

Response to the Draft Report

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

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Introduction

We commend the Commission for producing such a substantial and well-crafted document in the limited time available to it. We strongly agree with the approach generally taken by the Commission to the values and objectives that should underpin labour regulation, and to the matters that should be considered when deciding whether changes are warranted – and we trust that the same approach will be maintained in the final report.

At the same time, we believe there are some recommendations or tentative positions in the Draft Report that require clarification or further development – and some with which we would disagree. In the sections that follow, we have chosen to address some of the more important of these. In the time available, it has not been possible to canvas (or develop an agreed position on) every matter of potential interest. But we would be happy to address other issues on request, or of course to clarify any of the comments below.

In what follows, all page or chapter references are to the Draft Report, except where indicated otherwise.

1. Fair Work Commission

There are a number of suggestions in the Draft Report for improving the work of the Fair Work Commission (FWC) with which we agree. These include:

- broadening the skills and expertise available to the FWC by appointing ‘primary’ members from a wider range of backgrounds, both in terms of disciplinary field and prior occupation;
- improving the process for appointing such members and seeking to ensure ‘a more balanced, less partisan representation’ (p 152);
- creating greater information about the FWC’s conciliation processes, including by commissioning an external review; and
- empowering the FWC to undertake or commission more research to inform its decision-making – on the understanding that the greatest barrier to this happening does not rest with the agency itself, but with the lack of dedicated funding for such research.

We do not, however, support three key proposals: to divide the FWC into a Minimum Standards Division and a Tribunal Division, to remove tenure for FWC members, and to subject all members to ‘performance reviews’. In all three cases, we believe there are better ways to achieve the objectives that lie behind the proposals.

FWC structure

Taking the structural proposal first, we see the Minimum Standards/Tribunal distinction as too simplistic. For one thing, it ignores many aspects of the FWC’s work that are neither about setting or varying minimum standards, nor involve acting as a ‘quasi-judicial’ tribunal, but which account for a growing proportion of the FWC’s work and resources. These include the conciliation of unfair dismissal claims by specialist staff not formally empowered to exercise any control over the parties

or the process; the review and approval of enterprise agreements (EAs), at least where there is no formal objection or major problem identified; various functions concerning the registration and governance of employee and employer organisations; and the growing use of proactive intervention to improve cooperation at work, even in the absence of a 'live' dispute (see Stewart et al 2014). Significantly, many of these functions are not undertaken by members, or by members alone, but by or with the assistance of other staff.

As for the FWC's work in relation to the setting and variation of awards, it is certainly true that some of the policy issues that must be confronted involve 'balancing social and economic objectives', and could usefully 'be informed by a detailed assessment of empirical evidence' (p 149). As it stands, the *Fair Work Act 2009* (FW Act) provides that the task of reviewing basic wage levels each year is to be undertaken with the assistance of members whose expertise lies in economics, social policy, business or finance, not just law or workplace relations. If that is so, it is hard to see why the same should not be true in relation to other matters that potentially have 'economy wide impacts' (p 148), as well as consequences for the economic viability of businesses, such as the determination of award standards concerning penalty rates, allowances, leave entitlements and so on.

But not all award-related matters fall into that category. Of their nature, awards are lengthy, complex and technical instruments – and that will likely remain the case, notwithstanding the important strides that have been and are being taken to simplify them. For many technical matters, the expertise required will tend to be found in the kind of legal and other practitioners who have made a career advising on the interpretation, enforcement and revision of such instruments. More broadly, we also see value in ensuring that those responsible for setting and varying awards should at least include professionals with a practical understanding of how award standards are understood and applied – even if that is not the only type of experience that may be helpful.

Instead of arbitrarily dividing the FWC into divisions with different leadership and having to confront the inevitable overlaps between their work, we would suggest that a better option is to maintain the President's power to flexibly and appropriately allocate work and responsibilities within the FWC, but to give the President more options to find the right people for the right tasks. Besides the capacity that already exists to delegate roles to specialist staff who are not appointed as primary members, we would (as noted above) strongly support broadening the range of qualifications and expertise among those members, to complement the skills that more 'traditional' appointees can bring to their work.

We would also see value in being able to use the Expert Panel for more than just annual wage reviews and the selection of superannuation default funds. The FW Act could be amended to authorise the President to refer to the Expert Panel any matters of general principle concerning award entitlements, and perhaps also the resolution of equal remuneration claims under Part 2-7 of the Act. But the President would retain the power to allocate more minor or technical matters to single members or regularly constituted Full Benches, as at present.

FWC appointments

As to the proposal to remove tenure for FWC members and switch to a system of limited term and renewable appointments, we understand and agree with the Commission's desire to minimise the

politicisation of the appointments process. But we also think the proposed solution would be likely to exacerbate the risk of ‘partisan decisions’ (p 154), not reduce it.

The FWC is certainly not the only regulatory agency or tribunal to have to make decisions or take on responsibilities that may be politically sensitive. But there is still something distinctive about the area of workplace relations – it is almost *always* political. In the absence of some major shift in our political system, government is likely to be formed by a party either associated with organised labour, or more closely aligned to promoting the interests of business and minimising the influence of organised labour. There will always be a temptation for these parties to make political appointments, even if only to reverse what is seen (rightly or wrongly) as ‘stacking’ by a previous administration, or (perhaps more commonly) to reward loyal servants.¹

The main check at present to partisan *decision-making* (as opposed to appointments) is the fact that members have tenure. A government cannot be sure that its appointees will not be independent and impartial once they are secure in the job, setting aside their previous allegiances – as we believe the overwhelming majority of FWC members are able to do in practice. But if a member’s prospects of reappointment (or hopes of later governmental work or appointments) were to depend on the government of the day, or the party they expected to be in power at the relevant time, that would surely heighten the incentive to make decisions that would please those expected to make the reappointment decision.

Some support for this view can be found in a recent US study of judicial decision-making by ‘recess appointees’, who were initially chosen to fill a vacancy on a temporary basis, then later confirmed by the Senate. It was found that there was a substantial difference in their pre- and post-confirmation decisions, suggesting that the tenure conferred by their permanent appointment made a difference to their perceived independence (Graves et al 2014).

The Commission’s proposed solution for the problem of partisan appointments is to have an ‘expert appointment panel’ to advertise FWC positions, independently assess candidates and forward a shortlist to government. But besides the obvious risk of a future government ‘cherry picking’ the recommendation for limited terms, but not the expert panel, it would surely be expected that governments would simply seek to ‘stack’ any such panel instead.

As for the notion that potential appointees ‘be widely seen as having an unbiased and credible framework for reaching conclusions and determinations’, we wonder where such an individual might be found! Even the most respected practitioners or experts can be accused, fairly or not, of having anti-union/worker or anti-business views, or of being associated with one side or other. At any event, even if some individuals might qualify, insisting on this standard for *every* candidate would potentially disqualify some of the most able and talented people, merely because they had gained their expertise predominantly in the service of either business or workers, or (for public servants) in governments of one hue rather than another.

That said, we are not at all opposed to the Commission’s proposed appointments process, subject to not disqualifying candidates with actual workplace relations expertise. Indeed it would be greatly

¹ We accept that this is the case, even though we maintain (for reasons set out in the submission referred to on p 151 of the Draft Report) that the composition of the current FWC is not ‘unbalanced’.

preferable to have the FW Act mandate a proper and transparent selection process, rather than leaving the matter entirely to the discretion of the relevant Minister. And as already indicated, we would certainly like to see more members appointed from a broader range of backgrounds, as opposed to the lawyers, union or employer association officials and public servants who currently predominate – though the nature of most of the FWC’s day to day work is still such that, for example, legal expertise will often be both relevant and useful.

We also see force in the Commission’s concern about longer term appointments limiting ‘the inflow of members with different perspectives and expertise’ (p 152). But one way to address that would be to have appointments for a maximum of ten or fifteen years or until the age of 65 (or perhaps some higher age), whichever is reached sooner, rather than through a reappointment mechanism. As for what to do about ‘underperforming’ members (*ibid*), that is an issue that can and should be dealt with by other methods – a point to which we return below in discussing issues of accountability and performance.

