



**ACSA and LASA response to the Productivity Commission Draft Report:
Workplace Relations Framework**

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This submission is made by Leading Age Services Australia (LASA) and Aged & Community Services Australia (ACSA), in relation to the Productivity Commission Draft Report: Workplace Relations Framework.

ABOUT ACSA

Aged & Community Services Australia (ACSA) is the leading national peak body for aged and community care providers. It represents church, charitable and community-based organisations providing housing, residential care, community care and home support services to older people, younger people with a disability and their carers.

ACSA members provide care and support in metropolitan, regional, rural and remote regions across Australia.

The ACSA Federation is made up of the following members:

- Aged & Community Services NSW & ACT (ACS NSW&ACT);
- Aged & Community Services SA & NT (ACS SA&NT);
- Aged & Community Services Tasmania (ACS Tas);
- Aged & Community Services Western Australia (ACSWA);
- Aged & Community Services Australia - Victoria (ACSA Vic);
- Aged & Community Services Australia - Queensland (ACSA Qld).

Mission-based and other not-for-profit (NFP) aged care organisations are responsible for providing services to those older Australians who are most in need. Not-for-profit organisations deliver about 60 per cent of residential aged care services and more than 80 per cent of all community aged care in Australia.¹

These organisations are visible and highly accessible in the community and as a result, the public relies on them for service, support and care. The broad scope of services provided by ACSA's membership and the leadership they display gives it unique insights into the challenges and opportunities that come with the ageing of the population.

ABOUT LASA

Leading Age Services Australia (LASA) is the peak body for service providers of retirement living, home care, and residential aged care. LASA is committed to improved standards, equality and efficiency throughout the industry; helping older Australian live well. We advocate for the health, community and accommodation needs of older Australians, working with government and other stakeholders to advance the interests of all age services providers, and through them, the interests of older Australians.

The LASA Federation is made up of the following members:

- Leading Age Services Australia NSW-ACT
- Leading Age Services Australia Victoria
- Leading Age Services Australia South Australia
- Leading Age Services Australia Queensland
- Leading Age Services Australia Western Australia
- Leading Age Services Australia Tasmania

¹ Australian Government Department of Social Services (2014). 'Report on the Operation of the Aged Care Act 2012-2013', Canberra, 26.33.

ABOUT THE INDUSTRY

The aged care industry is one of Australia's largest service industries employing more than 350,000 people and accounting for 3.6% of government expenditures. More than 1 million older people received some form of aged care in 2013-14 with 231,515 people receiving permanent residential care. Government expenditure on aged care increased by 5.6% in 2013-14 to \$14.2 billion.

Demographic changes mean that the aged care and services industry in Australia needs to grow significantly in the coming years and decades. According to government projections, there is a need for an additional 75,000 residential aged care places and a further 85,000 home care packages over the 10 years from 2013 to 2023.

As aged care is, at its essence, human work this increase in the number of care places means the need for a significant increase in the number of workers estimated at an additional 55,770 FTE care workers (37,620 in residential aged care and 18,150 in community aged care). This is occurring at the same time as the ratio of working aged (15-64 years) people for each older person (65 years or more) will be decreasing from 4.5 in 2014 to an estimated 3.7 in 2024.

As care models change, the roles of staff and volunteers who are involved in the provision of care and support services will also fundamentally change. The challenge of developing the future aged care workforce is not simply about finding more workers; rather, the challenge is finding new staffing models and ways of delivering services, transforming the composition and structure of the aged care workforce.

To meet the operational requirements of providing continuous care employers require a workplace relations framework that fosters and promotes flexibility, facilitative provisions and fairness.

