



Australian Government

# Towards more productive and equitable workplaces

An evaluation of the Fair Work legislation

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The report can be accessed via the DEEWR website at:

**<http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview>**

15 June 2012

The Hon Bill Shorten MP  
Minister for Employment and Workplace Relations  
Parliament House  
CANBERRA ACT 2600

Dear Minister,

Review of the *Fair Work Act 2009*

We have pleasure in presenting to you our report titled *Towards more productive and equitable workplaces*. In accordance with the terms of reference, this report is a review of the Fair Work legislation, being the *Fair Work Act 2009* (Cth) and the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth). This report is also a post-implementation review of the Fair Work legislation, which meets the Australian Government's regulation impact analysis requirements.

The Fair Work legislation is the latest in a series of legislative changes to federal labour law, which have occurred over the last two decades. The legislation also marks a continuation of the shift to enterprise bargaining, which was commenced with the enactment of the *Industrial Relations Reform Act 1993* (Cth).

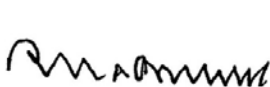
In our view, the current laws are working well and the system of enterprise bargaining underpinned by the national employment standards and modern awards is delivering fairness to employers and employees.

You asked us to make recommendations on areas where the operation of the Act could be improved. We have provided 53 proposals. In some instances, we have suggested alterations because provisions of the Fair Work legislation have not operated as envisaged; in others, we have made suggestions to improve the operation of our labour relations mechanism to ensure that it delivers fair outcomes and to further facilitate opportunities for employers and employees to develop equitable and productive workplaces.

We take this opportunity to thank all of the people and organisations who furnished us with detailed written submissions that aided our deliberations. We also thank the people who attended roundtable discussions with the Panel. These participants included officials from trade unions and employer associations, directors and senior personnel from large employers, industrial lawyers, academics and members of community groups. The submissions and the names and affiliations of attendees are set out in an appendix to this report. The evidence that we gathered from submissions and from meetings has provided us with a broad view of the actual operation of the Fair Work legislation and has informed and stimulated our thinking.

Finally, we sincerely thank Mr Matt O'Connor and his colleagues from the Fair Work Act Review Secretariat of the Department of Education, Employment and Workplace Relations. We are grateful for their expertise and research, which enriched our deliberations. Our work was greatly facilitated by their dedication, research and attention to detail. We also thank the officers of the Department, not members of the Secretariat, who provided expert assistance, and the officers of the Office of Best Practice Regulation.

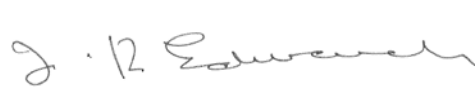
Yours sincerely,



**Professor Emeritus Ron McCallum AO**



**The Hon Michael Moore**



**Dr John Edwards**



**Australian Government**

**Department of Finance and Deregulation**  
Office of Best Practice Regulation

Ms Lisa Paul AO PSM  
Secretary  
Department of Education, Employment and Workplace Relations  
50 Marcus Clarke Street  
Canberra ACT 2601

Dear Ms Paul

**Post-implementation Review – Review of the Fair Work legislation**

Thank you for forwarding the report: *Towards More Productive and Equitable Workplaces: An evaluation of the Fair Work legislation* on 13 June 2012 for consideration as a Post-implementation Review (PIR).

The PIR contains an adequate level of analysis and meets the Government's best practice regulation requirements. We note that the PIR has been formally certified as required by the Australian Government Best Practice Regulation Handbook (the Handbook).

Please note the Handbook also requires that the PIR be sent to the relevant portfolio minister and the Prime Minister. The Department of Education, Employment and Workplace Relations (DEEWR) should advise the Office of Best Practice Regulation when the PIR will be made available to the public. Once we have received advice from DEEWR that the PIR has been published we will place the PIR on our website of [ris.finance.gov.au](http://ris.finance.gov.au) (Best Practice Regulation Updates Website).

For your information, our website provides a public comment facility. The OBPR moderates this facility for offensive content but does not moderate debate.

Please retain this letter as a record of the OBPR's advice, our reference number is 11916.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jason McNamara'.

Jason McNamara

Executive Director  
Office of Best Practice Regulation  
15 June 2012

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## Abbreviations

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AAA	Accommodation Association of Australia
AAWI	average annualised wage increase
ABCC	Australian Building and Construction Commission
ABI	Australian Business Industrial
ABS	Australian Bureau of Statistics
ACCER	Australian Catholic Council for Employment Relations
ACCI	Australian Chamber of Commerce and Industry
AMCA	Air Conditioning and Mechanical Contractors Association
ACT	Australian Capital Territory
ACTU	Australian Council of Trade Unions
AEC	Australian Electoral Commission
AEU	Australian Education Union
AFAP	Australian Federation of Air Pilots
AFEI	Australian Federation of Employers and Industries
AFPC	Australian Fair Pay Commission
AFPCS	Australian Fair Pay and Conditions Standard
AHA	Australian Hotels Association
AHEIA	Australian Higher Education Industrial Association
AHRC	Australian Human Rights Commission
AHRI	Australian Human Resources Institute
Ai Group	Australian Industry Group
AIER	Australian Institute of Employment Rights
AIMPE	Australian Institute of Marine and Power Engineers
AIPA	Australian and International Pilots Association
AIRC	Australian Industrial Relations Commission
ALLA Speech	Julia Gillard, address to the Australian Labour Law Association fourth biennial conference, 14 November 2008
ALRC	Australian Law Reform Commission
AMIC	Australian Meat Industry Council
AMIEU	Australasian Meat Industry Employees Union
AMIF	Australian Motor Industry Federation
AMMA	Australian Mines and Metals Association
AMWU	Australian Manufacturing Workers Union
ANF	Australian Nursing Federation
ANRA	Australian National Retailers Association
ANZSIC	Australian and New Zealand Standard Industrial Classification
APESMA	Association of Professional Engineers, Scientists and Managers, Australia
APTIA	Australian Public Transport Industrial Organisation
ARA	Australian Retailers Association
ARTIO	Australian Road Transport Industrial Organisation
ASA	Australian Shipowners Association
ASCO	Australian Standard Classification of Occupations

ASU	Australian Services Union
ATEC	Australian Tourism Export Council
AWAs	Australian workplace agreements
AWOTE	average weekly ordinary time earnings
AWU	Australian Workers Union
Background Paper	Fair Work Act Review Background Paper
BIG	Baking Industry Group Ltd
BCA	Business Council of Australia
BHP	BHP Billiton
BMIAA	Baking Manufacturers Industry Association of Australia
BOOT	better off overall test
BRIT	Bendigo Regional Institute of Technical and Further Education
CAA Act	<i>Conciliation and Arbitration Act 1904</i>
CAI	Clubs Australia Industrial
Cat. No.	Catalogue Number
CCIQ	Chamber of Commerce and Industry Queensland
CCIWA	Chamber of Commerce and Industry Western Australia
CCNT	Chamber of Commerce Northern Territory
CELRL	Centre for Employment and Labour Relations Law
CFMEU	Construction, Forestry, Mining and Energy Union
CFMEU C&G	Construction, Forestry, Mining and Energy Union—Construction and General Division
CFMEU M&E	Construction, Forestry, Mining and Energy Union—Mining and Energy Division
Code, the	Small Business Fair Dismissal Code
COIL	Committee on Industrial Legislation
COSBOA	Council of Small Business Australia
CEPU	Communications Electrical Plumbing Union
CPI	Consumer Price Index
CPSU PSU	Community and Public Sector Union—Public Sector Union Group
CPSU SPSF	Community and Public Sector Union—State Public Services Federation Group
DEEWR	Department of Education, Employment and Workplace Relations
DEEWR submission to the Fair Work Bill inquiry	The submission of the Department of Education, Employment and Workplace Relations to the inquiry of the Senate Standing Committee on Education, Employment and Workplace Relations into the Fair Work Bill 2008
EM	Explanatory Memorandum to the Fair Work Bill 2008
eS4W	economic Security4Women
ETU	Electrical Trades Union
Fair Work legislation	<i>Fair Work Act 2009 (Cth) and Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (Cth)</i>
Forsyth and Stewart	Professor Anthony Forsyth and Professor Andrew Stewart
FW Act	<i>Fair Work Act 2009 (Cth)</i>
FWA	Fair Work Australia
FWF	Forward with Fairness
FWFIP	Forward with Fairness—Policy Implementation Plan
FWO	Fair Work Ombudsman
G7	Group of Seven
GDP	gross domestic product
GFC	global financial crisis