Before getting to that, however, we wish to comment on the basis for supposing ‘politicised’ decision-making by the FWC and/or its predecessor, the Australian Industrial Relations Commission (AIRC). We think it notable that the only evidence for this mentioned in the Draft Report involves two studies of unfair dismissal arbitrations.

The first of these, by Southey and Fry (2012), suggests only a ‘mildly significant association’ between the professional background of members and their decisions and insists that the results be treated with caution. The second study, by Booth and Freyens (2014), claims to be far more definitive in its findings. But we are concerned that there may be problems with the methodology. There is no indication as to whether the sampled decisions were limited to ‘substantive’ rulings on whether a decision was harsh, unjust or unreasonable, or include cases decided on jurisdictional grounds (for example, that the application was out of time, or that the employee was not eligible to make a claim). As Southey and Fry recognised in concentrating on substantive decisions alone, the degree of discretion or judgment needed to resolve a jurisdictional point may be very different to that required to rule on the fairness of a dismissal. We also note the insistence by Booth and Freyens that unfair dismissal cases are allocated to what they call ‘judges’ on an entirely random basis. This seems to indicate a lack of understanding of the different processes that have been used over the years to handle such cases. In practice, especially in the AIRC (a body not mentioned in the article, despite having been the ‘labour court’ deciding most of the cases in the study), allocation of cases might depend on the location, the industry and (sometimes) the seniority of the member, but was never entirely random.

Even accepting the results, however, they reveal at most a slight propensity to come down on one side or other in what can often be the most difficult type of decision that an industrial arbitrator can face. Excluding relatively easy cases that can be decided on jurisdictional grounds, or where one of the parties is blinded by a sense of personal grievance that does not allow them to admit the weakness of their case, the matters that make it through to arbitration often involve difficult choices. These may be between the credibility of competing witnesses, or in determining whether dismissal was a ‘proportionate’ response to misconduct, incapacity or poor performance. It can perhaps be understood that an arbitrator’s background may have some bearing in how they resolve such cases, at least at the margins.

At any event, all this has little relevance to the unfair dismissal system as it presently operates. Relatively few complaints now require arbitration, with just 826 arbitral decisions (compared to 14,796 claims) in 2013–14 – and of those, only 359 required a finding as to the fairness of a dismissal (see the figures on pp 838–9). The overwhelming majority of matters are resolved without any formal input from a member, but are rather settled (or withdrawn) after a conference overseen by a specialist conciliator.

At the very least, we do not see a basis for reaching a conclusion that the FWC’s decision-making in this or any other area is fundamentally compromised by the admittedly politicised nature of the appointments process.

Accountability and performance review

That said, we accept that there can and will sometimes be concerns about the performance of individual FWC members, although these may go to matters of competence, capacity, general behaviour or comity/collegiality, rather than perceived bias.

Besides relying on the constraints imposed by a limited term appointment, the Commission proposes to help improve accountability on the FWC by mandating ‘a merit-based performance review undertaken jointly by an independent expert appointment panel and (excepting with regard to their own appointment) the President’ (p 157). We have already indicated our concerns about the likelihood of an appointment panel being truly independent, while directly involving the President would make it harder than it already is for them to maintain good relations with colleagues whose work must be managed and directed.

Our own preferred approach to improving performance and accountability within the FWC would be twofold. The first element would involve strengthening the President’s existing capacity to direct the work of the FWC and set standards for its performance. Among the innovations of the current President, Justice Ross, are the issue of Benchbooks (which effectively provide guidance on the interpretation and application of the FW Act for the benefit of FWC members, as much as the FWC’s customers or stakeholders), the setting of a wider range of performance benchmarks, and the release of data to indicate how well (or poorly) the agency is doing in meeting those benchmarks. These are all matters that might usefully be expressly recognised in the legislation, or even mandated – together with an obligation on the part of members (and other staff) to co-operate in seeking to meet performance standards set by the President and to comply with the agency’s Code of Conduct. These last obligations would need, obviously, to be subject to appropriate reservations to protect the right of members to form an independent view on the proper interpretation and application of the legislation. Freedom of decision-making would demand no less.

Our second proposal is to create an independent mechanism to deal with complaints of misconduct or inadequate performance against FWC members, drawing on the principles articulated by Appleby and Le Mire (2014) for dealing with problematic conduct by judges. Those principles, which were cited by the Commission in its report on access to justice (Productivity Commission 2014: 437-8), emphasise the importance of taking the primary responsibility out of the hands of the court or tribunal itself. An independent body could be tasked with the process of receiving and investigating complaints against FWC members, with the power to either dismiss them, refer those that appear to have substance to the President for further consideration, or in more serious cases that might

warrant removal from office, prepare a report for Parliament. For the less serious cases, the President should be expressly empowered to do more than just ‘temporarily restrict’ the relevant member’s duties (see FW Act s 581A(1)(b)), but to issue private or public reprimands.

2. Unfair dismissal

We agree with much of what is said in Chapter 5 of the Draft Report. But there are two recommendations about which we have concerns.

Merit based conciliation

The first is the suggestion that ‘more merit focused conciliation processes’ be used. We would agree that, in the right circumstances, it may be helpful to have more of a focus on the merits of the case at an initial conference. But this will only generally be appropriate where there is agreement as to the facts of the matter, there are no significant legal issues to be resolved and both parties have adequate representation. For example, it is not feasible or desirable for a conciliator to deal at a short conference with factual disputes that require testimony from witnesses, especially if the matter is likely to turn on issues of credibility. Similarly, there would be a clear risk of procedural unfairness (and hence a subsequent challenge) if a merits assessment were based on arguments presented by parties with grossly unequal representation – for example, an unrepresented applicant or small business respondent dealing with an experienced HR manager or union advocate.

It also needs to be born in mind that the greater the emphasis on merits assessment at conciliation, the more likely that the respective parties will be forced to incur expense in preparing for the conference, and/or harden their positions, to the detriment of a possible settlement.

Our preference would be for a ‘merits conference’ to be an option to be used in appropriate cases, where a preliminary assessment indicates its suitability. Such cases could be handled either by members, or by staff conciliators who also have prior experience as arbitrators.

The significance of procedural unfairness

The other recommendation we wish to challenge is Draft Recommendation 5.2, which would permit the award of compensation to an ex-employee only ‘when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct’ (p 233). Taken literally, this might suggest that a dismissed employee should be denied a remedy if, for example, they have been dismissed for poor performance despite never once having been alerted to the problem or given a reasonable opportunity to improve; or that a single act of misconduct can never be outweighed by (for example) a long and unblemished record, or inconsistency of treatment compared to other employees.

Read in context, however, it appears that the recommendation is not intended to narrow protection against unfair dismissal in so drastic a fashion, but rather to address a concern with employees who have done enough to ‘deserve’ dismissal, but who win an unfair dismissal case purely by showing a ‘technical’ breach of procedural requirements.

It is clear that a dismissal will not *automatically* be treated as harsh, unjust or unreasonable merely because of some procedural lapse: see *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410. The FWC's task is to weigh up all the circumstances, including the factors specified in s 387 of the FW Act, and reach a conclusion as to the fairness of the employee's treatment. In the face of compelling evidence of serious misconduct that would warrant dismissal, a breach of procedural fairness is only likely to be treated as a basis for a finding of unfair dismissal if it can be shown that following an appropriate procedure would have made a difference to the outcome: see *Farquharson v Qantas Airways Ltd* [2006] AIRC 488 at [41].

The case of *Sheng He v Peacock Brothers* [2013] FWC 7541, mentioned on pp 225 and 233, provides a good illustration. It is clear that what prompted Commissioner Wilson to find the dismissal unfair was not the lack of procedural fairness in the abstract, but the fact that the employer *might* have reached a different decision had it given the employees a proper chance to explain what happened and not simply relied on the account given by their superiors (see especially the comments at [49]). It is also noteworthy that, as in many cases of this kind, the employees received only a small amount of compensation (two weeks' wages), to reflect the fact that they had been guilty of misconduct that did in fact warrant their dismissal, despite their long service with the firm.