Draft Recommendations	Comments
Chapter 3 Institutions	
<p>Draft Recommendation 3.5</p> <p>The Australian Government should require that the Fair Work Commission publish more detailed information about conciliation outcomes and processes.</p> <p>In the medium term, it should also commission an independent performance review of the Fair Work Commission's conciliation processes, and the outcomes that result from these processes.</p>	<p>We support this recommendation.</p> <p>The overwhelming majority of disputes in the aged care industry are resolved at or before the conciliation stage.</p> <p>The more information the parties have as to likely outcomes of these proceedings would assist in narrowing the ambit of these claims and lead to speedier and fairer outcomes.</p> <p>We do however have concerns that a significant number of matters are settled with "go away" money and are not a true indication of a fair outcome based on the merits of the dispute. Many are in fact frivolous and vexatious.</p> <p>Therefore publishing of these matters may lead some applicants to an unrealistic expectation of outcomes so we therefore support an independent performance review of the conciliation processes and the resultant outcomes.</p>
Chapter 4 National Employment Standards	
<p>Draft Recommendation 4.1</p> <p>The Fair Work Commission should, as a part of the current four yearly review of modern awards, give effect to s. 115(3) of the <i>Fair Work Act 2009</i> (Cth) by incorporating terms that permit an employer and an employee to agree to substitute a public holiday for an alternative day into all modern awards.</p>	<p>We support this recommendation.</p> <p>We support facilitative and flexible provisions in Modern Awards (awards) applying to the aged care industry.</p> <p>Of the four awards applying generally across our industry two (<i>Nurses Award 2010, Health Professionals and Support Services Award 2010</i>) allow for the substitution of a public holiday and two (<i>Aged Care Award 2010, Social, Community, Home Care and Disability Services Industry Award 2010</i>) do not. We view it sensible if all our awards contained these provisions.</p>

<p>Draft Recommendation 4.2</p> <p>The Australian Government should amend the National Employment Standards so that employers are not required to pay for leave or any additional penalty rates for any newly designated state and territory public holidays.</p>	<p>We support this recommendation.</p> <p>The aged care industry operates 24/7 every day of the year, is subject to a fixed funding regime and is precluded by legislation from passing on additional costs. Therefore, any introduction of additional public holidays has a direct and immediate cost to the aged care industry, with no productivity benefit.</p>
<p>Draft Recommendation 4.3</p> <p>Periodically, the Australian, state and territory governments should jointly examine whether there are any grounds for extending the existing 20 days of paid annual leave in the National Employment Standards, with a cash out option for any additional leave where that suits the employer and employee.</p> <p>Such an extension should not be implemented in the near future, and if ultimately implemented, should be achieved through a negotiated trade off between wage increases and extra paid leave.</p>	<p>We do not support this recommendation.</p> <p>The age care industry is a highly labour intensive industry. There is a projected increase in the demand for age services which has a resulting increase in the age care workforce, which is expected to grow from 352,100 to 827,100 by 2050¹.</p> <p>Any increase to employee entitlements has a significant impact to wage costs and replacement staff costs and business viability which cannot be offset or passed on.</p>
<p>Further information</p> <p>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.</p>	<p>Although we generally support facilitative provisions, where they do not create additional unnecessary administrative burden, we do not support the recommendation.</p> <p>We believe that casual loading adequately reflects foregone annual and personal/carer's leave entitlements.</p> <p>We also view the introduction of allowing casual employees to elect to exchange part of their loading for additional entitlements will over complicate what we consider is a simple and straightforward system and would create difficulties for organisations to administer.</p> <p>We question how the much of the casual loading should be reduced by a partial or total reintroduction of accruing entitlements.</p>

Chapter 5 Unfair Dismissal

<p>Further Information</p> <p>The Productivity Commission seeks further views on possible changes to lodgement fees for unfair dismissal claims.</p>	<p>We support changes that will have the effect of reducing the number of frivolous and vexatious unfair dismissal claims (UFD).</p> <p>We do not believe that a simple increase to the lodgement fee would necessarily achieve that result and might be at the risk of denying access for legitimate claims for low paid workers.</p> <p>We consider recommendation 5.1 would be more effective in achieving this outcome.</p>
<p>Draft Recommendation 5.1</p> <p>The Australian Government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal applications ‘on the papers’, prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation processes.</p>	<p>We support this recommendation.</p> <p>We support the Fair Work Commission (FWC) having greater discretion to consider UFD applications ‘on the papers’ and we also support the introduction of a more merit focused conciliation process. We do not view these options as alternatives, but as complementary improvements to the UFD process.</p> <p>Both of the proposals included in this recommendation would focus on the merit of the claim and would restrict the number of frivolous and vexatious claims and reduce the number of commercial settlement outcomes for claims that have no merit.</p> <p>Currently employers have a limited ability to apply for costs for frivolous and vexatious claims, and by this stage considerable time, resources and money has been outlaid.</p>
<p>Draft Recommendation 5.2</p> <p>The Australian Government should change the penalty regime for unfair dismissal cases so that:</p> <ul style="list-style-type: none"> - an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or 	<p>We support the recommendation that procedural errors should not result in compensation to the employee or reinstatement.</p> <p>We do not support the FWC having the discretion to impose a financial penalty on an employer where there was found to be procedural errors but a valid dismissal.</p>

