Australian Government
Productivity Commission

Workplace Relations Framework: The Inquiry in Context

Productivity Commission
Issues Paper 1

January 2015

The Issues Papers

This is the first of five issues papers released by the Commission to assist individuals and organisations to prepare submissions to the inquiry. This paper outlines:

- the scope of the inquiry
- some of the broad questions about the objectives and operation of the workplace relations system
- the Commission's approach to evidence
- the Commission's procedures, and how to make a submission.

The remaining papers raise issues about other specific matters. Participants should not feel that they are restricted to comment only on matters raised in the issues papers. The Commission wishes to receive information and comment on issues which participants consider relevant to the inquiry's terms of reference.

Key inquiry dates

Receipt of terms of reference	19 December 2014
Due date for submissions	13 March 2015
Release of draft report	June/July 2015
Draft report public hearings	August/September 2015
Final report to Government	30 November 2015

Submissions can be made

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The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website (www.pc.gov.au).

Terms of reference

WORKPLACE RELATIONS FRAMEWORK

Productivity Commission Act 1998

I, Joseph Benedict Hockey, Treasurer, pursuant to Parts 2 and 3 of the *Productivity Commission Act 1998*, hereby request that the Productivity Commission undertake an inquiry into the workplace relations framework.

Background

The Australian Government believes that it is fundamentally important to make sure that the Fair Work laws work for everyone.

Workplaces are important to our economy and society. Higher living standards, better pay and more jobs all depend on having fair, productive, and effective workplaces. The prosperity of tomorrow is driven by what happens in our workplaces today and this is why it is in our national interest to make sure that the Fair Work laws are balanced and effective.

The Australian Government's objectives in commissioning this Inquiry are to examine the current operation of the Fair Work Laws and identify future options to improve the laws bearing in mind the need to ensure workers are protected and the need for business to be able to grow, prosper and employ.

Scope of the Inquiry

The Productivity Commission will assess the performance of the workplace relations framework, including the *Fair Work Act 2009*, focussing on key social and economic indicators important to the wellbeing, productivity and competitiveness of Australia and its people. A key consideration will be the capacity for the workplace relations framework to adapt over the longer term to issues arising due to structural adjustments and changes in the global economy.

In particular, the review will assess the impact of the workplace relations framework on matters including:

- unemployment, underemployment and job creation
- fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net
- small businesses
- productivity, competitiveness and business investment

- the ability of business and the labour market to respond appropriately to changing economic conditions
- patterns of engagement in the labour market
- the ability for employers to flexibly manage and engage with their employees
- barriers to bargaining
- red tape and the compliance burden for employers
- industrial conflict and days lost due to industrial action
- appropriate scope for independent contracting.

In addition to assessing the overall impact of the workplace relations framework on these matters, the review should consider the Act's performance against its stated aims and objects, and the impact on jobs, incomes and the economy. The review should examine the impact of the framework according to business size, region, and industry sector. It should also examine the experience of countries in the Organisation for Economic Co-operation and Development.

The workplace relations framework encompasses the *Fair Work Act 2009*, including the institutions and instruments that operate under the Act; and the *Independent Contractors Act 2006*.

The review will make recommendations about how the laws can be improved to maximise outcomes for Australian employers, employees and the economy, bearing in mind the need to ensure workers are protected, the need for business to be able to grow, prosper and employ, and the need to reduce unnecessary and excessive regulation.

The Productivity Commission will identify and quantify, as far as possible, the full costs and benefits of its recommendations.

An overarching principle for any recommendations should be the need to ensure a framework to serve the country in the long term, given the level of legislative change in this area in recent years.

In conducting the review, the Productivity Commission will draw on the full spectrum of evidence sources including, but not limited to:

- Australian Bureau of Statistics data and publications
- data sources maintained by other relevant Government bodies, including but not limited to the Department of Employment, Fair Work Commission and Fair Work Ombudsman
- employers or their representatives
- employees or their representatives
- academia
- special interest groups.

The review should also identify gaps in the evidence base where further collection may assist in the analysis of the overall performance and impact of the system.

Process

The Commission is to undertake an appropriate public consultation process including holding hearings, inviting public submissions and releasing a draft report to the public.

The final report should be provided to the Government in November 2015.

J. B. HOCKEY

Treasurer

[Received 19 December 2014]

Contents

The issues associated with assessing Australia's workplace relations (WR) arrangements are deep and wide. Successive Australian governments have recognised that choices about the design of a WR system reflect not just its pre-eminence in economic policy, but also its equity and ethical objectives. The current structure is also a product of history and changing social preferences. The Commission recognises that all of these dimensions are relevant to the assessment of the system.

The Commission has decided to vary from its usual practice of releasing a single issues paper. Instead, it has issued five extensive documents that reflect its initial views about the priority questions, informed by initial consultations. This approach will also make it easier for participants to focus particular effort on just one or two elements of the inquiry, if that reflects their priorities. The papers cover:

- a broad overview of the system, its objectives, its possible faults, the way in which evidence-based conclusions about reforms could be made, and the Commission's broad analytical framework (this document)
- the issues associated with the three main safety nets for pay and conditions: minimum wages, the award system (which includes penalty rates) and the National Employment Standards
- the bargaining framework, including processes associated with industrial disputes
- employee protections, such as those associated with unfair dismissal
- a range of other important matters, such as the effectiveness of the WR system's institutions, the compliance costs it imposes on parties, special WR arrangements for public sector employees, the role of competition law and alternative forms of employment.

Attachment A indicates how people can contribute to the inquiry through submissions and participation in hearings.

1.1 Scope and aim of the inquiry

Every week, around 11.6 million Australians go to work in about 2.1 million workplaces.[1] The WR framework comprises a complex array of labour laws, regulations and institutions. Along with market forces, accepted practices, cultural norms and the common law, these shape people's behaviour, the nature of their workplaces and their working lives.

This framework in turn influences the productivity, operating characteristics and internal cultures of workplaces. It affects workers' terms of employment and businesses'

[1] The data relate to 2013 and are based on ABS 2014, *Counts of Australian Businesses*, Cat. No. 8165, 31 March and ABS 2014, *Australian Labour Market Statistics*, Cat. No. 6105, 8 July.

profitability. It shapes the powers and distribution of returns to various parties in the system. It can provoke or mitigate industrial conflicts.

WR may significantly influence innovation, skill formation, the adaptability of businesses, and growth in different industries. It can affect personal and household income distribution, trust and cooperation between people, and the degree to which they regard a society as fair.

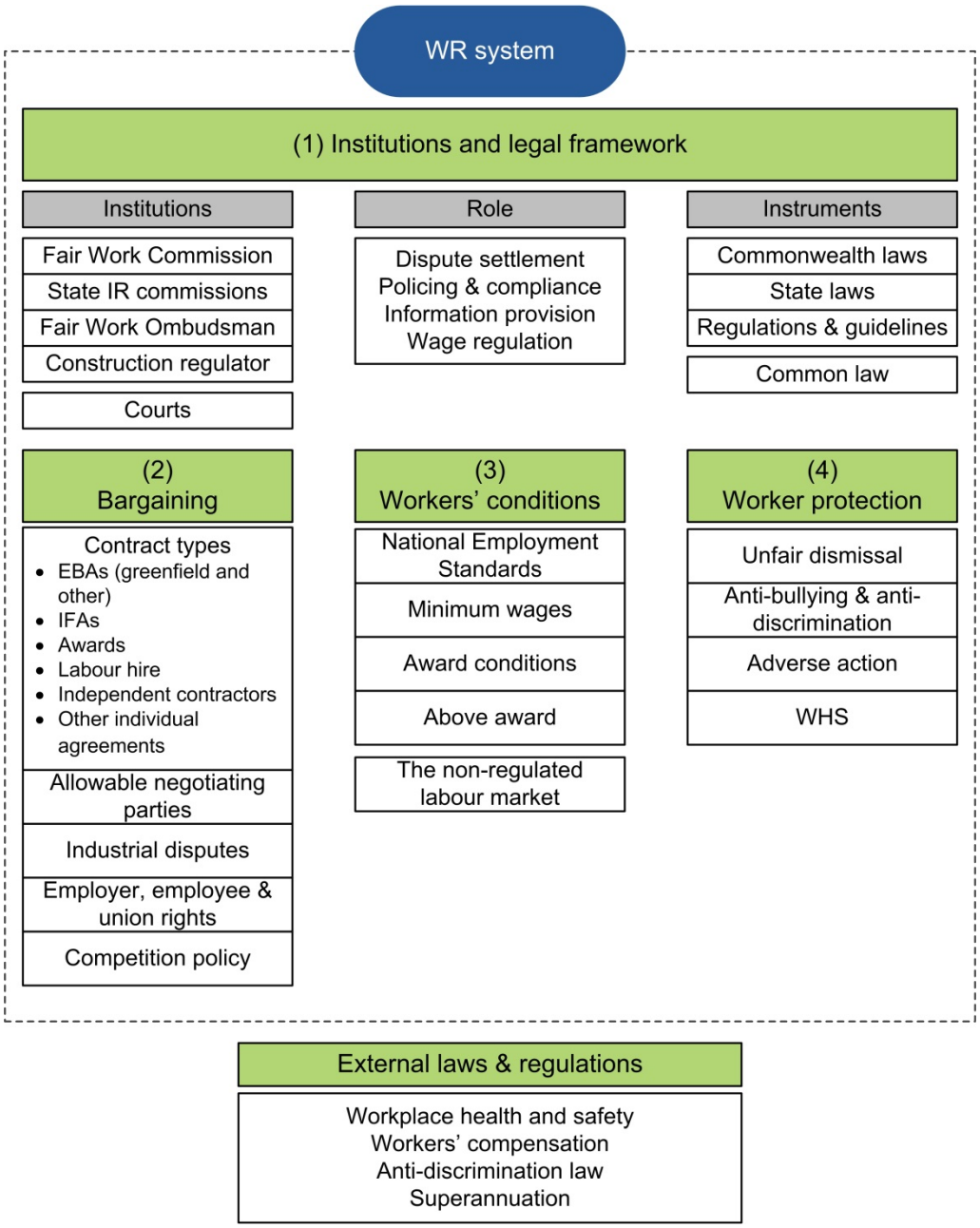
The WR framework affects unemployed workers as well as the employed. It can determine who gets employed, the total hours they work, when and where they can work, and how their employment is terminated. It can also influence the prospects of people who are unemployed or outside the labour force, as it may create barriers to their employment. Its effects can vary across regions, by the size and industry of firms, and by the age, skills and preferences of people. It can affect the way in which wages and prices move in an economy, and thereby influence overall macroeconomic performance and policy (section 4).

WR policy, institutions and regulation are now highly elaborate and broad ranging (figure 1.1). They have grown from a limited Commonwealth role in dispute settlement one hundred years ago to a position today where the Commonwealth regulates the bulk of industrial awards, resets minimum wages, and has created three specialist bodies that collectively mediate disputes, provide information, register agreements, check compliance with the law and adjudicate on some key matters of WR law. Other jurisdictions still retain a role.

The Australian Government has asked the Commission to undertake a wide-ranging inquiry into Australia's WR framework that covers these institutions and impacts. While the terms of reference for the inquiry cover an assessment of the performance of the *Fair Work Act 2009* (Cth) (FWA), the Government has requested the Commission to go beyond evaluating the current system to consider the type of system that might best suit the Australian community over the longer term.

Several key commentators have been sceptical about the need for major changes, placing some emphasis on the value of stability (Borland 2012; Giudice 2014). Previous formal reviews dating from the Hancock Committee (1985) through to the most recent review of the Fair Work Act (Australian Government 2012b) have tended to favour adaptation rather than holistic change.

Figure 1.1 **The main elements of the current workplace relations arrangements**



Nevertheless, there has been advocacy for and, at times, implementation of significant shifts in the WR landscape in the last few decades. For example, after almost one hundred years of centralised conciliation and arbitration, enterprise-level bargaining was introduced as the centrepiece of the *Industrial Relations Reform Act 1993* (Cth), and individual statutory arrangements were a key element of the *Workplace Relations Act 1996* (Cth). Legislated minimum standards and tests that aim to ensure a net benefit for employees involved in enterprise bargaining have taken greater precedence over judicial/tribunal

discretion by industrial tribunals. The administrative discretion exercised by the predecessor bodies to today's Fair Work Commission (FWC) through compulsory conciliation and arbitration of bargaining disputes has disappeared. The creation of the Australian Building and Construction Commission (and its successor, Fair Work Building and Construction) — the first industry specific WR agency — also reflected a major departure from historical practices.

Long-run shifts in labour markets, institutions, the nature of the economy and social security systems may provide an impetus for further change. For example:

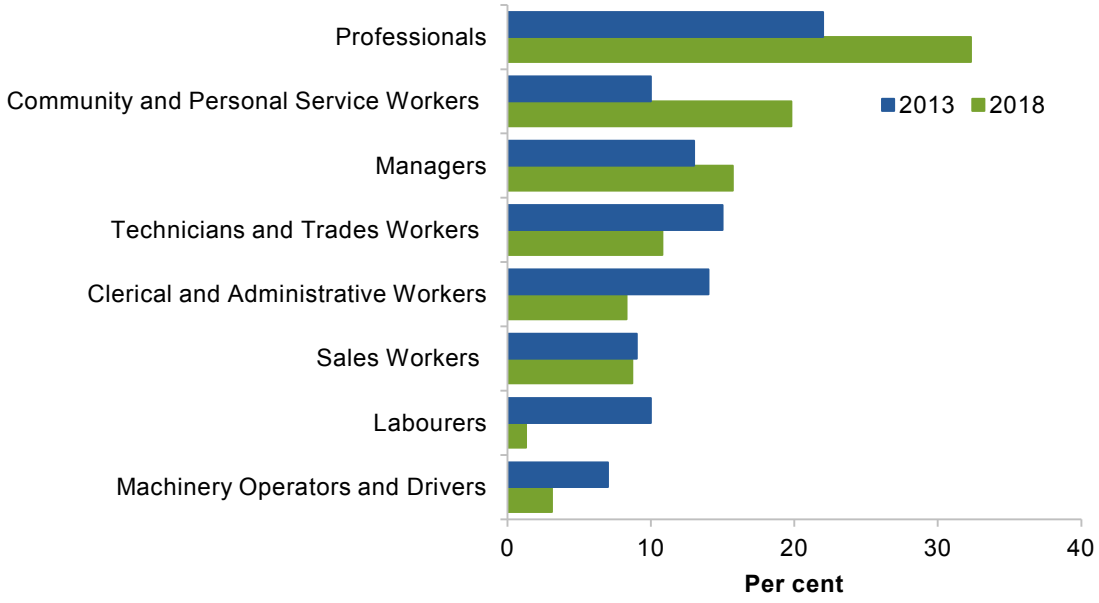
- cooperative relations between employees and employers may be more important for innovation, technological diffusion and investments in skills — developments that are critical for future productivity, economic growth and adaptability
- the sensitivity of employment demand to regulations that raise the costs of less skilled labour may increase with technological change and the increasingly tradable outputs of the service sector. International outsourcing of call centres; the online provision of music, books, financial services, and airline and accommodation booking systems; and new models of domestic service delivery (as in taxi services) are illustrations of developments that are already in train. These will inevitably change workplaces and the competitive pressures they face
- traditional notions of the 'workplace' may change for some types of occupation as a result of technological advances that allow people to work remotely
- the occupational mix of jobs will continue to change, with less demand for semi-skilled and lower-skilled manual workers, and greater demand for people working in social services and those with higher qualifications (figure 1.2). The Department of Employment has forecast that over the five years to the end of 2018, one in three new jobs will be for professionals (Department of Employment 2014, p. 24). In the United States and Europe, employment growth has been greatest for the lowest and highest skill workers. While there is little evidence of such a trend over the past two decades, this may change in the future (Wilkins and Wooden 2014, pp. 423–424). Regardless, the WR environments of higher skilled workers and those providing social services often differ from those for other occupations
- demographic change will dramatically shift the age structure of the population, with particular implications for older workers (figure 1.3)
- youth unemployment rates are rising again after a protracted reduction from 1992 (figure 1.3)
- unions have lost their pre-eminent role as employees' representatives, especially in key parts of the private sector,[2] raising questions about the best ways to represent employee interests, especially where a power imbalance is present. In fact, the sustained fall in

[2] Such as manufacturing, heavy and civil engineering construction, air transport, telecommunications and finance (Based on data from 2006 to 2013 from ABS 2014, *Employee Earnings, Benefits and Trade Union Membership, Australia - Trade Union Membership*, Cat. No. 6310.0).

unionisation rates in Australia (and New Zealand) is exceptional among OECD economies (falling in the Australian case from around 50 per cent in 1960 to below 20 per cent in 2011).[3]

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

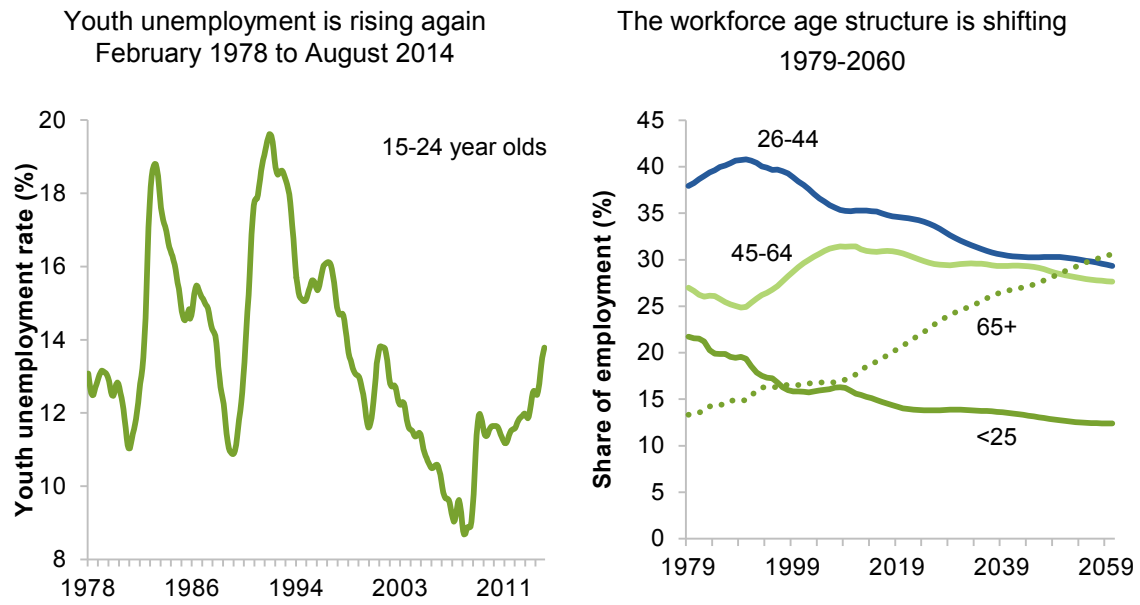
Figure 1.2 **The skill mix is shifting, 2013 to 2018**



Data source: Department of Employment (2014).

3 Derived from the Online OECD Employment database, 'Union members and employees' in July 2014.

Figure 1.3 **Labour markets are changing**



Data sources: Ageing data are from PC (2013a) and unemployment rates from ABS, *Labour Force, Australia*, Cat. No. 6202.0.

What is (largely) not in scope?

The Commission is not examining in any detail a number of issues that intersect with or are part of the WR framework, including:

- governance arrangements of individual unions (and concerns about specific instances of corruption and other criminally unlawful conduct by employers, employees and unions in the WR system)
- institutional arrangements in the construction industry, which were addressed in the Commission's inquiry into Public Infrastructure (PC 2014b)
- financial assistance for legal representation for WR matters, a matter covered in the Productivity Commission's inquiry into Access to Justice (PC 2014a)
- separate Workplace Health and Safety (WHS) institutions and laws, including workers' compensation schemes. However, the more general impact of the WR system on WHS is relevant to this inquiry
- the Superannuation Guarantee. While it may have arisen as an industrial relations trade-off, the Guarantee is now recognised as one of a set of interlocking retirement income policy measures, and consideration of it in any detail would therefore cover many issues not central to this inquiry

- Australia's vocational training system, with the important exception of agreements that may specify training requirements in a way likely to be inefficient or inconsistent with wider economic and social needs
- the newly established Fair Entitlements Guarantee, a statutory scheme that provides assistance to employees for unpaid entitlements following the insolvency of their employer. The Commission will examine this scheme in its inquiry into Business Set-up, Transfer and Closure.

The Commission notes that the Australian Government is proposing a variety of changes to the FWA via a number of Bills that are before Parliament.[4] The inquiry's primary focus will be on the preferred structure for WR in Australia and it is unlikely to directly assess amendments to relevant legislation, although it may indicate how these arrangements may need to be revised, if that is necessary, to conform to its proposed policy recommendations.

1.2 The stated objectives of Australia's workplace relations system

The FWA is the primary legislative device governing the WR system in Australia, although the pre-eminence of a Commonwealth statute is relatively recent. Historically and constitutionally, the Commonwealth and the states have shared responsibility for workplace relations. The FWA cites objectives that are diverse and — as is often the case with such diversity — potentially in conflict: The FWA is intended to deliver outcomes that are **fair, flexible, co-operative, productive, relevant, enforceable, non-discriminatory, accessible, simple and clear (s. 3).** It also provides for special arrangements for small businesses; preference for collective bargaining; balance between family and workplace responsibilities; minimum wage and employment standards; and the right of freedom of association.