It is of course possible to identify cases in which an arbitrator may have erred by placing too much store on a lack of procedural fairness and too little on the employee's conduct or performance. But in our experience, such cases are rare. More often than not, when an unfair dismissal complaint succeeds in the face of a finding that there was a valid reason for dismissal, it will be because of a combination of reasons that may include the employee's length of service and previous good record, not just a single lapse in the employer's procedures.

One of the reasons why the unfair dismissal provisions in the FW Act are framed as they are, with an emphasis on both substantive and procedural fairness, is to encourage employers to make sensible and rational decisions both in managing their staff's performance and in investigating allegations of misconduct – for their own benefit, as well as that of their employees. If a lack of procedural fairness could simply be ignored, no matter how blatant, where would the incentive be for employers to adopt sound decision-making processes in determining whether to dismiss an employee?

We appreciate of course that the Commission is not suggesting that there should be no response at all where an employer makes purely procedural errors in dismissal. The proposal is that a procedurally unfair dismissal might result, in the FWC's discretion, in 'counselling and education of the employer, or financial penalties' (p 233). But in the absence of any more serious sanction, counselling is unlikely to be viewed as anything more than a slap on the wrist. As for penalties, it is unclear how a non-judicial body such as the FWC could validly be authorised to impose fines. The High Court has interpreted the Constitution to mean that only a court created under Chapter III can validly exercise judicial power. The FWC's power to rule on the fairness of a dismissal is not caught by that restriction, because it can be considered to involve a policy-based decision to create a new right (that is, to reinstatement or compensation), rather than to enforce an existing legal right: see Creighton and Stewart 2010: 99–100. But it is hard to view a penalty as anything other than a sanction for failing to comply with a legal requirement, something only a court can impose for a breach of federal law.

In our view, in the absence of compelling evidence that purely ‘technical’ breaches are routinely being used to invalidate dismissals, it should be left to the FWC to balance any procedural failings against the overall justice of the case. This should continue to involve taking account, where appropriate, of what can reasonably be expected in the case of a smaller employer without access to HRM expertise, and recognising too the option of reducing compensation to reflect any misconduct by the applicant.

3. General protections

Besides agreeing that s 341(1)(c) of the FW Act (concerning the right to make a complaint or inquiry) needs redrafting, the only point we wish to make concerning the treatment of the general protections in Chapter 6 of the Draft Report relates to the proposed cap on compensation (pp 263–4).

In the first place, it is not clear to us what exactly the Commission is proposing. Is the cap only to apply to claims by dismissed employees, or all claims? If the latter, and the matter is one involving (for example) unlawful coercion or non-engagement of a contractor, how is the cap to be calculated? Is the cap to apply only to arbitration by the FWC, or to claims that go to the Federal Court or Federal Circuit Court? Draft Recommendation 6.4 is certainly not limited to FWC proceedings, yet just above it on p 264 we find the statement that ‘Dismissed employees seeking levels of compensation higher than the cap should still be able to access the courts directly.’

If the Commission’s proposal is purely that for dismissal-related claims that are arbitrated by the FWC, the same cap should apply as for unfair dismissal claims, we see no great problem in that. But if the proposal is broader, we believe a proper justification is warranted. For example, where is the data on compensation awards that establishes the existence of a problem? Why should a claim of victimisation or discrimination brought under the general protections be subject to a cap, when no similar cap applies under any of the federal anti-discrimination statutes?

If the concern is purely about speculative dismissal claims, as we suspect it may be, then other measures can or should be taken to deal with that. These could include making it easier to award costs against an applicant who unsuccessfully pursues court action in the face of a recommendation by the FWC not to proceed.

4. Awards

We strongly endorse the Commission’s general conclusions in Chapter 11 as to the ongoing role and utility of awards. In terms of the proposals in the Draft Report for changes to the award system, we offer the following general comments.

A more proactive approach

We agree with the suggestion in Chapter 12 that the FWC should be willing to take a more proactive role in both identifying problems with the award system and collecting robust evidence to inform its deliberations. But at the same time, we believe that it is unfair for the FWC to be criticised for not having made more of an effort to do these things in the past.

As we have noted previously, the agency has been willing since its creation in 2009 to commission research, but its capacity to do so has been hampered by having only a limited budget. The fact that it has been able, within that budget, to undertake a project as substantial as the recent Australian Workplace Relations Survey is little short of miraculous. It would clearly be preferable if that type of essential but general research were conducted by the Department of Employment, especially as continuing to do so would entail the creation of a research and statistical analysis capability which already exists within the Department. The FWC should instead be given the resources to focus on more specific projects relevant to minimum wages and award standards.

It also bears emphasising just how much of a drain on the FWC's time and resources the process of award modernisation has been. In theory, that process was completed in 2008–09, in time for the modern award system to commence in January 2010. But while the AIRC deserves enormous credit for reducing more than 1500 multi-employer awards to just 122 modern instruments, the reality is that many issues were necessarily glossed over or set aside for later consideration. The 'interim' review commenced in 2012 was meant to tidy up anything left over from the original process. But the pressure to deal with other matters as well (including the modernisation of single-enterprise and Victorian public sector awards, not to mention the complex transitional arrangements that ended for most parties in July 2014) has meant that a good deal of that tidying up has spilled over into the current four-yearly review, such as ironing out inconsistencies with the National Employment Standards (NES). It has also been understandable that unions and employers associations, who have themselves struggled to cope with the demands of reviewing the entire award system at once, have been eager to revisit important issues of principle that were (of necessity) accorded only brief attention in 2008–09, such as the quantum of penalty rates or the capacity to direct the taking of annual leave, thus extending the review into 2016.

If the AIRC had tried to adopt the Commission's preferred approach in 2008–09 (even assuming that it could lawfully have done that, given the legislative framework at the time), it is highly unlikely that it could have had modern awards ready to go by 2010. In theory, the FWC could have insisted on approaching the first four-yearly review with the idea of starting afresh, generating its own evidence rather than relying on the major parties. But resourcing issues aside, this would surely have created substantial conflict and delay – and likely have generated many legal challenges.

It can reasonably be expected that by some time in 2016, the modern award system will finally have been bedded down. It is then, we would suggest, with resources freed up, that the FWC would be in a position to start adopting a more proactive (though necessarily selective) approach to the reconsideration of award standards – provided it is funded to gain the information it needs. We would also expect further work to be done then on simplifying awards, building on recent advances.

History and precedent

Secondly, and on a related point, we would take issue with the criticism that '[h]istory and precedent play too big a role in some of the FWC's key economic and social functions, particularly award determinations' (Overview, p 11). We accept that some award provisions are 'more historical relics of the relative bargaining strength of past protagonists than a carefully thought out way of remunerating employees' (p 21) and that undue weight can sometimes be given to precedents set at a time when the tribunal was resolving a dispute rather than acting as an independent regulator. But

it also needs to be born in mind that the FWC is directed by s 134(1)(g) to have regard to the need for a ‘stable and sustainable modern award system’ (emphasis added). And even if the legislation did not say so explicitly, it seems to us perfectly appropriate for the FWC to be cautious about introducing significant variations to award wages and conditions, without clear evidence of the need for change.

Penalty rates

We make no direct comment about the Commission’s recommendation to bring Sunday penalty rates into line with Saturday rates in selected awards, other than to note that – as the Commission itself appears to have assumed – this is a matter properly left to the FWC to decide, rather than a change to be imposed by legislation.