GVA	gross value added
HIA	Housing Industry Association
HLOG	High Level Officials' Group
HSU	Health Services Union
IFA	individual flexibility arrangement
Implementation Plan	Forward with Fairness—Policy Implementation Plan
IC Bill	Workplace Relations Amendment (Independent Contractors) Bill 2006 (Cth)
IPA	Institute of Public Affairs
IR Act	<i>Industrial Relations Act 1988</i> (Cth)
IRR Act	<i>Industrial Relations Reform Act 1993</i> (Cth)
IRR Act (No. 2)	<i>Industrial Relations Amendment Act (No. 2) 1994</i> (Cth)
ITEA	individual transitional employment agreement
LSL	long service leave
LIV	Law Institute of Victoria
MBA	Master Builders Australia
MCA	Minerals Council of Australia
MFP	multifactor productivity
MGA	Master Grocers Australia
MPAQ	Master Plumbers Association of Queensland
MPMCANSW	Master Plumbers and Mechanical Contractors Association of New South Wales
MPMSAA	Master Plumbers and Mechanical Services Association of Australia
MUA	Maritime Union of Australia
NAPSA	notional agreement preserving a state award
NDT	no-disadvantage test
NECA	National Electrical and Communications Association
NED	nominal expiry date
NES	National Employment Standards
NESDP	National Employment Standards discussion paper
NFF	National Farmers' Federation
NRA	National Retail Association
NSW	New South Wales
NSWBC	New South Wales Business Chamber
NT	Northern Territory
NTEU	National Tertiary Education Union
NUW	National Union of Workers
NWRCC	National Workplace Relations Consultative Council
NWWC	National Working Women's Centres
OBPR	Office of Best Practice Regulation
OEA	Office of the Employment Advocate
OECD	Organisation for Economic Co-operation and Development
OHS	occupational health and safety
Panel	Fair Work Act Review Panel
PC	Productivity Commission
PCS	J Gillard, 'Introducing Australia's new workplace relations system', speech to the National Press Club, Canberra, 17 September 2008
PFA	Police Federation of Australia



PHIEA	Private Hospital Industry Employer Association
PIAA	Printing Industries Association of Australia
PIR	post-implementation review
Pittard	Professor Marilyn Pittard
PPL Act	<i>Paid Parental Leave Act 2010</i> (Cth)
Qld	Queensland
QTIC	Queensland Tourism Industry Council
R&CA	Restaurant and Catering Australia
RAM	report on agreement making
RBA	Reserve Bank of Australia
Report	this report
Review	Fair Work Act Review
RTBU	Rail, Tram and Bus Union
s.	section
SA	South Australia
SAL	Shipping Australia Limited
SDA	Shop, Distributive and Allied Employees' Association
Senate Inquiry	inquiry of the Senate Standing Committee on Education, Employment and Workplace Relations into the Fair Work Bill 2008
SRS	second reading speech to the Fair Work Bill 2008
Supplementary	supplementary submission to the Fair Work Act Review
Tas	Tasmania
TCF	textile, clothing and footwear
TCFUA	Textile, Clothing and Footwear Union of Australia
Transition Act	<i>Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008</i> (Cth)
Transition Bill	Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008
<i>Trends</i>	<i>Trends in federal enterprise bargaining</i> publication—DEEWR, Canberra
TTIA	Timber Trade Industrial Association
TWU	Transport Workers Union
UV	United Voice
VECCI	Victorian Chamber of Commerce and Industry
Vic	Victoria
WFPR	Work and Family Policy Roundtable
Work Choices	<i>Workplace Relations Act 1996</i> (Cth) as it existed subsequent to the amendments made by the <i>Workplace Relations Amendment (Work Choices) Act 2005</i> (Cth)
WPI	Wage Price Index
WR	workplace relations
WR Act	<i>Workplace Relations Act 1996</i> (Cth) as it existed prior to the amendments made by the <i>Workplace Relations Amendment (Work Choices) Act 2005</i> (Cth)

# 1 Executive summary and table of recommendations

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On 20 December 2011 the Hon Bill Shorten MP announced the appointment of a three-member panel to review the *Fair Work Act 2009* (FW Act) and the *Workplace Relations Amendment (Transition to Forward with Fairness Act) 2008* (Transition Act)—together, the Fair Work legislation. The Panel was asked to assess the operation of the FW Act and the extent to which its effects have been consistent with the objects set out in s. 3 of the FW Act. The terms of reference asked the Panel to examine and report on the extent to which the legislation is operating as intended, and on areas where the evidence indicates that the operation of the Fair Work legislation could be improved consistent with the objects of the legislation. The Panel's report to the Minister was also required to satisfy the requirements of a post-implementation review, as assessed by the Office of Best Practice Regulation (OBPR).

A Secretariat was appointed to assist the Panel, and DEEWR staff also responded to requests for research support. The OBPR assisted with liaison and has been, throughout the Review, scrupulous and professional both in explaining its requirements and in acknowledging the wider purposes of the Review. The Panel is grateful to the Secretariat, to the DEEWR officers who conducted research and supplied requested material for the Review, and to the OBPR.

In response to a background paper and a request from the Panel, we received over 250 submissions, almost all of which were published on the Review website. The Panel then held extensive consultations with the major stakeholders before evaluating the evidence and developing our report. The Panel makes 53 recommendations to the Minister.

Over four months of investigation the Panel has been guided by some key principles.

One of these was that economic issues must rank high in our assessment of the operation of the FW Act, since the objects in s. 3 and the Government's announced intentions in the legislation gave considerable weight to economic objectives. The objects, for example, include 'productive workplace relations', 'national economic prosperity', the promotion of 'productivity and economic growth for Australia's future economic prosperity', and 'achieving productivity and fairness'.

Another principle was that the Panel should not limit itself to evaluating the FW Act only through the lens of the legislation that had immediately preceded it. Though the OBPR requires a post-implementation review to include a detailed comparison of Work Choices and the FW Act, the Panel was disinclined to restrict ourselves to this comparison for the Review as a whole, or to find it a fruitful basis on which to examine the operation of the FW Act. Of the four bargaining frameworks over the last 20 years, Work Choices is least like the others. Its period of effective operation was relatively brief and during that period it was significantly amended. It was widely said to have contributed to the then government losing office in 2007 and it has found no political champion since. The option of returning to Work Choices was not seriously explored by any of the major stakeholders during consultations with the Panel.

A third principle guiding the Panel's work was the recognition that the interpretation of provisions in industrial relations legislation are often contested. The FW Act itself is not yet three years old, and judicial interpretation of some of its provisions is still evolving as issues are brought before courts. The Panel was disinclined to recommend legislative changes where there was a reasonable prospect that judicial interpretation of existing provisions would resolve the problem. Amending particular provisions of the FW Act before judicial clarification of their meaning and scope runs the risk of the courts revisiting issues which have been settled, and also of opening up new issues for unnecessary curial interpretation with uncertain benefits.

Finally, in evaluating submissions the Panel was disinclined to recommend changes that would advantage one party over another but not contribute to improving national prosperity, productivity or equity overall.

As documented in the Report, the Panel finds that the effects of the Fair Work legislation have been broadly consistent with the objects set out in s. 3 of the FW Act. We also find that the legislation is operating broadly as intended.

The Panel was asked to examine and report on areas where the evidence indicates that the operation of the Fair Work legislation could be improved, consistent with the objects of the legislation. Here the Panel recommends a number of significant changes. Some of the most important of these are intended to encourage productivity growth, and others to enhance equity in the workplace. Many other recommendations are to correct anomalies that have been revealed in the operation of the FW Act or to remove defects in the machinery of the legislation.

After considering the economic aspects of the FW Act the Panel concludes that since the FW Act came into force important outcomes such as wages growth, industrial disputation, the responsiveness of wages to supply and demand, the rate of employment growth and the flexibility of work patterns have been favourable to Australia's continuing prosperity, as indeed they have been since the transition away from arbitration two decades ago. The exception has been productivity growth, which has been disappointing in the FW Act framework and in the two preceding frameworks over the last decade.

The Panel is not persuaded that the legislative framework for industrial relations accounts for this productivity slowdown. It recognises, however, that productivity growth underpins rising living standards. Accordingly, the Panel has looked for ways to minimise constraints on flexibility in the FW Act that were not intended or that impede productivity enhancement and could be removed without significant harm to other objects of the legislation.

In its deliberations the Panel did not accept that enhancing productivity and enhancing equity are conflicting goals. Increased productivity permits both higher wages and higher profits. Increased equity need not come at a cost to productivity. Indeed, by supporting harmony in the workplace, increased equity may well reduce turnover, training costs and employee dissatisfaction, all of which enhance a productive workplace culture.

Among the recommendations that may significantly encourage flexibility and productivity, the Panel recommends that:

- the institutions created under the FW Act, Fair Work Australia and the Fair Work Ombudsman, extend their role to include actively encouraging more productive workplaces, including through promoting best practice in the productivity enhancing provisions of agreements, developing model productivity clauses for awards and agreements, and sponsoring training workshops for employers and employees on how to enhance workplace productivity
- the provisions in relation to individual flexibility arrangements be amended to make IFAs easier to access and more attractive to both employers and employees. The amendments should include: a requirement that enterprise agreements include the model flexibility term as a minimum, clarification of the BOOT to clearly include non-monetary benefits, the extension of the minimum term of an IFA to 90 days, a requirement to notify the FWO of the existence of the IFA, and new defence against a subsequent claim that an employer believed on all reasonable grounds that the requirements for an IFA had been met. However, the Panel has rejected the view that assent to an IFA may be required as a precondition to gaining employment
- greenfields agreement provisions be made consistent with the general enterprise bargaining stream by applying suitably modified good faith bargaining rules to negotiations for proposed agreements. Given the national significance of some greenfields projects and the need for assurance in project design and investment, the Panel also recommends a form of arbitration be available if the parties are unable to reach agreement within a suitable time frame
- to enhance its role in dispute settlement, FWA be given the power to initiate compulsory conciliation when the parties have been unable to reach agreement, including in greenfields negotiations
- to support the objective of good faith bargaining, the legislation be amended to require that protected action ballot orders can be issued only after bargaining has commenced

- the Government consider amending the transfer of business provisions to make it clear that when employees, on their own initiative, seek to transfer to a related entity of their current employer they will be subject to the terms and conditions of the new employer entity
- the time limits for lodging unfair dismissal applications and for general protections claims (involving dismissal) be amended to align them to 21 days, FWA be given the power to dismiss unfair dismissal applications in certain circumstances, and FWA be able to deal with applications by way of a hearing process that is informal, inquisitorial and determinative. Furthermore, FWA should have the power to make costs orders against a party that is unreasonably pursuing a proceeding
- Division 7 of Part 3-1 be amended to provide that the central consideration as to the reason for adverse action is the subjective intention or intentions of the person or persons taking the alleged adverse action.