State-based laws still survive, albeit with reduced reach, and their objectives largely mirror those of the FWA, though sometimes with greater elaboration. For example, the Queensland *Industrial Relations Act 1999* specifies 14 separate objectives, such as 'meeting the needs of emerging labour markets and work patterns', and 'promoting and facilitating jobs growth, skills acquisition and vocational training through apprenticeships, traineeships and labour market programs' (s. 3).

One issue for this inquiry is whether any system can hope to achieve coherence across this diversity of objectives. By its nature, legislation often claims multiple objectives. But establishing what a system is meant to achieve is important for this inquiry, and the

[4] Fair Work Amendment Bill 2014; Fair Work Amendment (Bargaining Processes) Bill 2014; Fair Work (Registered Organisations) Amendment Bill 2014; Building and Construction Industry (Improving Productivity) Bill 2013; Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013.

relevant legislation is an obvious starting point. *The Commission encourages stakeholders to give their views on the appropriate objectives of the WR system, how these can be balanced and their capacity to adapt to future structural change and global economic trends*.

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

The circumstances under which Australia's workplace relations laws and practices developed are unique to this country, but have adapted considerably over time.

Two significant events shaped the early development of the system in Australia:

- the debilitating strikes of the 1890s, which resulted in the creation of industrial arbitration tribunals at the state and Commonwealth level and the introduction of a limited dispute settlement power into the Constitution at federation
- the Harvester Judgment of 1907 in the Commonwealth Conciliation and Arbitration Court, which defined the minimum conditions under which a man would be able to support his family in 'reasonable and frugal comfort'. The criteria for determining the minimum wage and its scope have since changed considerably, exemplified by the 'equal pay for work of equal value' decision in the mid-1970s. Nevertheless, the decision was the first of many to come that set base-level standards for the wages and conditions (with such standards the main topic of Issues Paper 2).

Gradually, the system of federal awards grew, mostly due to efforts by some unions to broaden their national application through the active use of the Commonwealth's dispute settlement powers, although as recently as 1990, there were still more employees covered by state than federal awards. These awards and the processes that determined them distinguish Australia from most other developed countries. While their names and roles have changed, various specialist Commonwealth agencies have played an increasing role in regulating WR across all jurisdictions, in part due to the growing use by the Commonwealth of its constitutional powers and state governments' willingness to refer their powers (Lucev 2008; McCallum 2005). The pessimism expressed by the Constitution Commission 1988 about the capacity of the Australian Constitution to provide for a more national system was largely misplaced. The main remaining exceptions to a national system are employees of unincorporated enterprises in Western Australia and many employees paid by state governments — which provide an example of the lingering presence of past arrangements in the current system.

The most recent changes in the system include:

- the shift from centrally determining wages and conditions to enterprise-level bargaining (the biggest break from the past). While awards still provide a floor for employment conditions, there is no longer a third party industrial tribunal that settles industrial disputes by making awards (Hamilton 2012, p. 2)

- some emphasis on productivity and flexibility at the enterprise level as *goals* of the WR system. (An aspect of this inquiry will be to assess whether these goals have been achieved)
- simplification of awards (from 3715 state and federal awards to 122 'modern' awards in 2010 (Australian Government 2012a), and the introduction of greater flexibility into such awards
- the widening scope of the Federal Minimum Wage to encompass employees of all businesses (except those employed by unincorporated enterprises in Western Australia), and the creation of specific legislative criteria for setting the minimum (Bray 2013)
- introduction of protections for individual workers (rather than collectives of workers) that exceeded the protections in particular awards, specific state and territory laws, and remedies at common law. The most important development was the inclusion of unfair dismissal arrangements into the federal WR system (Figgis 1998, pp. 1–2; Forsyth 2008, p. 509; Wheelright 2001, pp. 173–176). In 2014, federal employment protection was extended so that workers subjected to alleged workplace bullying in constitutionally-covered businesses could take the matter to the FWC, which could make an order to stop any proven bullying
- the transfer of some key matters relating to working conditions (such as WHS) to dedicated laws and institutions outside the WR system
- according less weight generally to the powers of unions as negotiating parties for wages and conditions, and as monitors of WHS (Patmore 2006), as well as a general decline in union membership (Issues Paper 3).

At the end of this period of considerable change, there remains some continuity. Safety net arrangements remain a fundamental part of the system (through awards covering a wide range of industries; National Employment Standards that must be reflected in all agreements; and a regularly re-set minimum wage). There are still elaborate laws and administrative processes governing employment relations in all but a few pockets of the economy, and multiple specialist agencies still oversee the system. Even as the system has moved towards much greater use of enterprise bargaining, the requirements for review and registration of each agreement and the circumstances under which negotiations may proceed have remained within the (adapted) legal structure.

In some important respects, Australia's WR system is not internationally unique. Most countries have safety nets of some form, use multiple specialist agencies for (quasi and actual) judicial and mediation purposes, and prescribe laws about the processes for negotiation between parties. No system is simple. Arguably, many other federations have more fragmented WR systems. However, notwithstanding a shift towards enterprise bargaining (and, to a lesser extent, individual agreements), Australia appears to give more weight than other Anglo-Saxon countries to elaborate rules about WR processes and, most particularly, to the centralised determination of wages and conditions for many employees.

This then requires a complex legal and institutional architecture that is distinctive to Australia.

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

1.4 What might need to change?

Not surprisingly, what constitutes the 'best' design of a WR framework is hotly contested.

Some identify multiple severe flaws

Many commentators perceive flaws in Australia's WR framework, although views on the problems are divided.

Some businesses and other commentators have argued that the current system:

- lacks flexibility, and thus interferes with managers' ability to manage. In its submission to the Productivity Commission's automotive inquiry , the Australian Industry Group (2013) said that the existing system made it difficult for businesses to hire contractors and use labour hire businesses
- requires high negotiated wage rates and excessively short-term greenfield agreements that may threaten the viability of a large prospective group of long-term investments in the resource-intensive sector — particularly Liquefied Natural Gas (LNG) production (Ferguson 2014)
- does not encourage productivity, as this is not a central feature of enterprise agreements and where negotiated may sometimes be little more than buying out restrictive work practices (for example, Toyota Australia 2013, p. 16). Some survey evidence from resource businesses suggest that most enterprise agreements do not have clauses relating pay to productivity (Kates 2013, p. 5)
- encourages overly adversarial relationships between management and employees, which is likely to be inimical to productivity and innovation (PC 2014b)
- allows strikes over matters outside the employment relationship (AMMA 2014)
- imposes high penalty rates for work outside the five day working cycle (ROH Automotive 2013)

- has costly and slow unfair dismissal laws, with employers sometimes paying 'go away' money to avoid the formal process
- despite award consolidation, still has a highly regulated set of base wages across many occupations and industries, which threatens flexibility at the enterprise level and may price some workers out of jobs (Wooden 2010)
- allows copycat agreements across many enterprises, notwithstanding variations in the circumstances of the enterprises concerned
- remains fragmented across jurisdictions, with a panoply of laws, awards and institutions, for example in Western Australia, which has not referred its WR powers to the Commonwealth (CCIWA 2011)
- is below international best practice. Compared with its international peers, Australian business leaders perceive that Australia's WR system has led to a relatively inefficient labour market, especially in respect of: poor trust between employees; lower wage flexibility; higher hiring, firing and redundancy costs; and wages that are inadequately linked to enterprise productivity (figure 1.4 and World Economic Forum 2014). When asked about the most problematic factors for doing business, nearly one in four Australian business leaders cited restrictive labour regulations. (Across OECD countries, the average share of CEOs citing such regulations was just above 10 per cent).

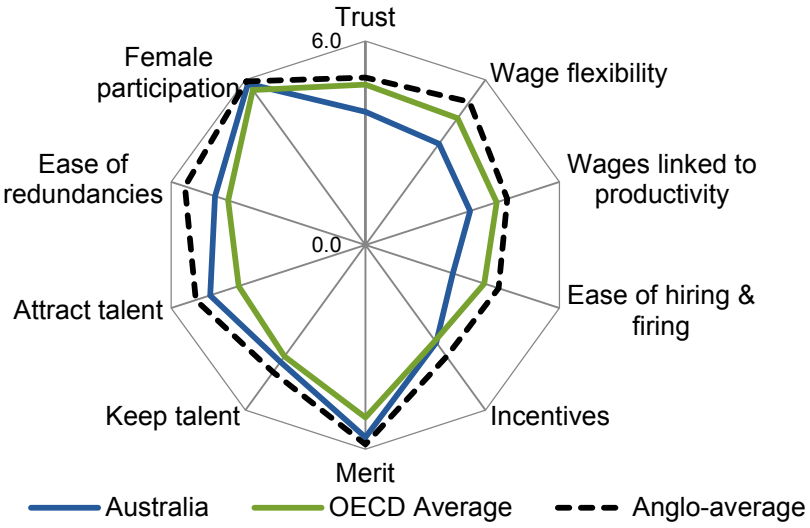
Of course others would see at least some of the specific 'flaws' listed above as in fact desirable features of the system; for example, high penalty rates and the guarantees offered by highly regulated minimum standards of wages and conditions across different occupations and industries.

Moreover, some unions and other commentators have their own concerns about aspects of the current framework, including that it:

- lacks a safety net for workers not classified as employees, such as outworkers and contractors (ACTU 2012), and that sham contracting is used to reduce wages and conditions (CFMEU 2011)
- offers inadequate protections in relation to temporary overseas workers (ACTU 2014)
- is too narrow in its general protections (ACTU 2012)
- unreasonably limits the scope of bargaining though its definition of permitted matters (ASU 2012)
- too narrowly provides rights to request flexible working arrangements (ACTU 2012; AHRC 2012)
- does not confer sufficient arbitral powers to the Fair Work Ombudsman (FWO) and the FWC (AMWU 2012)
- impedes collective action with insufficient protection of right of entry (UnionsWA 2012).

Figure 1.4 **Business perceptions of Australia's relative labour market efficiency**

2014-15



[a] The scores for the ease of redundancies and the female participation rate are based on re-scaling the cardinal measures of these factors using the World Economic Forum method. A higher score is 'better'.

Data source: World Economic Forum (2014).

Others paint a more positive picture

Notwithstanding the different criticisms of the current system, it can be said that the framework has (at the minimum) coincided in recent decades with positive developments in labour markets and economic performance:

> Over … two decades, the pertinent economic outcomes have been congenial. … industrial disputes are uncommon, overall wages growth has been consistent with low consumer price inflation … unemployment has steadily declined while participation in the workforce has increased … and at the same time the profit share of incomes has increased. These are considerable achievements, not to be put at risk lightly. (Australian Government 2012b)

Several commentators have identified past changes in labour relations as supporting improvements in Australia's macroeconomic environment, although they are cautious about precisely quantifying their relative importance (Ballantyne, De Voss and Jacobs 2014; Battellino 2010; Borland 2012; Lowe 2012; Mallick 2014; PC 2013b). The concerns that preoccupied the 1970s — cascading strikes, demarcation disputes, thousands of state awards and the rigidities of bargaining at the time — have now waned.

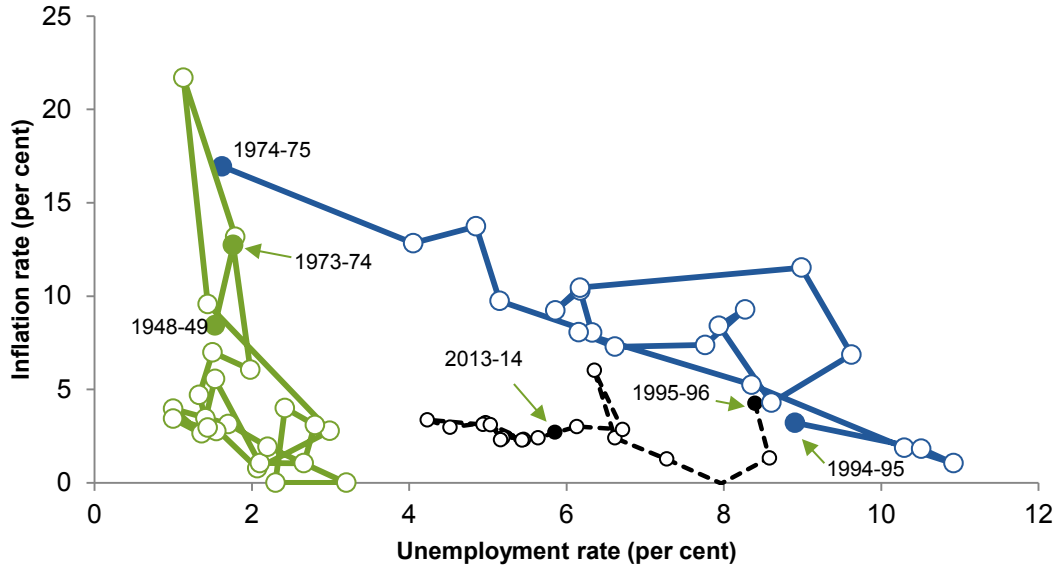
Reductions in unemployment rates do not now lead to significant economy-wide wage growth (figure 1.5). Wage shocks that affect one part of the economy (as in the resources

boom) do not appear to reverberate so greatly throughout the rest of the wage system (Borland 2012). An Assistant Governor of the Reserve Bank of Australia has noted:

> During these earlier booms, inflation had been more variable and Australia's centralised wage-setting system had the effect of spreading wage increases across the economy, to occupational categories for which the value of marginal product had not increased. Not surprisingly then, the result was a rise in inflation and unemployment. (Kent 2012)

Figure 1.5 **Prices are now largely unresponsive to strong labour demand**

1949-50 to 2013-14[a]



[a]The relationship is typically referred to as the 'Phillip's curve' and is based on the premise that at some point lower unemployment creates inflationary pressures. Borland (2012) investigated the relationship between unemployment and wage pressures, finding a similarly flatter Phillips curve after the introduction of enterprise bargaining.

Data sources: ABS 2014 *Labour Force Australia, Detailed*, Cat. No. 6291.0.55.001, November; ABS 2015, *Consumer Price Index, Australia*, Cat. No. 6401.0; (Withers, Endres and Perry 1985).

As the mining boom has abated, so have wages in the mining and construction industries. Indeed, in the latter case, a key union in Western Australia has suggested that it may accept a new enterprise agreement that reduces some wages by around 20 per cent (Barrett 2014).

Evidence about the flows into and out of unemployment also suggests that the labour market may be more flexible than supposed. The overall unemployment rate is relatively low because the average duration of unemployment is also modest — one indicator of hiring flexibility (Blanchard, Jaumotte and Loungani 2013). Industrial disputes, which are one indicator of the functioning of the system, have fallen significantly in the last two decades and are low by historical standards.

Moreover, economic forces and policies *outside* the WR system affect how enterprises and employees respond to the WR system. Australia's economic environment has changed markedly over time. Trade barriers have collapsed, the exchange rate has been floated, and competition policy has injected competition into many areas of the economy. Competitive pressures inevitably change the dynamics of bargaining between parties and reduce the size of any prizes from disputes.

Data about regulatory measures from the OECD and the International Labour Organization (ILO) suggest that Australia may have less stringent employment protection regulations than many countries. (Regardless of the actual stringency of employment protection, perceptions may influence the behaviour of businesses.)[5]

And even businesses have varying perspectives. The CEDA/Business Spectator Survey of CEDA trustees and business leaders suggested that, notwithstanding the impressions gained from particular business groups, reforming industrial relations ranked ninth out of eleven priorities for policy action in 2013, and seventh in 2012 (C&B 2013).

There are mixed views by experts in the field of WR about the nature of concerns about the system, and the direction and magnitude of desired reform. For example, Borland (2012), Farmakis-Gamboni and Prentice (2011), Peetz (2012), Philipatos (2013), Sloan (2010) and Wooden (2006, 2010).

In the face of the wide diversity of views about the WR system, the Commission will take a critical, evidence-based approach to differing claims about the impacts of different configurations of the system.

Though values and social norms legitimately shape views about what the WR system should look like, it is important to determine whether any particular policy measure does in fact have the impact it is claimed to have, and whether people and institutions actually behave as the underlying theories suggest. On the latter score, the Commission notes Chief Justice Dethridge's view in the 44-Hour Week Case in 1927 that evidence is needed to make policy — in balancing the claims of opposing parties about the effects of any particular reform, 'general prognostications of disaster on the one hand, or of uninjured prosperity on the other, are of little or no value'.[6]

It appears most people believe that WR systems matter to economic performance, but they disagree about what type of arrangement is best, what 'best' means, and the strength of the evidence for any option. Even if evidence is incomplete, it may at least provide some indication of what not to do, or some comfort that certain policy directions will have likely, if not entirely proven, benefits. *The Commission invites participants to submit proposals*

5 Based on the OECD (2013, p. 72) and the LAMRIG database prepared by Campos and Nugent (2012).

6 *Amalgamated Engineering Union v J. Alderdice & Company Pty Ltd & Others* (1927) 24 CAR 755, 24 February 1927, per Dethridge CJ at 774-5.

they consider would improve the operation of the WR system together with supporting evidence and argument.

1.5 The Commission's approach

As with all Productivity Commission inquiries, under its Act the Commission is required to recommend policies to maximise the wellbeing of the community as a whole. This inquiry is not intended to maximise the benefits to any particular groups, whether they be businesses, unions, employees, consumers or other stakeholders, as their individual interests may not coincide with those of Australians as a whole. Of course, the interests of the different parties form part of this broader assessment.

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

The Commission also recognises that the 'price' of labour differs from the price of most other inputs into an economy. This is not only because the price (wage) offered usually affects people's workplace performance and because of the virtual exclusion of WR from competition policy (Issues Paper 5), though these are distinctive features. It is also because many people's incomes and indeed wellbeing depend to a considerable extent on that price. No nation aspires to be a low-wage economy. The more relevant question is how a workplace relations system, together with other policies and practices, should be designed to achieve high productivity and to allocate labour to its best uses, thereby sustaining higher incomes and enabling greater wellbeing over time.

Considerations for assessing policy proposals

The Commission has no presumptions about the desired direction, magnitude or form of changes to the WR system. The Commission is open to lateral suggestions so long as they are practical, beneficial and backed by solid evidence and argument. It recognises that there may be proposals that are less beholden to the past that achieve productive and fair workplaces — either modelled on other countries, or reflecting entirely new ideas.

In examining submissions and other material, the Commission will be asking how any proposed changes:

- improve the overall use and allocation of resources in workplaces and around the economy (encompassing managerial as well as employee efficiency)
- enhance employment opportunities, matching of people to jobs and informed employment choices

- accommodate differences in the needs and circumstances and of different types of businesses and different regions
- promote efficient pricing and efficient investment in innovation, skill and capital
- promote institutions that are efficient and effective and avoid undue administrative or compliance costs
- ensure that any regulatory requirements are necessary and simple to understand and use
- curtail the abuse of power that could add significantly to social and economic costs
- achieve outcomes that are consistent with community norms, for example in relation to equitable outcomes and ethical behaviour
- are consistent with complementary regulations and policies
- are adaptable, particularly, but not solely, in the light of future demographic and global economic trends
- take account of international agreements.

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

Interdependencies, contingencies and risks may also be important

The impact of any given change to the WR system will often be affected by other changes to the system, or to other policies. For example, the impacts of penalty rates on the opening hours of retail outlets partly depend on the extent of any trading hour restrictions.

In considering policy options, to what extent are the benefits of a given element of a worthwhile reform package dependent on implementing other elements of the package?

All policy changes have risks. They may not have their intended effects because of miscalculation or failure to appreciate the counter responses by people. Transitional costs may be high and implementation imperfect.

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

Issues in assessing economy-wide impacts

In addition to assessing the impacts of particular aspects of the WR system, the Commission, in line with the terms of reference, will also seek to examine the economy-wide impacts of the system (and of possible reforms to it), including on jobs, inflation, productivity and incomes, and how these flow through at the regional and industry level.

In undertaking this task, the Commission is mindful of the complexity of the linkages between WR and the economy as a whole, and the difficulties in isolating its effects from other factors driving economic performance:

- the impacts may be indirect, such as through training, innovation, the adoption of new information technologies and investment, and thereby hard to separate from them
- the impacts may require other complementary organisational changes or policy shifts
- even if gains from any change 'only' show up as a modest one-off permanent upward shift in incomes (a possibility raised by Peetz 2012), these can be important to people's lifetime incomes, but hard to discern empirically among the noise in the economy
- there may be opposing benefits and costs from reform, which make it hard to identify the effects separately. Related to this, there is no single measure by which to gauge whether a WR system has been successful (is it lower unemployment, anchoring low inflationary expectations, higher real net national disposable income, productivity, greater job security, job satisfaction, lower dispute rates, higher wages, more equitable outcomes, among many other possible measures?)
- there are limited observations in macroeconomic data, which may not be ideally suited to isolating the effects of reform, and this appears to be reflected in the lack of consensus in this area (Borland 2012; Deakin, Malmberg and Sarkar 2014). Contrary to this more aggregate analysis, more disaggregated studies based on firm-level data appear to be more promising in discovering effects that may still have aggregate impacts (Farmakis-Gamboni and Prentice 2011; Loundes, Tseng and Wooden 2003; Tseng and Wooden 2001).

