



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	1
3.2	Types of enterprise bargaining and their key processes	1
3.3	When enterprise bargaining disputes lead to industrial action	10
3.4	Individual arrangements outside enterprise agreements	14
3.5	Resolving disputes over terms and conditions	16

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-authorized 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 2014²

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 judgment⁴ 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 Court⁵, 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.

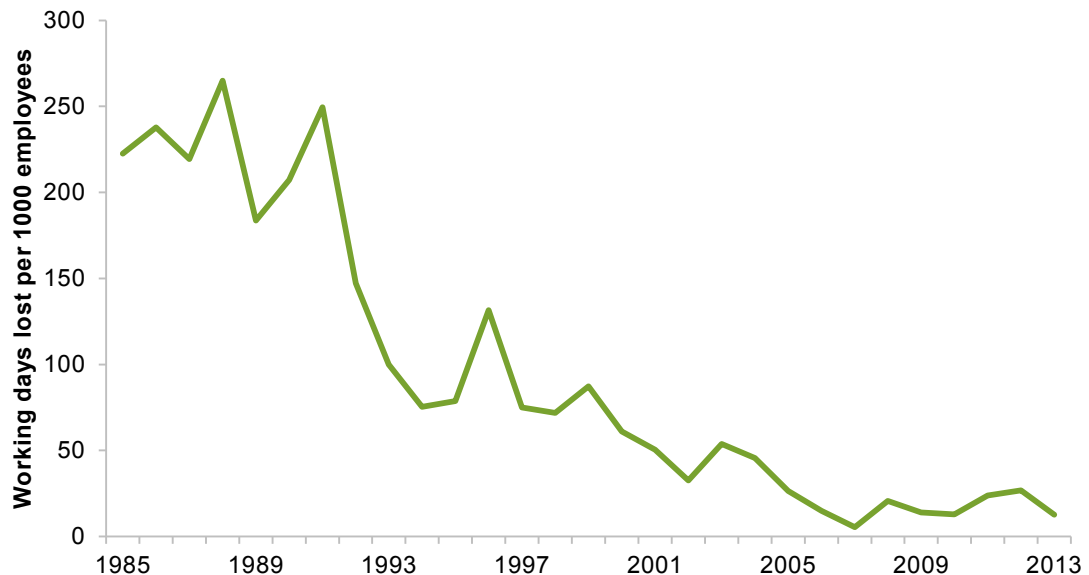
⁴ *Marmara v Toyota Motor Corporation Australia Limited* [2013] FCA 1351.

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 (typically⁶) 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?

References

- Ai Group 2014a, *Enterprise bargaining and agreement making*, Workshop Paper, 5-6 May, National PIR Group Conference.
- 2014b, *Submission to position paper*, Productivity Commission Inquiry into Australia's Automotive Manufacturing Industry, February.
- Australian Government 2012, *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation*, August, Canberra, <http://employment.gov.au/fair-work-act-review> (accessed 16 January 2015).
- Ellery, N., Creighton, B. and Levy, J. 2014, *No further claims provisions do not prevent proposed variations to enterprise agreements - Toyota decision confirms*, 29 July, Corrs Chambers Westgarth, Perth.
- Farmakis-Gamboni, S., Yuen, K., Preston, M. and Katic, M. 2014, *Productivity and innovation in enterprise agreement clauses: an overview of literature, data and case studies at the workplace level*, Future Directions 2014-15, Initiative 29, December, Fair Work Commission.
- Forsyth, A., Gostencnik, V., Parker, J. and Roach, R. 2010, *Navigating the Fair Work Laws*, Thomson Reuters Lawbook Co, Sydney.
- FWO (Fair Work Ombudsman) 2010, *Effective dispute resolution*, <http://www.fairwork.gov.au/about-us/policies-and-guides/best-practice-guides/effective-dispute-resolution#fwchelp> (accessed 16 January 2015).
- 2015, *Best practice guide: use of individual flexibility arrangements*, Australian Government.
- Herbert Smith Freehills 2014, *Enterprise bargaining – recent trends and issues*, 26 March, Brisbane.
- Kates, S. 2012, *The AMMA Workplace Relations Research Project – A Survey Based Analysis: Fifth Report – for the period from 1 November 2011 to 30 April 2012*, RMIT, Melbourne.
- Lucas, C. 2013, 'Firies plan unusual work bans in pay spat', *The Age*, 9 August, <http://www.theage.com.au/victoria/firies-plan-unusual-work-bans-in-pay-spat-20130809-2rm6y.html> (accessed 18 December 2014).
- MBA (Master Builders Australia) 2013, *Industrial relations policies 2013: essential changes to the Fair Work Regime*, Submission, Canberra.
- O'Neill, B. 2012, *General Manager's report into the operation of the first three years of the Fair Work Act 2009 (Cth) unfair dismissal system*, Fair Work Australia.
- PC (Productivity Commission) 2014, *Public Infrastructure*, Inquiry Report, Canberra.
- Stewart, A. and Riley, J. 2007, 'Working around Work Choices: collective bargaining and the common law', *Melbourne University Law Review*, vol. 31, pp. 903–937.