Among recommendations that are intended to increase workplace equity or remove current inequities, the Panel recommends that:

- the FW Act be amended to prohibit enterprise agreement clauses that permit employees to opt out of the agreement, and to prohibit the making of an enterprise agreement with one employee
- the right to seek flexible work arrangements be extended to a wider range of caring and other circumstances
- if an employee requests additional unpaid parental leave or flexible work arrangements, the employer must hold a meeting with the employee to discuss the request, unless the employer has agreed to the request
- taking unpaid special maternity leave should not reduce an employee's entitlement to unpaid parental leave
- notices of employee representational rights address only the relevant statutory requirements, be lodged with FWA and published on FWA's website
- good faith bargaining obligations be extended when bargaining for a new agreement commences prior to 90 days before the expiry of an existing agreement, and to variations of agreements
- the protected action ballot processes be improved, including by allowing electronic voting and allowing eligible union members and employee bargaining representatives at the time of a protected action ballot to vote in the ballot
- employers be required to continue to provide accommodation even when employees are taking protected industrial action
- FWA be given greater power to equitably resolve disputes over the right of union officials to make workplace visits.

After careful consideration the Panel rejected some submissions as diminishing fairness or otherwise being contrary to the objects of the FW Act, or as unreasonably favouring one party over another. The Panel's reasoning is explained in the appropriate chapters. In particular the Panel did **not** accept that:

- the FW Act should be amended to permit easier access to arbitration in the case of long running disputes, or where employees lack industrial strength. Nor did it accept that the FW Act should be amended to further permit FWA to terminate prolonged industrial action. As noted above, the Panel does, however, see a last resort role for arbitration in the event of failure to reach a greenfields agreement
- the permitted matters for negotiation in enterprise agreements should be restricted to those permitted in the Work Choices framework. Instead, the Panel supports the FW Act content rules, which are operating in a manner broadly consistent with interpretation of the longstanding 'matters pertaining' formula in recent decades, with the exception of the Work Choices period

- the Government should permit individual agreements with provisions that undercut award provisions. In the Panel’s view this is contrary to the objects of the FW Act and inimical to both the making of collective agreements and the safety net role of modern awards.

For well over a century Australians have debated what is the right legal framework for wages, working conditions and employment. No doubt we will continue to do so. Over the last 20 years, however, both the legal framework and the nature of Australian industrial relations have profoundly changed. Arbitration has given way to bargaining, and more recently a federal system has given way to a national system. While there are important distinctions between each of the four legislative frameworks for industrial relations since the shift towards a greater focus on enterprise bargaining in 1993, they also have a good deal in common, including an emphasis on bargaining at the enterprise level, constraints on resort to arbitration, a safety net of minimum conditions, and recognition of a right to strike in pursuit of a collective agreement. Over those two decades the pertinent economic outcomes have been congenial to continued prosperity. Industrial disputes are uncommon, overall wages growth has remained consistent with low consumer price inflation while wages growth between industries and regions is responding to supply and demand, unemployment has steadily declined while participation in the workforce has increased, wages after inflation have markedly improved, and at the same time the profit share of incomes has increased. These are considerable achievements, not to be put at risk lightly.

**Table 1.1—Table of recommendations**

Table of recommendations		
Chapter 4: Contemporary industrial relations and the economy		Reference
1	The Panel recommends that the role of the Fair Work institutions be extended to include the active encouragement of more productive workplaces. This activity may, for example, take the form of identifying best-practice productivity enhancing provisions in agreements and making them more widely known to employers and unions, encouraging the development and adoption of model workplace productivity enhancing provisions in agreements, and disseminating information on workplace productivity enhancement through conferences and workshops. The Panel does not consider that amendments to the FW Act are required to implement this recommendation.	Page 85
Chapter 5: The safety net		Reference
2	The Panel recommends that s. 130 be amended to provide that employees do not accrue annual leave while absent from work and in receipt of workers’ compensation payments.	Page 89
3	The Panel recommends that s. 76 be amended to require the employer and the employee to hold a meeting to discuss a request for extended unpaid parental leave, unless the employer has agreed to the request.	Page 94
4	The Panel recommends that s. 80(7) be repealed so that taking unpaid special maternity leave does not reduce an employee’s entitlement to unpaid parental leave under s. 70.	Page 95
5	The Panel recommends that s. 65 be amended to extend the right to request flexible working arrangements to a wider range of caring and other circumstances, and to require that the employee and the employer hold a	Page 99

	meeting to discuss the request, unless the employer has agreed to the request.	
6	The Panel recommends that s. 90 be amended to provide that annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect.	Page 100
7	The Panel recommends that the Commonwealth, state and territory governments should expedite the development of a national long service leave standard with a view to introducing it by 1 January 2015.	Page 102
8	The Panel recommends that the Government consider limiting the number of public holidays under the NES on which penalty rates are payable to a nationally consistent number of 11.	Page 103
9	The Panel recommends that the better off overall test in s. 144(4)(c) and s. 203(4) be amended to expressly permit an individual flexibility arrangement to confer a non-monetary benefit on an employee in exchange for a monetary benefit, provided that the value of the monetary benefit foregone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate.	Page 109
10	The Panel recommends that the FW Act be amended to require an employer, upon making an individual flexibility arrangement, to notify the FWO in writing (including by electronic means) of the commencement date of the arrangement, the name of the employee party and the modern award or enterprise agreement under which the arrangement is made.	Page 109
11	The Panel recommends that the FW Act be amended to provide a defence to an alleged contravention of a flexibility term under s. 145(3) or s. 204(3) where an employer has complied with the notification requirements proposed in Recommendation 10 and believed, on reasonable grounds, that all other statutory requirements (including the better off overall test) had been met.	Page 109
12	The Panel recommends that s. 144(4)(d) and s. 203(6) be amended to require a flexibility term to require an employer to ensure that an individual flexibility arrangement provides for termination by either the employee or the employer giving written notice of 90 days, or a lesser period agreed between the employer and employee, thereby increasing the maximum notice period from 28 days to 90 days.	Page 109
13	The Panel recommends that s. 144 and s. 203 be amended to include the prohibition currently under s. 341(3) preventing a prospective employer making an offer of employment conditional on entering into an individual flexibility arrangement.	Page 110
14	The Panel recommends that the FW Act be amended to expressly empower FWA to strike out an award variation application that is not made in accordance with the FW Act, is frivolous or vexatious or which has	Page 113

	no reasonable prospects of success.	
15	The Panel recommends that s. 160 be amended to provide that the parties entitled to bring an application to make, vary or revoke a modern award under s. 158 can also apply to vary a modern award to remove an ambiguity or uncertainty.	Page 113
<b>Chapter 6: Enterprise bargaining and agreement making</b>		<b>Reference</b>
16	The Panel recommends that s. 238(3) be amended to require an applicant for a scope order to 'take all reasonable steps' to notify all other relevant bargaining representatives of the application.	Page 139
17	The Panel recommends that s. 229(3)(a) be deleted so bargaining representatives can apply for bargaining orders where bargaining commences more than 90 days before the nominal expiry date of an existing enterprise agreement.	Page 140
18	The Panel recommends that the FW Act be amended to apply the good faith bargaining obligations in s. 228 to proposed variations of enterprise agreements under Part 2-4, Division 7, with any necessary modifications.	Page 141
19	The Panel recommends that s. 174 be amended to provide that a bargaining notice must address only the matters specified in that section and the regulations made under it.	Page 144
20	The Panel recommends that bargaining notices issued by employers under s. 173 should be lodged with FWA and made available through publication on FWA's website.	Page 145
21	The Panel recommends that s. 176 be amended to prevent an individual union official being a bargaining representative for employees for whom the official's union does not have coverage.	Page 146
22	The Panel recommends the FW Act be amended to include a new provision after s. 240 which expressly empowers FWA to intervene on its own motion where it considers that conciliation could assist in resolving a bargaining dispute, including in respect of a greenfields agreement.	Page 149
23	The Panel recommends that the FW Act be amended to prohibit enterprise agreement clauses which permit employees to opt out of the agreement.	Page 161
24	The Panel recommends that s. 203 be amended to require enterprise agreement flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in paragraph 1(a) of the model flexibility term in Schedule 2.2 of the FW Regulations, along with any additional matters agreed by the parties.	Page 164
25	The Panel recommends that the Government continue to monitor the application of the BOOT to enterprise agreement approvals, to ensure that it is not being implemented in too rigid a manner or resulting in	Page 166