‘Preferred hours’ clauses

The clear danger with standardised and employer-initiated ‘preferred hours’ arrangements, as the Commission effectively acknowledges (p 171), is that an employer may use its superior bargaining power to induce employees to nominate hours that are designed to accommodate the employer’s preference for lower labour costs, not any ‘true preference’ on the part of the employee. An arrangement that genuinely suits the individual needs and circumstances of a particular employee can be accommodated through an individual flexibility arrangement (IFA), as we note in a later section. If there is a good reason for a penalty rate to be imposed for a particular set of hours, then it should not be possible for an employee to contract out of that entitlement without an offsetting benefit, no matter how willing (or desperate) they may be. Receiving work that the employer claims it cannot otherwise afford to offer cannot and should not be treated as such a benefit – for otherwise, every under-award agreement could be rendered lawful.

5. Enterprise agreements

One of the proposals in Chapter 15 is that the current better off overall test (BOOT) for EAs be replaced by a new form of no-disadvantage test (NDT). From the discussion on p 574, this appears to rest on three assumptions about the two tests. These are that:

- the NDT is a ‘well established concept which has been extensively used under federal and state jurisdictions’, in comparison with the uncertainty over the BOOT portrayed in certain submissions to the Commission;
- the NDT is necessarily concerned only with whether a ‘class’ of employees is worse off overall under an EA, as opposed to the requirement under the BOOT to consider the position of *all* employees; and
- the BOOT ‘provides a wider scope for agreements to be rejected at the approval stage’.

The first of these, we believe, rests on a misconception. The difficulties and uncertainties over the NDT, in the form that applied to certified agreements under the *Workplace Relations Act 1996* (WR Act) from 1997 until the Work Choices amendments abolished it from March 2006, are captured in an overview of the relevant case law offered by Creighton and Stewart (2005: 236–8), but more

particularly in empirical research conducted by Mitchell et al (2004, 2005). Among other things, it is noted in these sources that there was little consensus or predictability over how to ‘value’ non-monetary entitlements, and that outcomes could and did vary substantially. Contrary to the second point above, it seems to have been accepted by the AIRC – at least when the point was raised and argued – that the NDT could only be satisfied if *no* employee was disadvantaged.² In practice, it seems to have been more common for agreements to be assessed on a generalised or averaged basis. Nonetheless, undertakings were routinely extracted to ensure that no individual employee would be disadvantaged by the operation of the agreement in particular circumstances.

As to the proposition – the third of the assumptions noted above – that the BOOT is a harder test to pass than the NDT, this must by definition be correct, though only in one unlikely situation. An EA that exactly replicated conditions from a relevant award would necessarily pass the NDT but fail the BOOT. Beyond that, we would concede that the symbolic difference between the two tests might conceivably incline a member of the FWC, consciously or otherwise, to treat the BOOT as setting a slightly higher bar. However, we do not believe that there is hard evidence that, when properly applied, the BOOT is any harder to satisfy than the NDT.

In our view, what has changed most since the FW Act took effect is not the switch from the NDT to the BOOT as such, but far more consistent scrutiny of agreements. The agreement approval process is now more structured and consistent than it used to be, with greater input from staff supporting the work of FWC members and publication of all approval (or rejection) decisions. We would accept that some members take a stricter line than others – but there is nothing new in that, compared to what used to happen under the WR Act. Where the relevant principles are misapplied to reject an EA, such decisions can be (and are in practice) reversed on appeal. We would also suspect (although research would be needed to confirm this) that fewer agreements that fail the BOOT, and should likewise have failed the NDT, are being approved by mistake or oversight, compared to the position under the WR Act revealed by Mitchell et al.

In terms of ‘guidance’ to FWC members (p 575), we believe that the Enterprise Agreement Benchbook issued by the FWC already fulfils that function – although for the reasons explored earlier in relation to the Commission’s recommendations on the FWC, we see no reason why the President should not have a more explicit power to issue and enforce guidelines on decision-making. Just as in relation to unfair dismissal cases, however, it needs to be accepted that, whether under a BOOT or a new NDT, some agreements will be difficult to assess, especially where employers (and/or unions) are intent on formulating agreements that only just meet the required threshold. It is the very ‘global’ nature of both the BOOT and the NDT as it operated after 1996, and the necessity to weigh the value of monetary and non-monetary entitlements, that dictate the possibility of differing views and uncertain outcomes.

6. Individual flexibility arrangements

We preface our comments on the Commission’s treatment of IFAs by noting some inaccuracies or omissions in Chapter 16 of the Draft Report that might usefully be corrected in the final report:

² See eg *Re Bodyguard Security Services – Certified Agreement – with Employees 2003* [2004] AIRC 125; [2004] AIRC 450.

- On p 597, the description of the Australian Workplace Agreement (AWA) system introduced in 1996 speaks of certain 'statutory minimums' that were 'deemed to be included in AWAs'. As the citation of the Minister's second reading speech suggests, this was the original proposal in the Workplace Relations and Other Legislation Amendment Bill 1996. But under a deal negotiated with the Australian Democrats to secure the Bill's passage in the Senate, this aspect of the proposed system was dropped. A stronger safeguard was imposed instead, requiring AWAs to be subject to a NDT which measured their content against a relevant or designated award, or any other relevant law (such as a State law on leave entitlements): see McCallum 1997: 53–4, 59–60.
- On p 598, it is stated that the last AWAs would have expired on 31 December 2014. In fact that should be 28 March 2013, which is five years from the date the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* took effect. That Act prohibited the making of any new AWAs, but allowed employers who had been using AWAs prior to December 2007 to make Individual Transitional Employment Agreements (ITEAs) instead. It was those agreements that could be made up until 31 December 2009, though their nominal expiry date could not be any later than that date: see Creighton and Stewart 2010: 298–9.
- On the same page, it is said that both modern awards and the NES override any lesser conditions in a surviving AWA. That is true of the NES, but not modern awards, with the sole exception of basic pay rates: see Creighton and Stewart 2010: 340.
- Although the 28-day termination period for IFAs made under EAs is correctly noted on p 599, no mention is made (here or elsewhere in the chapter) of the longer period of 13 weeks that applies in relation to the termination of an award-based IFA. All flexibility terms in modern awards were varied to that effect following the FWC's decision in *Modern Awards Review 2012 – Award Flexibility* (2013) 232 IR 159. Hence, for example, the proposal in the Fair Work Amendment Bill 2014 to create a 13-week notice period (see p 604) would in fact make an immediate difference only to EA-based IFAs – though it would prevent the FWC from reverting in the future to a shorter notice period for IFAs made under awards.
- It is said on pp 599–600 that the BOOT for IFAs can 'take into account intangible, non-monetary benefits', unlike the position with EAs. In fact, there is nothing to prevent such benefits being taken into account in the context of EAs: see eg *Transport Workers' Union of Australia v Jarman Ace Pty Ltd* [2014] FWCFB 7097, as noted in the FWC Benchbook on Enterprise Agreements, p 123. It is also noted on pp 604–5 that concerns have been raised about the 'line-by-line approach' taken in relation to EAs. But again, there is nothing different in this respect to the way the BOOT should be applied in relation to both EAs and IFAs. The fact that some FWC members may have misapplied the BOOT to proposed EAs (and been corrected on appeal) does not alter the fact that the test is a global one for both types of instrument. There *are* certain differences in the way the BOOT operates, as between EAs and IFAs – but they are not *these* differences.

Turning then to the Commission's treatment of IFAs, there are a number of comments we would make.

The first is that we are unsure why the Commission should consider it ‘surprising that employees and employers have not used individual flexibility arrangements more frequently’ (Overview, p 35). The answer surely lies in another observation on p 601 – that employers see ‘too little of AWAs in IFAs’. Under the WR Act 1996, AWAs could be imposed on workers as a condition of being hired. They could be used to exclude protected industrial action or union rights of entry. And in their Work Choices form, they could lower or remove award or (some) statutory entitlements without any compensating benefit. None of that can lawfully be done with IFAs.

As with AWAs, it is apparent that the kind of ‘flexibility’ many employers are seeking from IFAs has little if anything to do with the situation or preferences of individual employees, but rather is concerned with the freedom to lower labour costs, or to resist challenges to managerial prerogative: hence the overwhelming preference for standardised rather than customised terms. So long as IFAs are about genuinely individual and mutually beneficial forms of flexibility, we would not expect to see them widely used, especially given that many types of flexibility are already available under awards, EAs or the common law (a point to which we return in the next section on enterprise contracts).