<p>serious misconduct</p> <ul style="list-style-type: none"> - procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or financial penalties. 	<p>In situations of extreme procedural error or repeat offenders, we support the FWC having the discretion to require the employer to undergo counselling and/education.</p> <p>Despite our opposition, should a financial penalty be imposed for procedural errors it should not be up to the level of the UFD cap (26 weeks). Compensation up to the maximum of 26 weeks should only be awarded to employees who have been unfairly dismissed as not as a penalty to employers for procedural error.</p> <p>Further, should a financial penalty regime be introduced, we do not support the money being retained by FWC.</p>
<p>Draft Recommendation 5.3</p> <p>The Australian Government should remove the emphasis on reinstatement as the primary goal of the unfair dismissal provisions in the <i>Fair Work Act 2009</i> (Cth).</p>	<p>We support this recommendation.</p> <p>This is particularly important in the aged care industry where our primary obligation is to protect frail and vulnerable elderly people. There are some circumstances where reinstatement is appropriate, however this should only be an option and not the primary goal.</p>
<p>Chapter 6 General Protections</p>	
<p>Draft Recommendation 6.2</p> <p>The Australian Government should modify s. 341 of the <i>Fair Work Act 2009</i> (Cth), which deals with the meaning and application of a workplace right.</p> <p>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.</p> <p>The <i>Fair Work Act 2009</i> 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.</p>	<p>We support this recommendation.</p> <p>It is essential that workplace rights be more precisely defined and that complaints are made in good faith.</p> <p>As with our comments in Draft Recommendation 5.1 we strongly support the preliminary interview with the complainant prior to any action proceeding.</p> <p>We also believe that the FWC should be given the discretion to dismiss any claims which are not made in good faith or are without merit.</p>

<p>Draft Recommendation 6.3</p> <p>The Australian Government should amend Part 3-1 of the <i>Fair Work Act 2009</i> (Cth) to introduce exclusions for complaints that are frivolous and vexatious</p>	<p>We support this recommendation.</p> <p>Following our comments in Draft Recommendation 5.1 and Draft Recommendation 6.2 we believe claims should be made in good faith and the FWC should be given the power to exclude complaints that are frivolous and vexatious.</p>
<p>Draft Recommendation 6.4</p> <p>The Australian Government should introduce a cap on compensation for claims lodged under Part 3-1 of the <i>Fair Work Act 2009</i> (Cth).</p>	<p>We support this recommendation.</p> <p>The compensation cap should be no greater than that currently available to applicants in the UFD jurisdiction.</p>
<p>Draft Recommendation 6.5</p> <p>The Australian Government should amend Schedule 5.2 of the <i>Fair Work Regulations 2009</i> (Cth) to require the Fair Work Commission to report more information about general protections matters.</p> <p>Adequate resourcing should be provided to the Fair Work Commission to improve its data collection and reporting processes in this area.</p>	<p>We support this recommendation.</p> <p>Similar to our comments in Draft Recommendation 3.5 we support the collection of more information by the parties with the same qualifications as to the assessment of the merits of the application.</p> <p>The more information the parties have as to likely outcomes would assist to narrow the ambit of these claims and lead to speedier and fairer outcomes.</p>
<p>Chapter 9 Variations in Uniform Minimum Wages</p>	
<p>Draft Recommendation 9.1</p> <p>The Australian Government should amend the <i>Fair Work Act 2009</i> (Cth) so that the Fair Work Commission is empowered to make temporary variations in awards in exceptional circumstances after an annual wage review has been completed.</p>	<p>We support this recommendation.</p> <p>There seems no good reason to restrict applications to consider exceptional circumstances to the timing of a National Minimum Wage Review (s286 & 287).</p>
<p>Further Information</p> <p>The Productivity Commission seeks information on whether the structure of junior pay rates should be based on a model other than age, such as experience or competency, or some combination of these criteria.</p>	<p>We support this recommendation.</p> <p>We agree that there are good reasons for maintaining some form of discounted wages for young workers to avoid being priced out of the labour market. We also agree to the introduction of a hybrid model as exemplified in Table 9.2 (pg 358 Draft</p>