	agreements being inappropriately rejected.	
26	The Panel recommends that the FW Act be amended to prohibit the making of an enterprise agreement with one employee.	Page 168
27	The Panel recommends that the FW Act be amended to apply the good faith bargaining obligations in s. 228 to the negotiation of an s. 172(2)(b) greenfields agreement, with any necessary modifications.	Page 172
28	The Panel recommends that the FW Act be amended to require employers intending to negotiate a s. 172(2)(b) greenfields agreement to take all reasonable steps to notify all unions with eligibility to represent relevant employees.	Page 172
29	The Panel recommends that the FW Act be amended so that s. 240 (as with our Recommendation 22) applies to the negotiation of a s. 172(2)(b) greenfields agreement.	Page 172
30	The Panel recommends that the FW Act be amended to provide that, when negotiations for a s. 172(2)(b) greenfields agreement have reached an impasse, a specified time period has expired and FWA conciliation has failed, FWA may, on its own motion or on application by a party, conduct a limited form of arbitration, including 'last offer' arbitration, to determine the content of the agreement.	Page 173
<b>Chapter 7: Industrial action</b>		<b>Reference</b>
31	The Panel recommends that Division 8 of Part 3-3 be amended to provide that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained. The Panel further recommends that the FW Act expressly provide that bargaining has commenced for this purpose despite any disagreement over the scope of the agreement.	Page 177
32	The Panel recommends that Division 8 of Part 3-3 be amended to: <ul style="list-style-type: none"> <li>(a) allow protected action ballots to be conducted by electronic voting</li> <li>(b) allow an employee who becomes a union member after a protected action ballot order is obtained by that union to be included on the roll of voters for the ballot, and to vote on and take protected industrial action</li> <li>(c) allow an employee bargaining representative who is a union member to be included in the group of employees to be balloted pursuant to a ballot order obtained by the employee's union, and to vote on and take protected industrial action</li> <li>(d) require FWA to ensure that ballot agents conduct ballots expeditiously</li> <li>(e) if the group of employees to be covered by a proposed agreement includes employees covered by an agreement that has not passed its</li> </ul>	Page 183



	nominal expiry date, allow the remaining employees to be the subject of a ballot order, and to vote on and take protected industrial action.	
33	The Panel recommends that Division 9 of Part 3-3 be amended to provide that provision of accommodation does not constitute 'payment'. Employers should continue to be required to provide accommodation even if employees are taking industrial action.	Page 185
34	The Panel recommends that the FW Act no longer confer power on the Minister to terminate protected industrial action, as s. 431 presently does.	Page 187
<b>Chapter 8: Right of entry</b>		<b>Reference</b>
35	The Panel recommends that s. 505 be amended to provide FWA with greater power to resolve disputes about the frequency of visits to a workplace by a permit holder in a manner that balances the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without undue inconvenience.	Page 195
36	The Panel recommends that s. 492 and s. 505 be amended to provide FWA with greater power to resolve disputes about the location for interviews and discussions in a way that balances the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without undue inconvenience.	Page 197
37	The Panel recommends that the capacity for a permit holder to enter premises under s. 481 to investigate a suspected contravention relating to a member of the permit holder's organisation should continue to apply, with appropriate limits, following the end of the member's employment.	Page 198
<b>Chapter 9: Transfer of business</b>		<b>Reference</b>
38	The Panel recommends that s. 311 be amended to make it clear that when employees, on their own initiative, seek to transfer to a related entity of their current employer they will be subject to the terms and conditions of employment provided by the new employer.	Page 206
<b>Chapter 10: Unfair dismissal</b>		<b>Reference</b>
39	The Panel recommends that s. 386 be amended to bring employees who are subject to the circumstances set out in subsection (3) within the definition of 'dismissed' when the employment has terminated at the end of the specified period, on completion of the task or at the end of the season.	Page 218
40	The Panel recommends that the time limit for lodging unfair dismissal applications should be extended to 21 days (to align with the recommended amended time limit for general protections claims involving a dismissal).	Page 224
41	The Panel recommends that Division 5 of Part 3-2 be amended to provide that FWA can deal with applications by way of a hearing process that is	Page 229

	informal, inquisitorial and determinative.	
42	The Panel recommends that the FW Act be amended to give FWA the discretionary power to dismiss applications under s. 394 in circumstances where the parties have concluded a settlement agreement, or where an applicant fails to attend a proceeding relating to the application, or where the applicant fails to comply with FWA directions or orders relating to the application.	Page 229
43	The Panel recommends that the FW Act be amended to provide that FWA is not required to hold a hearing when exercising powers to dismiss an application under s. 587, nor when exercising the recommended powers to dismiss an application involving a settlement agreement or a failure by an applicant to attend a proceeding or comply with an FWA direction or order. In each of those circumstances, FWA must be required to invite the applicant and the employer to provide further information before making a decision to dismiss the application or not.	Page 229
44	The Panel recommends that the FWA President give consideration to requiring applicants to provide more information about the circumstances of the dismissal in the initial documentation lodged with FWA.	Page 230
45	The Panel recommends that the FW Act be amended to allow FWA to make costs orders against a party that has unreasonably failed to discontinue a proceeding, or that has unreasonably failed to agree to terms of settlement that could have lead to discontinuing the application, or that has through an unreasonable act or omission caused the other party to incur costs.	Page 230
46	The Panel recommends that s. 401 be amended to allow FWA to make an order for costs against a lawyer or paid agent whether or not FWA has granted permission for the lawyer or agent to represent a party in the relevant application.	Page 230
<b>Chapter 11: General protections</b>		<b>Reference</b>
47	The Panel recommends that Division 7 of Part 3-1 be amended so that the central consideration about the reason for adverse action is the subjective intention of the person taking the alleged adverse action.	Page 237
48	The Panel recommends that s. 357(2) be amended to provide a defence to the prohibition on misrepresenting a contract of employment as a contract for services only when the employer proves that at the time the representation was made, the employer believed that the contract was a contract for services rather than a contract of employment, and could not reasonably have been expected to know otherwise.	Page 243
49	The Panel recommends that s. 366 be amended to reduce the time limit for lodging a general protections claim relating to a termination of employment to 21 days (to align with the recommended amended time	Page 245

	limit for unfair dismissal applications).	
<b>Chapter 12: Fair Work Australia and Fair Work Ombudsman</b>		<b>Reference</b>
50	The Panel recommends that the FW Act be amended to change the name of Fair Work Australia to a title which more aptly denotes its functions. It is recommended that the new title contain the word 'Commission' and that it no longer contain the words 'Fair Work'.	Page 251
51	The Panel recommends that s. 660 of the FW Act be amended to require that the appointment of the General Manager by the Governor-General be on the nomination of the President.	Page 252
52	The Panel recommends that the FW Act be amended to allow the President or any Deputy President to stay the operation of a decision under appeal or review, whether or not the President or Deputy President is a member of the Full Bench hearing the appeal or conducting the review.	Page 252
53	The Panel recommends that the power to appoint Acting Deputy Presidents for specified periods in s. 648 be extended to the appointment of Acting Commissioners.	Page 252

## 2 Introductory matters

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### 2.1 Introduction and terms of reference

On 20 December 2011 the Hon Bill Shorten MP, Minister for Employment and Workplace Relations, announced a review of the *Fair Work Act 2009* (FW Act) and the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Transition Act). The terms of reference for the Review are:

*The Fair Work Act 2009 (Fair Work Act) and the Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (together, the Fair Work legislation) gave effect to the Government's commitment to restore fairness to the Australian workplace relations system. In 2008 the Australian Government committed to monitoring the impact of the provisions of the Fair Work legislation through a post-implementation review (the review).*

*The review is to be an evidence based assessment of the operation of the Fair Work legislation, and the extent to which its effects have been consistent with the Objects set out in Section 3 of the Fair Work Act.*

*The review will examine and report on:*

*1. the extent to which the Fair Work legislation is operating as intended including:*

- (a) the creation of a clear and stable framework of rights and obligations which is simple and straightforward to understand,*
- (b) the emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and related powers of Fair Work Australia,*
- (c) the promotion of fairness and representation at work,*
- (d) effective procedures to resolve grievances and disputes,*
- (e) genuine unfair dismissal protection,*
- (f) the creation of a new institutional framework and a single and accessible compliance regime, and*
- (g) any differential impacts across regions, industries, occupations and groups of workers including (but not limited to) women, young workers and people from non-English speaking backgrounds, and*

*2. areas where the evidence indicates that the operation of the Fair Work legislation could be improved consistent with the objects of the legislation.*

*The review will not examine those issues to be addressed as part of the review of all modern awards (other than modern enterprise awards and state reference public sector modern awards) after the first two years as required by Schedule 5, Item 6 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009. That review is to be undertaken by Fair Work Australia in accordance with the requirements of that legislation and in accordance with Item 6(2) must consider whether the modern awards:*

- (a) achieve the modern awards objective, and*
- (b) are operating effectively, without anomalies or technical problems arising from the award modernisation process*

*Evidence*

*The review will draw on a range of sources regarding the operation of the Fair Work legislation. Key evidence gathering activities to be undertaken in the conduct of the review include:*

- *the release of a background paper on the Fair Work legislation inviting stakeholders to make a submission to the review,*
- *meetings with key stakeholders / roundtable discussions to outline their experiences with the Fair Work legislation, and*
- *the commissioning of any additional quantitative and qualitative data that may be required.*

*Additionally, a wide range of qualitative and quantitative data will be drawn upon to measure the regulatory impact of the legislation, including from:*

- *the Department of Education, Employment and Workplace Relations' Workplace Agreements Database,*
- *the Fair Work Ombudsman,*
- *Fair Work Australia,*
- *the Australian Bureau of Statistics,*
- *evidence sources developed by stakeholders, and*
- *other relevant statistical sources.*

*The review will culminate in a comprehensive evidence based report which will draw conclusions about whether the legislation is meeting its objectives. The report will also include recommendations for any changes arising out of the review. The Office of Best Practice Regulation will assess the report to ensure that it meets the best practice regulation requirements for a review as outlined in the Best practice regulation handbook.*

*The review is to report to the Minister for Employment and Workplace Relations by 31 May 2012.*

## 2.2 The Panel

The appointment of the Review Panel (Panel) was also announced by the Minister on 20 December 2011. The Panel comprised Dr John Edwards, Professor Emeritus Ron McCallum AO and the Hon Michael Moore.