Secondly, we do not believe that the Commission has placed enough stress on the clear evidence (noted for example on p 602) that many employers who are currently using IFAs are doing so *unlawfully*, by imposing them as a condition of employment. Besides supporting the need for greater scrutiny of IFAs (see below), this evidence should at least cause us to question whether such employers are complying with the content requirements of IFAs, by ensuring that they leave each employee better off. We believe there is a need for further research into this issue, something that either the Fair Work Ombudsman (FWO) or the General Manager of the FWC should be funded to undertake or commission.

Thirdly, for the reasons given earlier in relation to EAs, we do not see any warrant for removing the BOOT in favour of a new NDT. The other comment we would make about the operation of the BOOT concerns the quote on p 605 from Amendola’s report on the Western Australian industrial relations system. He questions the example in para 867 of the Explanatory Memorandum (EM) to the Fair Work Bill 2008, which involves an employee agreeing to work just outside the normal span of hours without the penalty rates that would otherwise apply, to allow him to coach a junior football team. The EM stressed that in these very particular circumstances, which involve an arrangement initiated by the employee and tailored to his individual circumstances, it would be permissible to have regard to those circumstances in determining that the employee was better off overall. We see no difficulty in that view. We would contrast such an arrangement with the type of standardised and employer-initiated ‘preferred hours’ arrangement discussed earlier. If rolled out in a standard IFA, and with no offsetting benefit, we believe that such an arrangement would and should fail the BOOT – or indeed a new NDT.

Fourthly, while we can see merit in standardising the notice period for both award and EA-based IFAs at 13 weeks, we see no reason to allow employers to impose a much longer period. If IFAs are being genuinely used to meet individual needs, and not simply being imposed on employees as a standard term of employment, then employers cannot *rely* on being able to base their whole system of work scheduling or organisation around them. Three months seems more than adequate to allow an *individual* arrangement to be undone. For employers who want to be able to make more systemic

and reliable changes to working conditions, other mechanisms should be used – a point to which we return in the next section.

Finally, it is not clear from the discussion on pp 610–11 whether the Commission was agreeing with our (and others') proposal that IFAs should have to be lodged with the FWO. There is no formal recommendation to that effect. But the comment that 'lodgment of itself ... may not be sufficient' and that the FWO should conduct random audits (a suggestion with which we strongly agree) might suggest approval. So too might the ensuing discussion about ways in which the FWO could minimise the costs of a lodgment system. At any event, it would be preferable to clarify the Commission's position. Needless to say, we remain in favour. We would expect a lodgment requirement to help narrow the use of IFAs to lawful and genuinely individual arrangements, something that would in itself reduce the potential cost to the FWO.

7. The enterprise contract

It is not entirely clear to us what problem the introduction of an 'enterprise contract' (EC) option, as proposed in Chapter 17, is intended to solve. The most obvious explanation lies in the need to overcome the real or perceived difficulties for smaller employers in making EAs, as documented on pp 616–19. But if that is so, then it is hard to see why it should be possible for an employer that *already has* an EA to enter into an EC that covers some of the same workers, as p 624 plainly seems to contemplate. The undesirability of such a possibility is one to which we return below.

Another possible explanation might be that the EC is intended to meet the demands of certain employers for the 'flexibility' to employ workers on sub-award conditions. But that can safely be discounted because of the Commission's very clear affirmation, not just in this Chapter but elsewhere in the draft report, of the need to maintain the safety net function of awards – a stance we applaud.

The description of an EC as a 'collective individual flexibility arrangement' (Overview, p 37) is also more than a little misleading. It would appear to be 'collective' only in the sense that it can apply to a group of employees. But there is to be no process for collective negotiation or approval. And an EC could apparently apply to some members of a group, but not others. (Whether different members of the same group could be covered by different ECs is not made clear.) The comparison with an IFA is also a little stretched, since it appears that an EC is meant to operate as a 'safe harbour' template that employers (and employees) can rely on as meeting statutory requirements (see pp 615, 620). By contrast, the absence of any process for scrutinising or approving the content of an IFA means that it can never function as a safe harbour.

At any event, we will assume that the purpose of the EC is for an employer to be able to ask current employees, and/or require future employees, to accept a standardised set of terms that deviate from the instrument(s) that would otherwise apply, but that still leave the employees no worse off on balance than they would be under any relevant award – and all without the costs associated with making an EA.

But the question has to be asked, why add to what is already a complex system by creating yet another new type of instrument, and exacerbating the existing problem of 'layering', without first considering whether there are other ways to achieve the same objective? In our opinion, it is not

evident from the Draft Report that the Commission has given adequate consideration to the forms of flexibility that are or might be available under other instruments.

We accept that while over-award (or over-EA) contracts that take effect at common law already offer a great deal of flexibility, there is a limit to their utility. A common law contract cannot derogate from any award entitlement, regardless of whatever compensation the employee may agree to accept in return: see Creighton and Stewart 2010: 230. We also believe, consistently with what we have said earlier, that IFAs should continue to be (lawfully) available only for genuinely *individual* variations and trade-offs. But that still leaves two other possibilities.

Modern awards already offer many options for departing from a standard rule or entitlement. It is common, for instance, for awards to allow starting times or spans of hours to be varied by individual or collective agreement, or for ordinary working hours to be averaged over periods of longer than a week. Some awards stipulate an ‘all-in’ or ‘annualised’ rate that dispenses with the need to calculate penalty rates. It is not to the point that ‘the scope for variations in arrangements is not uniform across awards’ (p 616). The question is whether, in the particular industries or sectors where there is a demonstrated demand for greater flexibility that cannot feasibly be met through enterprise bargaining, modern awards could be amended to provide that flexibility.

There is nothing to stop the FWC being asked – or indeed statutorily required – to develop new options or sets of alternative conditions that could be used by employers of a certain type. To take just one example, the FWC might allow some greater freedom over the scheduling or rostering of working hours, provided an employee is paid an appropriate allowance. There is obviously a balance to be struck between keeping awards as simple and general as possible, and customising provisions (or sets of provisions) for the benefit of a subset of the employers covered by the award. But it is not apparent to us that the possibilities here have yet been fully explored.

As for EAs, one possibility would be for the FWC to be empowered to ‘pre-approve’ template agreements that were considered to meet the BOOT (or a new NDT), together with explanations of their terms. Rather than expect the FWC to develop these documents, there could be a mechanism for any adviser, consultant, employer association or union that wanted to draft such a template to apply to the FWC for approval. The approval would set out the FWC’s assumptions as to the type of employer and/or work arrangements that the template was intended to cover, while a standard inclusion might be an undertaking that no employee would be disadvantaged by the EA. There could then be an expedited process for the approval of any EA based on the template. Another possibility would be for the FWC to identify and promote specific innovative clauses that provide flexibility or tailored arrangements and that meet the requirements for the BOOT/NDT.

In our view, the possibilities we have outlined should be pursued in preference to creating yet another new type of instrument.

If, however, the Commission remains committed to the idea, then we believe it is vital that the use of ECs be prohibited for any employees already covered by an EA. If it were otherwise, an employer would be able to ask its existing workforce to approve a new EA, use that instrument to create security against protected industrial action for up to four years (or longer if other Commission recommendations were accepted) – and then start hiring new workers on sub-EA conditions, requiring each applicant to agree to an EC as a condition of being employed. The possibilities here

are heightened by a loophole in the FW Act's bargaining provisions, which have been interpreted by the Federal Court to allow an employer to make an EA with just a handful of workers, even though the EA is broad enough to cover future projects on which hundreds or even thousands of new employees will be employed.³

Whether or not that particular tactic were used, there would be an obvious incentive for the employer either to dispense with its old, EA-covered workers, or to persuade them to switch onto the inferior EC. The general protections would in theory protect those workers against dismissal or coercion – but the inclination to ignore or find a way around those protections might be powerful.

