, ‘ambiguous’, ‘of questionable relevance’ and written for the benefit of ‘bureaucrats and lawyers’;¹¹²
- there is little confidence in the modern awards and the ‘lack of certainty was disempowering for small business owners in the study’ leading to ‘active avoidance’.¹¹³

The current system of awards does not reflect the needs and capacities of the majority of employers who employ less than 20 employees. Small business owners struggle to navigate the complex dual-layered safety net of NES and awards. The complexity of the award system compounds the burden on small business employers to comply with multiple regulatory instruments in implementing the safety net and is at odds with the principle that regulation should be clearly accessible to those who must comply and in an appropriate form to facilitate compliance.

Accordingly, the appropriateness of a ‘modern award’ system built around historic award content must be challenged. Indeed the Productivity Commission has stated in relation to awards that “[i]n some instances, they are more historical relics of the relative bargaining strength of past

¹⁰⁹ Draft Report, p.73.

¹¹⁰ A Qualitative Research Report on: citizen co-design with small business owners, prepared by Sweeney Research for the Fair Work Commission, August 2014, p. 5.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid., p. 6.

protagonists than a carefully thought out way of remunerating employees”.¹¹⁴ It has also suggested that “[w]hile the system has adapted, the lingering presence of that history makes it unlikely that awards closely reflect the type of regulatory settings that could be designed for today’s economic environment”.¹¹⁵

Despite this, the Productivity Commission has suggested that the current system of awards does not appear to be producing highly adverse outcomes and has suggested that:

*The outcomes of any entirely new system are, by comparison, uncertain and would inevitably involve significant dissent plus implementation problems on a national scale. Moreover, the parties to employment contracts are not passive, but can be expected to respond (or attempt to respond) to circumstances that are favourable to them. Further, if the re-distributive effect of awards were to be reduced, the tax-transfer system would almost certainly have to markedly extend its reach.*¹¹⁶

The Productivity Commission has also stated:

*All parties suggested that the costs of transitioning to the modern awards between 2009 and 2014 were considerable (‘nightmarish’ according to some stakeholders). Any major shift away from awards would trigger costs of a higher magnitude again. Removing awards would also require re-assessment of many other features of the WR system. For example, what benchmark, if any, would be used for testing whether an enterprise agreement really met some ‘reasonable’ wage standards? A no-disadvantage test is meaningless without a benchmark.*¹¹⁷

The Australian Chamber does not share the view that the current system does not appear to be producing highly adverse outcomes nor does it share the view that the distortions created by awards reduce the transaction costs of forming employment contracts for small business.

The Australian Chamber agrees that transitioning to the modern awards could be described as ‘nightmarish’ however this outcome was a largely consequence of the then Minister’s statement previous Government’s commitment that no-one would be worse off as a result of the process. This was an impossible outcome. The Australian Chamber has noted in its initial submission that every policy change will have a consequence and in the context of our changing economic conditions, a shift toward a less prescriptive, decentralised system will have adjustment impacts. The scars left by the complex transitional processes of the past should not stand in the way of future reform but should inform transitional approaches into the future.

As identified by the Productivity Commission, the Australian Chamber’s primary position is that the safety net should move to a more decentralised and deregulated system which includes a set of legislated minimum standards (against which a full suite of agreements making options would be assessed), a national minimum wage and industry rates of pay, and any award conditions that are agreed upon by parties to an agreement.

¹¹⁴ Draft Report, p. 21.

¹¹⁵ *ibid.*, p. 424.

¹¹⁶ *ibid.*, p. 425.

¹¹⁷ *ibid.*, p.21.

The Productivity Commission has stated that “[a]wards should be easier to understand and no more complex than they need to be”¹¹⁸ however the award modernisation process and subsequent review process has enshrined historical content without adequately asking why it is there and whether it remains relevant in the modern context. Additionally, the current framework has operated in a way that affecting even marginal changes to the modern awards to address problems with their operation has proven difficult and costly. So how do we challenge award content and affect change?

The Productivity Commission has placed significant emphasis on reforming the Fair Work Commission and the Australian Chamber has provided conditional support for the establishment of a Minimum Standards Division.

The Productivity Commission has also made the following recommendations in the context of ‘repairing awards’:

DRAFT RECOMMENDATION 12.1

The Australian Government should amend the Fair Work Act 2009 (Cth) to:

- *remove the requirement for the Fair Work Commission to conduct four yearly reviews of the modern awards*
- *add the requirement that the Minimum Standards Division of the Fair Work Commission review and vary awards as necessary to meet the Modern Awards Objective .*

To achieve the goal of continuously improving awards’ capability to meet the Modern Awards Objective, the legislation should require that the Minimum Standards Division:

- *use robust analysis to set issues for assessment, prioritised on the basis of likely high yielding gains*
- *obtain public guidance on reform options*

DRAFT RECOMMENDATION 12.2

The Australian Government should amend the Fair Work Act 2009 (Cth) so that the Minimum Standards Division of the Fair Work Commission has the same power to adjust minimum wages in an assessment of modern awards as the minimum wage panel currently has in annual wage reviews.

An overhaul of the process for reviewing awards will be required to progress if historical award content is to be rationalised. The Productivity Commission has observed:

The WR system sets floors not ceilings. Many aspects of the economy that are the target of WR policy are predominantly shaped by market forces. In buoyant economic times, wage dispersion increases across industries (which is not an adverse outcome). Increased over award wages and conditions are important signals for employees to move to areas of high demand. Similar, when demand eases, there will be downward pressure over time on over award payments.¹¹⁹

¹¹⁸ Draft Report, p.22.

¹¹⁹ *ibid.*, p.68.

However in setting such a floor, the award system currently operates as more than a safety net, providing minimum wages for classifications of employees with a minimum entitlement to wages in excess of \$100,000. This prevents the market from adjusting as efficiently as it otherwise would and raises questions around why such market intervention is prescribed. The Productivity Commission has observed that “unlike the past, minimum wages and awards are intended primarily to serve as a safety net, not to regulate wages and conditions for the majority of employees”¹²⁰ yet there are clearly anomalies within the system which suggest it is not operating as intended.

In theory, awards should operate as a safety net to stop wages and conditions from falling below a regulated floor. With less than 20 per cent of people now considered award-reliant, we should be mindful of who sits among the award-reliant. Data suggests they are less skilled on average than other groups. For many people, award wage jobs are a temporary part of their working lives and can create a ‘stepping stone’ into the world of work and higher paid jobs later on in life. It is critical that regulated floor is not constructed in a way that will negatively impact the employment prospects of those most vulnerable in the labour market including the low skilled, our youth or the long term unemployed.

The Australian Chamber agrees that the Minimum Standards Division “having undertaken rigorous research to identify the tradeoffs it is seeking to weigh, should therefore be required to articulate exactly how its decisions are reached as well as the consequences of its decisions for all those affected”.¹²¹ The Productivity Commission has challenged the institutional influence of the industrial parties in making recommendations for reform of the workplace relations system however appears less inclined to challenge system content which has largely evolved as a consequence of the settling of disputes between industrial parties. However if awards are to remain, the Minimum Standards Division must be guided by a framework that drives rationalisation through challenging historical content which better takes into consideration the small businesses that are required to apply the awards. This will require legislative change.

Rationalisation of award content in transitioning to a simple safety net of minimum standards

The Australian Chamber maintains that there is a strong case for the rationalisation and redesign of the current system to make it more appropriate for application by small business. This should include reframing the objects of modern awards to ensure that they do not exist as a barrier to the efficient structuring of working arrangements at the workplace level, penalty rate reform and the rationalisation of award content with a view to moving toward codification of minimum standards that are non-prescriptive and easy to understand and which apply as a foundation for agreement making.

The Productivity Commission has suggested that “the more systematic analysis by the FWC of common issues in awards, such as weekend penalty rates and leave loadings, may pave the way

¹²⁰ Draft Report, p.80.

¹²¹ *ibid.*, p. 431.

for further consolidation of entitlements in the NES.”¹²² However it is the Australian Chamber’s view that the awards and NES should not have such a relationship and where the NES should prescribe nationally consistent content, while a system of awards remains it should address only industry specific content and should not deal with matters contained within the NES. The multi-layered nature of the safety net creates undesirable complexity and confusion and the interaction of the NES with aspects of the awards structure has been a source of uncertainty and disputation.

10 Penalty rates

The Australian Chamber has called for penalty rate reform within its initial submission and noted that while penalties may still be relevant in regulating work beyond reasonable ordinary hours, the way in which people spend their time has undoubtedly changed. Australian society and the source of our economic activity have changed significantly since the genesis of penalty rates and policy settings must enable businesses, particularly those in the services sectors, to interact with their workforce and consumer base in a more dynamic way.

The Productivity Commission has acknowledged these realities, stating that:

- *Weekend work is now common. The traditional Monday to Friday week is not dead, but nor is it as predominant as in the past. Some 4 million employed people – more than one in three in the workforce – work at least a Saturday or Sunday each week.*¹²³
- *The crucial development in the past few decades has been the growing demand for the weekend supply of certain services, precisely in the industries where penalty rates have become a controversial issue. Increased female workforce participation rates, the reduction in religious observance, changing social norms about shopping times, the softening trading hour restrictions, and the emergence of international online commerce will have contributed to this.*¹²⁴

The Australian Chamber’s initial submission referenced the trend toward deregulation of trading hours and the expectation of consumers that markets are responsive to their needs and prices are as low as possible. However the penalty rates structures of a number of awards risk hampering competition reform agendas in industries where trading outside of the 9am-5pm Monday to Friday pattern is a feature. Excessive penalty rates that hamper employment, service levels or see businesses close their doors have negative consequences for the economy and its participants and hamper choice. The Productivity Commission has also acknowledged that:

*Failure to recognise the current impacts of high Sunday rates in the relevant industries will also have longer-run effects by frustrating new business models (and the employment they can bring).*¹²⁵

This is particularly problematic for sectors of the economy upon which we are reliant for continued growth as our sources of economic activity change, such as tourism and hospitality. To demonstrate the importance of these sectors of the economy, National Tourism Alliance (which has

¹²² Draft Report, p. 170

¹²³ *ibid.*, p. 9.

¹²⁴ *ibid.*, p. 23.

¹²⁵ *ibid.*, p. 25.

now vested its peak policy and advocacy roles in the Australian Chamber National Tourism Council) has provided the following data:

1. *Around 90 per cent of 280,000 tourism and hospitality businesses in Australia are small businesses, and about half are in regional areas.*
2. *These businesses employ 1 million people across Australia, or 1 in 12 employees.*
3. *Growth in tourism and hospitality has a significant positive flow-on effect to the rest of the economy: tourism's output multiplier is valued at 1.92, which means for every dollar tourism earns directly in the Australian economy, it value adds an additional 92 cents to other parts of the economy.*¹²⁶

Supporting growth in these sectors will require policy settings that enable this outcome which are overwhelming comprised of small businesses, will

Centralised labour regulation that operates on a 'one size fits all' basis or a 9am to 5pm Monday to Friday paradigm does not reflect the evolution of the modern economy. The inflexible labour rules contained within the awards system prevent businesses from structuring their arrangements in the most efficient and productive ways and penalty rates have created absurd labour market distortions. As called out in the Productivity Commission's Draft Report, an inexperienced level 1 pharmacy assistant with limited qualifications who works on a Sunday is paid around 40 per cent more than the usual weekly rate of an experienced pharmacist (who requires four or more years of undergraduate education, a one year internship and continuing professional development). The continuation of high penalty rates in awards is anachronistic given our changing context including reduction in religious observance, changing social norms about shopping times, relaxation of trading hour restrictions and the emergence of the online economy.

The Productivity Commission has made the following draft recommendations:

DRAFT RECOMMENDATION 14.1

Sunday penalty rates that are not part of overtime or shift work should be set at Saturday rates for the hospitality, entertainment, retail, restaurants and café industries.

Weekend penalty rates should be set to achieve greater consistency between the hospitality, entertainment, retail, restaurants and café industries, but without the expectation of a single rate across all of them.

Unless there is a clear rationale for departing from this principle, weekend penalty rates for casuals in these industries should be set so that they provide neutral incentives to employ casuals over permanent employees.

DRAFT RECOMMENDATION 14.2

¹²⁶ National Tourism Alliance, Submission to the Productivity Commission Inquiry into the Workplace Relations Framework, March 2015, p. 1.

The Fair Work Commission should, as a part of its current award review process, introduce new regulated penalty rates as set out in draft recommendation 14.1 in on step, but with one year's advanced notice.