The Panel was supported by a Secretariat established within the Department of Education, Employment and Workplace Relations (DEEWR), which provided research, analytical and administrative assistance during the course of the Review. The Secretariat also assisted in developing the background paper for the Review (Background Paper) as well as this Report.

## 2.3 PIR requirements

The Australian Government committed in the Explanatory Memorandum to the Fair Work Bill 2008 (EM) to commence a post-implementation review (PIR) of the FW Act within two years of its full implementation.<sup>1</sup> As provided for in the terms of reference, the Review encompasses a PIR of the FW Act and the Transition Act, together referred to as the Fair Work legislation.

The Australian Government's regulation impact analysis process is administered by the Office of Best Practice Regulation (OBPR). The OBPR is a division within the Department of Finance and Deregulation (DOFD) but acts independently from DOFD and portfolio ministers in assessing and reporting on compliance with the best practice regulation requirements.<sup>2</sup>

<sup>1</sup> EM, p. Iv.

<sup>2</sup> <http://www.finance.gov.au/obpr/about/>.

Australian Government agencies are required to undertake a PIR when regulation is introduced without a regulation impact statement. The then Prime Minister granted the FW Act and the Transition Act 'exceptional circumstances' exemptions from the requirement to prepare a regulatory impact statement.

Broadly described, the *Best practice regulation handbook* and the *OBPR guidance note: post-implementation reviews* require a PIR to examine:

- the problem that the regulation was intended to address
- the objective of government action
- the impacts of the regulation (whether the regulation is meeting its objectives)
- whether the government's objectives could be achieved in a more efficient and effective way.<sup>3</sup>

The terms of reference were endorsed by OBPR on 2 December 2011. The terms of reference envisaged that the Review would traverse both these requirements and issues broader in scope. The principal focus of the Review is whether the FW Act is achieving its objectives and whether it can be improved. The vast majority of submissions addressed these issues. The Panel also has a responsibility to meet the requirements of a PIR. As interpreted by the OBPR, the PIR requires a direct comparison between the FW Act and the preceding Work Choices legislation to identify the 'problem that the regulation was intended to address'. While recognising and meeting the requirements of the OBPR, the Panel's approach to its wider terms of reference has been to assess the FW Act in the context of the industrial relations and economic experience of the two decades since the introduction of enterprise bargaining in 1993. This reflects the Panel's view that Work Choices is part of the context for the FW Act, but only a part. The material comparing the two is required by the PIR, but does not of itself bear on our central interest in whether the FW Act is meeting its objectives, and how it may be improved.

The OBPR endorsed the Review, and the Report, as meeting the best practice regulation requirements on 15 June 2012.

## 2.4 Consultation

The PIR requirements include the requirement to conduct consultation in accordance with the Australian Government's consultation principles,<sup>4</sup> commensurate with the significance of the measure under review.<sup>5</sup>

The Review conducted extensive consultation that targeted key users of the system as well as other interested parties. An overriding concern of the Panel was that all areas of business, the workforce, the union movement, academia, government and the community were given the opportunity to provide feedback on their experiences with the FW Act.

A public notice about the commencement of the public submission process was published in the *Australian* and *Australian Financial Review* newspapers on 12 January 2012. The Panel released the Background Paper calling for submissions to the Review on 18 January 2012. The Background Paper included general information about the Review and the FW Act, details of the submission process, relevant evidence sources and a list of 69 questions for stakeholders to consider in developing their submissions.

DEEWR notified most of the approximately 150 entities that had made submissions to the inquiry of the Senate Standing Committee on Education, Employment and Workplace Relations into the Fair Work Bill 2008 (the Senate Inquiry) and also issued a media release. The Background Paper and other information about the Review were made available on a dedicated Review webpage on DEEWR's internet site.<sup>6</sup>

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<sup>3</sup> *Best practice regulation handbook*, p. 21.

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.*

<sup>6</sup> <http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Pages/Home.aspx>.

The Panel asked that initial submissions be provided by 17 February 2012. It asked that supplementary submissions commenting upon the submissions of other participants be submitted by 2 March 2012.

The initial submission process elicited 207 submissions, and a further 47 supplementary submissions were lodged. Submissions were received from all peak employer and employee representatives, including:

- Australian Chamber of Commerce and Industry (ACCI)
- Australian Council of Trade Unions (ACTU)
- Australian Industry Group (Ai Group)
- Australian Mines and Metals Association (AMMA)
- Australian National Retailers Association (ANRA)
- Business Council of Australia (BCA)
- Master Builders Australia (MBA)
- Minerals Council of Australia (MCA).

Submissions were also received from most other significant employer and employee representatives; a number of community and not-for-profit organisations; small, medium and large businesses; academics; federal, state and territory governments and/or organisations; and a number of individuals. Supplementary submissions were generally made by significant employer and employee representatives, although some were received from other entities and individuals.

To supplement the submission process, the Panel held a series of meetings and roundtable discussions with a large number of stakeholders between 2 March 2012 and 29 March 2012. Individual meetings were held with peak employer and employee associations, as well as with some individual entities, including government organisations. The composition of roundtable groups was determined either on an issue basis or in order to hear the views of a particular stakeholder group. In addition to groups broadly representing employers, employees and government, they included two small business roundtables, an academic roundtable and a working women roundtable.

Appendix A provides a list of all the submissions and supplementary submissions received and the face-to-face consultations that were conducted.

## 2.5 Panel's approach to the Report

The terms of reference say that the Review is to be an evidence-based assessment of the operation of the Fair Work legislation. This requirement is emphasised in the *Best practice regulation handbook*, which says that post-implementation reviews should gather data from business and other stakeholders on the actual impacts of the measure.<sup>7</sup>

The Panel has endeavoured to meet the challenging requirements for a fact-based analysis of the Fair Work legislation. As the Transition Act operated for only a short period and was then repealed, its impacts were minimal. Accordingly, while we have considered the Transition Act where relevant, we have primarily focused our examination on the FW Act. In doing so we have drawn on statistics measured and developed by DEEWR, Fair Work Australia (FWA), the Fair Work Ombudsman (FWO) and the Australian Bureau of Statistics (ABS), and on academic studies, case law and other evidence such as case studies provided by stakeholders in the course of consultations.

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<sup>7</sup> *Best practice regulation handbook*, p. 21.

The recommendations we have made are based on the available evidence, set out in the Report, as to whether a particular aspect of the FW Act is operating effectively to overcome the problem it was introduced to address, or whether a better alternative is available.

The terms of reference required the Review to consider three broad questions:

- the operation of the Fair Work legislation and the extent to which its effects have been consistent with the object set out in s. 3 of the FW Act
- the extent to which the FW Act is operating as intended (including but not limited to seven specified areas)
- areas where the operation of the FW Act could be improved, consistent with the objects of the legislation.

Needless to say, the consultation process elicited diverse views of and experiences with the FW Act. The terms of reference called for particular attention to the operation and effects of the FW Act as it was constructed, bearing in mind that it was introduced to address specific problems with the regulatory regime that preceded it. In meeting the terms of reference we have also considered any unintended effects of the FW Act and alternative proposals for meeting its objectives.

Important issues and suggestions raised by stakeholders that were within the scope of the Review are dealt with extensively in the Report. However, due to their sheer number, not all the issues raised with us that were within the Review's scope are expressly dealt with in the Report. We determined which issues to address based on our conclusions as to their relative significance.

## 2.6 Research commissioned by the Panel or conducted by DEEWR

During the course of the Review data, reports and analysis were obtained from a variety of sources, including from DEEWR. The Panel is grateful for the research assistance provided by DEEWR and the Secretariat. Given the availability of a good deal of published data and research, and the time that any new survey-based research would have taken to complete, the Panel did not commission research additional to that provided by DEEWR and by stakeholders through the consultation processes.

## 2.7 Structure of the Report

Chapter 1 of the Report contains the executive summary and a table of the Panel's recommendations.

Chapter 2 outlines a number of introductory matters.

Chapter 3 examines Australia's workplace laws over the last 20 years and Australia's shift towards enterprise bargaining. Chapter 3 considers the FW Act in this context and outlines the broad policy objectives underlying the Fair Work legislation and the procedure adopted by the Government in its development and implementation. In this chapter we identify the problem that the Government intended to address in implementing the Fair Work legislation.

Chapter 4 examines the overall impact of the FW Act in the context of the broad impact of changes to the Australian workplace relations system since 1993, with particular reference to several key economic and other performance measures.

Chapters 5 through 12 address in detail the key features of the FW Act, including the safety net, enterprise bargaining and agreement making, industrial action, representation in the workplace, transfer of business, unfair dismissal, general protections, and its institutional framework. In each of these chapters we identify the policy rationale for the provisions under consideration, briefly summarise the relevant provisions, identify the key submissions from stakeholders,



consider the available evidence as to the operation of the relevant provisions and indicate our views on their operation, including the rationale for the recommendations we have made.

Seven appendices to the Report contain additional material relevant to the substantive chapters of the Report.