It is clear too that other questions about the status and operation of ECs would need to be answered. For example, would they preclude the taking of protected industrial action during their nominal term, as EAs do? Would coverage by an EC entitle an employee to bring an unfair dismissal claim regardless of their income, as is the case with coverage by an award or EA? Would ECs be able to modify the operation of the NES, in the same way that awards and EAs can do?

There are also a number of aspects of the proposed process for reviewing ECs (see p 623) that seem unclear, puzzling, or both. It appears that the FWC would have no power to intervene to prevent an EC being implemented, even if it formed the view (after lodgement) that it failed the NDT. But would it have any power to pass that view on to the employer, its employees or the FWO? Could a 'complaint' be formally initiated by anyone other than an employee – and if not, why not? Would the 'complaint' be heard by the FWC, or by a court? If a complaint succeeded, would the only option be to vary rather than annul the EC? Would the employer have any right to object to a proposed variation or suggest another? Would or could a complaining employee be compensated, or would any variation only take effect prospectively? And why would a variation not *automatically* apply to all other affected employees, but instead depend on the FWO (or is this meant to be the FWC?)⁴ having to obtain their consent? Would those other employees be entitled to compensation? There is clearly a lot of further work to be done if the EC idea is to be properly fleshed out – if it is to be adopted at all.

8. Industrial action

Requiring bargaining to commence before authorising protected industrial action

Draft Recommendation 19.1 recommends that s 443 of the FW Act be amended to clarify that the FWC should only grant a protected action ballot order to employees once it is satisfied that enterprise bargaining has commenced, either by mutual consent or as a result of a Majority Support Determination (MSD) being issued. This recommendation is made on the basis that 'the WR framework should not encourage employees to use industrial action if the employees can obtain the outcome they seek through an available alternative' (p 673) – the 'alternative' here being the MSD.

³ See *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* [2015] FCAFC 16. We do not believe this decision is necessarily correct in its interpretation of the FW Act, although nor is it clearly wrong.

⁴ It seems odd to propose that the FWO be empowered to order variations, when it is not a decision-making body and has (so far as we are aware) no comparable power or function under the FW Act.

If adopted, this recommendation could have significant repercussions for our workplace relations system. Those repercussions have not been clearly identified in the draft report, and nor were they when the 2012 FW Act Review made a similar recommendation (McCallum et al 2012: 175–7).

First, the Draft Report does not state the problem that the recommendation seeks to overcome. It notes costs to the community from industrial action, but it does not identify industrial action taken for the purposes of bringing an employer to the bargaining table as a significant cost within the current system. On the contrary, employees and their bargaining representatives have been able to take industrial action for these purposes (what we might term ‘recognition disputes’) since 1993, and there is no evidence that this type of industrial action has been a prominent feature or one which has led to huge flow on costs to the community (McCrystal 2010: 115–18). It was not until the introduction of MSDs in 2009 that this issue assumed any particular prominence. Since that time the focus has been on a perceived need to limit the choices available to employees in terms of their access to bargaining, and to funnel their choices through a narrowly defined legislative pathway.

Second, the recommendation would have the effect of moving the workplace relations system much further down the path of a ‘majoritarian’ model, such that access to protected industrial action would become predicated on the employer agreeing to bargain, *or* a majority of employees who would be covered by the proposed enterprise agreement indicating that they want to engage in collective bargaining. Such majoritarian models operate in some jurisdictions overseas (most notably in North America), where bargaining units are identified through a majoritarian process, and then unions are granted exclusive bargaining rights and exclusive access to lawful industrial action (Forsyth 2012).

The difficulty with instituting a majoritarian model in Australia is that the FW Act does not otherwise embody or recognise such a model. Instead, the collective bargaining provisions operate on individual rights – the right of individuals to nominate bargaining representatives, and the right of those bargaining representatives to an equal position at the bargaining table and a voice in negotiations, irrespective of the number of employees they represent (which may be just themselves). Access to protected industrial action is equally fractured, with each bargaining representative and the employees that they represent being able to take protected industrial action, separately, or concurrently with any other bargaining representatives involved in the process.⁵ The Commission’s recommendation seeks to limit access to protected industrial action for *some* employees – whether represented by a union or not – who will be covered by a proposed collective agreement, based on the view of *a majority* of the employees to be covered by that agreement.

In our view, to impose, as the only option, a majoritarian access requirement on the subsequent exercise of individual bargaining rights produces a conceptually confusing regulatory regime. Further, it is likely to increase pressure on the MSD system, giving employers greater incentive to challenge MSD applications and engage in anti-organising campaigns. Further, by removing the option of protected industrial action in these circumstances, the background threat of industrial

⁵ For example, to date there have been two examples of protected action ballot orders granted to individuals acting as their own bargaining representatives, and seeking to ballot themselves about taking individual protected industrial action: see *Dale v Australian Taxation Office* [2015] FWC 5665; *Streeter v BHP Coal Pty Ltd* PR510636, 17 June 2011.

action which operates as a potential incentive for employers to agree to collective bargaining would also be removed. This may also have the effect of increasing pressure on the MSD process.

The push by employer groups for this change (p 673) must be understood in the light of submissions by employer groups to change the MSD process from the way that it currently operates, to one that operates solely on the basis of ballots (p 556, particularly fn 185). The Commission has rightly resisted this recommendation. But employer groups will maintain their pressure for this change, particularly if Draft Recommendation 19.1 is implemented, because overseas experience of majoritarian bargaining models demonstrates that employers who can resist bargaining unit determination and recognition ballots are able frequently to resist collective bargaining altogether (see Forsyth 2012: 211, who notes that certification procedures have been a major contributor to bargaining decline in the private sector in the US).

Grounds for termination and arbitration of industrial disputes

The Commission seeks input from stakeholders on how 'significant harm' should be defined in the context of ss 423 and 426 of the FW Act. This flows from the Commission's preliminary view that the 'prevailing definition of significant harm sets the bar for FWC intervention too high' (p 688).

In our view, neither the legislative reference to significant harm, nor the interpretation adopted in *CFMEU v Woodside Burrup Pty Ltd* [2010] FWA 6021, set the bar for FWC intervention too high. If there is a problem, it is simply that the Full Bench's *application* of the relevant principles in *Woodside* was flawed. In that case, the flow on effect of the industrial action to the relevant third parties, other contractors and their employees, whose work could not proceed in the context of a \$9 billion project, were arguably significant harms that were outside of the ordinary course of the expected losses of industrial action, as had been found at first instance. This resulted from the unusually highly interconnected and dependent nature of different contractor businesses involved in the integrated project. A lot of industrial action does not have such immediate and significant flow on effects to third parties, beyond annoyance, inconvenience or delay. As such it would have been reasonable to find that these consequences were outside of the ordinary harms that are expected from industrial action, and within the scope of the test as posited by the Full Bench. The fact that the test may arguably have been misapplied to the facts in this one case does not of itself require the test to be changed, much less that the requirement of significant harm be removed.

To us, the decisions in *Schweppes Australia Pty Ltd v United Voice – Victorian Branch (No 1)* [2011] FWA 9329 (noted in Box 19.4 on p 657) demonstrate a workable approach to significant harm, at least in the context of s 423. The first application made in *Schweppes* was actively opposed by the relevant employees, who were prepared for a significant economic fight, and accepted that a certain amount of harm would necessarily follow. By the time of the eventual termination of the action (and arguably this second application could have been made sooner than it was), the employees themselves conceded that the harm had now progressed beyond what they considered to be reasonable harm and supported the employer's application. Thus, in this case, a balance was struck between allowing industrial action to take its natural course, and the alternative which was to allow the industrial actors to 'slog it out' indefinitely until one party surrendered.

If the right to take protected industrial action under the FW Act is to be meaningful, the ordinary and expected consequences of industrial action must be allowed to follow, without those consequences

leading to suspension or termination of protected industrial action. The Commission has correctly identified that the risk with changing the legislation in this area is that workers are deprived of the ability to take *meaningful* industrial action which causes economic harm, and that a lower threshold will lead to the imposition of arbitration in a much wider range of circumstances.