	Report) which gives some weight to age and rewarding work experience.
<p>Draft Recommendation 9.2</p> <p>The Australian Government should commission a comprehensive review into Australia's apprenticeship and traineeship arrangements. The review should include, but not be limited to, an assessment of:</p> <ul style="list-style-type: none"> - the role of the current system within the broader set of arrangements for skill formation - the structure of awards for apprentices and trainees, including junior and adult training wages and the adoption of competency-based pay progression <p>the factors that affect the supply and demand for apprenticeships and traineeships, including the appropriate design and level of government, employer and employee incentives.</p>	<p>We support this recommendation.</p> <p>As set out in our response to Draft Recommendation 4.3 the aged care workforce is expected to increase significantly over the next few decades. To meet this workforce demand employers in the industry will need to look at all avenues available to attract a skilled workforce.</p> <p>It is essential therefore that the apprenticeship and traineeship systems are designed to meet the future needs to the industry.</p> <p>While we understand the theoretical benefit of a competency based pay progression system, we voice concerns about its practical application in the workplace and how it will be implemented and monitored to ensure consistency and fairness.</p>
<p>Chapter 12 Repairing Awards</p>	
<p>Draft Recommendation 12.1</p> <p>The Australian Government should amend the <i>Fair Work Act 2009</i> (Cth) to:</p> <ul style="list-style-type: none"> - remove the requirement for the Fair Work Commission to conduct four yearly reviews of 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. <p>To achieve the goal of continuously improving awards' capability to meet the Modern Awards Objective, the legislation should require that the Minimum Standards Division:</p> <ul style="list-style-type: none"> - use robust analysis to set issues for assessment, prioritised on the basis of 	<p>We support this recommendation to remove the requirement for the FWC to conduct four yearly reviews of modern awards.</p> <p>The four year review process has created an inordinate drain on the resources, both time and costs, of organisations involved in proceedings and the FWC.</p> <p>We agree with comments made by Master Builders Australia in that the intensity of resource allocation and the polarisation of stances between the parties leads to adversarial outcomes.</p> <p>We generally support the approach set out in figure 12.1 in the Draft Report.</p>

likely high yielding gains	
- obtain public guidance on reform options.	
Chapter 15 Enterprise Bargaining	
<p>Draft Recommendation 15.1</p> <p>The Australian Government should amend Division 4 of Part 2-4 of the <i>Fair Work Act 2009</i> (Cth) to:</p> <ul style="list-style-type: none"> - allow the Fair Work Commission wider discretion to approve an agreement without amendment or undertakings 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. 	<p>We support this recommendation.</p> <p>Where an agreement has been supported by a majority vote it would seem appropriate for the FWC to be granted wider discretion to approve the Agreement where there have been minor procedural errors, including errors in the issuing or content of the NERR, ensuring that the employees are not disadvantaged.</p>
<p>Further Information</p> <p>The Productivity Commission seeks feedback on whether there is a mechanism that would only restrain pattern bargaining:</p> <ul style="list-style-type: none"> - where it is imposed through excessive leverage or is likely to be anticompetitive - while allowing it in circumstances where it is conducive to low transaction cost agreements that parties genuinely consent to. 	<p>We believe that s412 of the <i>Fair Work Act 2009</i> adequately addresses pattern bargaining issues.</p>
<p>Draft Recommendation 15.2</p> <p>The Australian Government should amend s. 203 of the <i>Fair Work Act 2009</i> (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.</p>	<p>We support this recommendation.</p> <p>We support facilitative terms that create the opportunity for flexibility.</p> <p>Where the opportunity for workplace flexibility is of genuine interest to employees and employers it seems perverse to create the opportunity but then allow a collective negotiation process to</p>