In recommending that Sunday rates in the hospitality, entertainment, retailing, restaurants and cafes industries be brought into line with Saturday rates, the Productivity Commission acknowledged that:

Employment and hours worked on Sundays would rise after the change. Lower regulated penalty rates are likely to increase the opening hours of businesses and encourage higher staffing ratios, with the job opportunities that this presents for people.¹²⁷

The Australian Chamber supports the Productivity Commission's recommendation and remains a strong supporter of penalty rate reform. However the Australian Chamber considers that there is a case for penalty rate reform beyond revising the rates applicable on Sundays and noted in its initial submission that area of award regulation that is particularly problematic for service sector businesses is the application of excessive penalty rates on public holidays when there is an expectation of trade. A minimum payment at the rate of double time and a half for people working in service sectors which are expected to trade on public holidays does not distinguish these industries from those that do not ordinarily trade on public holidays. The needs of businesses outside of the industries identified in the draft recommendation that trade and are expected to trade during non-standard working times should also be the target of penalty rate reform.

While the Australian Chamber supports the draft recommendations as interim measures, the mechanism for achieving penalty rate reform warrants further consideration. The Australian Chamber maintains the view is that long term objective of the system should be to move toward an environment where wages and conditions are overwhelmingly set by workplace bargaining, either collectively or individually, underpinned by a sustainable and effective safety of minimum wages and conditions. The Australian Chamber expects that penalty rates will remain a feature of bargained outcome as payment of a premium may also be required to attract people to work at certain times. However the Australian Chamber's model for a safety net of terms and conditions for the future will facilitate the organisation of labour in the most efficient way and will enable negotiation of working hours arrangements based on mutual interests.

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

Penalty rate reform

The Australian Chamber supports the Productivity Commission recommendation that Sunday

¹²⁷ Draft Report, p. 25.

penalty rates for cafes, hospitality, entertainment, restaurants and retailing be aligned with Saturday rates as an interim measure.

The long term object of the system should be to move toward an environment where wages and conditions are overwhelmingly set by workplace bargaining, either collectively or individually, underpinned by a sustainable and effective safety of minimum wages and conditions.

In working toward this longer term policy objective the objects of the *Fair Work Act 2009* (Cth) and awards should be reframed to require special consideration of the need to ensure that penalty rates applying to businesses that ordinarily trade during non-standard times (such as evenings, weekends and public holidays) do not negatively impact employment opportunities in those sectors.

The Productivity Commission has observed:

*It is not possible to characterise a 'normal' pattern of work. Many people do not work in regular full-time long-tenure jobs in daylight hours on weekdays. Indeed, there are many part-timers, shift and overtime workers, people in non-traditional forms of employment, and people with short-term tenure in their jobs. More than one in twenty people are multiple jobholders and close to one in three secondary students work.*¹²⁸

Our changing economy has facilitated this outcome with employment in manufacturing progressively declining and service industries continuing to grow. The participation rate of older workers is rising as our population ages and access to flexible forms of labour engagement has supported this outcome. It is critical that the framework provides access to the broadest range of work arrangements as possible and that barriers to employment within the industries that can facilitate flexible forms of labour engagement are removed.

The Productivity Commission has sought "views on whether there is scope to include preferred hours clauses in awards beyond the current narrow arrangements, including the scope for an arrangement where an employer would be obliged to pay penalty rates when it requested an employee to work at an employee's non-preferred time in the employment contract".¹²⁹ It also seeks views on the risks of any such 'penalty rate' agreements and how these could be mitigated.

The Australian Chamber's model safety net would facilitate the negotiation of working hours to enable such outcomes but while agreements continue to be assessed against the award structure, the Australian Chamber would support express clarification within the FW Act that non-monetary benefits and voluntary/preferred hours arrangements can pass any test underpinning those agreements. Preferred hours arrangements can help address cost barriers associated with parties reaching mutual agreement on working hours and can help reduce barriers to offering work to those who prefer to work at 'non-standard times'. The Productivity Commission has stated that "[v]oluntary consent to work longer hours than the average is not an obvious problem, unless it is actually not voluntary', but obtained through coercion".¹³⁰ To safeguard against coercion, the

¹²⁸ Draft Report, p. 89.

¹²⁹ *ibid.*, p. 532.

¹³⁰ *ibid.*, p. 80.

requirement for voluntary consent could be reflected within any express provision clarifying the legality of these arrangements.

Preferred hours clauses

The Australian Chamber supports the inclusion of preferred hours clauses in awards and agreements and recommends express clarification within the *Fair Work Act 2009* (Cth) that non-monetary benefits and voluntary/preferred hours arrangements can pass any test underpinning agreements.

The Australian Chamber's initial submission made reference to a FWC Full Bench decision (considering multiple fast food employer agreements) which cast doubt that they can be used in this way when it ruled that a "preferred hours" clause (which allows an employee to nominate which hours it prefers to work, without paid penalty rates being applicable), was less beneficial than the award. However these clauses were a feature in many approved pre FW Act agreements (both collective and individual agreements) and facilitated mutual flexibility. Preferred hours assist in helping to align expectations and to match people who want to work flexible and 'non-standard hours' with employers who can offer working patterns to suit their needs.

11 Enterprise bargaining

As noted by the Productivity Commission, the FW Act "explicitly emphasises enterprise-level collective bargaining (s. 3(f)) as the basis for determining wages and conditions and, more broadly, for shaping the relationship between business owners and their employees".¹³¹ Such an outcome was always intended with the central role of enterprise agreements reflected in the Labor Party's 'Forward with Fairness' pre-election policy and in the objects of the FW Act which include:

*ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can never be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system.*¹³²

The Productivity Commission has also identified that an overarching concern is "the extent to which bargaining arrangements allow employees and employers to genuinely craft arrangements suited to them".¹³³ The WR Framework's focus on collective agreement making underpinned by complex and impractical procedural considerations, together with prohibitions on the making of statutory individual agreements, is not conducive to small businesses and their employees negotiating arrangements of mutual benefit. Such an outcome leaves small businesses in a situation where they are required to navigate the complex and inflexible award system which, depending in the nature of the business, may act as a disincentive to employment or limit the work made available to employees.

¹³¹ Issues Paper 3: Bargaining, p. 1.

¹³² s. 3(c).

¹³³ Issues Paper 3: Bargaining, p. 1.

Three types of agreements can be made under the FW Act: single enterprise agreements, multi-enterprise agreements and greenfields agreements for new enterprises that have not yet engaged employees (which can take the form of single enterprise or multi-enterprise agreements).¹³⁴ The available options within the bargaining framework do not contemplate the needs of small and medium sized businesses. Even for larger businesses, the complexity of the bargaining framework generally necessitates specialist advice and can be a costly process, whether involving dedicated internal resources or external legal and/or industrial expertise.

A number of procedural steps must be met in order to make an enterprise agreement, including:

- employees that are to be covered by the agreement must be given written notice of their right to appoint a bargaining representative within 14 days of bargaining commencing;
- holding a vote where their employees determine whether to approve the agreement at least 21 days after the day on which employees were given their notice of representational rights;
- taking reasonable steps to ensure that all employees who will be covered by the agreement are either given a copy of, or have access to, the agreement itself and any other materials that are incorporated into the agreement at least seven days before the voting starts;
- notifying employees of the time and place where they will vote on the agreement and the voting method that will be used at least seven days before the vote;
- taking all reasonable steps to ensure that the terms of the agreement are explained to their employees (including the effect of the terms) in a way that the employees can easily understand;
- the agreement being 'made' if and when a majority of the employees (50 percent plus one employee) who cast a vote on the agreement approve it;
- lodging the agreement with Fair Work Australia for approval within 14 days of it being made.

Although agreement may have been reached between the employer and a majority of employees, it is often the case that the registration of an agreement is opposed by the union and/or is not approved on the basis that the employer has not complied with the complex pre-approval steps. A simple mistake such as altering the form of the notice of representational rights prescribed under s. 174(3) can be costly for an employer who may be required to commence the bargaining process again. The matter of *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union*¹³⁵ identifies the level of prescription to which the procedural requirements are applied, with documents stapled to the notice of representational rights found to have formed part of the notice of representational rights and deemed non-compliant with sub-section 174(1A), on the basis that it contained other content.

The Australian Chamber supports the following draft recommendation (15.1) as made by the Productivity Commission.

Substance over procedure in agreement making

¹³⁴ Issues Paper 3: Bargaining, p. 1.

¹³⁵ [2014] FWC 2042.

The Australian Chamber agrees that the Australian Government should amend Division 4 of Part 2-4 of the *Fair Work Act 2009* (Cth) to:

- allow the Fair Work Commission wider discretion to approve an agreement without amendment or undertaking as long as it is satisfied that the employees were not likely to have been placed at a disadvantage because of the unmet requirement;
- extend the scope of this discretion to include any unmet requirements or defects relating to the issuing or content of a notice of employee representational rights.

Changes to the framework are necessary to enable approval of an enterprise agreement where agreement of the parties has been reached and it is reasonable to do so, notwithstanding that a pre-approval step has not been complied with. The notion of freedom to contract should be reflected in the framework and primacy given to the intention of the parties.

More broadly, fundamental changes to the system are required to enable small business access to bargaining. The processes outlined above are impractical and overly complex for small workplaces. Processes for the creation of agreements should be simple and third party interference in agreed outcomes should be reduced. Agreement making options should be broad enough to have application in all types of workplace. Statutory individual agreements, union and non-union collective agreements and union and non-union greenfields agreements should feature among those options.

11.1 Discussing productivity improvements and pattern bargaining

The Productivity Commission has sought feedback on practical options to improve productivity and has asked “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?”¹³⁶ While ss. 3 and 171 of the FW Act refer to “productivity” in the context of the bargaining framework, the FW Act does not directly promote discussion and uptake of measures to improve productivity at the workplace and many aspects of the FW Act actually work against this outcome.

Workplace productivity is understood, at a basic level, as the number or units of production or services produced per unit of labour. Productivity improvement is best measured at the enterprise level and improvements in productivity occur when businesses find a way to increase output with fewer resources. This can occur through:

- removing barriers that unreasonably restrict output;
- reducing the cost of labour;
- working harder (assuming some level of underutilisation exists);
- increasing employee competency and proficiency;
- adopting a continuous improvement to improve work process and workflow;
- introducing capital to replace labour;

¹³⁶ Issues Paper 3: Bargaining, p. 6.

- improving workplace culture to increase the level of discretionary effort applied by employees;
- innovation.

In exploring whether parties should be expressly required to discuss productivity improvements as a part of the bargaining process the Productivity Commission has arrived at the following draft finding:

DRAFT FINDING 15.1

The case for imposing statutory requirements for employers and employees to discuss productivity improvements as a part of the bargaining process, or for the mandatory inclusion of productivity clause in agreements, is not strong. Voluntary agreements that promote productivity are highly desirable, but such agreements, and the gains that they deliver, should arise from better management, not from a regulated requirement, which is likely to have perverse effects.

The Australian Chamber agrees that productivity improvement is often a consequence of mutual exchange of ideas between management and individual employees which leads to innovative solutions and continuous improvement of work systems. However this is more likely to occur in a collaborative and non-adversarial environment where there is a direct dialogue between employees and their managers and a mutual understanding of the needs of the parties to the employment relationship. The Australian Chamber does not agree with the draft finding's claim that the case for imposing statutory requirements for employers and employees to discuss productivity improvements as part of the bargaining process, or for the mandatory inclusion of productivity clauses in agreements, is not strong.

Requirement to discuss productivity

The Australian Chamber supports the amendments proposed within the *Fair Work (Bargaining Processes) Bill 2014* which includes the needs to discuss productivity improvements during bargaining and maintains its position that applicants for a protected action ballot must be required to demonstrate that they are meeting all Good Faith Bargaining obligations.

The reinforcement of the threat of industrial action during bargaining and the employer's awareness of the level of damage such action may cause will often see employers pressured to concede to excessive claims. The entrenchment of the union and imbalance in the bargaining framework together with the FW Act's capacity to compel bargaining can result in agreements being made that may have a detrimental impact upon the business.

Mention has already been made of many of the system's features which are an impediment to small business bargaining. However for businesses that have exposure to the bargaining framework under the FW Act, the system permits behaviours that often drive "least worst case" agreement making rather than productivity oriented agreement making, particularly where agreements are made with the involvement of unions pursuant to the threat of industrial action. All of these factors are impediments to the making of agreements that enhance workplace productivity and can actually have a negative impact on workplace productivity. Negotiations that are

adversarial in nature do not drive 'win-win' outcomes, particularly where the union is unwilling to compromise on its standard 'log of claims' (as can be seen in the outcomes of pattern bargaining).

The Australian Chamber agrees with the Productivity Commission's statement that "pattern bargaining sits uneasily with the goal of the WR system to develop agreements that reflect the particular circumstances of the enterprise and its employees".