The Commission should also be cautious here with respect to the historical context surrounding the incidence of industrial action in Australia. Industrial actors in this country may exhibit a level of discomfort with the ordinary and expected consequences of prolonged industrial action because we have comparatively little history of industrial action being used as a coercive mechanism in collective bargaining. Prior to the passage of the *Industrial Relations Reform Act 1993* (Cth) there was no legislative right to take industrial action as a component of collective bargaining. Industrial action was taken by industrial actors in the context of the conciliation and arbitration systems – where an arbitral outcome was easily accessible. As noted by David Peetz (2012: 170), industrial action was often used under that system ‘as a signalling device to indicate the intensity of union positions, and to activate the processes of conciliation and arbitration’. Furthermore, most strikes were ‘unconditional’ in nature, such that employees and unions expected to return to work without resolution of the dispute. Peetz (2012: 168) contrasts this with overseas jurisdictions with longer term collective bargaining models, for example the US, where strikes are more often ‘contingent’ in nature such that employees and their unions will not return to work until a deal is struck. Through analysis of strike rates under the WR Act and the early years of the FW Act, Peetz demonstrates that while strike patterns in Australia have changed, the influence of historical strike patterns on modern strike behaviour remains, and Australian unions are much more likely to use short unconditional strikes rather than longer contingent actions. As such, where longer stoppages do happen, it is much more likely to appear out of place or unusual in the Australian context than it might in an overseas jurisdiction. Further, such action is much less likely to be contingent in nature. Peetz (2012: 181) notes that ‘once a strike has commenced negotiations play no greater role in termination [of the dispute] than they have in the past’. This may lead stakeholders to infer that the harm being done in longer stoppages or contingent strikes is ‘out of the ordinary’ course for an industrial dispute, rather than the consequences being in the normal order for an industrial campaign in a collective bargaining context.

By contrast to its concern with the bar being set too high for ss 423 and 426, the Draft Report suggests that the bar might be set too low for s 424, and seeks input on whether the section should be amended to allow industrial action to proceed where the FWC is satisfied that the risk of a threat to life, personal safety, health or welfare is acceptably low. Without commenting on the use of the section in the case of industrial action that might threaten life, personal safety or health, we would propose that the reference to ‘welfare’ in the section has been interpreted by the FWC in a manner which is impermissibly broad, and warrants attention in the form of amendment or repeal.

In the 2013 case of *NTEU v Monash University* [2013] FWCFB 5982, a Full Bench suspended protected industrial action by employees at Monash University after finding that the general welfare of students subject to a results ban was endangered, due to heightened anxiety levels and the potential threat to their mental health and welfare. The Full Bench also made specific findings about sub groups of students potentially subject to further assessment tasks dependent upon the release of their results, or unsure if they had met the prerequisites to progress into later year units. This was despite the efforts of the NTEU in this case to reduce the impact of the industrial action concerned

on vulnerable students through the use of an exemptions committee – to release results to students on a case by case basis where appropriate. The case was the most recent in a series of decisions where FWC members have found that results bans (one of the most potent industrial tactics available to university employees) threaten student welfare.⁶

The significance of the *Monash* decision is twofold. First, the Full Bench found that s 424(1) only requires that there be a threat identified to endanger life, health, safety or welfare, not that the threat be ‘significant’. This approach departs from earlier decisions under the FW Act, as well as decisions of the AIRC and courts under earlier legislation. It has reduced the bar for suspension or termination under the section. Second, the decision, in finding that a threat to endanger welfare can be substantiated on evidence that industrial action may cause stress and anxiety to a particular group, opens up almost all industrial action, particularly that taken by workers in service sectors, to potential suspension or termination on the basis of a threat to the welfare of the customers of a business. The decision in *Monash* has effectively neutralised the most effective forms of industrial action that university employees can take – any action that impacts upon the most direct ‘customers’ of universities, students. While the Full Bench noted that university students were, generically, a group at risk of heightened anxiety, it does not take any great stretch of the imagination to find other groups of individuals who may be at risk of stress and heightened anxiety across a range of social and other service sectors if their access to those services was interrupted by industrial action. This cannot constitute an appropriate bar for intervention in industrial action – which by its very nature causes stress and anxiety both to the participants themselves and any affected third parties.

In our view, s 424 should be amended either to remove the reference to ‘welfare’, or to require that any harm or threatened harm to a person’s welfare be significant.

Simplifying protected action ballot procedures

We welcome suggestions in the Draft Report that the protected action ballot process be simplified, and endorse the removal of the need for a protected action ballot to specify the types of action to be voted on by employees, removing a potential avenue under the Act for challenge to a process that is designed to be ‘simple’ and ‘fair’. We further endorse the suggestion that the 30 day rule for commencement of industrial action be amended or removed.

If the final recommendation on this point does not recommend the removal of this requirement, we suggest that, at very least, the decision of the Federal Court in *United Collieries Ltd v CFMEU* (2006) 153 FCR 543 be overturned by express amendment. This case interpreted the predecessor to s 459 to require that all forms of industrial action approved by a protected industrial action must be commenced within the first 30 days, or the mandate of the ballot lapses for those actions. It is not clear that this interpretation of the predecessor section, or s 459, is warranted on the wording of the statute, but the approach is arguably now too well entrenched to be challenged. In practice, it is this interpretation of the section that has driven the problems with the provision, particularly around union escalation of industrial action in order to ensure that action retains the mandate of the ballot.

⁶ See *University of Wollongong v NTEU* [1999] AIRC 1397; *University of South Australia v NTEU* [2009] FWA 1535 (upheld on appeal in *NTEU v University of South Australia* (2010) 194 IR 30); *Swinburne University of Technology v NTEU* B2013/1065, 30 July 2013.

The s 459 requirement would be less onerous in practice if the section had been interpreted as requiring only *a* form of industrial action to be taken within 30 days, rather than *every* form of action approved by the ballot. The section should either be repealed, or if it is maintained because it is considered that there should be some provision to ensure that the mandate of the ballot attaches to industrial action, it should be amended to make clear that it is only one form of action that needs to be taken and all industrial action remains open after that.

9. Unpaid work experience

We note the comments about internships and work experience in Chapter 20. For the reasons explored in the 2013 report for the FWO (Stewart and Owens 2013), unpaid internships undertaken outside of formal education or training programs have the potential to undercut the wages and conditions of those in paid employment, to reduce social mobility by raising barriers to access to professional labour markets, and to contribute to the exploitation of young people. The regulatory challenges posed by such arrangements are increasingly being acknowledged by policy-makers overseas (see eg Council of the European Union 2014; Owens and Stewart 2015), as well as in Australia (see eg Committee on Children and Young People 2014).

At the same time, however, we accept that there is still insufficient information about the nature, prevalence and quality of work experience arrangements in Australia. At the very least, it would be useful to have the kind of data collected in the EU by a major survey undertaken for the European Commission (Directorate-General for Employment, Social Affairs and Inclusion 2013). We are aware of efforts that are currently being made to attempt to fill that gap. Further research on this topic is also being undertaken at Adelaide Law School as part of an Australian Research Council funded project on ‘Work Experience: Labour Law at the Intersection of Work and Education’. Given too that the FWO, as noted by the Commission, remains committed to addressing this issue under the present regulatory framework,⁷ we believe that it is appropriate to gather more information before determining whether any particular changes are needed to that framework. The only qualification to that view is that it would be helpful for the formulation of the vocational placement exception in the FW Act to be reviewed and clarified, for the reasons explained by Stewart and Owens (2013: 75–82, 261).

10. Migrant workers

We commend the Commission for identifying the substantial work contribution by temporary migrants in Australia and the susceptibility of this group to exploitation in the labour market.