Nevertheless, as discussed earlier, many macroeconomists cite past labour relations reforms as one of the reasons for Australia's improved macroeconomic performance since the mid-1990s.

The Commission invites participants' views on the best evidence about the impacts of the WR system. It also requests views about the mechanisms through which the WR affects aggregate economic outcomes, as well as impacts on particular regions, industries and firm sizes.

Data and analytical methods

As specified in the terms of reference, the Commission will draw on a wide spectrum of evidence, including:

- past overarching reviews of the system (most recently, the 2012 post–implementation review of the FWA (Australian Government 2012b)), analysis undertaken or commissioned by the FWC (including as part of its minimum wage and award reviews), and submissions to various recent Senate inquiries into changes to the WR system

- ABS[7] and other survey data (including the Household, Income and Labour Dynamics in Australia (HILDA), the Australian Workplace Relations Study (AWRS) and the Australian Work and Life Index (AWALI))
- data held by the Australian Department of Employment, such as its Workplace Agreements Database
- data from the FWO and the FWC that shed light on specific aspects of the WR system (such as trends in unfair dismissal cases and their outcomes)
- key legal cases
- submissions to this inquiry. (The Commission has also provided scope for stakeholders to make brief comments about WR matters on its website (http://www.pc.gov.au/inquiries/current/workplace-relations/comment).)

The Commission will consider various modelling and analytical methods in undertaking the inquiry, including econometric, micro-simulation and general equilibrium modelling.

The Commission seeks feedback on major studies and databases relevant to this inquiry. How could new data and new methods help improve the assessment of policy choices?

International experiences may provide some lessons about future directions

The Commission will consider any lessons from overseas institutional arrangements in each of the theme areas identified in the issues papers. In addition, the economic and social outcomes of different WR arrangements may sometimes be best identified using data across countries and time.

The Commission proposes to examine various international sources of evidence about WR systems, such as the United Kingdom Workplace Employment Relations Study (Van Wanrooy 2013; Van Wanrooy et al. 2013), the ILO NATLEX database, and data from the OECD (2014), the World Bank (2013) and the World Economic Forum (2014). These have several inconsistencies and other limitations (Aleksynska and Cazes 2014; Hall and Casey 2006), but may still be useful in this inquiry.

However, there may be other important sources of information and, potentially, lessons from overseas that relate to the effects of the regimes as a whole, rather than their parts.

Beyond their advantages in providing lessons about parts of the WR system and any of its flaws, are there broad lessons for Australia from overseas WR arrangements?

What are the most rigorous and comprehensive measures of the nature and impacts of international WR arrangements? What are the strengths and weaknesses of the existing measures?

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[7] For example, surveys such as Forms of Employment (2013), Working Time Arrangements (2012), Employee Earnings and Hours (2012), and micro datasets such as the Business Longitudinal Database (2006-07, 2010–11).

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Attachment A: Inquiry participation

This is a public inquiry, and the Commission welcomes participation from interested people and organisations. The five issues papers released by the Commission are intended to facilitate this participation. The papers set out the scope of the inquiry, the issues about which the Commission is seeking comment and information, the Commission's procedures, and how to make a comment or a submission.

The Australian Government has asked the Commission to provide a final report by November 2015. To meet this timetable, the Commission is seeking initial written submissions by **Friday 13 March 2015**. These submissions will inform the draft report, which will be publicly released in June/July 2015.

The Commission has commenced informal consultations and, following release of the draft report, the Commission will seek feedback from stakeholders through public hearings in August/September 2015, as well as a second round of submissions. The Commission will provide the final report to the Australian Government by 30 November 2015.

How you can contribute to this inquiry

By making a brief comment

The Commission welcomes brief comments from people who want to share their experiences or views on any topic covered by the inquiry, but do not wish to make a public, formal submission.

Unlike submissions, brief comments are not considered public by default and will only be published if the submitter gives the Commission express permission to do so (a check box has been provided on the submission form on the website). The Commission may publish comments on its website and/or within the inquiry report.

By lodging a submission

The purpose of the issues papers is to provide initial guidance on what might be relevant to this inquiry and the evidence the Commission is seeking from stakeholders. The Commission encourages submissions on any of the issues relevant to the inquiry's terms of reference, even if not explicitly discussed in the issues papers. The papers are not intended to be exhaustive. You should feel free to raise any matter you see as relevant to the inquiry,

but should not feel obliged to comment on *all* the matters raised in the issues papers. Some issues papers may be more relevant to you than others.

How to prepare a submission

Submissions may range from a short letter outlining your views on a particular topic to a much more substantial document covering a range of issues. Where possible, you should provide evidence, such as relevant data and documentation, to support your views.

As this is a public review, all submissions should be provided as public documents. Each submission, except for any information supplied in confidence (see below), will be published on the Commission's website shortly after receipt, and will remain there indefinitely as a public document. Copyright in submissions sent to the Commission resides with the author(s), not with the Commission.

Under certain circumstances, the Commission can accept sensitive material in confidence, for example, if it was of a personal or commercial nature, and publishing the material would be potentially damaging. Please contact the Commission for further information and advice before submitting such material. Material supplied in confidence should be provided under separate cover and clearly marked 'IN CONFIDENCE'.

How to lodge a submission

Each submission should be accompanied by a submission cover sheet. The submission cover sheet is available on the inquiry web page. For submissions received from individuals, all **personal** details (for example, home and email address, signatures, phone, mobile and fax numbers) will be removed before it is published on the website for privacy reasons.

The Commission prefers to receive submissions as a Microsoft Word (.docx) files. PDF files are acceptable if produced from a Word document or similar text based software. Do not send password-protected files. Do not send us material for which you are not the copyright owner, such as newspaper articles. Please provide a reference or link to such material in your submission.

Please remove track changes, editing marks, hidden text and internal links from submissions before sending to the Commission. To ensure hyperlinks work in your submission, please type the full web address. Submissions sent by email must not exceed 20 megabytes as our email system cannot accept anything larger. If your submission is greater than 20 mb in size, please contact the inquiry team to organise another method of sending your submission. It is the Commission's experience that submissions exceeding 20 megabytes do so because they contain uncompressed photographs. We encourage submitters to only supply photographs if they are evidential in nature and are in a compressed format.

Submissions can be sent by email or post:

Email	workplace.relations@pc.gov.au
Post	Workplace Relations Inquiry Productivity Commission GPO Box 1428 CANBERRA CITY ACT 2601

* If you do not receive notification of receipt of an email message you have sent to the Commission within two working days of sending, please contact the Administrative Officer.

By attending a public hearing

The Commission holds public hearings in all of its public inquiries. They allow interested parties to expand on written submissions and to discuss inquiry issues with Commissioners in a public forum. Any organisation or individual can attend a public hearing, either to speak to a written submission or to observe the proceedings.

Public hearings will be held following the closing date of that round of submissions. The hearing schedule will generally run over a two-week period.

How to register to attend a public hearing

After the release of the draft report, the Commission will start taking registrations for presenting and observing hearings. Participants who are not able to attend a hearing in person can participate by phone.

Observers are encouraged to register to attend public hearings so that they can be notified via email of any changes to the schedule or start time of hearings. However, any member of the public is welcome to attend a public hearing as an observer without having registered beforehand.

Commission staff will contact you if you have registered to present at a public hearing to discuss a specific time for your appearance. The amount of time allotted to each appearance will vary depending on the number of registrations received for that hearing day. However, most appearances do not exceed one hour. Your name will then appear on a schedule of appearance for that public hearing, which will be made publicly available on the Commission's website prior to the hearing date.

You may register to represent yourself as an individual, or an organisation. Registrations will be accepted for up to four people to present jointly on behalf of an organisation, however registrations will not be accepted for the same organisation to be represented by different presenters at separate times or on separate dates.

Hearings are conducted in a relatively informal manner. Presenters will be called to the witness table and make a brief opening statement. Commissioners will then seek elaboration on, or clarification of, particular points raised by the presenter in their statement and written submission/s.

Legal representation is unnecessary and there is no requirement to take a formal oath. The *Productivity Commission Act 1998* does require participants to be truthful in their remarks.

The proceedings will be recorded and later transcribed into text, which will be available from the Commission's website and may be quoted in the inquiry report.

At the conclusion of the schedule for the day, Commissioners may accept brief comments from anyone in the audience. These comments would then be included in the transcript of the proceedings. Interjections from the floor are not permitted at any time during proceedings.

Australian Government
Productivity Commission

Workplace Relations Framework: Safety Nets

Productivity Commission Issues Paper 2

January 2015

Issues Paper No. 2

The Commission has released this issues paper to assist individuals and organisations to prepare submissions in relation to safety nets in the workplace relations system.

There are four other issues papers related to the inquiry that may also be of interest.

Information about the terms of reference, the key dates, how to make a submission, the processes used by the Commission and our contact details are in Issues Paper No. 1, and are also available on the Commission's website:

http://www.pc.gov.au/inquiries/current/workplace-relations

The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website (www.pc.gov.au).

Contents

2.1 Providing safety nets

The workplace relations (WR) system provides employees with various guarantees about their wages and conditions, most notably through various minimum wages, a multitude of awards and obligatory employment standards (the National Employment Standards (NES)). Understanding the impacts of safety nets and their ripple effects throughout the wages system is important to their effective design.

These regulations principally relate to employees. Other people supplying labour — business managers, the self-employed and independent contractors — offer their services in a largely unregulated market, although the general protections of the *Fair Work Act 2009* (Cth) (FWA) still apply to independent contractors.

Minimum standards for wages and conditions depend on the circumstances.

- Where there is a 'registered agreement' in place (Issues Paper 3), the minimum pay and conditions in the agreement apply. To create a registered agreement, the parties must obtain the agreement of the Fair Work Commission (FWC), which decides if the employees are each better off overall under the agreement than the award — indicating that the award safety net directly affects the terms that can be negotiated under enterprise agreements.
- If there is no registered agreement, the minimum pay and conditions in the relevant award is likely to apply.
- Some high-income employees and managers are award free. Where no award or agreement applies, the NES and the federal minimum wage[1] sets the floor on pay and conditions.

2.2 The Federal minimum wage

Minimum wages have been part of the workplace relations system for more than a century, but remain a persistently controversial issue. The current federal minimum wage rate is $16.87 per hour for adults (or around $33 300 annually for a full-time employee) with various lower rates for younger workers, apprentices and trainees, some people with disabilities, and people whose capabilities are being assessed during a trial period (FWC 2014b).

For much of its history, the federal minimum wage was not a universal minimum wage. It formally applied only to federal awards and, until 1975, women were paid only a share of the rate (Bray 2013). With an increasingly centralised WR system, Western Australia is

[1] Or the Western Australian minimum wage for employees of unincorporated enterprises in that state.

now the only state that has an independently-determined minimum wage, which applies to relevant employees of unincorporated enterprises (WAIRC 2014).

There is no agreed estimate of the number of adult Australians paid at the hourly minimum wage rate. Using a variety of surveys, one study estimated that in 2010 and 2011 between 4.1 and 9.1 per cent of employees were paid at or below[2] the minimum wage rate (Bray 2013, p. 22). Initial estimates by the Productivity Commission using the 2012 Household Income and Labour Dynamics of Australia (HILDA) survey suggests 7.1 per cent of adults were paid at or below the minimum wage.

Statutory minimum wages are common among developed economies (with 26 of 34 OECD countries having minimum wages). Some OECD countries that do not have a *universal* minimum rate, including Germany (currently), Finland, Denmark and Norway, still have disparate minimum rates covering many workers, with the rates determined on an industry basis. Overall, the trajectory of international policy has been to establish universal minimum wages, but to complement them with measures to stimulate employment. For example, the German Government is rolling out a universal minimum wage in 2015.

What is the appropriate role of minimum wages?

The original rationale for the Australian federal minimum wage — rooted in the Harvester decision in 1907 — was to ensure that a male breadwinner's income was sufficient to meet the reasonable needs of a family household (a man, his wife and their three children). Since that decision, women's social and economic roles have changed dramatically, family structures have evolved and the social welfare safety net has widened. Minimum wage provisions have partly adapted to these changes, most notably with the decision in the mid-1970s to require a common rate for males and females, which embedded the doctrine of 'equal pay for work of equal value'(Bray 2013, p. 16). Some see the economic and social developments over the last century as requiring a wider re-assessment of the role and design of the minimum wage in contemporary Australia.

Nevertheless, broader concerns about income distribution in working households remain an important consideration in the wage determinations by the minimum wage Expert Panel of the FWC (2014a). However, not all minimum wage earners are members of low-income households. In 2011, the likelihood that an adult employed person in the lowest quintile of working households was on the minimum wage (or lower) was nearly eight times higher than that for the top quintile of households (based on data from Bray 2013, p. 33). On the other hand, the same data showed that only around 30 per cent of all adult minimum wage earners were in the poorest 20 per cent of working households. Among other factors, the two results suggest the greater dependence of lower-income households on a single income earner (although the Commission will examine this issue further).

[2] For example, because their reported hourly wages did not take account of salary sacrificing. The variations across surveys reflect sample and other methodological differences.

Moreover, the degree to which people remain at low pay levels is important in considering the long-run impacts of minimum wages on individuals (Buddelmeyer, Lee and Wooden 2009; Cai 2013; McGuinness and Freebairn 2007). For example, a young person may start at the minimum wage, and then progress to higher wages. In that instance, any income effects of a minimum wage are temporary, which may affect the desirable level of the minimum wage.

The implication is that while minimum wages do assist some low-income households, they may not necessarily target poverty and inequality very well. Indeed, a higher minimum wage may actually increase inequality if it lowers employment in low income households (Leigh 2007). Findings on these issues depend on the degree to which non-market income (such as childcare at home) is included in household income (Apps 2001) and on evidence about the extent to which the labour market responds to minimum wages.

There is little consensus on the effects of modest changes in minimum wages on employment and equity. One of the Commission's challenges in this inquiry will be to unravel this contested area of labour economics, and to reach judgments about the size and nature of the effects of minimum wages.

In theory, for simple, highly competitive industries and labour markets, binding minimum wages should have unambiguous negative effects on employment. However, the effects are less clear-cut and may even operate in the other direction in more complicated labour market settings (Booth and Katic 2010).

On the empirical front, estimates of the impact of minimum wages on employment and hours worked vary substantially (Doucouliagos and Stanley 2009; Dube, Lester and Reich 2010; Neumark 2014; Sawhill and Karpilow 2014). The uncertainties about the importance of any employment effects are reflected in economists' opinions, most notably by the divergence of views by a sample of eminent US economists (IGM Economic Experts Panel 2013). For its part, the Expert Panel of the FWC, which determines the federal minimum wage in Australia, has argued that 'modest minimum wage adjustments lead to a small, or zero, effect on employment' (FWC 2014a, p. 10). However, the cumulative effect of successive increases in the wage may still have impacts on unemployment. There may be effects in only some regions and for some types of workers, and changing macroeconomic developments could increase (or decrease) the impacts of the regulated rate.

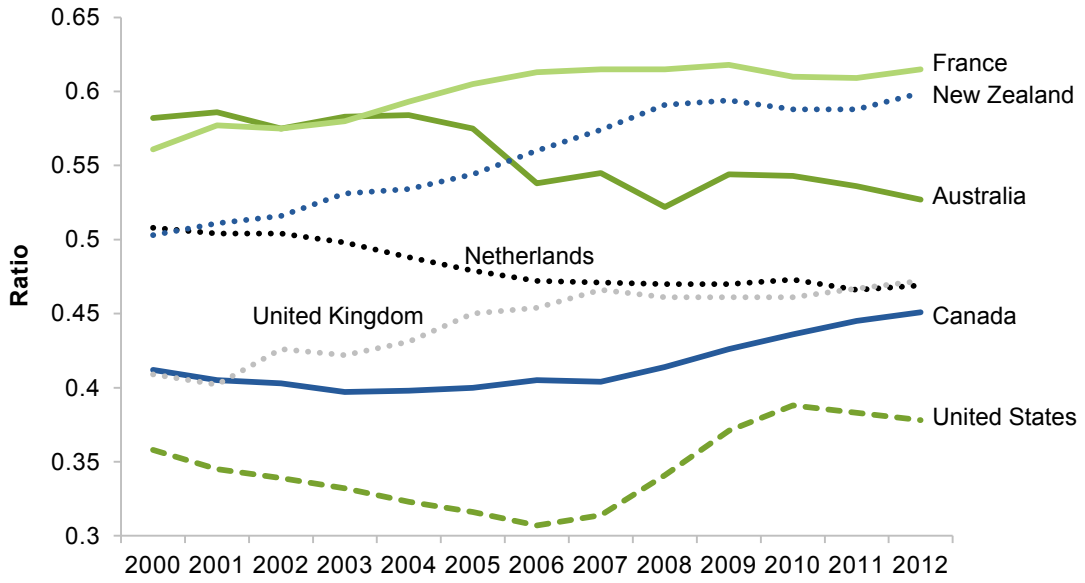
Sufficiently large increases in the minimum wage would make lower-skilled, less experienced employees less attractive to employers, and the FWC seeks to avoid the materialisation of this outcome in their consideration of any change to the minimum wage (FWC 2014a). Also, few claim that the wide disparity between junior minimum wages (currently around $6.20 an hour for a person aged below 16 years — or about 40 per cent of the adult rate) should be *entirely* eliminated. The size of the wage discount has long been justified on the grounds that younger workers have typically lower productivity and would be disadvantaged in labour markets were they paid at the adult rate — a point of consensus among many unions, employers and wage regulators. This seems to suggest an

acceptance that minimum wages can affect employment, but that views about the effects depend on the nature of the employee and the current level of the wage.

A further relevant factor may be that the ratio of the minimum wage to median full-time adult earnings has significantly fallen over the period from 2004 to 2012 (figure 2.1).[3] This may reduce the risks of increased unemployment.

The ultimate effects of minimum wage regulations are also influenced by the indirect impact of minimum wages on consumer prices, and the relative importance of the most affected consumer goods for households with different incomes.

Figure 2.1 **Minimum to median wages for several OECD countries**
2000–2012[a]



[a] Based on the ratio of the adult Federal Minimum Wage to the median of full time adult ordinary weekly cash earnings.

Data source: OECD.Stat database.

Minimum wages may also have other effects.

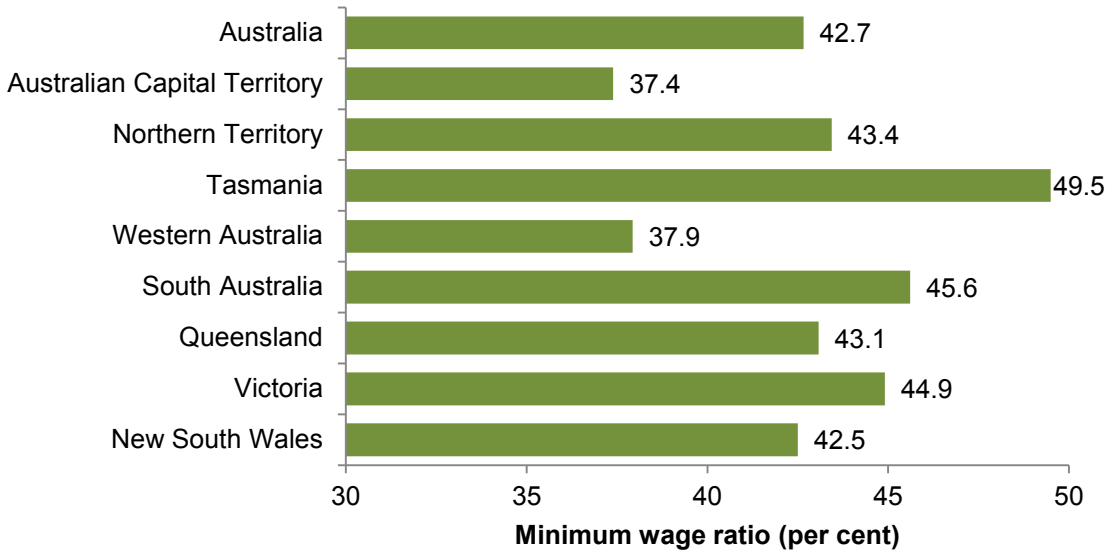
- Higher minimum wages may affect the returns to skill acquisition, with the direction and size of the effect dependent on the circumstances. A person who is either unemployed, or facing that risk, may acquire skills to be employable at the minimum wage. Moreover if the minimum wage rises, and in the presence of 'firing costs', it may pay for employers to raise the skills of any lower-skilled workers that are not

[3] While Australia has a relatively high ratio of minimum wage to median earnings by OECD standards, no other OECD country has experienced a decline in the ratio as steep as Australia (based on data from *OECD.stat*). The ACTU (2014b) has also undertaken extensive research in this area.

sufficiently productive at the higher minimum wage. There are also some arguments that minimum wages could lower training (Neumark and Wascher 2008, pp. 191–224)

- An increase in the minimum wage may also raise wages that are already above the minimum wage, so that the minimum wage affects many more workers than those on the minimum wage. Australia's award setting processes build in a link between award wages and statutory minimum wages. Around one quarter of employees in non-public sector workplaces are award-reliant (Wright and Buchanan 2013).
- Minimum wages have varying impacts on different workers (by age, gender, skill, industry and location). Minimum wages are more likely to affect lower skilled workers' employment prospects. Similarly, there may be varying state and regional impacts, with the ratio of minimum wages to average wages varying among these (figure 2.2). Some argue that rural businesses' employment decisions are more sensitive to minimum wages (Lewis 2004).