The Productivity Commission has sought feedback on "*whether there is a mechanism that would only restrain pattern bargaining*:"

- *where it is imposed through excessive leverage or is likely to be anti-competitive;*
- *while allowing it in circumstances where it is conducive to low transaction cost agreements that parties genuinely consent to.*

This request somewhat misunderstands what is meant by the term pattern bargaining which generally arises as a consequence of the bargaining strength of the union relative to the employers on which it is attempting to impose an agreement. The operation of such agreements has yielded substantial wage costs for no real productivity benefit, structurally defeating employer attempts to do something different and relevant to their enterprise. As such, the Australian Chamber holds the view that Part 2-4 of the FW Act should be amended to render 'pattern bargaining', as practically and broadly defined, unlawful and to prevent the taking of industrial action in support of pattern bargaining.

11.2 Individual Flexibility Arrangements

The Productivity has sought to understand the reluctance of employers to use individual flexibility arrangements (IFAs).¹³⁷ IFAs fail to meet these needs for a number of reasons including the reality that those seeking to apply an IFA in the workplace will still need to navigate the balance of award regulation and the requirements of the FW Act, particularly considering the narrow scope of matters within the award which are capable of being altered. Regulation should be contained in a minimum number of sources as possible for small business and an IFA, which may be a complex document in itself, will create a third reference point for compliance. There are also some practical impediments that limit the uptake of IFAs including the ability for a party to terminate the arrangement unilaterally on the provision of notice and the inability to offer an IFA as a condition of employment. There is also continuing uncertainty over the operation of the BOOT, particularly in circumstances where an employee trades away a monetary entitlement in favour of a non-monetary benefit, such as start or finish times outside the ordinary span of hours to accommodate family responsibilities. The FW Act's Explanatory Memorandum suggests that non-monetary benefits may in fact result in an employee being better off, stating

*...in Josh's case, however, he has agreed under the individual flexibility arrangement to give up a financial benefit (penalty rates) in return for a non-financial benefit (leaving work early). It is intended that, in appropriate circumstances, such an arrangement would pass the better off overall test...*¹³⁸

¹³⁷ Issues Paper 3: Bargaining, p. 9.

¹³⁸ Explanatory Memorandum, *Fair Work Bill 2008* (Cth), 867.

However decisions of Fair Work Australia involving the approval of enterprise agreements have applied inconsistent treatment in the assessment of agreements containing clause which would displace an entitlement to higher rates under the award in exchange for flexibility in working hours.¹³⁹

An independent panel appointed to review the FW Act in 2012 (FW Act Review Panel) made the following recommendation in its Report which has been reflected in the *Fair Work Amendment Bill 2014* for which the Government is yet to secure passage:

*Recommendation 12: The Panel recommends that the better off overall test in s. 144(4)(c) and s.203(4) be amended to expressly permit an individual flexibility arrangement to confer a non-monetary benefit on an employee in exchange for a monetary benefit, provided that the value of the monetary benefit forgone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate.*¹⁴⁰

The inflexibilities within the award structure such as prescriptive minimum engagement periods, prescriptive part-time hours and excessive penalty rates impose significant limitations on the pattern of hours an employer can offer. If employers and employees are unable to implement mutually beneficial changes to award working arrangements in the absence of a cost imposition, flexibility will not be extended and the parties will be forced to work within the strictures of the award. This may prevent employees from working in accordance with working patterns that suit them and may prevent employers from structuring their working arrangements in an efficient way.

Unions have also sought to narrow the scope of matters that can be subject to an individual flexibility arrangement in negotiations for enterprise agreements. The FW Act Review Panel made the following recommendation which seeks to overcome this, which has also been adopted as a measure within the *Fair Work Amendment Bill 2014*:

*Recommendation 24: The Panel recommends that s. 203 be amended to require enterprise agreement flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in paragraph 1(a) of the model flexibility term in Schedule 2.2 of the FW Regulations, along with any additional matters agreed by the parties.*¹⁴¹

The Productivity Commission has also adopted this as a draft recommendation, reflected in the following terms:

¹³⁹ Milbag Pty Ltd; re Milbag Pty Ltd Enterprise Agreement [2010] FWAA 1834 (4 March 2010); P & A Securities Pty Ltd [2010] FWAA 3639, Sylvan Lodge Trust [2010] FWAA 2243 at [3]–[5]; Anable Pty Ltd [2010] FWAA 3407.

at [3]–[6]; Undertaking of Hudaks Bakery Pty Ltd (15 April 2010) at [5], attached to Hudaks Bakery Pty Ltd; re HB Enterprise Agreement 2009 [2010] FWAA 3512 (3 May 2010); Fanoka Pty Ltd t/as Fairview Orchards re Fanoka Pty Ltd Agreement 2009 [2010] FWAA 2139 (16 March 2010); Bupa Care Services, ANF and ASU Enterprise Agreement 2009 (2010) 196 IR 1; [2010] FWA 2762 (15 April 2010); Samphie Pty Ltd t/as Black Crow Organics re Black Crow Organics Enterprise Agreement 2009 [2010] FWAA 5060 (8 July 2010); Top End Consulting Pty Ltd re Top End Consulting Enterprise Agreement 2010 [2010] FWA 6442 (24 August 2010).

¹⁴⁰ Department of Education, Employment and Workplace Relations, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (15 June 2012) <<https://docs.employment.gov.au/documents/towards-more-productive-and-equitable-workplaces-evaluation-fair-work-legislation>>.

¹⁴¹ Department of Education, Employment and Workplace Relations, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (15 June 2012) <<https://docs.employment.gov.au/documents/towards-more-productive-and-equitable-workplaces-evaluation-fair-work-legislation>>.

DRAFT RECOMMENDATION 15.2

The Australian Government should amend s. 203 of the Fair Work Act 2009 (Cth) to require enterprise flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in the model flexibility term, along with any additional matters agreed by the parties. Enterprise agreements should not be able to restrict the terms of individual flexibility arrangements.

The Australian Chamber supports this recommendation on the basis that if passed, it will affect marginal improvements to the current system. However small business employers are seeking simplicity, stability and certainty of compliance in relation to their workplace arrangements and these needs will be best addressed through a framework that offers simple and streamlined agreement making options, assessed against a simple and relevant safety net. Such a framework should include the option of statutory individual agreements that enable employers and employees to negotiate arrangements that vary from the prescription within the award structure.

Broadening the scope of Individual Flexibility Arrangements

The Australian Chamber agrees that the Australian Government should amend s. 203 of the *Fair Work Act 2009* (Cth) to require enterprise flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in the model flexibility term, along with any additional matters agreed by the parties. Enterprise agreements should not be able to restrict the terms of individual flexibility arrangements.

11.3 Greenfields Agreements and Agreement Terms

The Productivity Commission had sought views “about the best arrangements for greenfields agreements”.¹⁴² Greenfields agreements have particular utility in the delivery of construction projects, particularly in relation to resource and infrastructure projects, as they are able to ensure a period of industrial stability and certainty of labour costs. Given the significant levels of investment required for such projects, the certainty offered by greenfields agreements is an important consideration in evaluating the viability of such investment.

However the FW Act has eroded the certainty offered by these arrangements. As noted by the Productivity Commission, the current WR Framework does not allow employers to determine the conditions for future employees in new work sites absent negotiation and agreement with one or more relevant employee representatives (mainly unions).¹⁴³ This is a departure from the arrangements under the WR Act which enabled an employer to utilise employer greenfields agreements or individual statutory agreements where there was no agreement with the union. This did not mean that union greenfields agreements did not exist under the WR Act. The WR Act encouraged unions to negotiate with employers as being named a party to the agreement enabled right of entry for that union. Importantly, projects were enabled to commence efficiently without delays and industrial action early in the project's life.

¹⁴² Issues Paper 3: Bargaining, p. 2.

¹⁴³ Issues Paper 3: Bargaining, p. 2.

Under the current system, there is no such incentive for unions to bargain in good faith and agree to greenfields agreement and this has the potential to negatively impact investment outcomes and result in project delays. Unions are empowered to delay critical projects if their demands are unmet. The limited duration of greenfields agreements also means that renegotiation may be required during the life of the project, potentially at a critical juncture. The risk associated with this may negatively impact investment outcomes and the cost of project blow-outs is borne by the taxpayer where infrastructure projects are government funded. The efficient delivery of critical infrastructure is a primary concern for the Australian Chamber. While jobs are created through this process and business can directly benefit from infrastructure investment through participating in project delivery, the economic and social benefits extend well beyond those delivered through direct participation in the construction phase. The more efficiently infrastructure can be delivered, the further the funding and benefits can be spread.

The *Fair Work Amendment Bill 2014* proposes a number of changes to address current deficiencies in greenfields arrangements, including:

- a requirement for negotiations to be completed within three months, after which time the FWC will be able to intervene to arbitrate an outcome in accordance with ‘prevailing industry standards’;
- a requirement for parties to bargain in good faith.¹⁴⁴

The Productivity Commission has also made draft recommendations which seek to address circumstances where negotiations for a greenfields agreement have not been completed within three months and implement a requirement for parties to bargain in good faith.

DRAFT RECOMMENDATION 15.7

The Australian Government should amend the Fair Work Act 2009 (Cth) so that if an employer and union have not reached a negotiated outcome for a greenfields agreement after three months, the employer may:

- *continue negotiating with the union*
- *request that the Fair Work Commission undertake ‘last offer’ arbitration of an outcome by choosing between the ‘last offer’ arbitration of an outcome by choosing between the last offers made by the employer and the union;*
- *submit the employer’s proposed greenfields agreement for approval with a 12 months nominal expiry date.*

Regardless of the agreement-making process chosen by the employer, the ensuing greenfields arrangement must pass the proposed no-disadvantage test.

DRAFT RECOMMENDATION 15.6

The Australian Government should amend the rules around greenfields agreements in the Fair Work Act 2009 (Cth) so that bargaining representatives for greenfields agreements are subject to the good faith bargaining requirements

¹⁴⁴ *Fair Work Amendment Bill 2014 (Cth) Part 5, Schedule 1.*

The Productivity Commission has also looked beyond the negotiation process and has made the following draft recommendations which seek to address risk by extending the term of greenfields agreements and enterprise agreements generally:

DRAFT RECOMMENDATION 15.3

The Australian Government should amend s. 186(5) of the Fair Work Act 2009 (Cth) to allow an enterprise agreement to specify a nominal expiry date that:

- *can be up to five years after the day on which the Fair Work Commission approves the agreement, or*
- *matches the life of a greenfields project. The resulting enterprise agreement could exceed five years, but where so, the business would have to satisfy the Fair Work Commission that the longer period was justified.*

These recommendations are supported by the Australian Chamber as they represent incremental improvement to the system. In relation to Greenfields Agreements, the Productivity Commission has identified:

The main concerns are that large capital-intensive projects require some certainty about the start date of the project to secure finance, to plan the project, and to more generally manage risk. Unions' capacity to hold out in their negotiations provides them with unique and excessive bargaining power, and risks stripping some of the needed returns from inherently risky projects.¹⁴⁵

The recommended “menu approach” to addressing circumstances where an employer and union have not reached a negotiated outcome for a greenfields agreement after three is a step in the right direction and will assist in getting critical projects off the ground. However the Australian Chamber does not accept the statement that “[a]voiding all uncertainty for employers would shift the balance of power too far in their direction”.¹⁴⁶ It must be remembered that greenfields agreements are made when there are no employees employed and that minimum standards are already in place to regulate terms and conditions of employment, therefore nobody would be disadvantaged by the unilateral making of a greenfields agreement by an employer. In an economic environment where our policy settings must be recalibrated to encourage domestic and international investment, barriers to the commencement of new projects must be removed and policy settings that heighten the risk around such projects must be reformed.

Extension of enterprise agreement terms and enhancement to greenfields agreement making

The Australian Chamber agrees that the Government should amend s. 186(5) of the *Fair Work Act 2009* (Cth) to allow an enterprise agreement to specify a nominal expiry date that:

- can be up to five years after the day on which the Fair Work Commission approves the agreement, or

¹⁴⁵ Draft Report, p. 33.

¹⁴⁶ *ibid.*

- matches the life of a greenfields project.

The Australian Chamber also supports the Productivity Commission's draft recommendations which seek to address circumstances where negotiations for a greenfields agreement have not been completed within three months and implement a requirement for parties to bargain in good faith.

However beyond these changes, employers should also have the ability to implement employer- employee greenfields agreements as a part of a full suite of bargaining options.