<p>Enterprise agreements should not be able to restrict the terms of individual flexibility arrangements.</p>	<p>prevent its use.</p>
<p>Draft Recommendation 15.3</p> <p>The Australian Government should amend s. 186(5) of the <i>Fair Work Act 2009</i> (Cth) to allow an enterprise agreement to specify a nominal expiry date that:</p> <ul style="list-style-type: none"> - 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. 	<p>We support the recommendation in regards to nominal expiry date for enterprise agreements of up to 5 years after the day on which the FWC approves the agreement.</p> <p>Although we view it unlikely that employers in the aged care industry would seek a 5 year term we support provision which give the parties choice when negotiating the terms of an agreement.</p>
<p>Draft Recommendation 15.4</p> <p>The Australian Government should amend the <i>Fair Work Act 2009</i> (Cth) to replace the better off overall test for approval of enterprise agreements with a new no-disadvantage test.</p> <p>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.</p>	<p>We support the re-introduction of a global no disadvantage test.</p>
<p>Draft Recommendation 15.5</p> <p>The Australian Government should amend the <i>Fair Work Act 2009</i> (Cth) so that:</p> <ul style="list-style-type: none"> - 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 	<p>We support the recommendation which would require a reasonable period in which nominations to be a bargaining representative should be submitted.</p> <p>Such nominations should be received prior to the commencement of bargaining.</p> <p>We do not view it reasonable that a party can nominate themselves at any stage during the process. The late arrival of bargaining representative/s can disrupt the process of negotiations and may force the</p>

<p>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.</p>	<p>parties to reconsider issues that have already been negotiated.</p> <p>While we recognise the difficulties when there are too many representatives at the bargaining table, creating an unmanageable negotiation process, we would view an arbitrary decision to require the bargaining representative to cover at least 5 per cent of employees to be covered by the agreement as too prescriptive and could result in excluding a bargaining representative for a specific class of workers not otherwise represented.</p>
<p>Draft Recommendation 15.6</p> <p>The Australian Government should amend the rules around greenfields agreements in the <i>Fair Work Act 2009</i> (Cth) so that bargaining representatives for greenfields agreements are subject to the good faith bargaining requirements.</p>	<p>We support this recommendation.</p> <p>Good faith bargaining requirements should apply to negotiation of all agreements including greenfields agreements.</p>
<p>Draft Recommendation 15.7</p> <p>The Australian Government should amend the <i>Fair Work Act 2009</i> (Cth) so that if an employer and union have not reached a negotiated outcome for a greenfields agreement after three months, the employer may (as illustrated in figure 15.5):</p> <ul style="list-style-type: none"> - continue negotiating with the union - request that the Fair Work Commission undertake '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 arrangement for approval with a 12 month nominal expiry date. <p>Regardless of the agreement-making process chosen by the employer, the ensuing greenfields arrangement must pass the proposed no-disadvantage test.</p>	<p>We support this recommendation.</p> <p>The proposal provided offers other avenues to employer parties in the face of a stalemate.</p> <p>This recommendation balances power in the bargain by removing the absolute right of the Union to disengage in bargaining, ceasing the ability of the employer to progress an agreement.</p>

Chapter 16 Individual Arrangements

Draft Recommendation 16.1

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

We support this recommendation.

We support recommendations that allow for facilitative provisions and support the ability of the parties to agree on the period of operation of the Individual Flexibility Arrangement (IFA).

The 13 week default position is reasonable with the option for an agreed variation up to one year.

Draft Recommendation 16.2

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.

We support this recommendation.

We do not consider it essential, when agreeing to IFAs between an employer and employee, that the employee is better off overall, but instead view it appropriate that the employee is no worse off.

We view moving from the BOOT to a no disadvantage test is likely to result in employers being more willing to enter into IFAs.

Employers currently are unsure how to evaluate an IFA given the requirement to meet a BOOT, and how to compare monetary and non-monetary conditions when assessing whether the employee is better off overall.

Assistance on assessing IFAs would be essential to encouraging employers to take up of this option.