Figure 2.2 **Minimum wages to average weekly wages**
By state, May 2014[a]



[a] Based on the ratio of the adult Federal Minimum Wage to full time adult ordinary weekly cash earnings.

Data source: ABS, *Average Weekly Earnings, Australia*, May 2014, Cat. No. 6302.0.

It is common to examine international differences in the exchange-rate corrected values of the adult minimum wage levels as a potential measure of whether any given country's rate is excessive. Such comparisons may be misleading if exchange rates are volatile, but more problematically, do not take account of differences in labour productivity levels between countries. Expressing minimum wages relative to median wages (as in figure 2.1) is one way of addressing this. As an alternative, for some minimum wage jobs, it may be possible to estimate unit labour costs (PC 2014). *The Commission seeks feedback on the advantages*

and disadvantages of different approaches for comparing minimum wages across countries, and how such results should be interpreted.

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

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

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

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

What are the impacts of minimum wages on employment as a whole, and on particular groups of people (by age, skill, education, gender, and location, among other things)? How robust is the evidence? Are zero or positive employment effects from minimum wages for low-skill workers plausible for the industries in which minimum wages predominate, and if so why?

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

What evidence is there about the effects of minimum wages on the incentives for employees and employers to increase employees' skills?

How do minimum wages ripple throughout the wage system and over what time frame? Are any ripple effects desirable or undesirable and, if the latter, how would they be mitigated?

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

The minimum wage and the tax and transfer system

The tax and transfer system interacts with the minimum wage. People's decisions about whether to take a job and how many hours to work depend partly on the relative attractiveness of their net wages, the income they would otherwise receive through social security benefits and other considerations such as their prospects for promotion. Accordingly, at some point, reductions in the minimum wages are unlikely to have much effect on hours worked and employment. That point will vary across individuals, depending on their long-term job prospects and on their characteristics (which determine their eligibility for social security and other benefits). Below this point, the binding constraint on employment is not the level of demand by employers, but the degree to which households are willing to supply labour at a given net wage.

It follows that government-funded *in-work* benefits, which increases net wages, may encourage people to work if the minimum wage is relatively low. Some suggest that, in comparison with minimum wages, in-work social security payments can achieve better employment outcomes while delivering more targeted assistance for low-income households. The underlying question is where the balance should lie between wage regulation and the tax and transfer system in addressing concerns about income distribution. In-work benefits could take several forms:

- benefits in-kind that relate to employment, such as the child care subsidy provided by the Australian Government (which only targets families with young children)
- a minimum income paid to the employee comprising the employee's market wage plus a wage subsidy to the employer. An Australian Government program (*Wage Connect*) already provides such wage subsidies for the long-term unemployed to increase their likelihood of sustained employment. Similarly, state payroll tax exemptions for small businesses can be seen as a weakly targeted (and inefficient) subsidy for the size of firms most likely to employ minimum wage workers
- an earned income tax credit (EITC), which offers a credit for people who pay no tax on their labour income so their after-tax income exceeds their wage level. They were used in 17 OECD countries in 2010, including the United States, United Kingdom (now as part of Universal Credit), Ireland, France, Denmark, and the Netherlands (OECD 2011).

A combined EITC and a minimum wage might have advantages over an EITC by itself (ACTU 2014a, pp. 18–19; Sawhill and Karpilow 2014).[4] Some Australian economists have suggested that the real minimum wage be lowered and accompanied by an EITC to cushion people against any distributional impacts (Dawkins 2002). The issue was canvased by some submissions to the Henry Tax Review, and the Review itself suggested that it could be used in certain circumstances, but did not recommend its adoption (AFTSRP 2008, p. 101; Henry et al. 2009, p. 527). Four of the five original proponents for its adoption in Australia have called again for its consideration (Potter 2014). The fifth economist has highlighted the poor skills sets of many unemployed as the critical issue that needs to be addressed.

Any in-work government payment must ultimately be funded through higher taxes or forgone government services and transfers. Some tax measures, such as Australian corporate and income taxes, can significantly distort labour and investment choices (KPMG Econtech 2010). Accordingly, if the distributional objectives of the FWA associated with the low paid (as specified in s. 284(c)) are partly resolved through in-work benefits, this might eliminate some of the inefficiencies of wage regulations but, unless well-targeted, might raise (potentially greater) inefficiencies associated with taxes (OECD 2011, p. 11).

4 However, others question whether the hybrid approach helps the most disadvantaged (Neumark 2014, p. 8).

In-work payments involve additional considerations specific to them, including:

- the deadweight losses associated with tax benefits for people who would have worked regardless of the credit. These costs need to be compared to the deadweight costs of the minimum wage (such as potentially forgone employment opportunities and reduced output for some enterprises)
- the design of income cut-offs, tapers and other features of any model (Leigh 2005). There is considerable diversity in the design of working credit schemes internationally, including their generosity, eligibility criteria, methods for payment, the withdrawal regime and fiscal costs (OECD 2011, pp. 67–90). Most countries spent less than 0.5 per cent of GDP on working credits, but Sweden spent more than 2 per cent in 2009 (ibid 2011, p. 80)
- the degree to which they differentiate between family types, and bias the choice of family type (Meyer 2010)
- the extent to which people are able to manipulate in-work tax credits or make mistakes in their reporting (Slemrod 2010, p. 264). Overcompensation has been cited as an issue, and different countries adopt different approaches to minimise it (OECD 2011, p. 85)
- the complexity of any arrangements, including recipients' capacity to comprehend them and respond to the incentives they present, and interactions with the rest of the tax-transfer system
- the extent to which they might change community perceptions of recipients compared with traditional welfare measures (Sykes et al. 2013; cf Watson 1999)
- the degree of uncertainty about future net labour earnings. For instance, recent changes in the real minimum wage have tended to be relatively modest in Australia, so that uncertainty over future income is also low. Whether that would be true for budgetary measures (like the EITC) would depend on the institutional arrangements, the government's budget position and the state of the economy.

Are there grounds for an in-work benefit, taking into account their social and distributional impacts, effects on employment and economic efficiency, risks, administrative requirements, and compliance costs?

How would any in-work benefit be designed and implemented? How would it be targeted to minimise deadweight costs?

To what extent should an EITC or some other in-work payment serve as a complement or substitute for minimum wages?

How should any such payments be funded, and what would be the economic and distributional outcomes of alternative funding mechanisms?

What would be the budgetary implications of any in-work benefit, and how would this affect its desirability and possible timing?

Practical aspects of the minimum wage and alternatives

Evaluation of the minimum wage or alternatives also needs to take account of the processes used to determine the level of payments. The existing process for minimum wage determination is a transparent process, but an elaborate one, involving many matters of judgment. For example, there was considerable debate between stakeholders and the FWC about the degree to which the phased increase in the superannuation guarantee levy from nine to 12 per cent from 2013 to 2019 — an implicit pay increase — should have been offset by reducing increases in the minimum wage. The FWC says its practice is to take the superannuation guarantee 'into account' when determining changes to the minimum wage, but not in any mechanistic way (FWC 2014a, p. 80). Other countries adopt different processes for formulating the minimum wage and in defining its components (Belser and Sobeck 2012).

What reforms, if any, should be made to the processes used to determine the current minimum wage?

Should the desired processes be more prescribed in regulation or law; or are guidelines preferable?

2.3 National Employment Standards

If the first and primary safety net established in WR legislation is the minimum wage, the second safety net is the NES. Part 2-2 of the FWA specifies certain minimum standards for workers covered by the national WR system. Amongst other factors, the NES specifies minimum requirements for access to leave, hours of work, and termination and redundancy pay, though some provisions do not apply to casual employees. Terms in awards, agreements and employment contracts cannot exclude or provide a lower entitlement than the NES.

These standards have social and safety net goals similar to those that underpin the minimum wage, and in some cases there is an explicit acknowledgment that a condition has a wage equivalent (such as cashing out of paid annual leave in an award or enterprise agreement). Regardless, like minimum wages, there is a risk that they could impose a cost on employers that might exceed the marginal benefits of hiring some employees, with adverse implications for employment. Accordingly, some of the issues arising for minimum wages may also be relevant to the NES.

Nevertheless, the Commission does not propose to undertake the same holistic analysis of the NES, unless submissions present solid grounds for review. Unlike the minimum wage, there appears to be little controversy over the NES as a whole. Although the value of the benefits rises with each increase in the wage level, the primary policy interest appears to lie with specific aspects of the NES. This then is where the Commission proposes to focus.

Minimum standards may have impacts on workplace flexibility and compliance costs. The extent to which they do so will depend on the specific standard in the NES, the procedural obligations of employers, and the degree to which employers can use 'reasonableness' grounds to vary them (as in working on public holidays). As an illustration, the Australian Chamber of Commerce and Industry (ACCI) has claimed that some of the 'family friendly' provisions in the NES are problematic, and if nothing else, have uncertain impacts (Annexure 1, 2013). Similarly, the Australian Industry Group (2012, pp. 12–13) expressed concerns about the expansion of requests for flexibility of working arrangements beyond those associated with parental care. Of course, these might be balanced by the social benefits that such arrangements enable.

The Productivity Commission has previously recommended changes to specific aspects of the NES on social grounds, for example in relation to parents who have children with disabilities (PC 2011, p. 728) and to adoptive parents (PC 2009, p. XLIII). In some cases, it might be possible to preserve those social benefits and yet reduce compliance costs and uncertainty for employers.

In early consultations, participants also raised other concerns about the NES provisions:

- Although long service leave entitlements are included in the NES, the minimum entitlement is governed by different requirements in different states, rather than the one nationally-uniform set of provisions.
- In many industries, employees are unable to transfer some entitlements, such as qualification for parental leave and long service leave, when they move between jobs. Some claim that the capacity to transfer such entitlements may improve job matching and mobility, as well as being more equitable. Others suggest that the present contingency of these entitlements on tenure with the firm maintains loyalty to firms, and that changes would have cost implications for businesses. The issue of long service leave is raised further in Issues Paper 5.

What, if any, particular features of the NES should be changed?

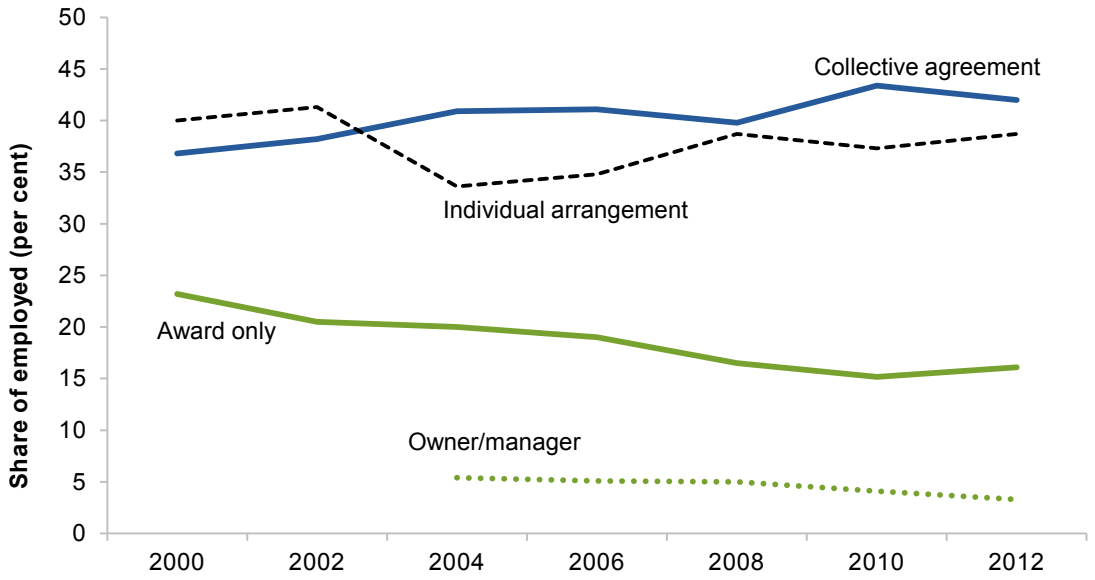
2.4 The award system and flexibility

The modern award system is seen as another important safety net, and is specified as such in the Objects clause of the FWA (s. 3(b)). While there has been a large reduction in the number of awards and a dramatic decline in the number of wage classifications per award (Hamilton 2012, p. 10), modern awards still spell out minimum wages and conditions for a wide range of industries, occupations and skill levels (such as the wage rate for 'Cemetery Employee Class 1' or a 'Car Parking Officer Level 1').

The share of employees with wages and conditions set exactly at the award has been falling (figure 2.3). Nevertheless, awards retain importance in setting enterprise agreements (which often refer to them) and in individual agreements that seek to pay given percentage increases above the award payment.

The level of prescription in awards reflects the 'modern awards objective' (s. 134 FWA). This seeks to achieve certain distributional and equity goals (most notably, the 'needs of the low paid', 'the principle of equal remuneration for work of equal or comparable value' and additional remuneration for work outside ordinary working hours), while taking account of their economic effects and regulatory burdens.

Figure 2.3 **Award-only contracts are becoming less important**
2000-2012[a]



[a] Individual agreements include a working proprietor of an incorporated enterprise (around 10 per cent of individual arrangements), an employee who has their pay set by an individual contract, registered individual agreement (for example, an AWA), common law contract or an individual agreement to receive over award payments. The survey was not designed as a time series, so caution should be exercised when comparing data between different years.

Data source: ABS, *Employee Earnings and Hours Australia*, Cat. No. 6306.0.

The FWC adjusts minimum wages in modern awards each year as part of the same process used to determine the federal minimum wage, typically copying the growth rate in minimum wages across to award rates. The FWC must also review all modern awards in a more holistic way every four years[5] based on legislated criteria set out under the 'modern awards objective' of the FWA (s. 134). The objective includes the goal of 'a fair and relevant safety net', consideration of the desirability of promoting social inclusion through increased workforce participation, the requirement to pay penalty and overtime rates, any impacts on business and the importance of simplicity. The FWC can also vary awards at other times if that is necessary to achieve the modern awards objective. However, the trigger for doing so must be an anomaly or a 'significant' change in circumstances ([2012] FWAFB 5600).

5 And in the transitional phase associated with modern awards, review the awards on a more narrow basis.

Many of the same considerations that influence the determination of the minimum wage are common to award decisions by the FWC, although the modern awards objective includes some further criteria (s. 284 versus s. 134 of the FWA).

Awards are more flexible than minimum wages. For example, at times, payments have gone down,[6] as illustrated by recent decisions by the FWC to change its initial versions of some modern awards. These decisions led to a *reduction* in the penalty rates for casual workers in the restaurant industry on Sundays ([2014] FWCFB 1996) and for allowances for pizza delivery drivers ([2014] FWC 1592). Modern awards must also include flexibility clauses, which allow an employer and an employee to create an individual flexibility arrangement (IFA) in which the parties agree to change (certain) award conditions if the employee is still better off ('the 'better off overall test' or BOOT, discussed below). Enterprise agreements can also depart from award conditions. The degree to which such arrangements really confer flexibility is discussed in Issues Paper 3.

Awards may serve several positive functions. They may:

- provide a template set of conditions for small businesses and employees that do not want to craft their own enterprise agreements, use detailed individually-tailored contracts or hire subcontractors. There can be significant costs in negotiating terms under such arrangements that mean they are not necessarily suited to smaller businesses
- provide a starting point for negotiations of enterprise agreements (and above-award payments for individuals), reducing the scope of required negotiations
- address the power imbalance that may occur between employers and some employees when negotiating individual arrangements
- be seen as credibly 'fair' as they have longstanding historical legitimacy and are determined by an independent agency that balances their various impacts.

On the other hand, some argue that the tax and transfer system, the NES and minimum wages already serve as adequate safety nets, and that awards, in effect, set a multitude of further 'minimum wage floors for jobs scattered across almost the entire wage distribution' (Wooden 2010). This raises questions about the role of awards, including their efficiency and regulatory burden. The FWA gives primacy to wage determination through enterprise-level collective bargaining (s. 3(f)). Yet the backdrop for that bargaining has already locked in a set of minimum requirements based on the occupation and skills of the employee. Even though now much simpler than in the past, some claim that awards can complicate human resource management, may contribute to payment errors by employers, and reduce the capacity of businesses to adapt (especially for those enterprises covered by multiple awards).

6 In principle, they could do so for a minimum wage, though the Commission is not aware of any case where this has occurred.

The FWC's award determination process is also sometimes seen as complex and lengthy, requiring fine judgments about appropriate entitlements, and involving challenges in identifying the appropriate coverage of jobs. These challenges permeated the process of award simplification. The issue persists, as illustrated by debates about the appropriate award for standalone catering businesses in the Restaurant Industry Award ([2013] FWC 7840). A question is whether there are arguments for further changes to awards, including:

- further consolidation and simplification
- reliance instead on the other safety nets in the WR system (potentially supplemented by the addition of some other basic provisions in the NES)
- changes to the processes for their determination by the FWC
- whether the four yearly review process is suitably nimble in addressing changing economic circumstances — an issue raised by some parties in early consultations.

The choice among these options depends on the:

- appropriate role of awards in a decentralised WR system that emphasises enterprise bargaining and allows for individual arrangements
- economic and social impacts of various type of award arrangements (including alternatives), taking account of the effects on different parties
- the scope for reducing the problems posed by awards through changes to the Modern Award Objective and the processes used by the FWC to periodically determine awards, including the timing of reviews.

The Commission seeks feedback on these issues, and the implementation and transitional challenges of any significant changes.

2.5 Penalty rates

While penalty rates are an important feature of awards and are not separate from them, some types of penalty rates have aroused a special degree of controversy, and accordingly are worth considering alone. The FWA specifies that modern awards must take 'into account' the need for additional remuneration for people working on overtime, shift work, weekends, public holidays and at 'unsocial, irregular or unpredictable hours' (s. 134 (da)). 116 of the 122 modern awards specify penalty rates, albeit with different rates, depending on the industry, the day and time worked (DEEWR 2012, p. 12).

Overtime and penalty rates can be a particularly important element of overall remuneration for some workers, both by:

- industry, for example, in the retail and hospitality industries in the case of weekend and evening work, and health services in the case of shift allowances
- wage level. For instance, for a casual employee aged 20 years working in a restaurant for 6 hours at the minimum relevant award wage on a Sunday would earn $172 of

which around $50 or just under 30 per cent would represent penalty rates (based on the tables reproduced in ACTU (2012b, p. 43). However, for most employees in such industries, income from penalty rates would comprise a much smaller share of total earnings.

While there are relatively few contentions about additional payments for overtime and shift work, there are polarised views about the appropriateness of weekend penalty rates in some sectors, which reprise aspects of the debate on the justification for, and effects of, minimum wages (Lewis and Mitchell 2014). The main concerns relate to arrangements in the hospitality and retail sectors.

Broadly, there are two alternative claims about penalty rates (summarised by the Senate Report into the matter, EEWRLC 2013).

Some argue that regulated penalty rates for working on weekends or evenings are justified because they compensate people for working at times that are asocial, and assist people who often have low incomes and poor bargaining power (ACTU 2012a, 2012b; SDAEA 2012; United Voice 2012). For instance, the Shop Distributive & Allied Employees Association has remarked that:

> The very fabric of our society is held together by engaging with friends, family and the wider community and these times frequently occur in the evenings, on weekends and on public holidays. For those who work during these times, regardless of whether or not they have elected or been required to, they are deserving of recompense for missing out on valued and valuable social times, especially when they are amongst the lowest-paid workers in the country. (2012, p. 3)

The FWC has typically accepted these arguments as valid when considering changes to awards although, at times, it has revised the rates.

In contrast, others claim that the social rationale for regulated penalty rates has declined as weekends have increasingly lost their historically special character as days of rest for some people, and as community and consumer expectations about buying goods and services have shifted in Australia towards a 24/7 economy (ACCI 2012; ARA 2013; Lewis 2014).

Changes in the regulatory environment may have also affected perceptions of normal working hours. A majority of states and territories in Australia have either completely deregulated trading hours or limited such restrictions to selected public holidays, with regulation of weekend trading hours remaining only in Queensland, South Australia and Western Australia.