The extension of agreement terms will assist in managing risk and delivering greater certainty regarding investment outcomes and agreement terms that survive the life of the project. The Productivity Commission has acknowledged the sound rationale underpinning this recommendation which it has identified as including the following matters:

- *As bargaining for an EA can be prolonged, the investment in achieving a bargain may currently be spread over too few years. Moreover, as noted earlier, the bargaining process can defer the implementation of business strategies — such as innovation — prior to a new agreement for fear that the returns will be partly bid away during bargaining.... Longer EAs increase the returns both of the time and effort in negotiating an agreement (for both parties to the agreement), and provide more certainty for employers about measures that enhance productivity and performance.*
- *Greenfields agreements are not intended to be enduring, but logically should survive for the duration of construction of a particular project. Any agreement with a life less than the expected duration of the project exposes the business to substantial risks. Delays in negotiating a greenfields agreement can lead to underutilised capital and may cause the contractor to incur a penalty for delay in the delivery of the project. This creates an imbalance in bargaining power....*
- *The Toyota decision removing the legal force of 'no extra claims' clauses (see box 15.3) has addressed the risk that extended EA lives might reduce the capacity of a business to adapt to adverse economic shocks (noting that the employees are protected by opportunistic exploitation of this capacity because they must approve any variations).¹⁴⁷*

11.4 Better off overall test

As the Productivity Commission has identified, the better off overall test (BOOT) is not a “collective test” as “[e]ach employee (or prospective employee) under the agreement must be better off”.¹⁴⁸ The Productivity Commission has also noted that “while there is scope in an enterprise agreement to trade off particular benefits of a modern award against other benefits that are valued more highly by employees, this requires that all employees covered by the agreement are better off overall”.¹⁴⁹ Such an approach is problematic in the context of a workplace where the individual workers have varying needs and attach different a different value to particular benefits.

¹⁴⁷ Draft Report, p. 568.

¹⁴⁸ Issues Paper 3: Bargaining, p. 4.

¹⁴⁹ *ibid.*, p. 4.

The Productivity Commission has made the following draft recommendation:

DRAFT RECOMMENDATION 15.4

The Australian Government should amend the Fair Work Act 2009 (Cth) to replace the better off overall test for approval of enterprise agreements with a no-disadvantage test. The test against which a new agreement is judged should be applied across a like class (or series of classes) of employees for an enterprise agreement. The Fair Work Commission should provide its members with guidelines on how the new test should be applied.

Replacement of the ‘Better Off Overall Test’ with a global no-disadvantage test

The Australian Chamber supports the principle of reintroducing a global no-disadvantage test to replace the ‘Better Off Overall Test’.

However the Australian Chamber maintains the view that the modern awards exist as an overly complex, prescriptive and costly foundation for bargaining. In the longer term, assessment of agreements against a reformed safety net comprised of legislated minimum standards and award rates of pay would provide a more suitable, flexible and sustainable platform for small business bargaining.

The Australian Chamber supports the principle of reintroducing a global no-disadvantage test however the manner of its application is of critical importance. Caution needs to be exercised to ensure that guidelines regarding its application do not create another layer of complexity and bureaucracy that undermines the intention of agreement making in securing more flexible arrangements relative to the award against which they are assessed. The Productivity Commission has suggested:

A particularly vexing issue – for both enterprise agreements and individual flexibility arrangements- is how to trade off non-monetary benefits against other benefits of an award.¹⁵⁰

The Productivity Commission has also asked:

What should be the basis for the revised form of the no-disadvantage test, including whether, and to what extent past forms of the no-disadvantage test provide a suitable model and would be workable within the current legislative framework?

The WR Act’s ‘global’ no-disadvantage test which provided that an AWA or certified agreement would pass this test if its approval would not result, on balance, in a reduction of the overall terms and conditions of employment under the relevant award and state and federal laws provide a benchmark for the design of such as test as a transitional measure.

However Australian Chamber maintains the view that the modern awards exist as an overly complex, prescriptive and costly foundation for bargaining. Assessment of agreements against a reformed safety net comprised of legislated minimum standards and award rates of pay would provide a more suitable, flexible and sustainable platform for small business bargaining.¹⁵¹ For

¹⁵⁰ Draft Report, p. 32.

¹⁵¹ Australian Chamber of Commerce and Industry, Initial Submission, see pp. 3-4 and 85-89.

legislated minimum standards to underpin bargaining, they must exist as a simple, non-prescriptive set of core entitlements that are flexible in application. A simplified safety net against which agreements can be assessed will enable a timely and streamlined approval process that mitigates the need to pay for specialist expertise or involve an industrial tribunal in the assessment process. Such an approach better reflects the role of acceptable statutory minima existing as a safety net and would encourage small business employers to negotiate terms and conditions with their employees that drive productivity, provide competitive advantage and that are in the mutual interests of the parties.

11.5 Bargaining representatives

Unions are accorded preferential status as bargaining representatives under the new system. This presents a number of practical difficulties in workplaces where unions are not a dominant feature as employers may not even know if an employee is a union member and freedom of association laws make it imprudent for them to ask. The default position of the union as bargaining representative, unless displaced in writing, has also resulted in many effective employee based bargaining structures becoming disenfranchised and replaced by adversarial third party interference in negotiations, notwithstanding that only one or few union member(s) are members of the representative union.

The Productivity Commission has suggested that its “proposal for Enterprise Contracts, amended IFAs and less constrained flexibility terms in EAs should go a long way in allowing enterprises to negotiate with individuals without union representation is they wish”¹⁵² and has made the following draft recommendation in the context of bargaining representatives:

DRAFT RECOMMENDATION 15.5

The Australian Government should amend the Fair Work Act 2009 (Cth) so that:

- *a bargaining notice specifies a reasonable period in which nominations to be a bargaining representative must be submitted*
- *a person could only be a bargaining representative if they represent a registered trade union with at least one member covered by the proposed agreement, or if they were able to indicate that at least 5 per cent of the employees to be covered by the agreement nominated them as a representative.*

This recommendation does not address the core concerns raised by the Australian Chamber raised in relation to and does not take into consideration the contention around whether a union has members in a workplace. The FW Act provides that the union will automatically be the default bargaining representative for its members. The only way to displace this assumed, entrenched position is for an employee to displace this default appointment in writing. The small business employer is now more exposed to a union presence in bargaining negotiations, even if there is not a strong union presence in the enterprise.

¹⁵² Draft Report, p. 578.

Removal of the default position of the union as bargaining representative

Part 2-4 of the *Fair Work Act* should be amended to remove unions being a “default” bargaining representative and union officials should not be allowed to be appointed in person unless their employing union has constitutional coverage of the work under the proposed enterprise agreement.

12 Individual arrangements

The Productivity Commission has noted that “[o]ne of the goals of workplace flexibility is to fashion arrangements that suit both parties to an employment contract”.¹⁵³ However the FW Act’s current focus on unionised collective bargaining creates a gap in the bargaining framework for workplaces with low levels of unionisation and there is a need for flexibility beyond the terms and conditions set out within industrial awards.

The Australian Chamber does not share the Productivity Commission’s surprise that employers and employees have not used individual flexibility arrangements more frequently¹⁵⁴ as they are encumbered with a number of practical problems. The Productivity Commission has restated some of the identified concerns including the uncertainty regarding compliance with the BOOT and the capacity for an employee to terminate an arrangement on 28 days’ notice.¹⁵⁵ These concerns are consistent with those raised by the Victorian Employers Chamber of Commerce and Industry (VECCI) stating:

*Members report an overwhelming lack of familiarity and/or hesitance in implementing IFA’s due to the systemic issues including the narrow scope of matters altered, unilateral termination of the IFA at short notice, and inconsistency and uncertainty over the operation of the ‘better off overall’ test.*¹⁵⁶

Accordingly and consistent with draft recommendation 15.4 the Productivity Commission has recommended that the BOOT be replaced with a no-disadvantage test and has made the following draft recommendations:

DRAFT RECOMMENDATION 16.1

The Australian Government should amend the Fair Work Act 2009 (Cth) so the flexibility term in a modern award or enterprise agreement can permit written notice of termination of an individual flexibility arrangement by either party to be a maximum of 1 year. The Act should specify that the default termination notice period should be 13 weeks, but in the negotiation of an agreement, employers and employees could agree to extend this up to the new maximum.

DRAFT RECOMMENDATION 16.2

¹⁵³ Draft Report, p. 105.

¹⁵⁴ *ibid.*, p. 35.

¹⁵⁵ *ibid.*, p. 36.

¹⁵⁶ Victorian Employers Chamber of Commerce and Industry, *Not Balanced, Not Effective: VECCI Submission to the Productivity Commission Review of the Workplace Relations Framework*, March 2015, p. 8.

The Australian Government should amend the Fair Work Act 2009 (Cth) to introduce a new 'no-disadvantage test' (NDT) to replace the better off overall test for assessment of individual flexibility arrangements. The guidance in implementing the new NDT should also extend to collective agreements (as recommended in draft recommendation 15.4).

To encourage compliance the Fair Work Ombudsman should:

- *provide more detailed guidance for employees and employers on the characteristics of an individual flexibility arrangement that satisfies the new NDT, including template arrangements*
- *examine the feasibility, benefits and costs of upgrading its website to provide a platform to assist employers and employees to assess whether the terms proposed in an individual flexibility arrangement satisfy a NDT.*

Enhancements to Individual Flexibility Arrangements

The Australian Chamber supports the extension of the maximum term of an individual flexibility arrangement and assessment of the arrangement against a new 'no-disadvantage test'

The above recommendation would introduce some modest enhancements to individual flexibility arrangements and is supported by the Australian Chamber as an incremental change. However there are other obstacles to their use which warrant reform including the limited scope of an individual flexibility arrangement and the requirement to apply such an arrangement alongside the NES and award and the complexity that this creates for small business. Such multi-layered and overlapping regulation are the antithesis of best practice regulatory principles and the concept that regulation should be contained in as few as possible sources and easy to apply and understand. The Productivity Commission has made the following draft recommendation:

DRAFT RECOMMENDATION 16.3

The Fair Work Ombudsman should develop an information package on individual flexibility arrangements and distribute it to employers, particularly small businesses, with the objective of increasing employer and employee awareness of individual flexibility arrangements. It should also distribute the package to the proposed Australian Small Business and Family Enterprise Ombudsman, the various state government offices of small business, major industry associations and employee representatives.

This recommendation is unlikely to address the critical limitations to the use of the Individual Flexibility Arrangement regime by employers, particularly small business employers. With the majority of employers being aware of the existence of individual flexibility arrangements as identified by the Productivity Commission¹⁵⁷ Australian Chamber does not consider that a lack of awareness of is the key impediment to their use.

The Productivity Commission had sought to understand "whether there should be greater (or lesser) reliance on individual arrangements, and why should this be so".¹⁵⁸ The capacity for an

¹⁵⁷ Draft Report, p. 609.

¹⁵⁸ Issues Paper 3: Bargaining, p. 16.

individual in their employer to negotiate and agree upon mutually suitable terms and conditions of employment should not be constrained and runs contrary to the tenet of freedom to contract. Agreements tailored to the mutual needs and interests of the enterprise and the individuals in it are also the most productive model of engagement. BlueScope Steel has also expressed the view that:

Subject to the continued operation of minimum standards, the adoption of individual arrangements (which is the clearest form of direct employee engagement) is preferred as the most productive model by most employers and employees in the Australian workforce, as evidenced by the prevalence of voluntary common law employment contracts.¹⁵⁹

The FW Act's current prohibition on individual statutory agreements is unreasonable and should be removed. Individual statutory agreements had been a feature of the system since the passage of the WR Act in 1996 when Australian Workplace Agreements were introduced and they operated for almost a decade without political controversy. These agreements could be offered as a condition of employment and they were required to pass the 'No Disadvantage Test', pursuant to an assessment process administered by the Office of the Employment Advocate (OEA). Such agreements were able to displace industrial awards and agreements that would have otherwise regulated an employee's terms and conditions of employment.

The Productivity Commission has sought views on how the WR system should "address the desire by some employers and employees for flexibility in the workplace".¹⁶⁰ The reintroduction of individual statutory agreements will go some way to providing such flexibility, particularly for employers and employees in workplaces and circumstances unsuited to bargaining in a collective manner. The system should provide a broad range of choices of employment instruments pursuant to which employers are able to employ so as to enable arrangements to be tailored to the needs of individual workplaces and employees. The FW Act's prohibition on individual statutory agreements currently inhibits such flexibility, undermines the direct relationship between employers and their employees and detracts from, rather than promoting, productivity.

13 The enterprise contract

The Productivity Commission has made the following information request:

INFORMATION REQUEST

The Productivity Commission seeks information on the costs (including compliance costs) and benefits of an enterprise contract to employers, employees and to regulatory agencies. Particular areas that the Commission seeks information on are:

- *additional evidence on the potential gap in contract arrangements between individual arrangements (broadly defined) and enterprise agreements*
- *the extent to which the enterprise contract would be a suitable addition to the current suite of employment arrangements, how it could fill the gap identified, and specific examples of where and how it could be utilised*

¹⁵⁹ BlueScope Steel, *Productivity & the Australian Workplace Relations System*, March 2015, p.10.

¹⁶⁰ Issues Paper 3: Bargaining, p. 9.