<p>Draft Recommendation 16.3</p> <p>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.</p> <p>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.</p>	<p>We support this recommendation.</p> <p>An information package on IFA's is key to encouraging employers to look at this option.</p> <p>Training, a direct line for enquiries, and examples of acceptable clauses would assist employers and employees understand what can be included in an IFA and increase the likelihood of their take up.</p>
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Chapter 17 The Enterprise Contract

<p>Further Information</p> <p>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:</p> <ul style="list-style-type: none"> – 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 – 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. 	<p>We support the further exploration of the enterprise contract as another option for employers and employees when agreeing terms and conditions of employment.</p> <p>We understand some employers find awards to be inflexible and not able to meet the needs of their business. Enterprise agreements, as the only alternative to the award system, are time consuming and costly to implement particularly for many small to medium business that may lack the resources, experience, time and expertise to bargain.</p> <p>When considering the introduction of an enterprise contract, in keeping with our support of facilitative and flexible provisions, we would consider it appropriate that the terms of the enterprise contract, including operational dates and included clauses should be determined by the parties involved.</p>
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<p>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.</p>	
<p>Chapter 19 Industrial Disputes and Right of Entry</p>	
<p>Draft Recommendation 19.1</p> <p>The Australian Government should amend s. 443 of the <i>Fair Work Act 2009</i> (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.</p>	<p>We support this recommendation.</p>
<p>Further Information</p> <p>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:</p> <ul style="list-style-type: none"> - 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. 	<p>Protected action ballots should specify the types of action the employees are being asked to vote in support of.</p>

<p>Draft Recommendation 19.2</p> <p>The Australian Government should amend s. 423(2) of the <i>Fair Work Act 2009</i> (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).</p>	<p>We support this recommendation.</p> <p>We do not view it necessary for there to be harm to both parties in order for the FWC to take action.</p>
<p>Further Information</p> <p>The Productivity Commission seeks further input from inquiry participants on whether s. 424 of the <i>Fair Work Act 2009</i> (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.</p>	<p>We do not support this recommendation.</p> <p>We are concerned with providing the FWC with discretion to determine whether the threat to life, personal safety, health or welfare is acceptably low.</p> <p>The aged care industry is charged with a responsibility of looking after frail aged Australians. We are opposed to any amendment to s.424 which would give the FWC the discretion to determine what action constituted an acceptably low risk to our residents or client's life, personal safety, health or welfare.</p> <p>We view any threat to life, personal safety, health or welfare should be enough to warrant the termination or suspension of industrial action.</p>
<p>Draft Recommendation 19.3</p> <p>The Australian Government should amend the <i>Fair Work Act 2009</i> (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.</p>	<p>We support this recommendation.</p> <p>As the aged care industry must always have employees available to care and support for our residents and clients it is appropriate, where a contingency plan has been put in place, that it is not disrupted by a last minute withdrawal notice of industrial action.</p>
<p>Draft Recommendation 19.4</p> <p>The Australian Government should amend the <i>Fair Work Act 2009</i> (Cth) to grant the</p>	<p>We support this recommendation.</p> <p>Legislation should be aimed at creating a dispute resolution environment where</p>

<p>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.</p>	<p>tactics that create disruption and costs for employers are discouraged.</p>
<p>Draft Recommendation 19.7</p> <p>The Australian Government should amend s. 505A of the <i>Fair Work Act 2009</i> (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:</p> <ul style="list-style-type: none"> - 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: <ul style="list-style-type: none"> - 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. 	<p>We support this recommendation.</p>
<p>Draft Recommendation 19.8</p> <p>The Australian Government should amend the <i>Fair Work Act 2009</i> (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.</p>	<p>We support this recommendation.</p>

Chapter 20 Alternative Forms of Employment	
<p>Draft Recommendation 20.1</p> <p>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 <i>Fair Work Act 2009</i> (Cth).</p>	<p>We support this recommendation.</p>
Chapter 22 Transfer of Business	
<p>Draft Recommendation 22.1</p> <p>The Australian Government should amend the <i>Fair Work Act 2009</i> (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.</p>	<p>We support this recommendation.</p>

ⁱ <http://www.myagedcare.gov.au/about-us/aged-care-workforce>