It is sometimes further claimed that if penalty rates were de-regulated, profits, employment and hours worked would rise, and for some employees this might actually increase their earnings. Penalty rates might still be paid, but would be determined by the need to attract skilled and reliable workers, rather than because they were regulated. For example, the Council of Small Business of Australia has said:

> The nature of society has changed: trading hours of shops and restaurants have changed to 7 days a week; consumers expect service 7 days a week; rural areas rely upon tourist dollars to maintain jobs and their economic security; many people cannot work during the traditional Monday to Friday period and can only work on weekends or in the evening; as the population ages more and more people are seeking employment to supplement their income and also give them access to activity and interaction with people. (2012, p. 1)

A key question is therefore establishing a conceptually sound and consistent rationale for penalty rate regulations and, where testable, the empirical basis for any claims. An evidence-based understanding of the impacts of current and any amended penalty rate regulations on employees, businesses (by size and industry), the community and consumers will be an important issue for the Productivity Commission. The Commission will draw on survey research on 'work and life' (Skinner and Pocock 2014), a study of Sunday trading (ACRS 2012), various ABS datasets (including the Time Use Survey) and the Household, Income and Labour Dynamics in Australia (HILDA) Survey to further examine the issues. The FWC's Australian Workplace Relations Study 2013–2014 may also assist. However, the Commission welcomes provision of other data and analysis that will contribute to a rigorous examination of the issues.

There are a several policy approaches to penalty rates that might result from such analysis. One would be to accept the principle that regulated penalty rates are an inherent element of any regulatory structure necessary to protect employee interests. In that case, the prime area of interest would be the methodologies and benchmarks for determining regulated rates. Another is that that setting of such rates is not part of an essential regulatory structure and should instead be a choice for individual enterprises and their employees, with less or no role by the regulator. Any premiums for weekend and evening work would then be market-determined, and might vary over time, place, occupations, industries and businesses.

It would be helpful if submissions indicated whether one of these courses is the preferred model, why, and with what effects on society broadly, and on employees, consumers and businesses.

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

Other countries' experiences may also be useful. Many do not have penalty rates for weekend trading, but instead have time-off-in-lieu arrangements. An interesting question is what happens to the prevalence of work on weekends in countries with different penalty rate arrangements, and the impacts on wages and profits. The experiences of New Zealand may be particularly instructive.

How should penalty rates be determined?

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

What are the economic effects of current and alternative penalty rate arrangements on business profitability, prices, sales, opening hours, choice of employment type, rostering, hours worked, hiring, unemployment and incomes?

Were penalty rates deregulated, would wages fall to those applying at other times, or would employers still have to pay a premium to attract labour on weekends and holidays?

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

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

What do the experiences of countries like New Zealand, the United Kingdom and the United States — which generally do not require penalty rates for weekends — suggest about the impacts of penalty rates?

What are the variations in profit margins and sales over the week, and to what extent does this affect the appropriate design of penalty rate arrangements?

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Australian Government
Productivity Commission

Workplace Relations Framework: The Bargaining Framework

Productivity Commission
Issues Paper 3

January 2015

Issues Paper No. 3

The Commission has released this issues paper to assist individuals and organisations to prepare submissions in relation to bargaining and industrial disputes in the workplace relations system.

There are four other issues papers related to the inquiry that may also be of interest.

Information about the terms of reference, the key dates, how to make a submission, the processes used by the Commission and our contact details are in Issues Paper No. 1, and are also available on the Commission's website:

http://www.pc.gov.au/inquiries/current/workplace-relations

The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website (www.pc.gov.au).

Contents

3.1 Bargaining and industrial disputes

In addition to setting minimum terms and conditions, the workplace relations (WR) framework regulates how employers and employees can bargain for better conditions. Under current arrangements, employers and employees have multiple avenues for making employment agreements. They can bargain collectively or individually, and with or without a representative. Different rules apply to different agreements, and flexibility to determine employment arrangements is conditional.

This paper raises the main issues associated with bargaining, including the leverage through industrial disputes that parties may use as part of the negotiating process. As in the other WR inquiry issues papers, the Commission's approach will be to test alternative bargaining arrangements against the objectives and design criteria identified in Issues Paper 1. An overarching concern will be *the extent to which bargaining arrangements allow employees and employers to genuinely craft arrangements suited to them — a broad issue for stakeholders in this inquiry.*

This issues paper covers three main topics: the enterprise bargaining framework (section 3.2), industrial action associated with enterprise bargains (section 3.3), and bargaining of individual arrangements outside enterprise agreements (section 3.4). Though a keystone of bargaining, general protections are discussed within a wider context in Issues Paper 4.

3.2 Types of enterprise bargaining and their key processes

The *Fair Work Act 2009* (Cth) (FWA) explicitly emphasises enterprise-level collective bargaining (s. 3(f)) as the basis for determining wages and conditions and, more broadly, for shaping the relationship between business owners and their employees. This is not a new development. Since the introduction of the *Industrial Relations Reform Act 1993* (Cth), employees and employers have been expected to work together at the enterprise-level to agree on conditions of employment.

Three types of agreements can be made under the FWA: single enterprise agreements; multi-enterprise agreements (employees can bargain together in certain circumstances); and greenfields agreements for new ventures that have not yet engaged employees (and can be both single-enterprise and multi-enterprise agreements).

The FWA (Part 2-4) requires employers to take certain procedural steps before asking employees to approve an enterprise agreement, and to obtain Fair Work Commission (FWC) approval of the agreement. There are multiple requirements to meet, requirements to recognise representatives of employees, time limits for lodgment, provisions to establish

informed consent by parties to the agreement, an obligation to bargain in good faith, and compliance with the National Employment Standards (NES) and minimum conditions set under the relevant awards.

Clearly, some processes are important to enable efficient bargaining, but it is an open question whether there should be changes to processes to meet the objectives set out in the first Issues Paper. The Commission seeks stakeholders' views.

Greenfields agreements involve another set of obligations. Current regulatory structures do not allow employers to unilaterally determine the conditions for future employees in new work sites. The FWA requires that greenfield agreements be negotiated between an employer (or employers in a multi-enterprise greenfields agreement) and one or more relevant employee representatives (mainly unions).

Greenfields agreements are especially important in project-specific employment arrangements in the resources and construction sectors. The data show that two-thirds of greenfields agreements are in the construction industry (Australian Government 2012, p. 169). They can be important for negotiating finance, as project risk is influenced by labour costs and any arrangements in the agreement that may be inimical to the efficient and speedy completion of projects. Accordingly, any weaknesses in the arrangements have potentially large impacts on major project investment in Australia. The FWA Review Panel shared these concerns (Australian Government 2012, recommendations 27-30). Proposed amendments currently before Parliament seek to extend good faith bargaining to greenfields agreements and establish a three month negotiating timeframe (Fair Work Amendment Bill 2014). If agreement cannot be reached within the three months, employers would be able to take their proposed agreement to the FWC for approval.

Whatever the merits or otherwise of these proposals, they bring greenfield agreements under the spot light, and raise the issue of the best arrangements for new projects.

The Commission seeks views about the best arrangements for greenfields agreements (not just those contemplated in the recent Bill), including an assessment of the effects of any arrangement on the viability and efficiency of major projects on the one hand and, on the other, maintaining the appropriate level of bargaining power for employee representatives.

A further concern expressed by some employers, as discussed in the Commission's examination of Australia's infrastructure construction industry (PC 2014), is the prevalence of what amounts to replica enterprise agreements among many firms, reflecting 'pattern bargaining'. The FWA has several provisions hostile to pattern bargaining (most notably s. 412), but the practice continues as adoption of a template is lawful if the negotiating parties can make a case that the bargaining still took place in good faith. Moreover, negotiating parties would need to be seeking identical (rather than merely similar) terms across two or more employers to fall foul of the prohibition (Forsyth et al. 2010, p. 146).

Pattern bargaining sits uneasily with the goal of the WR system to develop agreements that reflect the particular circumstances of the enterprise and its employees. Some business groups suggest that the scope for adoption of what amounts to pattern bargaining should be eliminated (MBA 2013, pp. 34–35).

However, pattern agreements (broadly defined) may genuinely be agreed to for a number of reasons. They may reduce the costs of negotiating enterprise agreements and may, as some employer groups have argued (Ai Group 2014a, p. 15), reduce project risk if they take the form of identical agreements forged by a head contractor and subcontractors on a major project. Template arrangements may also lower costs of developing enterprise agreements for smaller enterprises and might sometimes be preferred over awards or individual arrangements.

These various aspects raise the question of the appropriate role, if any, of pattern bargaining, a matter on which the Commission seeks comments.

An additional issue relates to the capacity of employers to genuinely negotiate conditions with their employees where the employer lacks substantive control over the workplace. Some claim that this may occur under some labour hire arrangements, for example. Labour hire involves a three-way relationship between host, agency and worker, in which agencies may sometimes have limited control over the conditions of workers and the nature of the working environment. Where agencies have little scope to influence conditions of work, bargaining between agencies and workers may not allow the genuine setting of conditions.

To what extent does the current system allow for bargaining with the most appropriate enterprise?

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

To the extent that it would be desirable, how could joint enterprise bargaining work in practice?

Restrictions on agreement content

The FWA requires that enterprise agreements contain 'permitted matters' that relate to the employee-employer or union-employer relationship (s. 172(1)). The FWA is specific on some matters, such as the way in which an agreement will operate and employee-authorised deductions from wages. However, the FWA is largely silent on the large set of matters that might be considered as part of the employee-employer or union-employer relationship.

'Unlawful terms' (s. 194) are those that cannot be included in enterprise agreements and relate to issues such as discrimination, the ability to 'opt out' of an agreement, bargaining service fees and breach of existing provisions within the FWA.

Much of the debate around content restrictions surrounds terms about union deductions from wages, the capacity of unions to represent employees and terms that restrict the employer's ability to use contractors or labour hire (discussed further in Issues Paper 5). Employers have sometimes also objected to the specification in agreements of certain training requirements (such as a requirement to engage a certain number of apprentices).

The 2006 changes to the workplace relations system (Work Choices) placed some restrictions on permitted matters. However, the FWA moved away from legislative prescription to reliance on jurisprudence about 'matters pertaining' to the employment relationship. This recognises that it would be hard (and perhaps undesirable), in the absence of an understanding of the context of bargaining, to set out a white or black list of all permitted matters. For example, a training requirement in an enterprise agreement might be a two-way commitment intended to achieve productivity improvements or alternatively an intrusive arrangement that limits an employer's prerogative to manage their business. The recent FWA review did not recommend further changes to current arrangements.

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

Agreements need to make employees 'better off overall'

A registered agreement cannot make a person worse off than under the NES and any relevant award — an agreement must pass a 'better off overall test' or BOOT (s. 193 FWA). The BOOT is a mechanism for assessing the content of proposed enterprise agreements against the safety net. It replaces various formulations of the No Disadvantage Test that applied under previous federal enterprise bargaining laws.

The test only requires comparison against the modern award, not any existing agreement. It is a global test. Not every provision needs to be an improvement, provided that the advantages outweigh the disadvantages. Further, it is not a collective test. Each employee (or prospective employee) under the agreement must be better off. So, while there is scope in an enterprise agreement to trade off particular benefits of a modern award against other benefits that are valued more highly by employees, this requires that all employees covered by the agreement are better off overall.

The final determination is made by the FWC, which must be satisfied that the BOOT has genuinely been met before it will approve an agreement. There is a small degree of flexibility. There are exceptional circumstances when the FWC may approve an agreement that does not pass the test, for example, a business that is experiencing a short-term crisis (s. 189 FWC).

In submissions to the Australian Government's (2012) post-implementation review of the FWA, stakeholders raised concerns about the impact of the BOOT on the WR system's flexibility. These concerns related to the limited consideration of non-monetary benefits to

employees, the need to ensure that every employee under an agreement was better off, and claimed inconsistencies in the application of the BOOT by the FWC. In its review, the Panel shared some of these concerns, and recommended that flexibility terms in the FWA for both awards and enterprise agreements (ss. 144 and 203) give more explicit acknowledgment to tradeoffs between monetary and non-monetary benefits. The FWA does not incorporate this recommendation, but its absence does not mean that parties cannot make such tradeoffs. The FWO has explicitly indicated that its interpretation of flexibility clauses would allow tradeoffs between some remuneration rates and non-monetary benefits (FWO 2015). On the other hand, the scope for such tradeoffs in an enterprise agreement is constrained by the content of the flexibility clause in the agreement. Negotiated clauses apparently do not necessarily include non-monetary benefits as acceptable tradeoffs. There is, in other words, a difference between what the FWA might permit and, in practice, what actual agreements specify.

As in the previous review, the current Australian Government has proposed changes to the BOOT to make it clear that non-monetary items (such as more flexibility for an employee about when they work) can be considered as part of the BOOT, and that alter the oversight arrangements and burden of proof for the BOOT.

To what extent is the BOOT clear and appropriate in its current form, and how, if at all, should it be improved?

Should the BOOT be met for all employees subject to an agreement, or should the test focus on collective welfare improvement for employees?

Is there evidence that the BOOT prevents working arrangements that would mutually benefit employers and employees, or in other ways limit worthwhile flexibility in workplace arrangements?

Requirement to consider productivity improvements?

While enterprise agreements can contain clauses that specify commitments to productivity improvement in exchange for improvements in wages and conditions, these are not mandatory. Data provided to the Commission suggest around one third of agreements include some specific productivity measures and around half make general commitments.[1] Case studies of particular enterprise agreements suggest that the parties may agree to quite concrete arrangements (as described in Farmakis-Gamboni et al. 2014).

However, the business community has sometimes expressed concern that agreements do not give enough emphasis to productivity (Kates 2012). The Australian Government is proposing to introduce rules that require discussion of productivity improvements as part of the bargaining process. The Fair Work Amendment (Bargaining Processes) Bill 2014[2]

1 These are not mutually exclusive — a given agreement may include both.

2 Referred by the House of Representatives to the Senate Education and Employment Legislation Committee on 4 December 2014, with the report due on 25 March 2014.

would require the FWC to consider the parties' ability to achieve productivity benefits when deciding any bargaining application, including whether to grant a majority support determination or a low-paid bargaining authorisation.

Of course, in principle, employers, employees and their representatives have strong incentives to commit to productivity improvement and, where possible, to specify ways in which this might be achieved. This acknowledges that in a competitive commercial environment, high wages and job security are dependent on a business's capacity to survive, innovate and grow.

On the other hand, some employees may lose from measures that promote productivity (such as replacement of unskilled labour by new technologies), and this may affect the weight given to productivity in bargaining.

Accordingly, in practice, actual enterprise agreements may forgo opportunities for productivity and higher average wage growth. However, the dilemma for any initiative by government to require clauses in enterprise agreements is:

- on the one hand, the practicalities of leaving judgments about whether any apparently specific clauses achieve productivity improvements to the FWC. This might involve significant subjective judgment by a party that is not aware of the commercial circumstances of the firm, could entail delay in registering agreements, and open up a fresh area for disputes
- on the other hand, the risk that agreements include rather vague terms to meet the legal requirement, but lack real bite.

It may still be that a requirement for the insertion of clauses may assist productivity, or that there are others ways in which more emphasis could be given to genuine productivity commitments (or to remove clauses likely to create impediments to the achievement of that goal).

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

The Commission also request views about the effectiveness of existing productivity clauses, and whether there are any features of the industries, unions and firms that explain why some forge such agreements and others do not.

Requiring parties to bargain in good faith

Under the FWA, all bargaining representatives must bargain with each other in 'good faith'. The FWA prescribes six good faith bargaining requirements, including attending and participating in meetings, disclosing relevant information and giving genuine consideration to proposals made by other bargaining representatives (s. 228).

The requirements are procedural only — parties are not required to make concessions or forcibly sign up to an agreement. A representative can seek a 'bargaining order' from the FWC if they have concerns that good faith bargaining requirements are not being met. Such orders commonly involve some form of direction as to the conduct of the negotiating process. Failure to comply with orders can lead to penalties and, potentially (as a last resort), FWC arbitration where repeated breaches occur.

Yet negotiations in some cases appear to have extended for considerable periods, for example, more than five years in the case of Cochlear Limited and its workforce.

The FWA's good faith bargaining requirements were a significant change to the WR framework, and are linked to the introduction of enterprise bargaining in 1993.

The good faith obligations begin to apply when employers and employees mutually agree to bargain for a new agreement, or where the FWC makes an order requiring parties to bargain, via a majority support determination, scope order or low paid authorisation (s. 230).

Majority support determinations are the most widely used of the three gateways to bring parties to the bargaining table and start the clock on good faith obligations, and have demonstrably encouraged collective bargaining (Australian Government 2012, p. 130). They allow a majority of employees to compel an employer to commence bargaining. The FWC may determine whether a majority of employees want to bargain using any method it considers appropriate.[3]

The 2012 Review Panel recommended relatively few changes to good faith bargaining requirements, arguing that the measures were largely effective. However, there were mixed views about the good faith bargaining requirements by employers and employee representatives. Some employers and unions considered that the current provisions operate effectively. Some unions said that the FWC's narrow construction means they are of limited effect. Some employers said the FWC adopts an overly bureaucratic approach. In relation to majority support determinations, some employers wanted mandatory secret ballots to determine majority support (Australian Government 2012, p. 131).

To what extent are the good faith bargaining arrangements operating effectively and what if any changes are justified? What would be the effects of any changes?

Are the FWC good faith bargaining orders effective in improving bargaining arrangements?

[3] The other two approaches are rare. Parties can apply for a scope order when bargaining is not proceeding 'efficiently or fairly' (s. 238(1) of the FWA) because a proposed agreement does not cover the appropriate group of employees. Low paid authorisations are only available in limited circumstances. They apply where a multi-enterprise agreement covers low paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level.

Individual Flexibility Arrangements

Under the FWA, all awards must contain a flexibility clause that gives employees and employers the capacity to form Individual Flexibility Arrangements (IFAs) that vary the effect of the award (as discussed briefly in Issues Paper 2). Similar provisions hold for enterprise agreements, except that if the agreement does not specify a particular set of arrangements, a model clause is deemed to be part of the agreement (s. 202).

As an illustration of their purpose, IFAs can be made to provide additional flexibility in relation to working hours and family-friendly work practices (Explanatory Memorandum, Fair Work Bill 2008, para. 860). IFAs can only be formed after the relevant employee has commenced employment, rather than as a condition of employment. Nor could an existing employee be required to sign an IFA to continue employment. These requirements were intended to protect employees with weak bargaining power from having to accept an IFA even if it did not genuinely make them better off compared to the relevant award (O'Neill 2012, p. 8). Research by the FWC found that, in practice, there seems to have been only partial compliance with this requirement, with around one third of employers requiring an employee to sign an IFA to commence or continue employment (ibid 2012, pp. 41–48). Nevertheless, this practice did not necessarily disadvantage employees, as 83 per cent of employees on IFA said it made them better off (ibid 2012, p. 71).

Ideally, IFAs would allow employees and employers to vary work conditions where mutually beneficial and, to some extent, they appear to have succeeded in this objective. Employers cited higher wages and more flexible hours as the most common perceived benefits for employees, and better rostering flexibility, clarity and formalisation of existing arrangements, staff retention and improved productivity as major employer benefits (O'Neill 2012, pp. 67–68).

However, the degree to which IFAs genuinely increase flexibility is unclear, and both employer and employee groups have concerns about their practicality and value (Australian Government 2012, p. 106).

- More than 90 per cent of employers do not have any IFA in place in their workplaces for even a single employee, so their practical impact on flexibility appears to be limited (O'Neill 2012, pp. 35–37). Only around one in two employers and one in three employees are even aware of them (ibid 2012, pp. 31–33).
- The scope of what may be dealt with in an IFA is limited by the nature of the flexibility clause in the agreement and the operation of the BOOT (as discussed above). The model flexibility term in awards only allows variations in relation to working time, overtime and penalty rates, allowances and leave loading (though flexibility terms in enterprise agreements allow more scope).
- While IFAs do not require approval by the FWC, the employer may be fined if it subsequently emerges (following an employee complaint) that the agreement fails the BOOT. Accordingly, any ambiguity in the application of the BOOT creates risks for the employer, and may act as an obstacle to IFAs.

- IFAs are prescribed as short-lived contracts. An IFA made under an award can be cancelled unilaterally with 13 weeks' notice. A registered agreement will say how much notice is required, but it cannot be more than 28 days. Short-term contracts reduce certainty for both parties, and also mean that the transaction costs of forming tailored arrangements may not be worth it to either party.
- Putting aside those employers who are not aware of their existence, the evidence suggests that most employers do not use IFAs because they see no need for them (51 per cent) or have had no request from an employee (33 per cent) (ibid, p. 41). This limited use of IFAs appears at odds with employers' requests for greater flexibility in the employment relationship.

How should a WR system address the desire by some employers and employees for flexibility in the workplace?

What protections need to be in place for employees and employers in creating bespoke agreements?

What are the benefits and costs of IFAs (or similar provisions)? Case studies would be very helpful.

Why are employers apparently reluctant to use IFAs (in both enterprise agreements and individual arrangements that seek to override an award)?

Should there be restrictions on the matters that parties can trade off in forming individually-tailored agreements, and if so, why?

On the factual front:

- *How widespread are current IFAs?*
- *Which industries and occupations are most likely to be subject to these agreements?*
- *What sorts of matters are varied by IFAs?* [The Commission is aware of the FWC's 2012 employer and employee surveys relating to IFAs, but is seeking any further evidence on these matters, as there have been changes to the arrangements for IFAs and potentially greater familiarity with them since then.]