- *clauses that could be included in the template arrangement*
- *possible periods of operation and termination*
- *the advantages and disadvantages of the proposed opt in and opt out arrangements.*

In addition, the Productivity Commission invites participants' views on the possible compliance and implementation arrangements suggested in this chapter, such as their impact on employers, employees and regulatory agencies

The Productivity Commission's recommendation to introduce a new type of contract in the form of the 'enterprise contract' is a step in the right direction when it comes to broadening the choice of instrument for application in a workplace. The Australian Chamber supports this option as a part of a 'suite' of agreement making options however the design and implementation of such an option warrants further consideration. The Australian Chamber supports the principles that:

- Employers should be able to offer it to all prospective employees as a condition of employment;¹⁶¹
- Ballots should not be required for the adoption of the enterprise agreement and nor should any employee group be involved in its preparation and agreement unless the employer wished this to be the case.¹⁶²

However there are a number of practical problems with the proposed design that could lead to a multiplicity of arrangements within the workplace, creating unnecessary complexity and uncertainty for small business including:

- The lack of an approval process that would provide certainty of compliance;
- The capacity for employees to exit the enterprise contract after one year;
- The continued application of multiple instruments in workplaces where consistency of some terms and conditions is a desired outcome.¹⁶³

Nevertheless, these are matters which could be addressed in the design of such arrangements. In developing the concept of an Enterprise Contract, the Australian Chamber cautions against the creation of a complex regulatory regime. If, for example, templates are to be developed, it is vital that they do not become Modern Awards by a different name. Take-up will be negligible if the option of using Enterprise Contracts becomes too difficult due to prescription, inflexibility and a proliferation of 'safeguards' to counter every conceivable risk of non-compliance.

In our initial submission, we highlighted the Keating Government's introduction of enterprise flexibility agreements (**EFAs**).¹⁶⁴ The provisions allowing for enterprise flexibility agreements (EFAs) were said to have the effect of allowing agreements between an employer and its employees in an enterprise¹⁶⁵. However, they were heavily regulated:

- EFAs did not remove the involvement of unions in the agreement making process because the implementation of an EFA could be refused or adjourned if the AIRC was satisfied the

¹⁶¹ Draft Report, p. 37.

¹⁶² *ibid.*, p. 37.

¹⁶³ *ibid.*, p. 39.

¹⁶⁴ Australian Chamber's initial submission at pages 20-21.

¹⁶⁵ Explanatory Memorandum to the *Industrial Relations Bill 1993* (Cth), p. 59.

employer did not adequately notify each eligible union about negotiations and had not given them the chance to participate in negotiations (s.170ND(7)).¹⁶⁶

- Eligible unions had the opportunity to agree to be bound by any agreement submitted to the AIRC for approval, or already approved.¹⁶⁷ Rights of representation were preserved because unions could choose to take part in negotiations and they also had the right to be heard when application was made to the AIRC to have an EFA approved.¹⁶⁸ The practical effect of these requirements was that it would be not possible for an employer who wanted to negotiate directly with employees without any union involvement to do so and nor were wholesale changes to employment conditions that might depart from awards possible without union consent.
- The AIRC could not approve an EFA unless it was satisfied it did not, in relation to their terms and conditions of employment, disadvantage the employees covered by it. This would be deemed to have occurred if the EFA reduced any entitlements or protections of the employees under an award or relevant law and, in the context of their terms and conditions as a whole, the reduction was deemed to be contrary to the public interest.¹⁶⁹
- The AIRC was also empowered to refuse to approve an agreement if it was satisfied, because of exceptional circumstances, that approving it would be contrary to the public interest.¹⁷⁰
- Even after having approved an EFA, the AIRC retained the power to terminate an EFA on its own initiative.¹⁷¹

EFA's remained inextricably linked to awards and with about 21 steps required to obtain approval, it was little wonder that their use was minimal.

The Productivity Commission has suggested that larger enterprises would not be prevented from adopting enterprise agreements and the Australian Chamber considers that further consideration should be given to the development of a form of direct collective employment arrangements as a part of the suite of agreement making options.

BlueScope Steel has made a submission to this inquiry and has noted:

*Outside of Australia & New Zealand, BlueScope has never experienced anything like the adversarial collective culture that intrudes into the employee relationship with production and maintenance employees in Australia (and to a lesser extent New Zealand) during the employment contract renewal process. The level of third party involvement in day to day operational decisions and business response to competitive changes is pervasive in Australia.*¹⁷²

¹⁶⁶ *Industrial Relations Act 1988* (Cth), s.170ND(7)

¹⁶⁷ *Industrial Relations Act 1988* (Cth), s.170NP.

¹⁶⁸ *Industrial Relations Act 1988* (Cth), s.170NB.

¹⁶⁹ *Industrial Relations Act 1988* (Cth), s.170NC(1)(d) and s.170NC(2).

¹⁷⁰ *Industrial Relations Act 1988* (Cth), s.170ND(3).

¹⁷¹ *Industrial Relations Act 1988* (Cth), s.170NN.

¹⁷² BlueScope Steel, *Productivity & the Australian Workplace Relations System*, March 2015, p. 1.

BlueScope has also stated that it employs around 16,500 people across 17 countries¹⁷³ so it is well placed to draw such international comparisons. BlueScope Steel's annual report indicates that the Group operates in four main geographical regions being Australian, New Zealand, Asia and North America.¹⁷⁴

BlueScope Steel has expressed the view that:

*The system is geared towards the management of adversarial collective negotiations. Where there is, in fact, an environment of adversarial collective workforce negotiation, the current system has a significant and important role. However, there are changes that are necessary to introduce a bargaining balance, and to support a transition to collective mutual interest facilitating better productivity outcomes. "Opt-out" direct workforce engagement arrangements governed under common law would enable the present statutory system to be streamlined to deal with adversarial disputes. Also, a form of direct collective employment arrangements would underpin a more productive, modern employment relationship based on mutual interest, with appropriate legal protection.*¹⁷⁵

The Australian Chamber agrees with this view and maintains its position that the design of a workplace relations system for the future should include a full suite of agreement making options as identified below.

Reintroduction of a full suite of agreement making options

The Australian Chamber recommends the reintroduction of statutory individual agreements to promote greater choice and flexibility among a full suite of agreement options, including:

- Registered individual agreements;
- Employer-employee enterprise agreements;
- Employer-union enterprise agreements;
- Employer greenfield enterprise agreements;
- Employer-union greenfield enterprise agreements.

14 Industrial disputes and right of entry

The Productivity Commission has suggested that there is little evidence that the effects of industrial disputes on productivity and efficiency are material.¹⁷⁶ The Australian Chamber disagrees with this assertion. Industrial disputes within the workplace and the use of industrial action as a weapon and a threat can have a profound impact on the culture of a workplace. By its nature, industrial action is intended to inflict harm to a party's interests and is the antithesis of a cooperative approach which respects the mutual interests of the parties.

¹⁷³ BlueScope Steel, *Productivity & the Australian Workplace Relations System*, March 2015, p. 2.

¹⁷⁴ BlueScope Financial Report 2013/14, p. 31

¹⁷⁵ BlueScope Steel, *Productivity & the Australian Workplace Relations System*, March 2015, p.10.

¹⁷⁶ Draft Report, p. 41.

The reinforcement of the threat of industrial action during bargaining and the employer's awareness of the level of damage such action may cause will often see employers pressured to concede to excessive claims. The entrenchment of the union and imbalance in the bargaining framework together with the FW Act's capacity to compel bargaining often results in agreements being made that may have a detrimental impact upon the business.

The FW Act requires parties to bargain in good faith which entails attending and participating in meetings, disclosing relevant information and giving genuine consideration to proposals made by other bargaining representatives.¹⁷⁷ The Productivity Commission has sought views on the extent to which the good faith bargaining arrangements are "operating effectively and what if any changes are justified"?¹⁷⁸ Since the operation of the FW Act, the good faith bargaining rules have been subject to tactical legal debate and deployed as a tool to apply pressure in negotiations. The good faith bargaining rules reflect the nature of bargaining shifting from being about substance to process. Fundamental changes to the bargaining system are needed so that parties are motivated to search for mutually beneficial outcomes rather than applying blunt, transactional conflict to secure outcomes.

Under the current system, a union is able to compel an employer to bargain through a majority support determination commencing a process from which the employer is unable to withdraw in the absence of agreement. Once this process has commenced the threat of industrial action is a strong means to compel an employer to concede to claims and employers can present no equivalent threat. Industrial action is not only in itself damaging to the immediate interests of the business, the legacy of adversarial negotiations can negatively impact workplace culture for a long time after the agreement is reached. Such circumstances distract the focus away from negotiated outcomes that enhance productivity and toward 'damage control'.

Amendments should be made that move from a tactical/technical procedural focus on good faith bargaining compliance to a focus on substance, whenever an application is made for a bargaining order. The FWC should be required to undertake active conciliation with the FWC empowered to do "all things reasonable" in the circumstances to assist and facilitate bargaining to a mutually beneficial outcome. The system should also enable employers to apply to the FWC to terminate bargaining in a broader range of circumstances (e.g. bargaining is not proceeding efficiently due to multiple bargaining representatives, the bargaining representatives are not genuinely representing employees or are otherwise undermining bargaining).

14.1 When enterprise bargaining disputes lead to industrial action

Agreements made pursuant to the threat of industrial action can have damaging implications for the business and workplace culture. As such industrial action and the threat of it should only be capable of being deployed as an option of last resort. The costs of industrial action across the economy are significant resulting in immediate losses in production for the employer against whom industrial action, losses for other businesses who provide products and services to the employer,

¹⁷⁷ s. 228.

¹⁷⁸ Issues Paper 3: Bargaining, p. 7.

loss of wages to employees and financial loss for investors. Industrial action also has negative impacts for the taxpayer due to revenue lost and inefficiently spent.

There is a need to reintroduce sensible limitations of the matters over which industrial action should be taken. The Productivity Commission has identified that the FW Act has “moved away from legislative prescription to reliance on jurisprudence about ‘matters pertaining’ to the employment relationship”. In doing so, the FW Act has expanded upon the matters over which industrial action can be taken. The Explanatory Memorandum to the *Fair Work Bill 2008* provided that terms that would contain a “general prohibition” on an employer engaging labour hire employees or contractors or employing casual employees are not intended to be within the scope of permitted matters.¹⁷⁹ However it blurs the distinction between the legitimate worlds of employment and contractors stating that a permitted term in an enterprise agreement might be one relating to:

*conditions or requirements about employing casual employees or engaging labour hire or contractors if those terms sufficiently relate to employees’ job security – e.g. a term which provided that contractors must not be engaged on terms and conditions that would undercut the enterprise agreement.*¹⁸⁰

In practice, we have seen protected disputes over matters such as use of contractors and labour hire as well as third party interference in matters that properly sit within the remit of management. Employers are required to navigate complex jurisprudence in seeking to contain bargaining claims to ‘matters pertaining to the employment relationship’, a near impossible task for employers in the absence of specialist industrial expertise or a litigated outcome.

The Productivity Commission has sought views about “what aspects of the employee/union-employer relationship should be permitted matters under enterprise agreements”.¹⁸¹

Amendments to section s 172(1) are required to expressly clarify that terms containing prohibitions or restrictions on the engagement of labour hire employees and/or contractors and the employment of casual employees are not permitted matters. Freedom to contract is a foundation on which our system of commerce operates and persons freely entering into lawful contracts for the provision of services should be allowed to do so without interference in those contracts. Furthermore, utilising flexible forms of labour is an entirely legitimate practice and should be supported by the WR Framework.

The framework may not only be improved by limiting the content of agreement to the terms and conditions of employment, but by better preventing the taking of protected industrial action in circumstances where ‘non-permitted’ matters or excessive claims are being pursued.

The Productivity Commission has stated that:

There should not be any legislative requirement that protected industrial action can only proceed after a FWC assessment confirms that employee’s claims are not ‘excessive’, or will not have an adverse impact on the enterprise’s productivity. A test of this kind is both

¹⁷⁹ Explanatory Memorandum, *Fair Work Bill 2008* (Cth), 673.

¹⁸⁰ *ibid.*, 672.

¹⁸¹ Issues Paper 3: Bargaining, p. 4.

asymmetric (favouring employers over employees), but could run into a definitional quagmire about what was 'excessive' in the context of a particular enterprise's commercial environment. It is inherently undesirable to have an industrial regulator effectively act as a commercial arbiter between two parties. The circumstances in which it exercises any such role should be minimised. This is a broad principle that should inform any future development of the Fair Work Act.¹⁸²

The Australian Chamber agrees that the role of the FWC in bargaining should be minimised. However the Productivity Commission's statement overlooks a number of considerations:

- there is already a safety net in place to prevent employers from providing terms and conditions of employment below a floor. However on the other hand there is no upper limit on the nature of claims that can be made by employees and their representatives. Accordingly, limitations on industrial action in the case of excessive claims would not have the consequence of 'favouring employers over employees';¹⁸³
- enabling excessive claims to go unchecked increases the risk of disputation and associated productivity loss and increases the likelihood of FWC involvement.