We support the Commission’s Draft Recommendation 21.1 to increase the resources of the FWO for pursuing employers who are involved in underpaying migrant workers. The FWO has an important role in taking action against employers involved in exploiting temporary migrant workers (see eg FWO 2013). But its resources are limited and out of necessity the FWO adopts a strategy of pursuing high profile targets in order to maximise the impact of its investigative and prosecutorial work. Whilst these and other enforcement initiatives of the FWO make sense, its regulatory capacity is necessarily bounded by the huge challenge presented by Australia’s geography and the significant

⁷ The proceedings in *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140 offer an important example, but certainly not an isolated one.

number of temporary migrant workers. It seems unlikely that the FWO's current resourcing is sufficient, a point which has been highlighted by recent media investigations into exploitation of temporary migrant workers (see eg ABC 2015a, 2015b). FWO currently has 300 inspectors divided into teams: compliance, early intervention, alternative dispute resolution and campaigns. Its inspectorate is required to serve up to 11.6 million workers (ABS 2014), over 10% of which are temporary migrants with work rights in the domestic economy.⁸ The logistical challenges involved in enforcing the rights of temporary migrant workers, especially given the strong disincentive to complain to the FWO about mistreatment because of high wage differentials between some migrant workers' countries of origin and Australia, creates a vulnerability that might be openly exploited by some employers.

We do not, however, support the Productivity Commission's proposal for closer information sharing and cooperation between the FWO and the Department of Immigration and Border Protection (DIBP) (p 748). Since 2012, the role of the FWO has been extended to monitor employer obligations in relation to skilled (457 visa) temporary migrant workers under the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth), which conferred on the FWO the powers exercised by inspectors under the *Migration Act 1958* (Cth) (see Howe et al 2013). Any breaches discovered by the FWO must be reported to the DIBP. The vesting of these powers in the FWO immediately raises some concerns in terms of the enforcement of labour standards. A basic principle of international standards on labour inspection is that labour inspection and effective enforcement must not be compromised by the fact that there is anything irregular about the status of migrant work: 'the primary duty of labour inspectors is to protect workers and not to enforce immigration law' (ILO 2006: [77]–[78]). Furthermore, conferring migration inspectorate roles on labour inspectors may amount to a diminution in resources available to the primary purpose of enforcing labour standards (ibid).

If the Commission's proposal were to be adopted, it would be critical that the identity of temporary migrant workers be protected and workers assured that no punitive consequences could ensue from their reporting of their exploitative work arrangements to the FWO. Without this protection, the relationship between the FWO and the DIBP would act (as it does already) as a disincentive to migrant workers informing the FWO about exploitative work arrangements, since it may have consequences for their visa and ultimately for their right to remain in Australia (Howe 2015; Clibborn 2015a).

A related issue, is that of regulatory cohesion between labour law and immigration law. In particular, migrant workers need to be protected if they breach immigration law by performing a different job or being in receipt of lower wages and conditions to that specified in the sponsorship agreement, either through inadvertence or coercion. Under Australian immigration law a person may be fined, detained or deported if performing work that breaches their visa conditions.⁹ This means that if an employer pays a 457 visa holder lower wages than the Temporary Skilled Migration Income Threshold or the market salary rate as determined in the sponsorship agreement, this can have dire consequences for the worker, regardless of their degree of complicity. They potentially face

⁸ For example in 2013–14, visas were issued for 293,223 international students, 239,592 working holiday makers and 98,571 subclass 457 visa holders (DIBP 2014: 2).

⁹ *Migration Act 1958* (Cth) s 235.

deportation, whereas the employer may merely suffer civil or criminal penalties (although these have rarely been applied) and the trouble of finding a replacement worker. In this situation, the intersection between labour law and immigration law leads to the unintended consequence of increasing the precarity of the migrant worker without properly functioning as an incentive for employers to follow Australian labour law and the terms of the sponsorship agreement.¹⁰ This has the binary effect of inhibiting migrant workers from reporting their situation to the authorities whilst ‘unscrupulous employers will calculate the savings from long-term exploitation of ... workers against the risk of detection and penalty’ (Clibborn 2015b: 468).

For example, a recent investigation by FWO inspectors and DIBP officials into visa fraud and worker exploitation led to the detention of 38 illegal workers, six of whom had been working in breach of their visa conditions (Dutton and Cash 2015). This punitive action against temporary migrant workers found in exploitative work arrangements strongly deters them from informing authorities about their situation and inhibits their ability to trust that information they provide to the FWO will not be passed on to the DIBP. It is often asserted that temporary migrant workers should not accept work, wages or conditions that do not match their sponsorship agreement, but this tends to obscure the reality of their situation: they need work to support themselves as they are not eligible for social security and they are often in debt, having paid large amounts of money to procure a visa to enter Australia in the first place. They also may be unfamiliar with their legal rights under the sponsorship agreement or Australian labour law. Given this, it seems rather disingenuous and counterproductive to penalise them for acquiescing to exploitative work arrangements.

On p 746 of the Draft Report, it is stated that ‘[m]igrants who work in breach of the Migration Act have limited access to workplace rights and entitlements, because under current case law, they are not covered under the FW Act’. There is certainly some support for that view in the case law, notably the Queensland Court of Appeal decision in *Australian Meat Holdings Pty Ltd v Kazi* [2004] 2 Qd R 458. It was this decision that was relied upon in *Smallwood v Ergo Asia Pty Ltd* [2014] FWC 964 to find that a 457 visa holder would have had no valid employment contract if she had been engaged by a person other than her sponsor. The assumption is that since the legislation prohibits such a contract, it must necessarily be void. But other decisions in this area have adopted a different approach, reasoning that it is not necessarily contrary to public policy, nor the intent of the relevant legislative scheme, to deny an ‘illegal’ worker any employment entitlements: see Creighton and Stewart 2010: 177–8. The High Court has repeatedly stressed, most recently in *Gnych v Polish Club Ltd* [2015] HCA 23, that whether a statutory prohibition should be construed as denying all effect to a particular contract must depend on a careful consideration of the legislative regime. The following comment in *Gnych* (at [45]) seems especially pertinent to the case of an employer who deliberately employs a temporary migrant in breach of their visa conditions, then seeks to rely on that breach to avoid liability for an underpayment of wages or otherwise entitlements under the FW Act:

As a matter of legislative construction, the likelihood of adverse consequences for the ‘innocent party’ to a bargain has been recognised as a consideration which tends against the attribution of an intention to avoid the bargain to the legislature. That consideration is consistent with the general disinclination on the part of the courts to allow a party to a contract to take advantage of its own wrongdoing. There may be cases where the legislation which creates the illegality is sufficiently clear

¹⁰ For anecdotal evidence of this, see the stories of 457 visa holders in ABC 2015c.

as to overcome that disinclination; but it is hardly surprising that the courts are not astute to ascribe such an intention to the legislature where it is not made manifest by the statutory language.

In light of that statement, and particularly given that the Migration Act has changed in important respects since it was considered in the *Australian Meat Holdings* case, there is reason to believe that a court might today take a different view to the one reached in that case. Nevertheless, it would be preferable to put the matter beyond doubt by including in the FW Act a provision of the type found in some workers compensation statutes (see eg *Workers Compensation Act 1987* (NSW) s 27), which would ensure that the illegality of an employment arrangement may be disregarded in any proceedings brought under the FW Act. The illegality of an employment contract could still be a valid reason for the dismissal of a worker,¹¹ but the employer could not for instance use the breach of the Migration Act to justify an underpayment of wages.

In summary then, we propose the following:

- We support the Productivity Commission's recommendation to substantially increase the FWO's resources to identify exploitation of migrant workers in the labour market.
- We do not support the Productivity Commission's recommendation of closer cooperation between the FWO and the DIBP.
- The identities of temporary migrant workers who report to the FWO instances of exploitation not be passed onto the DIBP.
- Migrant workers who are in breach of their visa or are being remunerated or employed in violation of Australian law should not face the possibility of deportation and/or cancellation of their visa, where the breach is attributable to exploitation or coercion by the employer or a third party.
- The FW Act should be amended to allow a court or tribunal to disregard the illegality of an employment arrangement in proceedings brought under the Act.

¹¹ See eg *Emurugat v Utilities Management Pty Ltd* [2008] AIRC 1114.

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