## 3 Australia's workplace laws since 1993

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### 3.1 Introduction

For most of last century Australia's industrial relations system was defined, at a national level, by centralised conciliation and arbitration of wages and conditions through awards of an industrial tribunal. Conditions were often determined by the tribunal on an industry-wide and, in some cases, national basis. While enterprise bargaining often occurred within this framework, it was informal and generally limited in its scope.

The late 1980s marked the beginning of a gradual shift away from this centralism and towards a more formal recognition of enterprise-level bargaining. There was, to some degree, a consensus between business, unions and government about the desirability of this shift; however, like today, there was significant deviation in views as to the precise form it should take.

Initially the move towards enterprise bargaining took place within the context of the existing conciliation and arbitration system, through 'consent awards' and 'certified agreements' under the *Industrial Relations Act 1988* (IR Act), made in accordance with principles developed by the Australian Industrial Relations Commission (AIRC). However, the pace of reform was considered too slow by the bargaining parties and the Keating government. In 1992 the Keating government passed legislation amending the IR Act to further facilitate the making of enterprise-level certified agreements by unions and employers.<sup>8</sup> This was closely followed, after the Keating government's re-election in 1993, by the more substantial reforms to the IR Act made by the *Industrial Relations Reform Act 1993* (Cth) (IRR Act).

The genesis of today's industrial relations laws can be traced to the IR Act post-1993.<sup>9</sup> These changes were considered by many at the time to be the most significant reforms to Australia's industrial relations system since its inception. The further shift towards enterprise-level bargaining was widely viewed as a necessary extension of Australia's integration into the international economy through the deregulation of financial markets and lowering of tariffs.

In order to provide some context for our examination of the FW Act, this part of our Report examines details of the legislative framework of the IR Act post-1993 and the most significant legislative changes since then.

### 3.2 The *Industrial Relations Act 1988* post-1993

#### 3.2.1 Enterprise agreements

The objects of the IR Act post-1993 reflected a new, more central role for the making of agreements through bargaining at the workplace or enterprise level.

In furthering those objects, the IR Act post-1993 established a two-stream agreement framework. The first stream facilitated the making of union certified agreements, including greenfields agreements, between parties to industrial disputes or industrial situations. The second stream provided for the making of non-union enterprise flexibility agreements (EFAs) between constitutional corporations and their employees. There was no statutory provision for individual agreements.

The parameters of agreements under the IR Act were established by the definition of 'industrial dispute', which required a dispute to be about matters pertaining to the relationship between employers and employees. Certified

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<sup>8</sup> *Industrial Relations Legislation Amendment Act 1992* (Cth).

<sup>9</sup> The *Industrial Relations Amendment Act (No. 2) 1994* (IRR Act (No. 2)) made minor refinements to the amendments made by the IRR Act. References to the IR Act post-1993 in the Report refer to the IR Act as amended by the IRR Act and the IRR Act (No. 2), as at 30 June 1994.

agreements could contain terms about any matter to prevent or settle the relevant industrial dispute or industrial situation. EFAs could contain terms about matters pertaining to the relationship between employers and employees. Agreements were required to include dispute resolution procedures and procedures for consulting about change (unless the parties expressly agreed otherwise). Agreements could not be certified or approved if they contained discriminatory terms or terms that were inconsistent with the minimum entitlements of employees in Part VIA.

Awards still played a significant role for parties covered by agreements. First, only employees covered by awards could be covered by an agreement. Second, the relevant agreement could not disadvantage the employees it covered in relation to their terms and conditions of employment. Under the IR Act 'no-disadvantage test', the agreement could not reduce a term or condition under an award or other relevant law in a way that, when considered in the context of the terms and conditions as a whole, the AIRC considered contrary to the public interest. Third, awards continued to operate in respect of parties to an agreement; however, the terms of the agreement prevailed over the terms of the award.

The IR Act facilitated a strong representative role for unions in agreement making. Unions bound by relevant awards were granted rights to negotiate and be a party in respect of each agreement stream. For union agreements, unions were 'party principal' and thereby the de facto representative for all relevant employees, who were required to be consulted about the agreement but were not required to agree to its terms. Each union bound by a relevant award, or with a member to be covered by the agreement, had a right to be heard during certification proceedings. For non-union agreements, an employer was required to notify unions bound by a relevant award, or with a member to be covered by the agreement, about negotiations and provide them with an opportunity to take part. Such unions were entitled to be bound by any non-union agreement. Further, any union bound by an applicable award had a right to be heard during approval proceedings.

Other than in limited circumstances, the AIRC was required to certify or approve agreements where the requisite statutory conditions relating to agreement content and the agreement making process were met. It was prohibited from certifying or approving agreements where the conditions were not met. The AIRC retained discretion to refuse to certify or approve an agreement where the agreement included a term that could not be included in an award, where the AIRC thought certifying an agreement that applied to more than one business or workplace was contrary to the public interest, or where it thought approving an enterprise flexibility agreement would be contrary to the public interest because of 'exceptional circumstances'.

### **3.2.2 Bargaining and industrial action**

#### **Good faith bargaining**

The IR Act post-1993 contained good faith bargaining provisions. These empowered the AIRC to make orders to ensure parties negotiated in good faith, to promote the efficient conduct of bargaining and to facilitate agreement making. These provisions, however, were soon found to permit orders of a procedural nature only and did not empower the AIRC to compel an employer to bargain.<sup>10</sup>

#### **Protected industrial action**

Prior to the IR Act post-1993, most industrial action by unions and employees in Australia was unlawful, although in practice employers rarely sought remedies.

The IR Act post-1993 introduced a limited legal 'right to strike' in Australia for the first time. The parties negotiating a union agreement could initiate a bargaining period. During a bargaining period, unions and their members could take protected industrial action to support or advance their agreement claims, and employers could lock out relevant

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<sup>10</sup> *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union* (1995) 59 IR 385; [1995] AIRC 2565 (1 March 1995).

employees for the same purpose or to respond to industrial action taken by the union. A notice period of 72 hours applied in each case. Industrial action and lockouts were only protected when the party had first 'tried to reach agreement' with the other party and where the party had complied with any relevant good faith bargaining order. Secret ballots prior to industrial action were not required, although the AIRC had a general power to order secret ballots for a range of purposes, including authorising industrial action.

Bargaining periods, and therefore protected industrial action, could be suspended or terminated where: a bargaining party was not genuinely trying to reach agreement or had failed to comply with a direction to negotiate in good faith; where the industrial action was threatening to endanger the life, safety, health or welfare of the population or part of it, or threatening significant damage to the economy or part of it (the safety and economy ground); or where the initiating party was not complying with certain orders of the AIRC.

#### **Arbitration where agreement not reached**

Where a bargaining period had been terminated on the safety and economy ground, the AIRC was required to make or vary an award as a paid rates award, unless the parties agreed otherwise, to prevent or settle the relevant dispute. The award or variation could be for a fixed period, during which time only limited variations to the award were permitted and no new bargaining period could be initiated by the parties in relation to matters dealt with under the award.

#### **Strike pay**

Under the IR Act it was not unlawful to make or receive payment for periods of industrial action. Further, the AIRC had limited powers to order payment when a period of industrial action was justified by a reasonable employee concern about health and safety within the employer's responsibility.

### **3.2.3 Awards**

Awards, which had traditionally been the primary mechanism for determining terms and conditions of employment, retained a significant role under the IR Act post-1993. However, new objects in the Act reflected a shift in the role of awards as a 'safety net' to underpin bargaining and to further the efficient performance of work according to the needs of particular industries and enterprises while also taking into account employees' interests.

There were no express statutory limits on matters that could be included in an award; however, the AIRC's jurisdiction to make awards was confined to preventing or settling an 'industrial dispute', reflecting the scope of the constitutional power on which the award-making power was based.

Where the AIRC considered it appropriate, awards were required to include a flexibility clause to facilitate agreements to vary the award to allow individual workplaces to operate more efficiently. An order varying the award could be made where the variation did not disadvantage employees.

### **3.2.4 Transfer of business**

Subject to any order of the AIRC, awards were binding on successors, assignees and transmittes of a business or part of a business of an employer that was party to the industrial dispute. Generally speaking, agreements were also binding on successors, assignees and transmittes of the business or part of a business of the employer.

### **3.2.5 Right of entry**

Unions had a statutory right of entry to ensure that an award or order of the AIRC binding the union was observed. Permits were not required. An authorised union officer was empowered to enter relevant premises during working hours; inspect work, materials, machinery, appliances, articles, documents or other things on the premises; and interview members or persons eligible to be a member of the union.

There were no provisions allowing an employer to restrict the area of the workplace that the union officer could enter; however, the union officer was required to exercise right of entry powers without hindering or obstructing an employee's work. There was no statutory notice requirement.

Awards also typically provided for union rights of entry. Statutory powers of inspection were to be exercised subject to any conditions prescribed in an award.

### 3.2.6 Unfair dismissal

The IR Act post-1993 introduced statutory unfair dismissal provisions for the first time in federal law. Before that, since the 1984 termination, change and redundancy test case<sup>11</sup>, unfair dismissal provisions had been contained in awards.

The provisions applied to all employers, with no exclusions or differentiation in treatment based on the size of the employer's business. Certain employees were excluded from bringing a claim, namely:

- employees serving a probationary period determined in advance of the employment and of a reasonable length, having regard to the nature of the employment
- casuals with less than six months service and no expectation of continued employment (excluded by regulation)
- high income non-award employees
- employees on fixed term contracts or contracted for a specified task.