14.2 Strike first bargain later

The current framework has also resulted in unions being able to deploy industrial action before exhausting avenues for negotiations as seen in the matter of JJ Richards where the Federal Court held that a protected action ballot order could be granted in circumstances where bargaining had not yet commenced.¹⁸⁴ The *Fair Work Amendment (Bargaining Processes) Bill 2014*, if passed, would affect amendments to s. 443 of the FW Act to provide that the FWC must be satisfied that the party seeking a protected action ballot order is genuinely trying to reach agreement as a condition of its granting. In making this decision, the FWC would need to have regard to a non-exhaustive list of matters (derived from the Full Bench in *Total Marine Services*¹⁸⁵ which include:

- the steps taken by each applicant to try to reach an agreement;
- the extent to which each applicant has communicated its claims in relation to the agreement;
- whether each applicant has provided a considered response to proposals made by the employer; and
- the extent to which bargaining for the agreement has progressed.

The Bill also proposes changes that will provide that the FWC must not make a protected ballot order where it is satisfied that the claims of an applicant for a protected action ballot order are manifestly excessive or would have significant adverse impact on productivity at the workplace. 'Strike first talk later' tactics are clearly contrary to the notion that industrial action should be a matter of last resort and must be addressed.

¹⁸² Draft Report, p. 41.

¹⁸³ Ibid., p. 41.

¹⁸⁴ *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53.

¹⁸⁵ *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWAFB 368.

The Productivity Commission has stated that:

Since employees can always compel an employer to commence negotiations through a majority vote, there is no rationale or community interest in permitting industrial action prior to bargaining. This was also recommended by the 2012 review of the Fair Work Act.¹⁸⁶

In this regard, the Australian Chamber supports the following draft recommendation 19.1 made by the Productivity Commission.

Prevention of ‘strike first bargain later’ tactics

The Australian Chamber agrees that the Australian Government should amend s. 443 of the *Fair Work Act 2009* (Cth), clarifying that the Fair Work Commission should only grant a protected action ballot order to employees once it is satisfied that enterprise bargaining has commenced, either by mutual consent or by a Majority Support Determination.

14.3 Protected action ballot procedures

The Productivity Commission has made the following information request:

INFORMATION REQUEST

The Productivity Commission seeks further input from stakeholders on how protected action ballot procedures may be simplified to reduce compliance costs, while retaining the benefits of secret ballots. Potential simplifications include:

- *removing the requirement that a protected action ballot specify the types of actions to be voted on by employees, and instead simply requiring a vote in favour of any forms of protected industrial action*
- *amending or removing the requirement that industrial action be taken within 30 days of ballot results being declared*
- *granting the Fair Work Commission the discretion to overlook minor procedural defects when determining if protected industrial action is authorised by a ballot.*

The taking of industrial action is a matter that has serious consequences for the workplace resulting in productivity loss, cost impacts and impacts to the culture of the workplace. As the framework places significant limitations on the capacity of employers to respond to industrial action, it is not unreasonable for the process of obtaining a secret ballot order to be rigorous and for employers to have sufficient details and particulars of the industrial action they will face. Employees are able to take industrial action to apply significant bargaining pressure. The Productivity Commission has outlined how difficult it is for employers to succeed in applications to terminate it. The Australian Chamber does not support changes of the nature identified. It is reasonable that the protected action ballot procedures continue to be regulated as per the current regime.

¹⁸⁶ Draft Report, p. 40.

14.4 Aborted industrial action

Aborted industrial action is another damaging tactic that is deployed by the unions in bargaining, behaviour which is not adequately addressed in the FW Act. As noted by the Productivity Commission “[c]alling a stop work and then cancelling it minutes before it commences can deeply inconvenience a firm (and its customers) while ensuring limited, if any, loss of pay.”¹⁸⁷ The FW Act’s ‘3 day notice rule’¹⁸⁸ was intended to allow an employer reasonable time to take steps to protect their business where industrial action was to occur. However as was highlighted in a dispute between Boral and the AWU, unions can give notice to for instance go on strike, wait until an employer has changed their operation and locked in protective or mitigation measures and then simply have its members turn up for work and get paid. This was also a factor in the well-publicised QANTAS dispute that in part appeared to drive QANTAS to move to lock out its employees. Part 2-4 of the FW Act should be amended so that once notice is given under s. 414 of the FW Act, it can only be withdrawn with the employer’s consent.

In this regard, the Australian Chamber supports draft recommendation 19.3 and 19.4 made by the Productivity Commission as follows.

Addressing aborted industrial action

The Australian Chamber agrees that:

- The Australian Government should amend the *Fair Work Act 2009* (Cth) so that where a group of employees have withdrawn notice of industrial action, employers that have implemented a reasonable contingency plan in response to the notice of industrial action may stand down the relevant employees, without pay, for the duration of the employer’s contingency response.
- The Australian Government should amend the *Fair Work Act 2009* (Cth) to grant the Fair Work Commission the discretion to withhold a protected action ballot order for up to 90 days, where it is satisfied that the group of employees has previously used repeated withdrawals of protected action, without the agreement of the employer, as an industrial tactic.

14.5 Suspension or termination should not require both parties to be harmed

While the bar is currently set too low for the taking of industrial action the framework also sets too high a bar for its cessation. Protected industrial action may only be suspended or terminated by the FWC where it is:

- (a) causing (or threatening to cause) significant economic harm to the employer *and* employees covered by the agreement;
- (b) threatening the life, safety or welfare of the population or part of it;
- (c) threatening to cause significant economic harm to the Australian economy; or

¹⁸⁷ Issues Paper 3: Bargaining, p. 12.

¹⁸⁸ s.414.

(d) causing (or threatening to cause) significant economic harm to a third party.

The scale of the damage required before such an order is issued is extreme and results in employers to conceding to unreasonable claims against the interests of the business. Tighter controls within the framework are required to ensure that industrial action cannot be taken unless genuine negotiations have occurred and the claims pursued are reasonable. Furthermore, there should be greater capacity within the system to terminate damaging industrial action.

In this regard, the Australian Chamber supports the following draft recommendation 19.2 made by the Productivity Commission:

Suspending and terminating industrial action

The Australian Chamber agrees that the Australian Government should amend s. 423(2) of the *Fair Work Act 2009* (Cth) such that the Fair Work Commission may suspend or terminate industrial action where it is causing, or threatening to cause, significant economic harm to the employer **or** the employees who will be covered by the agreement, rather than both parties (as is currently the case).

Further changes should be considered to lower the bar to the taking of protected industrial action given that the meaning of 'significant economic harm' has been construed to mean that such action can only be ceased in extreme circumstances.

The Productivity Commission has also sought "further input from stakeholders on how 'significant harm' should be defined when the Fair Work Commission is deciding whether to exercise its powers under s. 423 and s. 426 of the *Fair Work Act 2009* (Cth)". The Productivity Commission is warranted in considering this issue. There has to be recognition among the factors that a loss exceeding \$3 million per day would in the eyes of the community cause significant economic harm.

The Productivity Commission has sought "further input from inquiry participants on whether s. 424 of the *Fair Work Act 2009* (Cth) should be amended to allow industrial action to proceed where the Fair Work Commission is satisfied that the risk of a threat to life, personal safety, health or welfare is acceptably low." The Australian Chamber strongly opposes this recommendation. It would place the FWC in a very difficult position in assessing whether the threat to life, personal safety, health or welfare is acceptably low. We think it is entirely inappropriate. Any threat to life, personal safety, health or welfare is sufficient to warrant the termination or suspension of industrial action.

14.6 Other changes to minimise harmful industrial action

The Productivity Commission has sought views on the extent to which there should be changes to the FWC's conciliation and arbitration powers.¹⁸⁹ Consistent with the principle that the threat of or taking of industrial action to resolve bargaining disputes should be of last resort, the following changes to the framework should be considered, as noted in the Australian Chamber's initial submission:

¹⁸⁹ Issues Paper 3: Bargaining, p. 13.

- to provide that industrial action cannot be taken unless the union obtains majority support of all workers in circumstances where an employer refuses to bargain;
- to provide that unions must particularise their claims and provide this to employers prior to applying for a protected action ballot;
- to provide that industrial action cannot be taken over “non-pertaining employment matters”;
- to require applicants for a protected action ballot to demonstrate that they are meeting all Good Faith Bargaining obligations;
- to help prevent industrial action in circumstances where claims are not in the public interest via a new “public interest” criteria”;
- to build a ‘safety-valve’ by way of a cooling off period which allows the bargaining process to be re-set following damaging industrial action;
- to render unlawful threats of violence, intimidation, coercion or duress at picket lines, associated with protected or unprotected industrial action;
- that prevent industrial action in support of pattern bargaining.¹⁹⁰

The Productivity Commission has stated:

A well-functioning WR framework places limits on the countervailing power of employees. It also recognises that unions predominantly represent their members, not necessarily all employees or potential employees and so, if possessing greater power than employers, may achieve conditions that lock out alternative (including non-union) labour, with the adverse equity and efficiency effects this may entail.¹⁹¹

The Australian Chamber agrees with this statement and notes the Productivity Commission has made the following information requests:

While the Productivity Commission sees a prima facie case for allowing employers to deduct a minimum of 25 per cent of normal wages for the duration of any partial work ban that impacts on the performance of normal duties, the Commission requests feedback from stakeholders about the risks that such a change may entail.

The Productivity Commission seeks further feedback from inquiry participants on what forms of more graduated employer industrial action should be permitted, and how these should be defined in statute.

While acknowledging the damage that industrial action can cause and the appropriateness of it being accessed only as a tool of last resort, the Australian Chamber considers that there is scope to introduce more effective employer response actions. The comments of BlueScope Steel are worthy of further consideration in this regard:

The relative ease of gaining access to protected action during bargaining (merely needing to demonstrate that a union bargaining representative is “genuinely trying to reach an agreement”) period is symptomatic of a system predicated on an adversarial bargaining model. The bar needs to be set higher to reinforce the necessary transition to a more productive

¹⁹⁰ Initial submission, p. 107

¹⁹¹ Draft Report, p. 79.

workplace culture based on constructive mutual interest (such as requiring proof that bargaining has reached an impasse). Consistent with this principle, where protected action orders are issued, an employer should also be able to seek “no work as directed – no pay” orders. Presently, a company might have no option other than the extremely adversarial response of locking out a workforce as its only response to industrial tactics that have minimal effect on union members but are designed to significantly disrupt operations.¹⁹²

The Australian Chamber also supports the following draft recommendation 19.6 made by the Productivity Commission:

Increasing penalties for unlawful industrial action

The Australian Government should increase the maximum ceiling of penalties for unlawful industrial action to a level that allows federal law courts the discretion to impose penalties that can better reflect the high costs that such actions can inflict on employers and the community.

This is consistent with the Australian Chamber’s position that remedies for unlawful industrial action must be readily accessible and effective.¹⁹³

14.7 Short strike pay?

The Productivity Commission has made the following draft recommendation:

DRAFT RECOMMENDATION 19.5

The Australian Government should amend the Fair Work Act 2009 (Cth) so that where employees engage in brief work stoppages that last less than the shortest time increment used by their employer for payroll purposes, the employer should be permitted to choose to either:

- *deduct the full duration of the increment from employee wages. The maximum permissible deduction under this provision would be 15 minutes per person, or*
- *pay employees for the brief period of industrial action, if the employer is willingly doing so to avoid the administrative costs of complying with prohibitions on strike pay.*

The Australian Chamber does not support strike pay and has concerns that such an amendment may incentivise shorter stoppages of work in a more frequent basis and result in attempts to coerce the payment of strike pay.

14.8 Right of entry

The Australian Chamber considers that the Productivity Commission recommendations do not go far enough to address concerns regarding abuse of entry rights to workplaces.

Union officials have extremely broad right of entry powers under the FW Act and work health and safety laws. This right has generally developed into three scenarios:

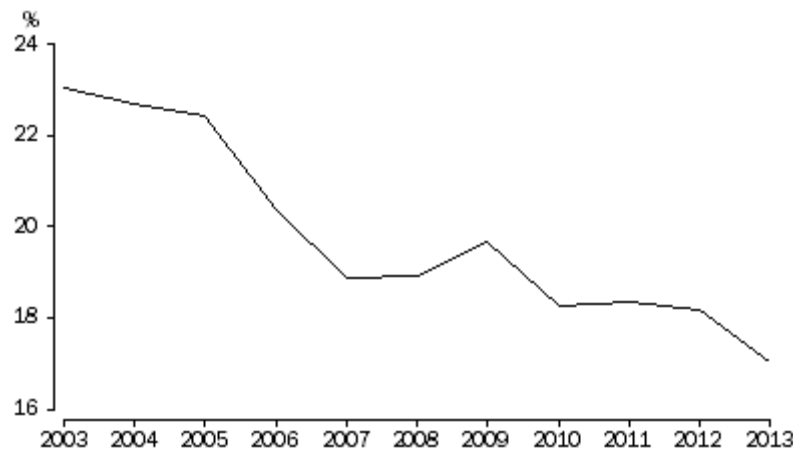
¹⁹² BlueScope Steel, *Productivity & the Australian Workplace Relations System*, March 2015, pp. 9-10.