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

Are the notice provisions adequate?

To what extent are IFAs standardised across employees, rather than tailored to individual circumstances?

Are there better models for individual agreements internationally, and what evidence is there about their costs and benefits?

No extra claims provisions

The FWA provides scope for varying an enterprise agreement where a majority of affected employees approve (Division 7 of Part 2-4 of the FWA). However, many agreements have

a ‘no extra claims’ provision that attempts to constrain changes to the enterprise agreement’s terms and conditions during its life (Herbert Smith Freehills 2014).

No extra claims provisions appear to be based on a mutual fear that the other party to the bargain will re-open arrangements as soon as an opportunity arises. However, there may be unanticipated costs to such a provision. For instance, employers and employees may mutually wish to amend an agreement before it expires when changes to the economic environment put the enterprise and the continuing employment of its employees at risk.

There has been some uncertainty about whether and to what extent no extra claims clauses are effective in preventing parties from changing enterprise agreements. This issue came to a head when Toyota Australia was seeking, with the support of its employees, to recast its enterprise agreement so that it could become more internationally competitive (Ai Group 2014b). An initial Federal Court judgment[4] meant that the combined consent of employees and the employer was not sufficient to overturn the ‘no extra claims’ provision in Toyota’s enterprise agreement, thus precluding the desired flexibility. In mid-July 2014, Toyota won on appeal to the full Federal Court[5], so it now appears that the ‘no extra claims’ provision is not an ironclad condition that prevents proposed variations to enterprise agreements that would otherwise be allowed by the FWA.

Given the clarification provided by the Toyota decision, what if any concerns persist about no extra claims provisions, and what should be done about this?

3.3 When enterprise bargaining disputes lead to industrial action

Industrial action is one of the most important forms of bargaining muscle flexed by employers, employees and their representatives.

Work stoppages are not the only type of industrial action employees can take. There are many graduated lawful options for bringing pressure on employers — such as work bans, ‘go slows’, ‘work to rule’, and picketing. There are also unlawful options.

Under the FWA (s. 19), industrial action includes employees: performing work in a way different to normal arrangements without employer consent; adopting a practice that restricts, limits or delays the performance of work; banning, limiting or restricting the performance or acceptance of work; or failing/refusing to attend for work or perform any work.

Employers can also engage in industrial action, but their options are more restricted. Their principal option is a reverse strike or lockout, where they do not permit employees to work.

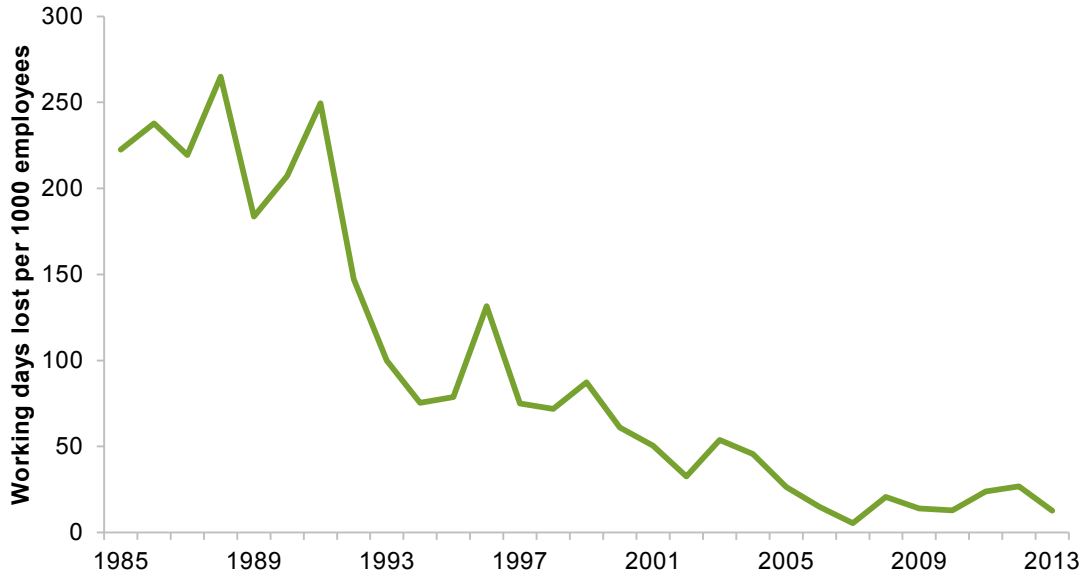
4 *Marmara v Toyota Motor Corporation Australia Limited* [2013] FCA 1351.

5 *Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84 and Ellery et al. (2014).

At times, suggestions have been made that employers should have a wider set of options in bargaining that mirror those available to employees (such as ceasing certain functions in an enterprise, while maintaining others).

As typically measured (days lost per 1000 workers), industrial action is now very uncommon (figure 3.1). In part, this is likely to reflect changes in WR arrangements, such as the emergence of enterprise bargaining processes where industrial action is only protected once the negotiation of a new agreement has commenced. Changes in industry structure, increased competitive pressures on businesses and lower rates of union membership may also have contributed to lower rates of industrial action.

Figure 3.1 **Industrial disputes have been declining**
1985 to 2013



Data source: ABS, *Industrial Disputes, Australia*, Cat. No. 6321.0.55.001.

However, some forms of industrial action may not show up in the ABS estimates of disputes. Calling a stop work and then cancelling it minutes before it commences can deeply inconvenience a firm (and its customers) while ensuring limited, if any, loss of pay. Conducting computer work with the caps lock engaged has also been cited as a novel approach (Lucas 2013).

Any given industrial dispute reduces efficiency at the time of the dispute, without any corresponding short-term employee benefit (strike pay is unlawful). Therefore, disputes appear superficially to involve pain with no gain. However, disputes are a bargaining tool that may reduce power imbalances between parties, and can therefore result in long-run income re-distribution to employees and, in some instances, efficiency gains. Industrial

action can also be used as an 'information gathering' exercise where a party to a negotiation has incomplete information about the other party.

Taking protected industrial action

Part 3-3 of the FWA contains the framework regulating industrial action. The Act protects employees and employers engaging in industrial action in certain circumstances. 'Protected' means protection from being sued. Employers and employees engaging in protected industrial action are immune from civil liability, unless they cause personal injury or damage, or destroy or take property. This is similar to the arrangements in the United Kingdom.

Since 1993, the WR system has provided some form of protection for parties who engage in industrial action. While there was no legal 'right' to take action prior to this, in practice, employers rarely sought remedies. Some analysts have noted that industrial disputes have been at their lowest during the period in which the WR framework specifically provided for protected industrial action.

An employer or employee who seeks the ability to undertake protected industrial action needs to meet certain requirements (ss. 413-414). For example, the agreement in question must have passed its nominal expiry date, the party must be genuinely trying to reach agreement, the industrial action must not relate to a proposed greenfields or multi-enterprise agreement, and the required written notice must be given before action is taken. There is no requirement for bargaining to have commenced for parties to seek permission to undertake protected industrial action, provided that other requirements have been met. (The Fair Work Amendment Bill 2014 proposes to introduce this requirement.)

The FWC can suspend or terminate the industrial action under the five grounds provided for under the FWA.

Employee protected action — secret ballot requirement

To engage in protected industrial action, employees or unions first need approval from employees via a secret ballot. To do this, they must apply to the FWC for a protected action ballot order, and provide the employer and proposed ballot agent with a copy of the application within 24 hours. The employer has the right to be heard and to object to the application.

If the FWC grants the order, a secret ballot must be carried out to determine whether to take the industrial action listed in the order. Employees who are covered by the proposed agreement and represented by the bargaining representative who applied for the order are eligible voters. For the proposed protected action to be approved, at least half of eligible employees need to vote, and a majority of voters need to vote in favour. Where the Australian Electoral Commission runs the secret ballot, the costs of running the ballot are

met by government. Otherwise, the applicants must pay the costs (ss. 464-465). Once the secret ballot results are declared, employees must take the industrial action within 30 days. Employers must withhold pay from employees who are undertaking industrial action.

Some commentators argue that the secret ballot requirements are too prescriptive. The Commission seeks participants' views.

Limited conciliation and arbitration

The FWA aims to facilitate bargaining between parties. The FWC primarily plays a voluntary conciliation role. Bargaining representatives can apply to the FWC to deal with a dispute in certain circumstances, but only where all bargaining representatives agree (s. 240).

The FWC has limited powers to impose an outcome. Compulsory arbitration is only available in four limited circumstances, and is the exception rather than the rule. It applies where:

- protracted industrial action is causing significant harm to bargaining participants (Part 2-5, Div 3)
- protracted industrial action is causing or could cause significant harm to the economy or the safety/welfare of community (Part 2-5 Div 3)
- a party flouts the good faith bargaining obligations (Part 2-5 Div 4)
- the employees are low-paid and other tightly defined criteria are met (Part 2-5 Div 2).

The FWC may also terminate or temporarily suspend an industrial dispute if certain criteria are met (such as danger to life or significant economic harm), with some claiming that the threshold for such actions are too high.

The 2012 Review Panel recommended that the FWC be able to intervene on its own motion where it considered that conciliation could assist in resolving a bargaining dispute (recommendation 22).

To what extent should there be any changes to the FWC's conciliation and arbitration powers?

Are policy changes for industrial disputes needed?

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

- *any appropriate* changes to what constitutes protected industrial action under the FWA
- *arrangements that might practically avoid industrial disputes*

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

3.4 Individual arrangements outside enterprise agreements

Underlying every employment relationship is an understanding between parties. An employee and an employer agree that the employee will perform work under certain terms and conditions. This agreement is a contract, which can take a multitude of forms:

- it can be relatively informal (or even verbal)
- it can operate alongside (or, more rarely, incorporate) award provisions or an enterprise agreement, such that most or all employment terms and conditions are found in a relevant award, enterprise agreement or legislation rather than in the contract
- some employees and employers agree to more detailed employment contracts, specifying matters that are not regulated by legislation. For example, they may agree on a contract term governing ownership of any intellectual property created during the course of employment, or a restraint of trade clause preventing the employee from working for competitors for certain period of time following the end of the employment relationship.

However, the extent to which parties can agree the terms and conditions between themselves is constrained by legislation. The tussle between the common law and legislation governs the employment relationship, with legislation taking precedence and the common law playing a residual role.

Common law contracts do not sit outside the WR system, as some suppose. The employee protections and safety net arrangements still apply, and contracts must be read in conjunction with these.

Parties are free to enter agreements that provide employees with conditions that are more beneficial than required by the legislation, but not less beneficial. Individual contracts cannot be used to circumvent registered enterprise agreements or modern awards, and employers and employees are (typically[6]) only free to agree on terms that do not contravene an employee's legislated minimum rights in the NES and the minimum wage (Issues Paper 2).

This combined influence of the employment contract, awards, the NES and enterprise agreements on the employment relationship makes Australia's WR system one of the most complex in the world.

The distinction sometimes made between employees on 'common law contracts' and those on awards and enterprise agreements is somewhat misleading. Aside from the few jobs and industries that are not covered by an award or registered agreement, an employee is not on a common law contract *or* an award/ enterprise agreement — *both* apply at the same time, although one may have a greater influence over the terms and conditions of employment.

Different data sources use different classifications and categories, which can make analysis difficult. The problems in categorising individual arrangements means that it is hard to estimate the prevalence of common law contracts that are effectively minor deviations from the award from those that involve more elaborate terms. The Australian Bureau of Statistics (ABS), for example, categorises an agreement as an 'individual arrangement' when it is:

> An arrangement between an employer and an individual employee on the terms of employment (pay and/or conditions) for the employee. Common types of individual arrangements are individual contracts, letters of offer and common law contracts. An individual contract (or letter of offer) may specify all terms of employment, or alternatively may reference an award for some conditions and/or in the setting of pay (e.g. over award payments). Individual contracts may also be registered with a Federal or State industrial tribunal or authority (e.g. as an Australian Workplace Agreement). However, the Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 ceased the registration of individual agreements from 28 March 2008. (Glossary to ABS Employee earnings and Hours, Australia, May 2012, Cat. No. 6306.0)

The complexities in defining individual arrangements have other practical ramifications. Many people do not know what type of contract they have agreed to (O'Neill 2012), which raises questions about the effective enforcement of such contracts. Moreover, while in law contracts must meet the minimum conditions specified by the FWA, in practice individual contracts may often lie effectively outside the strictures of the FWA.

6 Some high-income employees are able to contract out of the award system (s. 47(2) of the FWA).

To the extent that parties are able to negotiate their own employment terms and conditions, employment contracts have some potentially desirable features. They provide flexibility for the employer and employee to craft arrangements that suit them specifically, and without third party involvement. While the FWA prohibits various terms from inclusion in enterprise agreements, some terms may instead be established via employment contracts. Such contracts are less constrained than IFAs made under enterprise agreements, and are not beholden to the (sometimes allegedly compromised) flexibility clause of an enterprise agreement.

There are sometimes costs to relying on individual contracts. While it is straightforward to write an individual contract that largely refers to existing awards, there may be significant costs in writing contracts that are genuinely bespoke.

An implication of the common law's residual role is that if statutory employment law widens or narrows its reach, the common law either retreats or advances in significance (Stewart and Riley 2007). There is never a vacuum in employment law. What inhabits the space left outside statutory employment law is not static, but reflects the evolving nature of the common law.

The Commission requests information about the relative importance of common law and the FWA in establishing employment terms and conditions (by industry, skills and occupation). An associated issue is the extent to which such individual agreements do, in practice, lead to more flexible working arrangements.

The Commission is also interested in understanding:

- *the extent to which the common law provides a legal 'safety net' for employees and employers if there are flaws or omissions in statutory employment law*
- *whether there should be greater (or lesser) reliance on individual arrangements, and why should this be so.*

3.5 Resolving disputes over terms and conditions

The various WR institutions (Issues Paper 5) have different roles to play in resolving disputes over terms and conditions.

The interaction rules between enterprise agreements, modern awards and employment contracts (Part 2-1, Divisions 2 and 3) mean that parties may only be covered by one dispute resolution procedure:

- the procedure in an applicable enterprise agreement
- where there is no applicable enterprise agreement, the procedure in an applicable modern award, or
- where neither an enterprise agreement nor award applies, the procedure (if any) in a contract of employment (Forsyth et al. 2010, pp. 32–33).

The FWO can assist parties by providing information and advice, offering dispute resolution processes, and sometime litigating on a person's behalf in the courts. The FWO's functions include promoting and monitoring compliance with the FWA (s. 682). It can investigate disputes related to breaches of the Act, such as under-award wage payments, contraventions of the NES, the minimum wage or an enterprise agreement. Fair Work Inspectors have compliance powers, including the power to enter premises and require a person to produce documents. The FWO can accept enforceable undertakings and can issue compliance notices.

The FWC can deal with disputes about the NES, or disputes about awards or enterprise agreements where the relevant dispute resolution clause allows. Modern awards allow the matter to be referred to the FWC. Enterprise agreements must include a procedure allowing an independent person to settle the dispute, which may or may not be the FWC. The FWC may only deal with disputes if an application has been made by a party to the dispute.

Where a provision in an award, an enterprise agreement or contract of employment refers a dispute to the FWC:

- depending on the terms of the clause, the FWC may settle a dispute via mediation, conciliation, or by making a recommendation or expressing an opinion, except in the circumstances where the parties have agreed to limit the powers of the FWC
- the FWC may, where agreed by the parties, deal with the matter by arbitration and make a binding decision regarding the dispute (FWO 2010). While an order made by the FWC is legally binding, only courts have powers to enforce FWC orders.

Parties can, with permission, appeal a FWC decision to the Full Bench of the FWC.

There is no general capacity for the FWC to deal with disputes between employees and employers under employment contracts. For employment conditions that may derive from an employment contract, parties need to pursue common law remedies through the federal courts. Enforcement of entitlements under common law can be 'expensive and complex' (Stewart and Riley 2007, p. 937), given the expense of court-based litigation, the limited range of useful common law remedies and difficulties associated with third parties such as unions getting involved.

However, if a provision of a contract of employment replicates or improves upon the NES or a modern award in relation to matters such as wages or leave entitlements, it can be treated as a 'safety net contractual entitlement' and have effect as an entitlement under the FWA (s. 542-3). Further, failure to pay an amount specified in an employment contract can be argued to be a breach of the FWA (s. 323).

Where the FWO or FWC are unable to deal assist with a dispute, parties must lodge their case with the Federal Circuit Court or Federal Court of Australia.

The complexities of the arrangements for enforcement raise additional issues about effective redress for parties to individual agreements. Not only may parties not know what

type of agreement they may be on, but they may not know where to go if they require assistance. This means that the performance of the FWO in its informational role can be crucial (Issues Paper 5).

The Commission is interested in understanding whether employees and employers can effectively and efficiently resolve disputes over employment terms and conditions under the existing framework. How are existing dispute resolution pathways working? Do people know where they should seek assistance?

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Australian Government
Productivity Commission

Workplace Relations Framework: Employee Protections

Productivity Commission
Issues Paper 4

January 2015

The Issues Paper

The Commission has released this issues paper to assist individuals and organisations to prepare submissions on matters relating to various employee protections.

There are four other issues papers related to the inquiry that may also be of interest.

Information about the terms of reference, the key dates, how to make a submission, the processes used by the Commission and our contact details are in Issues Paper No. 1, and are also available on the Commission's website:

http://www.pc.gov.au/inquiries/current/workplace-relations

The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website (www.pc.gov.au).

Contents

4.1 Protections in workplace relations systems

Workplace relations (WR) systems throughout the world legislate some protections for employees, employee representatives and, in some circumstances, employers. Central to these are various arrangements that address the unfair dismissal of employees and that allow employees to organise collectively. The avoidance of racial and sexual discrimination are also key protections for people in workplaces, though these are often outside the WR system itself.

4.2 Unfair dismissal

Australia's workplace relations (WR) system provides remedies for workers who are dismissed in a 'harsh, unjust or unreasonable' manner. The Fair Work Commission (FWC) may order the unfairly dismissed employee to be reinstated, or paid compensation where reinstatement is inappropriate.

Unfair dismissal arrangements reflect that employees and employers are not always angels. Employees may underperform, be disruptive or behave inappropriately. Firms and labour markets can only function efficiently if managers have the power to demand behavioural change by poorly performing employees and, absent that, to dismiss or otherwise penalise them. On the other hand, employers may bully workers, make unreasonable demands (such as working longer without pay or overlooking safety issues) or may dismiss people based on prejudice, whimsy or without due process. Accordingly, there is a need for some balance between the prerogative of businesses to manage and the rights of employees to fair treatment.

There are different views about where the balance lies. Some of the important factors will be the impacts of alternative systems on productivity, worker turnover, wages, the propensity to hire and fire vulnerable workers, the compliance costs faced by the relevant stakeholders and fairness to people (both employees and employers). While much of the evidence is international,[1] there is emerging empirical analysis in Australia that unfair dismissal provisions have imposed modest, but not trivial, costs on employment and businesses, but had uncertain impacts on productivity (Freyens and Oslington 2007, 2013).

[1] There is an extensive literature on effects, such as on absenteeism (Ichino and Riphahn 2005), productivity (Autor, Kerr and Kugler 2007; Bassanini, Nunziata and Venn 2008; Bjuggren 2014; Cingano et al. 2014; Gianfreda and Vallanti 2013; Laporsek and Stubelj 2012; Trentinaglia De Daverio 2014), employment (Micco and Pages 2006); and investment (Calcagnini, Ferrando and Giombini 2014). However, it is an open question whether these findings are relevant to Australia.

It is important to consider the potential for unintended impacts, strategic behaviour and compliance costs of different systems. For example:

- if the processes for dismissing an underperforming employee are excessive, employers may be reluctant to hire people with a higher perceived risk of underperformance, use less open processes to recruit staff such as using only known contacts and not advertise the job more broadly (to the potential disadvantage of some vulnerable groups) or use more costly recruitment screening processes (a hidden form of compliance cost)
- the higher costs of employment may be reflected in terms of employment (for instance, casual work only) or wages that are lower than otherwise
- exemptions from, or reduced requirements under, unfair dismissal provisions based on headcounts may distort the choice of full-time versus part-time workers, or may create business growth traps (akin to payroll tax exemptions)
- if some forms of employment termination lie outside the unfair dismissal system, businesses have incentives to re-categorise dismissals to avoid coverage by unfair dismissal laws
- protracted unfair dismissal proceedings might generally increase workplace tensions among all the employees of an enterprise
- firms facing the procedural requirements of unfair dismissal laws may improve their personnel management systems (a benefit were this to occur)
- a reduction in the capacity for workers to initiate unfair dismissal proceedings might lead to greater use of alternative legal remedies — anti-discrimination laws, anti-bullying laws, Workplace Health and Safety (WHS) regulations and common law actions — which would still involve costs (and sometimes potentially greater ones). That raises the issue of whether changes to one form of employment protection might require changes to others, or whether some form of consolidation might be feasible
- the compliance costs associated with unfair dismissal, uncertainty about how to avoid disputes, and the process for resolving disputes may loom strongly in the minds of employers (and would-be employers). Businesses may pay 'go away money' to quickly settle unjustified cases of unfair dismissal, rather than resolve the matter at the FWC. The issue of compliance costs in general are raised in Issues Paper No. 5.

