



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:

<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

5.1	Exploring some other important areas	1
5.2	How well are the institutions working?	1
5.3	Compliance costs — a ‘bog of technicalities’?	3
5.4	Is competition law a neglected limb of the WR system?	5
5.5	Public sector workplace relations	8
5.6	Alternative forms of employment	9
5.7	Other elements of the WR framework	15
	References	17

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.

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,

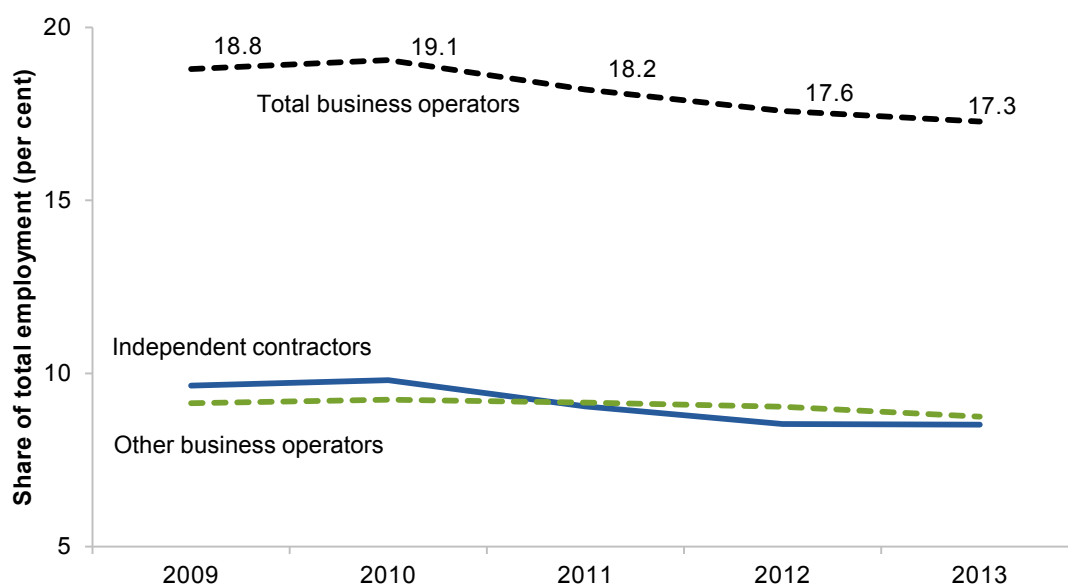
⁷ These data relate to November 2008 and exclude people who obtained jobs through employment agencies. The latter help with the process of recruitment, but do not have an ongoing employment relationship with the person.

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?

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).

References

- ABS (Australian Bureau of Statistics) 2010, *Labour Hire Workers*, Australian Labour Market Statistics, January 2010, Canberra, 8 January.
- 2012, *One in Five Australian Workers are Casual Employees*, Media Release, Canberra, 20 April.
- ACCC (Australian Competition and Consumer Commission) 2011a, *Collective Bargaining Notifications*, Canberra.
- 2011b, *Professions and the Competition and Consumer Act*, Canberra.
- ACTU (Australian Council of Trade Unions) 2012, *Submission to the Post-Implementation Review of the Fair Work Act 2009*, February.
- 2014a, *Submission to issues paper*, Competition Policy Review, June.
- 2014b, *Submission to the Post-Implementation of the Fair Work Amendment (Transfer of Business) Act 2012*.
- Ai Group 2014a, *Enterprise bargaining and agreement making*, Workshop Paper, 5-6 May, National PIR Group Conference.
- 2014b, *Submission to issues paper*, Competition Policy Review, June.
- 2014c, *Submission to the Transfer of Business Post Implementation Review*, March.
- AIRC (Australian Industrial Relations Commission) 2006, *Historical Overview*, December.
- AMMA (Australian Mines & Metals Association) 2014, *Submission to issues paper*, Competition Policy Review, June.
- 2012, *Submission to the Fair Work Act Review Panel*, February.
- Anderson, P. 2003, *The Last Frontier: Workplace relations and the Trade Practices Act*, Occasional Paper, Institute of Public Affairs, Melbourne.
- ASU (Australian Services Union) 2012, *Submission to the Fair Work Act Review Panel*.
- Australian Government 2012, *Fair Work Act Review Background Paper*, Canberra, January.
- Azaries, J., Lambert, J., McDonald, P. and Malyon, K. 2014, *Robust New Foundations: A Streamlined, Transparent and Responsive System for the 457 Programme*, September.
- BCA (Business Council of Australia) 2012, *Business Council of Australia Submission to the Review of the Fair Work Act 2009*, February.
- Borland, J. 2012, 'Industrial Relations Reform: Chasing a Pot of Gold at the End of the Rainbow?', *Australian Economic Review*, vol. 45, no. 3, pp. 269–289.

-
- DTF (Victorian Department of Treasury and Finance) 2012, *Public Sector Workplace Relations policies, December 2012 update*, Victorian Government, Melbourne.
- Ellery, N., Forsyth, A. and Levy, J. 2014, *Who employs labour hire workers? Fair Work Commission rejects the concept of 'Joint Employment'*, 14 February, Corrs Chambers Westgarth, Perth.
- Fels, A. 2005, 'Employment & Industrial Relations', presented at Employment & Industrial Relations Seminar, 25 May, Melbourne, Arnold Bloch Leibler.
- FWC (Fair Work Commission) 2014, *Future Directions 2014-2015: Continuing the Change Program*.
- IPA (Institute of Public Affairs) 2012, *Submission to the Fair Work Act Review 2012*, February.
- King, S. 2013, 'Collective Bargaining by Business: Economic and Legal Implications', *UNSW Law Journal*, vol. 36, no. 1, pp. 107–138.
- Lloyd, J. 2014, *Competition Policy Review*, June, Fair Work Building Inspectorate Advisory Agency and Red Tape Commissioner, Victoria, Victoria.
- MBA (Master Builders Australia) 2014, *Submission to issues paper*, Competition Policy Review, May.
- Miller, R. 2013, *Miller's Australian Competition and Consumer Law Annotated*, 35th edn, Thomson Reuters, Sydney.
- NCA (National Commission of Audit) 2014, *Towards Responsible Government: Report of the National Commission, Phase Two*, Commonwealth of Australia, Canberra, March.
- NCC (National Competition Council) 1999, *Review of sections 51(2) and 51(3) of the Trade Practices Act 1974*, Melbourne.
- PC (Productivity Commission) 2010, *Bilateral and Regional Trade Agreements*, Research report, Canberra.
- 2014, *Public Infrastructure*, Inquiry Report, Canberra.
- Wilkins, R. and Wooden, M. 2014, 'Two Decades of Change: the Australian Labour Market, 1993-2013', *Australian Economic Review*, vol. 47, no. 4, pp. 417–431.