¹⁹³ ACCI, “Modern Workplace: Modern Future – A Blueprint for the Australia Workplace Relations System 2002-2010”, 2002, p.p. 94-95.

- for discussion purposes;¹⁹⁴
- to investigate suspected breaches of workplace laws and instruments;¹⁹⁵ and
- for work health and safety (WHS) purposes.¹⁹⁶

The extremely broad right of entry powers reflect the FW Act's current focus on union based collectivism, a focus which is at odds with the low levels of unionisation in the private sector generally. In August 2013 ABS data indicated that 17 per cent of all employees were trade union members in relation to their main job.¹⁹⁷ Trade union membership was higher in the public sector, with 42 per cent of all employees being members, compared with 12 per cent in the private sector.¹⁹⁸

Proportion of employees with trade union membership in main job



Source: ABS, *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013*, cat. no. 6310.0.

Trade union membership is continuing a steady decline, as plotted in the graph above, yet the FW Act facilitates an extraordinary amount of third party involvement as can be seen in the following areas:

- the default position of the union as an employee's bargaining representative unless the employee appoints an alternative in writing or resigns;
- the ability of the union to initiate bargaining despite the desires of the employer or a majority of both union and non-union member employees;

¹⁹⁴ *Fair Work Act 2009* (Cth), s. 484.

¹⁹⁵ *Fair Work Act 2009* (Cth), s. 481.

¹⁹⁶ *Fair Work Act 2009* (Cth), s. 494.

¹⁹⁷ Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership, Australia*, August 2013 (cat. no. 6310.0).

¹⁹⁸ Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership, Australia*, August 2013 (cat. no. 6310.0).

- the requirement for an employer to bargain in good faith with the union if bargaining has commenced and the capacity for unions to use the provisions in a way that indirectly initiates or triggers bargaining to catch out less industrially aware employees.¹⁹⁹

The FW Act enables employees to bargain in good faith with their employer for terms and conditions which would see them 'better off overall' in comparison to the terms that they would otherwise receive under a modern award. As noted within the Discussion Paper, where a majority of workers would like to bargain with their employer and the FWC makes a 'majority support determination' as a consequence, an employer can be forced to bargain for an enterprise agreement 'in good faith' even though they did not wish to depart from the terms of the modern award.

Section 176 of the FW Act has the effect that an employee organisation is automatically a bargaining representative for a proposed enterprise agreement (that is not a greenfields agreement) if an employee to be covered by the proposed agreement is a member of the employee organisation and the employee organisation is entitled to represent the employee's industrial interests in respect of the work to be covered by the agreement. While an employee who is a union member may appoint someone else to represent them in bargaining, so long as there is one union member who has not appointed someone else the union will be a bargaining representative. Employee organisations are also automatically parties to greenfields agreements.

The outlawing of individual agreements and shift in the focus of the framework towards collectivism has been a significant shift in terms of union access privileges. The absence of appropriate constraints on third party intervention across the system as a whole continues to be a concern for employers, including in the context of the current right of entry provisions. Union right of entry was expanded under the current workplace relations framework and vests in permit holders broad rights. The mechanisms for addressing abuse of those rights are inadequate. The Australian Chamber does not consider that right of entry should be unfettered and given the breadth of the rights and potential impact upon the enterprise when exercised, considers that appropriate checks and balances must be in place to prevent their misuse.

From the perspective of unions, entry to sites provides a pathway to organise and represent. However uninvited lawful access supresses normal property rights and can infringe what is sometimes called the employee right to freedom from association (implicit in the freedom of association). A legislative judgement is required which balances economic costs and normal civil property rights against a socially acceptable level of representation and disruption. However since its departure from the long standing system regulating right of entry prior to the commencement of the FW Act, the current framework has disturbed the appropriate balance.

The previous Government extended the ability for a union official to enter a private business for discussion purposes. Previously, the entering official's union had to be bound by the applicable award or agreement, and this restriction conditioned the union's eligibility rules. Modern awards no longer bind unions but the removal of this condition where agreements are in place, as well as

¹⁹⁹ ACTU "Fair Work Bargaining Guide", Version 2.2 (11 March 2011).

removing it where the award applies, removes any condition on eligibility. Unions with no previous history at a workplace, unionised or not, can now enter on the basis of an aspect of their coverage which overlaps, or is purported to.

As a result, unions have greater scope to enter for recruitment and organising purposes, provided they are entitled to industrially represent at least one employee for whom the entry is related.²⁰⁰

The Productivity Commission has made the following draft recommendation in relation to the right of entry to workplaces where there are no union members:

DRAFT RECOMMENDATION 19.8

The Australian Government should amend the Fair Work Act 2009 (Cth) so that unions that do not have members employed at the workplace and are not covered by (or are not currently negotiating) an agreement at the workplace, would only have a right of entry for discussion purposes on up to two occasions every 90 days.

In the Australian Chamber's view, this recommendation does not go far enough. Rather the Australian Chamber had advanced the position that entry for discussion purposes should be conditional on the workplace at least having union members who actually invite the union to enter. One of the Australian Chamber's members, the Australian Mines and Metals Association (AMMA) has observed:

Union entry to workplaces under the FW Act increasingly sees unrepresentative and unsupported unions attempting to force their product (union membership and representation) on uninterested employees, who are well aware of what unions have to offer and choosing not to join or participate. Non-union members are exercising a fundamental right not to join a trade union and our rules around entry should better acknowledge and accommodate those rights, which are being exercised by 88% of private sector employees.²⁰¹

The changes the previous Government made to the right of entry rules gave rise to much debate about both frequency of entry and the location of discussions. While the Fair Work Act Review Panel appointed to review the FW Act in 2012 made recommendations regarding these issues that suggested changes that made some re-balance to the competing rights,²⁰² they were not taken up by the previous Government.

Instead it amended entry rules in 2013 by:

- giving the Commission the power to deal with disputes over frequency of entry (for discussions). However, the Commission can only make orders where the applicant employer or occupier can demonstrate 'an unreasonable diversion of the occupier's critical

²⁰⁰ Fair Work Act 2009 (Cth), s.484.

²⁰¹ Australian Mines and Metals Association, *Getting Back on Track: Delivering the Workplace Relations Framework Australia Needs*, 13 March 2015, p. 206.

²⁰² McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, June 2012 at pp. 195 (Recommendation 35) and 197 (Recommendation 36).

resources',²⁰³ that is, there is no excessively frequent entry if there is only a *reasonable* diversion of *critical* resources (read beneficially). The explanatory memorandum confirms this, describing the test as an 'appropriately high threshold';

- removing the section empowering the Commission to deal with disputes about the location to hold discussions by making the lunch room the default location in the absence of agreement between the union and employer/occupier.

AMMA has observed:

*Due to the significant changes to union access laws on 1 July 2009, and again on 1 January 2014, employers are now faced with greater costs and more frequent disruptions to their businesses than before, with less control over visits and fewer consequences being applied to inappropriate behaviour by permit holders.*²⁰⁴

The Productivity Commission has also observed that:

By exercising the right too frequently, unions can impose significant burdens and costs on employers due to:

- *the need to prepare and document the visit*
- *the need to escort the permit holder around the worksite*
- *disruptions to the normal performance of work.*²⁰⁵

While section 505A of the FW Act enables the FWC to deal with disputes about frequency of entry to hold discussions, orders can only be made where the FWC is satisfied that the frequency requires an unreasonable diversion of the employer's 'critical resources'. In this regard the Productivity Commission has observed:

In practice, this has proved a high bar. Employers are required to demonstrate that each visit is a critical issue requiring an unreasonable diversion of their resources. This test overlooks the possibility that excessive entries may impose large, unwarranted costs on an employer without necessarily diverting 'critical resources'. Indeed when considering excessive frequency of entries, it would seem more likely that it is the ongoing accrual of the incremental costs of each entry that would be most damaging to employers.

A more fundamental concern, from a policy perspective, is that s 505A currently places a burden on the employer to provide that the costs of entry would be unreasonable and critical, with no consideration of the relative size of the benefits of entry to employees... At present s. 505A effectively assumes that the value of the benefits to employees of entries by representatives is equal to just less than the cost of an 'unreasonable diversion of the employer's critical resources'. Where being used for tactical purposes, this is unlikely to be the

²⁰³ s.505A(4).

²⁰⁴ Australian Mines and Metals Association, *Getting Back on Track: Delivering the Workplace Relations Framework Australia Needs*, 13 March 2015, p. 205.

²⁰⁵ Draft Report, p. 703.

*case. In these circumstances, the costs of entry to a workplace should not have to be critical, before the merits of additional entry should be questioned.*²⁰⁶

The Australian Chamber notes the *Fair Work Amendment Bill 2014* (Cth) is currently before the Senate and seeks to restore part of the earlier balance by narrowing the circumstances of entry. It proposes to repeal s. 505A(4), which would remove the requirement of an unnecessary diversion of critical resources, and amend s. 505A(6) to require consideration of the combined impact of entries onto premises on the employer's operations. The Productivity Commission has described these amendments as 'broadly sound'²⁰⁷ and has made the following recommendation:

DRAFT RECOMMENDATION 19.7

The Australian Government should amend s. 505A of the Fair Work Act 2009 (Cth) for determining when the Fair Work Commission may make an order to deal with a dispute about frequency of entry by an employee representative to:

- *repeal the requirement under s. 505A(4) that the frequency of entry would require an unreasonable diversion of the occupier's critical resources*
- *require the Fair Work Commission to take into account:*
 - *the combined impact on an employer's operations of entries onto the premises*
 - *the likely benefit to employees of further entries onto the premises*
 - *the employee representative's reason(s) for the frequency of entries.*

However the Australian Chamber considers that further changes are needed to strike the appropriate balance.

The *Fair Work Amendment Bill 2014* (Cth) which remains before the Senate also seeks to repeal changes introduced by the *Fair Work Amendment Act 2013* (Cth) which:

- required employers or occupiers to facilitate transport and accommodation arrangements for permit holders exercising entry rights at work sites in remote locations; and
- made lunch or meal rooms the default location for union officials to hold discussions or conduct interviews rather than a reasonable employer-designated location as was previously the case.

These amendments made by the *Fair Work Amendment Act 2013* (Cth) were not based on recommendations made by the Fair Work Act Review Panel and were strongly opposed by employers for reasons which included but are not limited to:

- with respect to the location for interviews and discussions:
 - there was no cogent evidence provided that suggested that it was necessary to depart from the pre-existing rules regarding interviews and discussions;
 - the amendments overturned significant case law which had determined for a variety of reasons, a lunch room is not an appropriate venue for holding discussions or conducting interviews; and

²⁰⁶ Draft Report, p. 705.

²⁰⁷ *ibid.*, p. 705.

- the amendments violated non-union members right to privacy and also rendered irrelevant employees' right to not participate in discussions (i.e. to enjoy their lunch breaks without being harassed by permit holders); and
- with respect to accommodation/transport arrangements:
 - there was no cogent evidence provided to suggest that such changes were necessary;
 - the amendments overlooked or ignored the fact that in today's world there are multiple ways in which permit holders could hold discussions with their members without having to actually physically attend sites; and
 - the amendments required occupiers to incur considerable costs, and waste valuable time and resources in the FWC if they declined entry under these arrangements.

The changes proposed restore some much needed balance with respect to right of entry privileges. Beyond this, the Australian Chamber's primary position is that provisions providing for right of entry should be amended so that they reflect the pre-FW Act rules and restrictions.

The FW Act also introduced the capacity to include clauses in enterprise agreements that confer additional access privileges beyond legislated rights. This should be arrested.

Restoring balance to right of entry laws

The Australian Chamber recommends that the provisions providing for right of entry be amended so that they reflect the pre-Fair Work Act 2009 (Cth) rules and restrictions. The position of the Australian Chamber is that right of entry entitlements should be limited to those rights contained within statute.