Perceptions can still influence people's behaviour. Business perceptions about the prevalence of unfair dismissals and 'go away' money, and reported instances of the apparent misuse of the provisions may affect their hiring practices, even if the reality does not match the perceptions. Similarly, employees' perceptions about their workplaces and relationships with their employers may be conditioned by particular instances of unfair dismissal highlighted in the media. One of the roles of this inquiry will be to use evidence to assess the validity of people's perceptions.

The design of any employment protection system needs to be informed by the likely responses by all parties. There are examples where the design of the arrangements at least reflect a *desire* to reduce the costs of the arrangements:

- current unfair dismissal arrangements make it relatively easy for an employer to dismiss an employee who has worked for six months or less with the business (12 months for small businesses). This may partly address concerns about the recruitment of new workers whose performance has not been tested in the job. However, employers must still observe some requirements for dismissing employees with short lengths of service, and failure to do so would expose the employer to action
- in recognition of the compliance costs of unfair dismissal provisions for the smallest businesses, the Australian Government developed the Small Business Fair Dismissal Code for businesses employing less than 15 employees on a headcount basis. If a small business follows the code, then the dismissal will be deemed to be fair.

Whether these arrangements are justified or function well is unclear.

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

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

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

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

What are the effects of unfair dismissal arrangements on firm costs, productivity, recruitment processes, employment, and employment structures?

What are the impacts on employees of unfair dismissal, both personally and in terms of altered behaviours in workplaces?

What are the main sources of costs (including indirect costs), and how could these be reduced without undermining the fundamental goals of unfair dismissal legislation?

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

Do unfair dismissal actions disproportionately affect any particular group of employees (for example, by gender, ethnicity, geographical location, industry, union affiliation, occupation or business size)?

What are the main grounds on which people assert unfair dismissal, and what types of claims are most likely to succeed?

How does Australia compare internationally with regard to the unfair dismissal protections? Are there elements of overseas approaches and frameworks that could usefully by applied to Australia?

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

The WR system also protects employees from workplace bullying. Broad anti-bullying provisions were introduced under the *Fair Work Act 2009* (Cth) (FWA) in January 2014. Bullying is defined as behaviour towards another person that is unreasonable, repeated, and creates a risk to health and safety (s. 789FD). As is the case for unfair dismissal, the FWC is the mediator, conciliator and, as a last resort, adjudicator.

The anti-bullying provisions are available to employees of all 'constitutional businesses', but also to contractors, hire-workers, apprentices, trainees, work experience students and volunteers. They do not relate to employees of unincorporated enterprises or state government agencies (though such parties could use one of various avenues outside the FWA for redress). Nor do they relate to people who have been bullied in the past, but have since left the employer. However, the provisions may apply to bullying occurring at times prior to the commencement of the new regime, so long as the person is still employed by the same employer, and where there is a concern that absent action, bullying might re-occur (Murphy 2014).

There are no differences in the applicability of the measures by the size of the business, or the salary or tenure of the worker (unlike unfair dismissal). The bully may be a supervisor, subordinate or colleague. Anti-bullying laws could apply to intimidation by, or of, union officials.

No compensation is payable under the FWA for a proven case (though compensation could be sought through other means). The usual goal is to prevent future bullying. However, failure to comply with FWC orders would expose the employer and/or the relevant bullying party to civil penalties.

Initially it was anticipated that many thousands of claims would be lodged annually. However, since the commencement of the jurisdiction in January 2014, there have been 343 applications for an order to stop bullying (Fair Work Commission 2014), with 197 finalised in that period. Only 21 of these involved a formal decision by the FWC (with one application granted). Claims may increase as people become aware of the legislation. On the other hand, the absence of compensation and the fact that any redress only applies to people who have continued their employment in the relevant business may limit the use of the provisions (Caponecchia 2014).

Some stakeholders have argued that the existing arrangements are confusing and complex for employees and employers alike. This reflects that the anti-bullying provisions of the FWA coexist with other, partly overlapping, measures that target bullying, including:

- WHS legislation (and an associated anti-bullying code) outside the WR system
- where discrimination is the basis for bullying, more general anti-discrimination laws both in the FWA and other legislation (Andrades 2009)
- an additional anti-bullying provision exclusive to Victoria, which makes serious bullying a criminal offence (the *Crimes Amendment (Bullying) Act 2011* (Vic) or 'Brodie's Law', named after a victim of bullying)
- the potential for parties to take actions under the common law.

Sometimes parties could simultaneously use several of these avenues for the same incident.

Some stakeholders have argued that the WHS system rather than WR law is the appropriate avenue for pursuing bullying, given that the main concern is harm to people in the workplace (for example, ACCI 2011, p. 5). While recognising some of the overlaps, others see the FWA provisions as largely complementary.

Regardless, there are issues about the effects and the design of the present arrangements.

What are the likely utilisation rates of the anti-bullying provisions, and what factors are most likely to affect these rates?

What are the impacts, disadvantages and advantages of the anti-bullying provisions of the FWA for employers and workers?

Are there any unintended consequences of the anti-bullying provisions?

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

How effective has the FWC been in assessing applications for orders to stop workplace bullying?

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

4.4 General protections and 'adverse action'

The WR system aims for fairness and representation in the workplace by recognising and protecting the right to freedom of association, preventing discrimination, and preventing other unfair conduct. Part 3-1 of the FWA sets out a framework for achieving this. It contains general protections against 'adverse action' in connection with exercising workplace rights and engaging in industrial activity. The complex scope of protections

provided by this part of the Act is indicated by the array of actions that are defined as 'adverse'. These include doing, threatening, or organising any of the following:

- an employer dismissing an employee, injuring them in their employment, altering their position to their detriment, or discriminating between them and other employees
- an employer refusing on discriminatory grounds to employ a prospective employee or discriminating against them in the terms and conditions the employer offers
- a principal terminating a contract with an independent contractor, injuring them or altering their position to their detriment, refusing to use their services or to supply goods and services to them, or discriminating against them in the terms and conditions the principal offers to engage them on
- an employee or independent contractor taking industrial action against their employer or principal
- an industrial association, or an officer or member of an industrial association, organising or taking industrial action against a person, or taking action that is detrimental to an employee or independent contractor
- an industrial association imposing a penalty of any kind on a member.

Some recent decisions on, and modifications to, select provisions appear to have served to clarify and possibly improve the operation of the general protections. [2] The Commission is therefore seeking views on the operation of the general protections as they are now configured, and their implications for the conduct of employees, unions, employers and customers, and their overall impacts on the operation of workplaces and labour markets.

The coherence of the general protections, both as a discrete segment of the FWA and in relation to other key segments and protections within and additional to the Act, is a further point of interest to the Commission.

Do the general protections within the Fair Work Act 2009, and particularly the 'adverse action' provisions, afford adequate protections while also providing certainty and clarity to all parties?

What economic impacts do these protections have?

To what extent has the removal of the 'sole or dominant' test that existed in previous legislation shifted the balance between employee protections and employer rights?

Is there scope or argument for consolidating or clearly separating the mechanisms by which employees can seek redress for unfair conduct by others in the workplace?

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2 Recent High Court decisions of note include *Board of Bendigo Regional Institute of Technical and Further Education v. Barclay and Anor* (M128/2011, October 2012) and *Construction, Forestry, Mining and Energy Union v. BHP Coal Pty Ltd* (B23/2014, October 2014). Modification of the time limit for the lodgment of general protections claims involving dismissal set out in s. 366 took effect from 1 January 2013.

Are the discrimination provisions within the general protections effective, and are they consistent with other anti-discrimination regulations that currently apply in Australia?

In regard to the dismissal-related general protections, to what extent do the current arrangements for the awarding of costs and convening of conferences produce outcomes that are problematic?

To what extent has the recent harmonisation of the time limits for lodgments of general protection dismissal disputes and unfair dismissal claims increased certainty for all parties involved and reduced the 'gaming' of such processes?

Employee protections outside the WR system

People in workplaces can also seek protection from discrimination and harassment within workplaces under federal human rights and anti-discrimination laws[3], as well as various equal opportunity and anti-discrimination acts at the state and territory level. Within the federal anti-discrimination system, an employee can bring a complaint to the Australian Human Rights Commission, which can investigate complaints and facilitate resolution through conciliation between the employee and their employer. If the employee is not satisfied with the outcome of this process, they can choose to bring the matter before the Federal Court.

While the existing human rights and anti-discrimination legislation partially overlaps with other WR protections, it also serves a broader purpose for the community in preventing discrimination outside of workplaces. As such, the Commission considers Australia's broader human rights framework to be distinct from the WR system and only considers any tensions between the two frameworks.

3 Including the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth).

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Australian Government
Productivity Commission

Workplace Relations Framework: Other Workplace Relations Issues

Productivity Commission
Issues Paper 5

January 2015

Issues Paper No. 5

The Commission has released this issues paper to assist individuals and organisations to prepare submissions to a range of issues not covered by the previous set of four issues papers, including:

- the performance of the various workplace relations institutions
- compliance costs
- the role of competition law
- public sector workplace relations
- employment arrangements not covered by (most) WR legislation
- a range of more discrete matters.

There are four other issues papers related to the inquiry that may also be of interest.

Information about the terms of reference, the key dates, how to make a submission, the processes used by the Commission and our contact details are in Issues Paper No. 1, and are also available on the Commission's website:

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Contents

5.1 Exploring some other important areas

This paper examines a variety of issues often neglected in assessments of the effectiveness of Australia's workplace relations (WR) system, including:

- the efficiency and effectiveness of its various institutions (section 5.1)
- the degree to which it imposes compliance costs on parties subject to the regime, of which small business is a particularly important group (section 5.2)
- the degree to which there is an overlap between competition policy and WR policy, noting that much of the WR system is about seeking balance in the bargaining power of various agents (section 5.3)
- the nature of the WR system for employees in the public sector, noting that many of these are covered by state WR laws (section 5.4)
- the role played by alternative forms of labour in the economy (section 5.5)
- a number of other individual elements of the WR framework, such as rights of entry and rules around transfer of business that have been raised as relevant issues in early consultations (section 5.6).

5.2 How well are the institutions working?

The Fair Work Commission (FWC) and the Fair Work Ombudsman (FWO) are the two main Australian Government workplace regulators and dispute resolution bodies (box 5.1). The Fair Work Divisions of the Federal Court and the Federal Circuit Court have jurisdiction over matters under the *Fair Work Act 2009* (Cth) (FWA) and other workplace legislation. Fair Work Building and Construction is a separate, industry-specific regulator.

State and territory governments have their own industrial relations commissions (of which the Western Australian Industrial Relations Commission has the broadest functions). There is also a specialist construction-specific regulator (Fair Work Building and Construction) with wider powers than the FWC.

These various institutions play different roles. Sometimes it can be hard for people to know which one to turn to, as it can depend on the type of dispute at hand, or the nature of the remedy sought (a point emphasised in Issues Paper 4 for matters relating to individual arrangements between employees and employers).

Box 5.1 The roles of the main Australian Government WR agencies

The Fair work Commission (FWC) is the national workplace tribunal. It is responsible for setting minimum wages and employment conditions. It approves registered agreements, can make and change awards, make decisions about what constitutes lawful (protected) industrial activities (outside the construction and building industry) and can hear cases relating to unfair dismissals and bullying. It also provides information to employers and employees.

The Fair Work Ombudsman (FWO) provides information about the roles, rights and responsibilities of actors in the system, monitors compliance with suspected breaches of workplace laws and regulations (for example, under-award payments), and can seek penalties for breaches (through the Federal Circuit Court and the Federal Court of Australia).

Other institutions with specific workplace relations (WR) functions include:

- the Fair Work Division of the Federal Court of Australia, which has jurisdiction over all civil and criminal matters under the *Fair Work Act 2009* (Cth)
- the Fair Work Division of the Federal Circuit Court of Australia, which provides a simpler, less formal alternative to employment litigation than the Federal Court of Australia, including a small claims proceedings option
- the Australian Competition and Consumer Commission, which ensures compliance with the secondary boycott provisions of the *Competition and Consumer Act 2010* (Cth)
- Fair Work Building and Construction (FWBC), which is responsible for workplace relations in the building and construction industry. While the FWO and the FWC remain relevant, FWBC assumes most of the functions of the FWO for the construction industry, and has special investigatory powers. FWBC is largely outside the focus of this inquiry as the Productivity Commission has recently completed analysis of the WR regime specific to the construction industry (PC 2014)
- the Road Safety Remuneration Tribunal, which, among other functions, approves road transport collective agreements, conducts research into pay and conditions, and deals with certain disputes between the parties in the industry. The Tribunal was evaluated in 2014, but the Australian Government has not announced its response to the review (with one central issue being the continued existence of the tribunal).

Sources: Information from the websites www.fairwork.gov.au ; www.fwc.gov.au; http://www.rsrt.gov.au; http://www.fwbc.gov.au and PC (2014).

Views about the performance of the FWC, the FWO and other WR institutions may be coloured by the outcomes of their decisions and whether they favour one party or another. Nevertheless, all regulatory bodies should be subject to occasional performance review. As a regulator, the FWC influences the prices of the most basic input to any economy: labour. The way it applies its processes can add to or reduce the costs of those required to use it, and can add to or reduce the quality of decision-making by those same participants as they implement its directions. Accordingly, it would be useful if submissions to this inquiry identified areas where the FWC could improve and the reasons why these improvements are desirable.

There may also be a case for examining the challenges for regulatory agencies in making decisions about matters that are inherently subjective — most notably unfair dismissal

cases — and the processes and governance arrangements that best achieve consistency. (It may be that the tests set in the FWA contribute to these challenges — an issue raised in Issues Paper 4.)

A more general issue is how to assess of the performance and resourcing of the FWO and FWC and, where there are any deficiencies, the steps that are needed to address these.

How are the FWC and FWO performing? Are there good metrics for objectively gauging their performance?

Should there be any changes to the functions, spread of responsibility or jurisdiction, structure and governance of, and processes used by the various WR institutions?

Are any additional institutions required; or could functions be more effectively performed by other institutions outside the WR framework?

How effective are the FWO and FWC in dispute resolution between parties?

What, if any, changes should they make to their processes and roles in this area?

The main adjudicators in WR are bodies with statutory independence. However, the FWA also includes a role for the responsible Australian Government Minister to intervene on behalf of the Commonwealth in proceedings before any Australian court if it is in the public interest (s. 569). That capacity has rarely been used, but has at times been surrounded by considerable controversy.

Should s. 569 remain in the FWA, and if so, should there be any modifications to it?

5.3 Compliance costs — a 'bog of technicalities'?

In 1910, the president of the Commonwealth Court of Conciliation and Arbitration observed that the approach to the Court was through a bog of technicalities (AIRC 2006). On face value, the access to, and efficiency of, services from the existing equivalent agency (the FWC) is easier than at that time, with steps in train to make it more so, such as through electronic case management (FWC 2014). Moreover, the FWO provides information and mediation services, which might reduce some types of compliance costs.

Nevertheless, the workplace relations system is highly complex and some of its features may have legalistic features that raise costs and present problems for participants. Legal matters may involve arcane debates between bargaining parties, many of whom lack legal sophistication.

Much of one case before the FWC related to the role of a staple, and whether three documents stapled together, rather than provided separately, contravened a major part of the FWA.[1] On a matter of law, it appeared this simple piece of thin metal did so, though

[1] *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FWCFB 2042 (2 April 2014).

the FWC did not believe that the substance of what was provided by the business to employees contravened the fundamental purpose of the Act. Sometimes, such battles of words are the inevitable and desirable consequence of combative parties searching for the exact boundaries of complex laws, but their costs may sometimes exceed the precedent value they create.

Compliance costs reflect multiple aspects of the system:

- the processes and roles of its major institutions
- uncertainty about where to go for advice
- the need for employers and employees to understand a complex system when disputes occur, or when attempting to comply with laws and regulations. The FWA is only one of a plethora of Australian Government laws relevant to workplace relations, while there are also a range of state and territory government laws that remain relevant (notwithstanding the referral of major WR matters to the Commonwealth). The common law provides another source of uncertainty
- constant change in the system. While award modernisation may well have been appropriate, its transitional costs were significant. Borland (2012, p. 286) raised the issue of transitional costs more generally:

  > I think that too often policy-makers suffer from what I label the 'Ikea fallacy'. We see the furniture in the store and think how good it would look where we live. But, we forget about the costs of putting it together. Similarly, with policy. Policy-makers are great at visualising what they think will be the end product of policy reform, but not so good at taking into account the adjustment costs, a real cost of the reform to society, in getting there.

Complexity and compliance costs do not just raise costs directly. They can also change behaviour. Given their high fixed costs, compliance burdens may create a barrier to the transition of a business from a non-employer to an employer. High compliance costs can also deny fairness, weaken bargaining power and lead to capitulation in some disputes (such as those that lead to 'go away' money — Issues Paper No. 4). For example, a union bargaining with a small business will often have considerably greater expertise, as may an employer dealing with a single employee.

The very complexity of a system that leads to high compliance costs may also lead to non-compliance. People make mistakes in complex systems. It is notable that most instances of sham contracting are not deliberate, a symptom of the complexity of this single issue alone. Notwithstanding their simplification, awards are still seen as highly complex, and are a source of payroll error. Moreover, some businesses may simply decide that it is cheaper not to invest in compliance, but to use simple rules of thumb about how to behave and hope for luck.

What are the main compliance costs faced by parties in the WR system (management time, costs of paying for expertise, delays in making decisions)? How big are they (in dollars or share of management time)?

To what extent do such compliance costs vary by enterprise size, by industry or by jurisdiction?

What aspects of the WR system are the main sources of compliance costs (for example, rules concerning enterprise bargaining, awards, industrial disputes)?

How could compliance costs be reduced?

To what extent do compliance costs or other barriers relating to the WR system represent a barrier for non-employers shifting to employers?

5.4 Is competition law a neglected limb of the WR system?

While the FWA and its two main institutions are the centrepiece of Australia's WR system, the *Competition and Consumer Act 2010* (Cth) (CCA) administered by the Australian Competition and Consumer Commission (ACCC) represents a complementary (and potentially competing) limb of that system. In that vein, Anderson has aptly described industrial law and trade practices law as 'neither married nor divorced'(2003, p. 2).

Secondary boycotts

From a WR perspective, the most notable feature of the CCA is its provisions prohibiting secondary boycotts (section 45D).[2] These are complex provisions with many tests that must be met before they can be applied.[3] Secondary boycotts may occur where union officials and/or employees act in concert to hinder or prevent a customer or supplier from providing their services to another business. For example, a contravention may occur if union officials block a concrete pour by a sub-contractor at a building site.[4]

Among other factors, the prohibition only applies where the main purpose of the action is *not* related to remuneration or the working conditions of the employees (s. 45DD). Accordingly, it would be permissible under the CCA for a secondary boycott if the purpose was to increase wages of employees working for the customer (even if the action led to major costs for suppliers and customers). Such an action might however remain subject to penalties under the FWA and the common law, so s. 45DD may only cut off one option for legal action against secondary boycotts.

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2 Section 45E relates to conduct that indirectly leads to secondary boycotts. The circumstances in which it applies are different from section 45D, but the section has much the same legislative intent as section 45D.

3 Unlike the WR framework, Australia has a genuinely national set of competition laws. Although sections 45D and 45E of the CCA strictly only apply when the relevant party subject to detriment is a corporation (reflecting the heads of power under the Australian Constitution), the uniform Competition Policy Reform Acts also apply these relevant sections to non-corporations (Miller 2013, p. 522).

4 As in *ACCC v Construction, Forestry, Mining and Energy Union* [2006], FCA 1730.

Various submissions to the 2014 Competition Policy Review have raised questions about the appropriate reach and enforcement of the secondary boycott provisions of the CCA and the degree to which even applicants and respondents understand their application (ACTU 2014a; AMMA 2014; Lloyd 2014; MBA 2014). For example, Lloyd claims that the secondary boycott provisions are 'essentially ineffectual' due to inadequate enforcement.

To what extent do the existing secondary boycott arrangements in the CCA contribute to a well-functioning WR system? Should the Australian Government modify ss. 45D and 45E, and if so, how?

Are there barriers of a regulatory or policy nature to enforcement of ss. 45D and 45E, and if so, what should be the remedies?

Anticompetitive conduct by employees, unions and employer associations is not covered by Australian competition law

The exemption applying to secondary boycotts under s. 45DD is mirrored by a much broader and more fundamentally important exclusion of matters relating to the employment contract from the restrictive trade practices provisions of the CCA (s. 51(2)(a)). This means that the ACCC cannot take action against anticompetitive conduct by employees and their representatives (or by industry associations) relating to wage claims or other employee benefits. Allan Fels (2005, p. 1) has remarked on the apparent discordance between the underlying framework of competition law and WR:

> Competition policy and industrial relations policies have headed in opposite directions for over one hundred years. Competition policy has sought to strike down anticompetitive arrangements in product markets. Industrial relations policy has encouraged collective bargaining and union monopoly.