Employers were prohibited from terminating an employee's employment unless there was a valid reason, including one based on the operational requirements of the business. Employers were further prohibited from terminating employment based on a series of specified prohibited reasons of a discriminatory nature. In both cases, employers bore the onus of proving that the provisions had not been contravened.

Applications were heard by the Industrial Relations Court and had to be made within 14 days of the dismissal or such further period as the court allowed. The Industrial Relations Court could order reinstatement to employment plus lost remuneration, or compensation of up to six months remuneration. Where dismissal was for a prohibited reason, additional penalties could be ordered.

### 3.2.7 Statutory minimum entitlements

There were only embryonic statutory minimum entitlements in the IR Act post-1993, with most minimum conditions found in awards. In addition to the unfair dismissal provisions, there were statutory provisions for minimum wage orders for non-award employees, equal remuneration provisions and unpaid parental leave.

## 3.3 The *Workplace Relations Act 1996*

While it also favoured an industrial relations system based on enterprise bargaining, the federal opposition regarded the Keating reforms as a failure, claiming they were overly complex and union-centric.<sup>12</sup> Upon its election in 1996, the Howard Coalition Government introduced an alternative model for enterprise bargaining, which it claimed would 'increase productivity, achieve faster real growth in wages and profits, and, most importantly, create more real jobs'.<sup>13</sup> The *Workplace Relations Act 1996* (Cth) (WR Act) was to some degree the product of compromise, as it required the support of the Australian Democrats to ensure its passage through the Senate. However, it largely gave effect to the coalition's election policy.

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<sup>11</sup> (1984) 8 IR 34; (1984) 9 IR 115.

<sup>12</sup> P Reith, Shadow Minister for Industrial Relations, *Better pay for better work—the Federal Coalition's industrial relations policy*, p. 1.

<sup>13</sup> *ibid.*

The WR Act furthered the legislative shift towards enterprise bargaining. It contained a number of new measures directed at 'ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level'.<sup>14</sup> Among the new objects of the WR Act was 'encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market'.<sup>15</sup>

### 3.3.1 Enterprise agreements

The WR Act continued to make provision for collective certified agreements. It maintained the union and non-union agreement streams from the IR Act post-1993 but increased reliance on the Commonwealth's constitutional power to regulate corporations for these provisions. It provided for greenfields agreements to be made between relevant unions and employers. It provided for a relatively similar agreement approval process by the AIRC.

In addition, the WR Act introduced statutory agreements called Australian workplace agreements (AWAs) to be made between an employer and an individual employee (or a group of individual employees). AWAs were required to be in writing and signed by the parties. For new employees they were to commence operation once they had been filed with the newly created Office of the Employment Advocate (OEA). For existing employees they were to commence operation once they had been approved by the advocate.

Agreements under the WR Act could contain terms about matters pertaining to the relationship between the employer and the employee or employees or, in the case of some union agreements, terms to prevent or settle a relevant industrial dispute or situation. The WR Act, however, restricted the content of collective agreements more than the IR Act post-1993 had. The WR Act's new freedom of association provisions (described further above) meant that previously acceptable provisions granting preference to unions and union members were unlawful. AWAs had fewer restrictions on content. They were required to include prescribed provisions about discrimination and a dispute resolution procedure but could not prohibit or restrict a party disclosing the terms of the AWA.

Award coverage was no longer a precondition to agreement making; however, awards remained the benchmark for the content of all agreements. Where there was no applicable award, the AIRC was required to designate one. In applying the benchmark, the WR Act replaced the IR Act no-disadvantage test with a new one. Where the previous test had required each individual reduction in terms or conditions to be considered in the context of the agreement as a whole, the new test provided that disadvantage would result only from a reduction in the 'overall' terms and conditions of employment under the relevant or designated award or law. The WR Act also introduced a limited capacity to approve an agreement that did not pass the no-disadvantage test, when it was not contrary to the public interest to do so.

The WR Act required the AIRC to certify an agreement where the statutory preconditions were met and did not permit it to do so when they were not. The 'public interest' test, which had remained in a limited form in the IR Act post-1993, was removed.

Awards continued to operate in respect of parties to a certified agreement, with the agreement prevailing over the award (and state laws, awards and agreements) to the extent of any inconsistency. In contrast, AWAs excluded the operation of awards and state laws and instruments that would otherwise have applied. In many circumstances an AWA also excluded the operation of a concurrent certified agreement.

The WR Act changed unions' representative role in agreement making. Award responsiveness was no longer the trigger for union involvement in most agreements. Instead, when a union had at least one eligible member employed in the relevant business it could be party principal to a certified agreement, provided a majority of employees approved the agreement. In the case of non-union agreements, employers were no longer required to notify relevant unions and

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<sup>14</sup> WR Act, s. 3(b).

<sup>15</sup> WR Act, s. 3(a).

negotiate with them. Instead, they were required to notify employees of their right to be represented and to 'meet and confer' with a union only at the request of a member. A union could still apply to be bound by a non-union agreement after the agreement was made but before it was certified, but only where requested by an eligible member. There was no specific representation role for unions in AWAs. Both employers and employees could appoint a 'bargaining agent' in writing, with the other party required to 'recognise' a bargaining agent after they were provided a copy of the instrument of appointment.

### **3.3.2 Bargaining and industrial action**

#### **Good faith bargaining**

There were no good faith bargaining requirements in the WR Act.

#### **Protected industrial action**

The WR Act retained the bargaining period and protected action model from the IR Act post-1993, as described above, and applied it to both union and non-union agreements. Industrial action was not protected unless the party had first 'genuinely tried to reach agreement'. Further, new prohibitions meant that industrial action was not protected when it was organised or taken in concert with persons who were not also taking protected action. A notice period of three working days applied unless the action was in response to action of the other bargaining party. Secret ballots prior to industrial action were not required, although the AIRC retained a general power to order secret ballots for a range of purposes, including authorising industrial action.

The WR Act expanded the grounds upon which bargaining periods, and therefore protected industrial action, could be suspended or terminated by the AIRC to include: when action related to a demarcation dispute, when the union action related to claims of employees who were not members or eligible to be members of the union, or when action was being taken by parties to a paid-rates award and there was no reasonable prospect that they would reach agreement during the bargaining period.

In addition, the WR Act introduced a new general provision allowing the AIRC to issue orders to stop or prevent industrial action, which then facilitated the making of a Federal Court injunction. Such orders could not apply to protected industrial action.

#### **Arbitration where agreement not reached**

The AIRC was required, when it considered it appropriate, to exercise arbitration powers after a bargaining period had been terminated on the safety and economy ground or the new paid-rates award ground. The Full Bench of the AIRC could then arbitrate what was known as a 'section 170MX award', which more closely resembled a certified agreement than an award in the traditional sense in its content and legal effect.

#### **Strike pay**

The WR Act made it unlawful for payments to be made by an employer, accepted by an employee or claimed by a union in relation to periods of industrial action.

### **3.3.3 Awards**

The WR Act introduced express statutory limits on matters that could be included in an award for the first time. It identified 20 'allowable matters' relating to types of employment, hours of work, classification structures, rates of pay and loadings, leave entitlements, notice of termination, superannuation and outworkers. Further, awards could provide only for minimum rates and could not limit the number or proportion of employees that an employer could employ in a particular type of employment. Nor could they limit the power to set maximum or minimum hours of work for part-

time employees. Award provisions dealing with right of entry were unenforceable. Award provisions requiring or permitting breach of the freedom of association provisions, such as union preference clauses, were void and could be removed on the application of a relevant party. These new limits did not come into effect immediately; instead, the AIRC was empowered to review and simplify awards over time so that they reflected the new provisions.

The WR Act continued to provide for enterprise flexibility provisions in awards, and facilitated award variations to give effect to those agreements; however, such variations could only be made in respect of allowable award matters, could only operate as a minimum rates award and were no longer subject to a no-disadvantage test.

### **3.3.4 Transfer of business**

As with the IR Act post-1993, subject to any order of the AIRC, awards were binding upon successors, assignees and transmittes of a business or part of a business belonging to a party to the industrial dispute. Successors, assignees and transmittes of businesses to which an agreement applied were also bound by the agreement.

### **3.3.5 Right of entry**

The WR Act implemented a new statutory right of entry regime. To enter premises, an employee or officer of a union was now required to hold a permit issued by the Australian Industrial Registrar. Union employees or officers were permitted to enter premises where a member of the union worked if it was to investigate suspected breaches of the WR Act or an award or certified agreement binding the union. They were also permitted to enter any premises where work covered by an award binding the union was being carried out if it was for the purpose of holding discussions with relevant employees during breaks. Twenty-four hours notice of entry was required.

### **3.3.6 Freedom of association**

The WR Act introduced a new suite of provisions dealing with ‘freedom of association’, which gave effect to the coalition’s election commitment to ‘end union preference and compulsory unionism’.<sup>16</sup> The provisions prohibited:

- discriminatory conduct by employers / persons towards employees / independent contractors where the reason for the conduct was related to an employee’s / independent contractor’s union or industrial activities (or lack thereof)
- unions from taking action against employers for reasons relating to the union or industrial activities of the employer or the employer’s employees
- unions from taking action against their own members in relation to participation in industrial action
- unions from taking action against employers or persons directed at encouraging or coercing them to take discriminatory action against non-union members.

A reverse onus of proof applied when establishing a person’s reason or intent in respect of conduct covered by the provisions.