15 Alternative forms of employment

The Productivity Commission has acknowledged that "[t]he prevalence of independent contracting has remained an important source of labour and has been stable over the last decade"²⁰⁸ and has also observed:

*Security of work appears to have changed relatively little in recent years. While the proportion of casual jobs increased throughout the 1990s, this trend tapered off during the 2000s, particularly for women. Most people working in casual jobs move into permanent jobs in later stages of their lives.*²⁰⁹

The availability of flexible forms of labour engagement, including casual employment, plays a critical role in creating attachment to the workforce. While casual employees do not receive paid leave entitlements, they are compensated for this with a loading and can negotiate which shifts they are available to perform rather than being locked into fixed working patterns which may not suit their changing personal priorities. By its very nature 'casual' employment can facilitate a

²⁰⁸ Draft Report, p. 9.

²⁰⁹ *ibid*, p. 9.

reasonable degree of choice. The Productivity Commission has observed that casual work rates are highest among people aged 15-19 years and become progressively lower until age 60-64²¹⁰ which demonstrates that this type of work is important for people at particular life-stages, particularly while at school or studying or in facilitating transition to retirement. Indeed the Productivity Commission has stated that:

*There is little evidence that the prevalence of non-traditional forms of labour is an adequate predictor of low quality jobs. People in non-standard jobs are highly heterogeneous. Such jobs can suit people's circumstances well and can act as stepping stones for more secure employment...*²¹¹

The Productivity Commission has also stated that:

*There are several indicators that the labour market has become more flexible, most notably through a greater tendency to adjust hours rather than employment during demand downturns...*²¹²

Flexible forms of labour engagement make such an outcome possible and enable the impact of downturn to be spread across the workforce to mitigate its impact on cohorts of individuals by enabling more people to maintain their attachment to the labour market. This helps to ensure the enterprise remains viable and provides opportunities for impacted individuals to increase their hours when the market recovers. Structuring of work to support this outcome is assisted by the availability of flexible forms of labour engagement.

The Productivity Commission has stated:

*There are grounds for changes to the Fair Work Act to limit the capacity of agreements to regulate the use of contractors and labour hire (which are in any case, in spirit, contrary to the Competition and Consumer Act 2010 (Cth)).*²¹³

The Australian Chamber strongly agrees with this statement and the Productivity Commission's draft recommendation 20.1 as provided below:

Prohibition of terms that restrict the engagement of independent contractors, labour hire and casual worker or regulate their engagement

The Australian Chamber agrees that terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the *Fair Work Act 2009* (Cth).

16 Sham contracting

The Productivity Commission has suggested that "[u]nless presented with contrary evidence, the Commission sees merit in replacing the 'recklessness' test with a 'reasonableness' test. The

²¹⁰ Draft Report, p. 102.

²¹¹ *ibid.*, p. 100.

²¹² *ibid.*, p. 9.

²¹³ *Ibid.*, p. 34.

Australian Chamber strongly disagrees. There is no widespread incidence of sham arrangements nor of any widespread pattern of dishonesty or exploitation; and (to the extent they occur) there is already sufficient law dealing with sanctions against sham contracts and there is no case for extending it further.

If a business has entered into a sham arrangement there is already a substantial penalty. That person is in all likelihood going to have obligations as an employer of the person purportedly engaged as a contractor. This generally involves substantial back-pay, restitution and an ongoing obligation to employ. In financial terms this hurts any business and is a substantial disincentive to enter into sham arrangements.

The common law provides that contracts of employment where employees are labelled as contractors, but where in fact and law they are really employees, are sham contractor arrangements and do not have legal recognition as contracts for services at common law. Contracts that are non-consensual or which are tainted by coercion or undue influence are not enforceable and do not have legal recognition as contracts for services at common law. A business in such circumstances may also face actions under:

- Common law for breach of contract, tort or equity;
- Breaches of statutory misleading and deceptive conduct in trade or commerce provisions;
- Breaches of the *Fair Work Act 2009* or state legislation.

If an individual is found by a court to be an employee, the ATO may also pursue the putative employer for penalties under superannuation and taxation legislation.

The existing provisions governing sham contracting are sufficiently strong. Fair Work Inspectors can seek the imposition of penalties for contraventions of sham contracting arrangements and the courts may impose a maximum penalty of \$54,000 per contravention. The Courts have shown a willingness to impose such harsh penalties. To provide an example, in relation to a Federal Circuit Court finding of sham contracting in one matter the Court decided to impose a total of \$57,024 in penalties (\$47,520 ordered against the company, and \$9,504 ordered against the director) despite the underpaid wages and entitlements owed to the worker amounting to no more than \$1858.53.²¹⁴

The Australian Chamber has long advocated the following principles in support of independent contracting:

- Recognition that the underlying principle of freedom of contract is the basic pillar on which our system of commerce and industry operates;
- That persons genuinely and freely entering into contracts for the provision of their personal services as contractors should, provided those contracts are lawful, not have them varied, redefined, reshaped, annulled, downgraded or otherwise interfered with by persons or bodies (including governments, regulators, tribunals or courts) who are not parties to those contracts;
- That the common law generally provides a proper and sufficient basis on which the law should give legal recognition to a contract for services and a proper basis for setting out the

²¹⁴ *Fair Work Ombudsman v Jooine (Investment) Pty Ltd & Anor* [2013] FCCA 2144.

necessary elements of a contract for services, although additional certainty can be provided by statute so long as common law rights are not prejudiced;

- That contracts of employment where employees are labelled as contractors, but where in fact and law they are really employees, are sham contractor arrangements and do not have legal recognition as contracts for services at common law;
- That arrangements which are non-consensual or which are tainted by coercion or undue influence are not enforceable and do not have legal recognition as contracts for services at common law;
- That genuine and consensual contracts for services under which work is performed as principal and contractor are in and of themselves a legitimate, welcome and beneficial form of commercial arrangement that adds value to the Australian economy, and in particular is no less welcome than contracts of employment;
- That genuine and consensual contracts for services are not inherently exploitative, unfair or otherwise requiring the attention of consideration of governments, parliaments or regulators;
- That contracts for services provide a flexibility, efficiency and productivity that is of real value to the parties and the economy and society as a whole;
- That the values of entrepreneurship, risk taking, investment and choice which underpin contracts for services are values that should be welcomed, encouraged and highly regarded by policy makers.
- Governments should not be in the business of deciding what working arrangements suit a business or individuals. Regulating true independent contractors as employees is a regulation of entrepreneurship, and not something that even the International Labour Organisation has recommended.

The desire to regulate for every possibility of bad behaviour must be resisted. The regime against sham contracting is sufficiently strong. Further regulation in this area risks discouraging engagement of flexible forms of labour and the benefits they deliver as articulated above and is not supported by the Australian Chamber.

17 Unpaid internships

The Productivity Commission seeks “feedback on the extent to which unpaid internships have become more commonplace across the economy, whether any growth in such arrangements has led to problems rather than opportunities, as well as the potential remedies to any specific issues.” The Australian Chamber notes that unpaid internships provide legitimate learning experiences provided they do not give rise to an employment relationship triggering employee entitlements under the FW Act. Internships and work experience arrangements can provide a valuable learning experience and can guide career choices by enabling a person to gain insights into an industry, occupation or particular employer. It can provide young people and those seeking entry to the labour market with an understanding of what it is like to be in a work environment and enable them to identify and develop work ready skills such as effective communication, teamwork, problem solving and commercial awareness which may assist in their future employability.

An extensive body of common law has developed to guide the question on whether an arrangement constitutes an employment relationship and having already commissioned and received a report on internships the FWO provides guidance in relation to internships and work experience. The Australian Chamber is not aware of any evidence or developments that would suggest a need for further regulation in this area is necessary.

18 Migrant workers

The Productivity Commission has noted that employer can face fines for imprisonment under the *Migration Act 1958* (Cth) for unlawfully employing migrants. Imprisonment is a serious consequence of a breach and the Australian Chamber does not consider that a further deterrent is necessary where the threat of imprisonment already exists.

The Australian Chamber condemns any exploitation of vulnerable workers, including migrants and considers that the FWO's compliance activities should be properly targeted toward such practices as a key priority and notes that such activities are already within its remit.

19 Transfer of business

The Productivity Commission has made the following draft recommendation:

DRAFT RECOMMENDATION 22.1

The Australian Government should amend the Fair Work Act 2009 (Cth) so that an employee's terms and conditions of employment would not transfer to their new employment when the change was at his or her own instigation.

While this recommendation will affect some incremental improvement, the Australian Chamber's position remains as follows:

Reinstate former longstanding transfer of business provisions

The Australian Chamber recommends that the existing transfer of business rules should be re-aligned with the former longstanding provisions under the *Workplace Relations Act 1996* (Cth) and there should be a maximum time limit for transferring industrial instruments.

As the Australian Chamber indicated in its submission to the Senate Committee on the *Fair Work Bill 2008* and within its initial submission, feedback from employers indicates the effect of the changes to the former transmission of business provisions has been the following:

- diminish the likelihood of a purchaser keeping on existing employees;
- make it difficult for a purchaser to undertake changes to stabilise or restructure the business, or alter inefficient work practices;
- increase the chances of industrial disputes on the sale of a business;
- reduce the purchase price of commercial arrangements for the sale of business if inefficient work practices have to be inherited.

Comments made by BlueScope Steel to this inquiry reinforce this view:

In many instances, the reasons behind the decision to sell a business or its assets are unrelated to the terms of the collective agreement, and the acquiring company's interests coincide with the interests of employees in maintaining the inherited collective employment arrangements. However, there are circumstances where provisions in an enterprise agreement have contributed to poor business performance, and the present provisions of the Act that preserve the agreement, combined with the fact that it would remain in force after its nominal term (if not replaced by agreement) are a major disincentive to a prospective buyer. The outcome can be business failure and the loss of jobs, instead of the possibility of an acquisition and turnaround and maintenance of jobs²¹⁵

20 Interactions between competition policy and the workplace relations framework

The Productivity Commission has sought further input from inquiry participants on “*whether the secondary boycott prohibitions in the Competition and Consumer Act 2010 (Cth) (CCA) should be amended to:*

- *amended or remove s. 45DD(1) and s. 45DD(2)*
- *grant Fair Work Building and Construction a shared jurisdiction to investigate and enforce secondary boycott prohibitions in the building and construction industry.”*

The Australian Chamber's position is as reflected in its response to the Competition Policy Review which addressed the interaction of the workplace relations system and the anti-competitive practices it gives rise to with the CCA. ACCI specifically addressed secondary boycotts, anti-competitive agreements and transfer of business rules as a part of the Competition Policy review and restated its position in initial submissions made to this inquiry. The Australian Chamber position is as reflected in the following recommendation:

Secondary Boycotts

The Australian Chamber recommends that:

- the ACCC provides transparent and consistent reporting with respect to its enforcement activities involving secondary boycotts. This should include, but not be limited to, clear, consistent and comparative reporting about:
 - all complaints and enquiries received;
 - assessments commenced (and concluded);
 - investigations undertaken (whether at their own initiative or otherwise);
 - undertakings made; and
 - litigation commenced (and concluded);
- approximately one year after the abovementioned transparency mechanisms have been

²¹⁵ BlueScope Steel, *Productivity & the Australian Workplace Relations System*, March 2015, pp. 8-9.

in operation, a further review should be conducted which in light of additional information invites stakeholders to provide comment about whether the provisions of the CCA are actually operating effectively;

- the ACCC be mandated to give a firm commitment to enforcing the secondary boycott provisions which is ideally more authoritative than a policy statement as is currently the case;
- the Government should give consideration to providing the ACCC with an additional budget apportionment for the purposes of enforcing the secondary boycott provisions of the CCA;
- the legislative framework for the secondary boycott provisions should be simplified, or failing that, the Government should give consideration to providing the ACCC with funding to formulate information tools and/or educate individuals, particularly small businesses, about the relevant provisions;
- the Cole Royal Commission Report recommendations 181 and 182 be adopted, but consideration should be given to:
 - simplifying the provisions (including removing the ‘dominant purpose’ test under section 45DD(1) of the CCA) whilst ensuring that there is harmonisation of penalties and compensation, and that the Fair Work Building and Construction (FWBC)/ Australian Building and Construction Commission (ABCC) possesses the same powers as the ACCC;
 - requiring a reverse onus of proof for unions alleged to have engaged in such conduct; and
 - developing a formal Investigation and Prosecution Cooperation Protocol to guide the functions of the FWBC/ABCC and ACCC, particularly in circumstances where both bodies may be investigating the same matter;
- in the interests of small business, a separate procedure for small business claims should be considered;
- there should be a positive obligation to report secondary boycott behaviour including circumstances in which an individual is approached by another individual requesting that an agreement, arrangement or understanding is reached in contravention of sections 45D and 45.

21 About the Australian Chamber

21.1 Who We are

The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia’s most representative business organisation.

We speak on behalf of the business sector to government and the community, fostering a culture of enterprise and supporting policies that keep Australia competitive.

We also represent Australian business in international forums.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses also get involved through our Business Leaders Council.

21.2 What We Do

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living. We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

ACCI Members

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