The practical outcome is that, aside from some secondary boycotts, WR is effectively excised from competition law. Instead, industrial law permits some degree of anticompetitive conduct by unions and employer associations, and offsets it by constraining the exploitation of market power (for instance, an employer must still pay at least minimum wages and comply with the NES. Similarly, only some forms of industrial disputes are lawful). However, tensions remain between parties about whether one or the other maintain excessive bargaining power through either industrial action or through existing definitions of unlawful matters in agreements (as covered in Issues Paper 3).

Some have asked about the desirability of maintaining separate competition and industrial laws. In part, industrial law may be separated from competition law because it has ethical and social dimensions at its heart, to a greater extent potentially than the business-to-business aspects of competition law. In addition, labour markets have some characteristics different from goods markets, noted in Issues Paper 1.

On the other hand, these distinctions are not always easy to make. Collective action by professionals and micro businesses more closely resembles collective action by employees

than a cartel of major corporations. Yet the CCA prohibits such collective action, except where the ACCC authorises such action or businesses obtain a notification from the ACCC, with the authorisation/notification process subject to a public benefit test (ACCC 2011a, 2011b; King 2013). For example, the ACCC authorised the Australian Medical Association to collectively bargain with state and territory governments. In another instance, the ACCC sought undertakings that a group of doctors negotiating with a regional hospital not seek common prices where this was accompanied by the threat of collectively withdrawing services if that price was rejected (ACCC 2011b, p. 24). Accordingly, in this instance, it is the CCA, not industrial law, that determines the (circumscribed) scope of collective action.

Moreover, neither history nor the existence of other goals need provide a strong or sufficient rationale for the nearly complete separation of employment relations from the CCA. It may be that there are areas where competition policy might take a more active role, while still exempting other employment-related matters. For instance, Ai Group (2014b, p. 5) has advocated that industrywide pattern agreements should be outlawed by modifying s. 51(2)(a). In its submission to the National Competition Council's (NCC) review of s. 51(2) of the then *Trade Practices Act 1974* (Cth) (NCC 1999), the Australian Government Department of Employment, Workplace Relations and Small Business argued that in *certain* instances, there should be a capacity to revoke the exemption from trade practices law of employment arrangements. While few stakeholders considered this was practical or desirable at the time, the NCC left open the possibility that, subject to constraints, competition law might play a greater future role in regulating employment relations (NCC 1999, pp. 70–71).

The difficulties in finding the right legislative framework for alleviating anticompetitive conduct is exemplified by the swinging statutory pendulum for consideration of secondary boycotts. Secondary boycotts first found a home in the *Trade Practices Act 1974* (Cth) in 1977, only to be evicted into workplace relations legislation in 1993, and then re-housed in trade practices legislation in 1996, where it has stayed ever since.

Are there grounds for widening the capacity of the CCA to address concerns about misuse of market power exerted through collective bargaining by employees and employer groups? If so:

- *what would be the scope of any desirable changes and their linkages with the FWA?*
- *what would be the effect of any changes on the outcomes of the WR system (for example, workplace harmony, the power balance between employers and single employees, efficiency, productivity; wages and conditions, transaction costs), the existing industrial law system, and the resourcing of the ACCC?*
- *how would it be practically applied? For example, how would the ACCC identify restrictive trade practices, who could be the infringing parties, and what would be the role of authorisations and notifications for unions and employer groups?*
- *Are there grounds for changes to the CCA to address enterprise agreements that have the effect of limiting competition from contractors or labour hire businesses (and why would the CCA be preferred to the FWA in this respect)?*

- *what would be the benefits, costs and risks of any changes?*

On the other hand, are there grounds for shifting some aspects currently covered by the CCA to the FWA?

5.5 Public sector workplace relations

The key features of the FWA apply to most people employed in the private sector, regardless of their jurisdiction (with employees of unincorporated enterprises in Western Australia, contractors and managers of businesses being the notable exceptions).[5] However, public sector employees are generally in a different situation.

Public enterprises are major employers, accounting for around 1.9 million employees in 2012-13 (13 per cent Commonwealth, 10 per cent in local government and 77 per cent in state and territory governments). Together, public servants account for over 15 per cent of the workforce. While workplace relations in public sector agencies have moved towards those applying in the private sector, they are nevertheless quite different from each other (in part reflecting views about their different role, obligations and pressures).

- Administrative law (for example, merits review) covers some key public sector employment issues, adding another layer of regulatory requirements and scope for appeal. The Commission of Audit suggested changes in some arrangements for the Australian Public Service (NCA 2014, p. 41).
- FWA coverage of public sector employees differs between states, territories and different levels of government. States have referred their industrial relations powers to the Commonwealth in varying degrees, and there remain constitutional limitations about the extent to which federal laws can govern certain state government employees. The recent Full Federal Court decision in *United Firefighters' Union of Australia v Country Fire Authority*[6] demonstrates that there is continuing uncertainty about the constitutional limitations.
- While employees and management still negotiate enterprise agreements at the public sector agency level, governments, as the overall employer, also shape those agreements and other WR matters centrally. For example, in Victoria, enterprise agreements must be approved centrally, with differing arrangements depending on whether the funding source of the agency is 'budget' or 'non-budget' (DTF 2012). The Australian Government similarly constrains remuneration agreements and must approve enterprise agreements to ensure they are in line with government policy.
- Management control in the public sector is less clear-cut than in the private sector (for example, in relation to the dismissal of staff).

5 The 2012 Review found that 96 per cent of private sector employees were covered Australia-wide at that time (Australian Government 2012, p. 5).

6 [2015] FCAFC 1 (8 January 2015).

In this context, the impacts of changes to the generic WR system may vary depending on whether workplaces are private or public. Reforms to the WR system applying to the private sector may need to be accompanied by complementary measures (for example in administrative law, codes of conduct or long-held work cultures) to realise the benefits for the public sector. Reforms might need to take account of the fact that outputs and productivity improvements are less easily measured and consequently less transparent in the public sector. Accordingly, arrangements in the WR system aimed at improving productivity in the private sector might not always be easily transferable to the public sector.

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

5.6 Alternative forms of employment

While many workers enter into a contract with an employer for regular and ongoing work, there are also several alternative forms of employment that apply to large proportions of the workforce. Each of these alternative forms caters to certain needs of either the employer or the worker, which are not fulfilled by the standard employment form. They include (but are not limited to):

- independent contractors, who supply their services on a job-by-job basis (around 9 per cent of total Australian employment — figure 5.1)
- owner-managers of both unincorporated and incorporated enterprises who are not independent contractors (also around 9 per cent of total employment — figure 5.1)
- workers contracted to labour hire firms, who are then hired out to a 'host'. These comprise around 1 per cent of all employed people (ABS 2010)[7]
- skilled migrant workers, who are sponsored by an employer for a stay of up to 4 years
- casual workers, who are employed on an informal and irregular basis and account for around 20 per cent of employed people (ABS 2012).[8]

These groups capture most workers who are not ongoing and permanent employees. There are also other forms of employment where the appropriate employee status of workers is not clear (such as textile and footwear outworkers).

While arrangements for pay and conditions for casual workers differ from those of permanent employees, such workers are covered by generic workplace laws. In contrast,

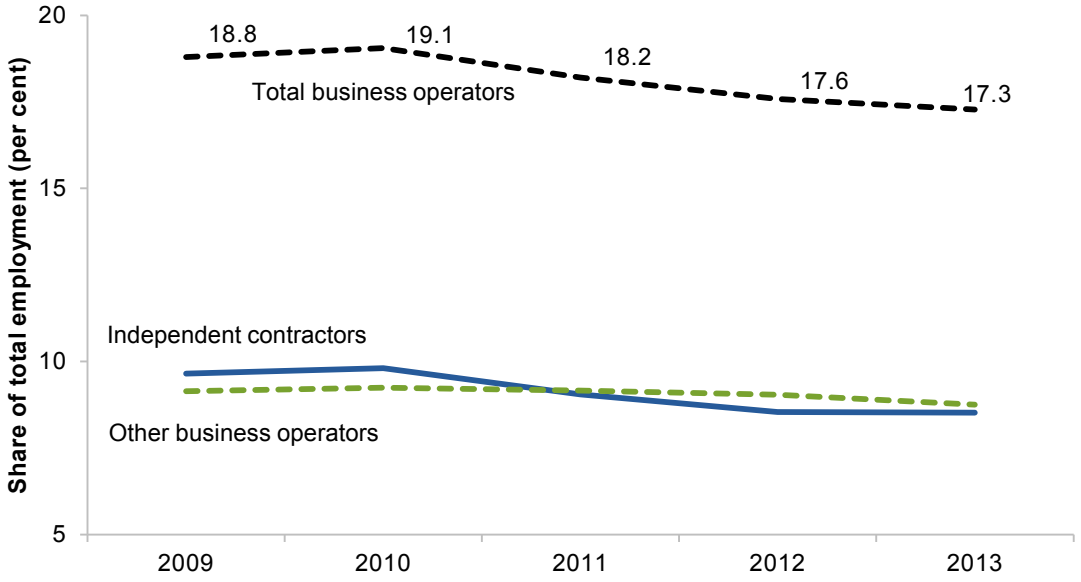
7 These data relate to November 2008 and exclude people who obtained jobs through employment agencies. The latter help with the process of recruitment, but do not have an ongoing employment relationship with the person.

8 These data relate to late November 2011.

owner-managers who are not independent contractors are completely outside the WR system and the Commission is unaware of suggestions that they should be included.

The three remaining labour forms — independent contracting, labour hire and, to a lesser extent, skilled migrant workers — do appear to involve special issues.

Figure 5.1 **Business operators are an important source of labour**
November 2009 to November 2013



Source: ABS, Forms of Employment, Australia, November 2013, Cat. No. 6359.0.

Independent contractors and labour hire

Labour hire workers and independent contractors differ in that labour hire workers (mostly) remain national system employees and, as such, have the terms and conditions of their employment regulated by awards and enterprise agreements, while one of the purposes of the *Independent Contractors Act 2006* (Cth) is to prevent independent contractors from being treated as employees. However, in one important regard, and presumably because they can both be used to supplement or as an alternative to ongoing employees, the WR system has affected both independent contractors and labour hire workers in a similar manner.

Independent contractors

Independent contractors are generally categorised as self-employed individuals who hire out their services on a contractual basis, often short term. In most cases, they are single person owner-operated businesses.

Independent contractors can act as both a supplement to and a substitute for ongoing employees. So, in addition to being used for specialist tasks that are beyond the capacity of a business' existing labour force, independent contractors can be used temporarily for more general tasks and as an alternative to the hiring of extra ongoing employees.

Independent contractors may differ from ordinary ongoing employees in several ways:

- length of employment — employees are appointed on an ongoing basis, while the employment of an independent contractor generally lasts as long as the job they are contracted for
- choice of work — ongoing employees are allocated to jobs by their employer, while independent contractors choose what jobs they will accept
- manner of work — ongoing employees may be directed by their employer how to perform a job, while independent contractors are generally able to undertake their work in any way that they see fit
- payment for work — ongoing employees draw a regular wage, while independent contractors will often negotiate a fee for the services they provide on a per job basis
- hours of work — ongoing employees typically work standard hours, while independent contractors may be able to choose their own hours of work
- employment entitlements — whereas employees are currently able to access a number of workplace entitlements (such as minimum wages, minimum work requirements, penalty rates, leave loading and unfair dismissal protections), independent contractors are not.

Most of them do not have employees, can work on multiple jobs at the same time and can subcontract their work. While some independent contractors are women, the majority are men and are most likely to work in the construction; professional, scientific and technical service; administrative and support service; transport, postal and warehousing and healthcare and social assistance employment sub-classifications.

An important question is whether the existing WR system overly frustrates (or encourages) independent contracting as an employment form.

Are there any impediments in the current legislation to the efficient mix of independent contractors and ongoing workers?

Are there any general concerns about the WR system as it applies to independent contractors?

Sham Contracts

It is unlawful for an employment contract to be disguised as an independent contract — so-called 'sham' contracting.[9] Such contracting raises tax and WR issues (with the former out of scope in this inquiry).

Several submitters to the 2012 Fair Work Review commented that the provisions in the FWA that dealt with sham contracting were insufficient.

In particular, the ACTU labelled the current provisions 'weak' and suggested that they were 'failing to deal with the growing problem of sham contracting' (ACTU 2012). The ASU argued that the Act should be amended to strengthen the sham contracting clause and that it should provide a clearer definition of a genuine independent contracting arrangement (ASU 2012).

These provisions have not changed as a result of the 2012 Review. The Commission itself examined sham contracting in the construction industry as part of its inquiry into public infrastructure, and recommended that businesses that engaged in deliberate sham contracting might be outlawed from government contracts (PC 2014).

One of the complicating factors of determining the genuine status of an independent contractor is that the common law test is holistic in nature, taking account of all of the circumstances of the relationship between the contractor and their client. This suits the complex nature of that relationship, but is a complicated test. Some have suggested that the definition of an independent contractor should be specified in statute to make the test simpler. This might reduce ambiguity and the errors that employers and workers sometimes make in determining the nature of the employment contract. On the other hand, if it does not generally reproduce the outcomes that would otherwise be found using the common law approach, then it may fail to properly discriminate between employees and independent contractors.

What are the advantages and disadvantages of creating a statutory definition of an 'independent contractor'?

Do any aspects of the WR system represent a barrier to independent contractors?

Are the current provisions in the Fair Work Act sufficient to discourage sham contracting?

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

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

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9 Sections 357-359 of the *Fair Work Act 2009* make it unlawful to knowingly misrepresent an employment relationship as an independent contracting arrangement, fire or threaten to fire an employer in order to re-contract with them as an independent contractor and from making false statements in order to induce a worker to accept an independent contracting arrangement.

Labour hire

The use of labour hire requires a three-way arrangement between the worker, his or her employer — the labour hire agency — and the business that ultimately uses their services. Labour hire agencies supply the services of a worker to a 'host' business. Instead of paying the worker directly, the 'host' pays the agency the costs of the worker's services, plus a profit margin and the agency then pays the worker. Labour hire businesses provide a means by which people who do not wish to become independent contractors can have ongoing employment with one employer, while being able to obtain work at other enterprises.

Moreover, in all other respects, a labour hire employee can be like other employees in the host company in relation to the *way* they perform their duties (for example, the level of direction they receive and the provision of tools). Accordingly, there is no equivalent to sham contracting for labour hire (Ellery, Forsyth and Levy 2014). This reflects that any labour hire employee is still covered by the FWA.

While there are some dated estimates of the importance of labour hire (as shown above), the Commission does not have contemporary estimates to indicate their importance, nor information about the industries and occupations in which they predominate. *The Commission welcomes any such data.*

Are there any general concerns about the treatment of labour hire workers under the FWA?

Have recent enterprise agreements affected the use of independent contractors and labour hire workers?

In the recent 2012 Fair Work Review (and as briefly discussed in Issues Paper 2), several submissions expressed concern that provisions making it more difficult to engage with independent contractors and labour hire agencies had begun to creep into enterprise agreements. Among others, the BCA stated that 'some unions have been seeking the inclusion of terms in enterprise agreements that purport to regulate the terms and conditions to be observed by contractors and labour hire agencies in such a way as, in effect, to control the engagement of contract and agency staff' (BCA 2012). With specific regard to independent contracting, AMMA argued that 'Fair Work Australia's approval in industrial agreements of clauses restricting the use of contractors is a huge issue for resource and construction industry employers' (AMMA 2012). This was supported by the IPA, who concurred that the 'fair work system enables unions to demand enterprise agreements that severely limit the use of independent contracting' (IPA 2012). The concern still persists (Ai Group 2014a).

Some of the terms that have been cited as being 'permitted' in enterprise agreements include requiring an employer to disclose to employees and their representatives:

- the name of any independent contractor or labour hire agency proposed for work

- the type and duration of work
- the qualifications of the independent contractor or labour hire workers.

In some instances, the enterprise agreements specify that the terms of an independent contractor's engagement are no more favourable than that provided for in the agreement for employees. Moreover, the employer may not be permitted to make ongoing employees redundant while independent contractors or labour hire workers remain on the payroll.

What is the prevalence of provisions restricting the use of independent contracting and labour hire arrangements in enterprise agreements? What types of restrictions have been applied?

What are the arguments for and against any such provisions, and to what extent are there grounds for any legislative amendments?

What are the effects of such provisions on flexibility, productivity and costs in workplaces, and on the capacity of employers to manage labour? How have they affected independent contractors and labour hire businesses?

To what extent do such provisions affect the mix of independent contractors / labour hire workers and ongoing workers?

Sponsored foreign workers

Encouraging skilled workers to lawfully migrate to Australia to bridge 'gaps' in the local labour market has been a longstanding feature of Australian immigration policy. One of the key mechanisms for achieving this is the subclass 457 visa. Employers can use these to sponsor an overseas worker for a stay of up to 4 years.

457 visas are a contentious issue. They have been the subject of no fewer than six reviews and two Senate inquiries. The most recent of these — the report of a temporary 457 visa independent panel — was released in September 2014. The report noted that, as of the 31 May 2014, there were about 200 000 temporary 457 visa holders in Australia. This comprised around 110 000 principle applicants and 80 000 family members, and accounted for around 11 per cent of all temporary visa holders (Azaries et al. 2014). There has been substantial growth of such visa holders from the early 2000s (Wilkins and Wooden 2014).

While issues concerning to the *Migration Act 1958* (Cth) are not explicitly included in the terms of reference of this inquiry, the FWA does have implications for the use of the subclass 457 visa. Primarily, the employment rights and workplace entitlements of the sponsored visa worker may be determined within the WR system. Less directly, changes in the availability of workers in certain occupations attributable to the WR system may lead employers to look offshore to augment their workforce.

How does the WR system affect the use of sponsored foreign workers?

Does any element of the WR system affect the incentives of employers either towards or away from the use of sponsored worker visas?

5.7 Other elements of the WR framework

Right of entry

There are laws governing the right of entry of employee representatives (typically trade union officials) to workplaces and the circumstances under which they may enter. The FWC is responsible for issuing entry permits to suitable organisation officials, and ensuring that such entry rights are properly exercised.

A number of conditions specified in the FWA must be met for an official to exercise rights of entry. These conditions are intended to balance the rights of employees to meet with representatives and the rights of employers to conduct their business operations without disruption. Both employee representatives and employers claim that the arrangements are sometimes abused.

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

Transfer of business

The *Fair Work Amendment (Transfer of Business) Act 2012* (Cth) sought to protect employee entitlements in the event of a transfer of a business. Under the Act, when a business changed hands, a worker would receive the same pay and conditions from the new owner, if it could be demonstrated that the new job was largely a continuation of the old one. In circumstances where the transfer was between a state and national system employer, the FWA would assume coverage and the FWC would be able to make orders over the worker's pay and conditions.

While the Department of Employment's post-implementation review of this amendment is, as of January 2015, yet to be publicly released, participants did express some concerns about lingering issues. Where transfers were between state and national system employers, several participants argued that the current arrangements led to the imposition of 'inappropriate' public sector terms and conditions on private companies, which discouraged the new owners from retaining employees (Ai Group 2014c). The ACTU indicated that there was anecdotal evidence that some employees 'did not transfer to the new national system employer' and instead the new employer 'hired their own employees to do work that was previously undertaken by state government employees'(ACTU 2014b).

What are the problems, if any, about the WR arrangements for the transfer of business, what are the appropriate changes and what effects would these have?

Long service leave

Under the current WR system, long service leave entitlements are primarily determined by state and territory laws. Differences in these entitlements between states and territories may lead to difficulties and unnecessary complexities for businesses that operate in more than one jurisdiction. The lack of a national minimum standard for long service leave may also arguably be inconsistent with existing regulations ensuring a universal safety net for other leave entitlements, such as annual leave and parental leave.

While there have been some efforts to develop uniform long service leave entitlements under the National Employment Standards, these have been met with some difficulty. Standardisation between states and territories would necessarily lead to some groups being left worse off than under their existing provisions. For example, uniform adoption of those long service leave arrangements that currently provide the most generous leave entitlements would benefit employees in some jurisdictions, at a cost to their employers. At the same time, moving to a new national arrangement would impose some transition costs on the large majority of employers that only operate in one jurisdiction.

What are the costs associated with existing differences in long service leave entitlements across states? Do these costs justify the adoption of a uniform national standard?

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

International labour standards

Australia is a signatory to various international agreements relating to labour standards. While these agreements have no legal force unless Parliament chooses to enact domestic laws to bring them into effect, they nonetheless form part of the WR framework. They may be invoked, where relevant, in an Australian court to guide the development of common law and assist in the construction of a legislative provision. International standards also form part of domestic debates about what Australia's WR system should look like.

The main (but not only) sources of international influences on Australia's WR framework are the labour standards adopted under the auspices of the International Labour Organisation (ILO). Australia is a signatory to various ILO Conventions. Some basic labour provisions have also been incorporated in some of Australia's trade agreements, including those with the United States and Chile.[10]

What are the implications of international labour standards (including those in trade agreements) for Australia's WR system?

[10] The Commission discussed the inclusion of labour standards in trade agreements in its 2010 report on Bilateral and Regional Trade Agreements (PC 2010, pp. 277–280).

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