The WR Act also introduced prohibitions on coercion in the making of agreements.

### **3.3.7 Unfair dismissal**

The WR Act reduced the scope of unfair dismissal provisions by limiting their application to federal award-bound (and other Commonwealth) employers. The range of employees excluded from bringing a claim was similar to that under the IR Act post-1993, with the casual employee exclusion extended to casuals with less than 12 months service.

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<sup>16</sup> Bills Digest 96, Workplace Relations and Other Legislation Amendment Bill 1996; P Reith, Shadow Minister for Industrial Relations, *Better pay for better work—the Federal Coalition’s industrial relations policy*, p. 8.



Employees to whom the provisions applied could apply to the AIRC on the ground that the termination was harsh, unjust or unreasonable (unfair dismissals), or for prohibited reasons (unlawful dismissals), or due to a failure to pay statutory notice. A reverse onus of proof applied only to termination for prohibited reasons.

The AIRC was required to conciliate the claim and, where unsuccessful, issue a certificate indicating a view of the claim's merits. Employees who had claimed both unfair and unlawful dismissal were then required either to have the unfair dismissal claim arbitrated by the AIRC or to have the prohibited reason claim determined by the Federal Court.

The AIRC could order reinstatement to employment plus lost remuneration, or, where reinstatement was considered impracticable, compensation of up to six months remuneration. The AIRC was required to consider the impact of any order on the viability of the employer's business. The court could order similar remedies in respect of unlawful dismissal, as well as penalties in respect of the conduct.

The AIRC was also empowered to order costs in respect of vexatious or unreasonable applications or an unreasonable failure to agree to terms of settlement. The court was permitted to order costs when a party instituted proceedings vexatiously or unreasonably, or conducted themselves unreasonably in the course of the proceeding.

### **3.3.8 Statutory minimum entitlements**

Most minimum entitlements continued to be provided for in awards, save for equal remuneration and unpaid parental leave. The WR Act removed the capacity for minimum wage orders to be made for non-award employees.

## **3.4 The Workplace Relations Amendment (Work Choices) Act 2005**

When the Howard government won a fourth term in 2004 and obtained a majority in the Senate, it subsequently moved to implement further industrial relations reform. It developed the policy and amending legislation now widely known as Work Choices.<sup>17</sup>

In the context of the evolutionary development of enterprise bargaining described above, Work Choices made significant changes to the system that preceded it.

A key feature of Work Choices was that it relied heavily on the corporations power to underpin its provisions, meaning that it applied to all constitutional corporations. Further, it expressly overrode most state and territory industrial laws, meaning that its provisions were largely unable to be supplemented by the states.

### **3.4.1 Statutory minimum entitlements**

Statutory minimum entitlements were a rare feature of the systems that preceded Work Choices. In contrast, Work Choices prescribed a number of minimum terms and conditions of employment that had previously been covered by awards. The Australian Fair Pay and Conditions Standard (AFPCS) applied to all employers and employees and regulated pay, annual leave, personal leave, hours of work and parental leave. Elsewhere, Work Choices included minimum statutory conditions relating to meal breaks, public holidays and equal remuneration.

Pay rates were established and reviewed by a new agency, the Australian Fair Pay Commission (AFPC). In exercising its wage-setting functions it was to have regard to: the capacity for the unemployed and low paid to obtain and remain in employment; employment and competitiveness across the economy; providing a safety net for the low paid; and providing minimum wages for junior employees, trainees and employees with a disability to ensure they were competitive in the labour market.

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<sup>17</sup> *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

### 3.4.2 Workplace agreements

Work Choices provided for five types of workplace agreements. Union collective agreements and employee collective agreements continued the two-stream union and non-union agreement approach of the previous systems. Australian Workplace Agreements were individual statutory agreements derived from AWAs under the WR Act. Union greenfields agreements were similar to greenfields agreements under the WR Act. New employer greenfields agreements allowed an employer to make an agreement without any other party being involved.

Work Choices did not contain any express statutory statement about the breadth of matters that workplace agreements could contain; instead, it prescribed what workplace agreements could *not* contain, including a range of 'prohibited content' that would attract penalties on all relevant parties if included. Matters that workplace agreements could not contain included:

- any term calling up content of any other industrial instrument, such as an award, unless the award applied immediately before the agreement was reached
- terms about deduction of union dues from wages, including payroll deductions
- terms about trade union training leave or paid union meetings
- terms about renegotiating the workplace agreement
- various terms about union representation rights, provision of information to a union and union right of entry
- terms that required direct or indirect encouragement of union membership or non-membership
- terms restricting engagement of independent contractors or labour hire employees
- terms allowing for industrial action
- terms providing remedies for unfair dismissal
- terms restricting the capacity for AWAs to be made
- terms about matters not pertaining to the employment relationship.

Initially, Work Choices no longer used awards as the benchmark for agreements and did not have a no-disadvantage test; instead, the statutory minimum conditions described above applied to the parties to a workplace agreement and could not be excluded or modified. In addition, a list of 'protected' award conditions relating to rest breaks, leave loadings, penalties, allowances, bonuses and public holidays could be expressly excluded or modified by a workplace agreement. If not expressly excluded or modified, they were otherwise deemed to be included in agreements.<sup>18</sup>

In 2007, the Howard government passed legislation amending Work Choices 'to strengthen the safety net for agreement making in the national workplace relations system'.<sup>19</sup> The main feature of the amendments was the establishment of a new 'fairness test', which required workplace agreements to be assessed against protected award conditions to see if they provided fair compensation to an employee (in the case of an AWA) or fair compensation in their overall effect (in the case of a collective agreement). A new agency, the Workplace Authority, was established to administer the fairness test.

All workplace agreements, once made, excluded any award that otherwise would have applied. That award then permanently ceased to operate in relation to the employer and employee save for protected award conditions, which resumed operation upon the termination of a workplace agreement.

Work Choices changed the previous lodgment and approval procedures for collective agreements by requiring that all workplace agreements be lodged first with the Employment Advocate and later with the Workplace Authority, rather

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<sup>18</sup> Excepting award outworker terms, which could not be excluded or modified by a workplace agreement.

<sup>19</sup> *Workplace Relations Amendment (A Stronger Safety Net) Act 2007*; Joe Hockey, *Workplace Relations Amendment (A Stronger Safety Net) Bill*, second reading speech.

than with the AIRC. Workplace agreements commenced operation upon their lodgment rather than after scrutiny as to their compliance with legislative requirements.

Work Choices also changed the way agreements could be terminated. Previously, agreements would cease operation only when they were terminated by agreement of the parties, replaced with a new agreement, or by order of the AIRC in applying a public interest test. Work Choices provided for a party to unilaterally terminate a workplace agreement that had passed its nominal expiry date by giving 90 days notice. In 2006 the Howard government amended the Work Choices legislation to provide that when a workplace agreement was unilaterally terminated the redundancy provisions in the agreement would continue to apply for up to 12 months.<sup>20</sup>

As with the WR Act, where a union had at least one eligible member employed in the relevant business, it could be party principal to a union collective agreement and a union greenfields agreement (where the union would be entitled to represent one or more prospective employees). Unions no longer had specific representation rights in relation to employee collective agreements; instead, as with AWAs under the WR Act, employees could appoint a 'bargaining agent' to represent them. The employer was required to meet and confer with a bargaining agent, but only in the seven-day period prior to the approval of an agreement.

### **3.4.3 Bargaining and industrial action**

#### **Good faith bargaining**

There were no good faith bargaining requirements under Work Choices.

#### **Protected industrial action**

Work Choices imposed new procedural requirements for taking protected industrial action. Industrial action was only protected when there had first been a secret ballot of employees authorising industrial action and a ballot order had been made by the AIRC. To make a ballot order, the AIRC had to be satisfied that the applicant for the order was genuinely trying to reach agreement with the employer.

Work Choices also introduced new exclusions on protected industrial action, namely action taken in support of claims for prohibited content or action in support of pattern bargaining.

Additional grounds for suspending or terminating bargaining periods included: where a party was engaging in pattern bargaining, for the purposes of a cooling off period, and where the action was causing significant harm to a third party. The AIRC was required to issue an interim order suspending a bargaining period if an application to terminate on the grounds of the action threatening life or endangering the economy had not been determined in five days.

Applications for orders to stop industrial action other than protected action now had to be determined within 48 hours, or an interim order made.

#### **Arbitration where agreement not reached**

The AIRC was only required to exercise arbitration powers after a bargaining period had been terminated on the safety and economy ground. The AIRC could then make a Workplace Determination, with the provisions of Work Choices then largely applying to the Determination as though it were a workplace agreement.

#### **Strike pay**

Work Choices continued to provide that payments made by an employer, accepted by an employee or claimed by a union in relation to periods of industrial action were unlawful. It further provided for payments to be withheld for a minimum of four hours or otherwise for the duration of the industrial action.

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<sup>20</sup> *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006*, Schedule 3.

#### 3.4.4 Awards

Work Choices made significant changes to the role of awards. The objects of Part 10 provided, in addition to ensuring minimum safety net entitlements were protected, that awards should be rationalised and simplified so they were more conducive to the efficient performance of work.

Work Choices reduced the scope of allowable award matters, reflecting in part the shift of some minimum conditions to the AFPCS. Redundancy provisions were only allowable insofar as they applied to employers with more than 15 employees, thereby reversing the effect of the Redundancy Case of 2004, in which the AIRC granted award redundancy entitlements to employees of businesses with 15 employees or fewer.<sup>21</sup>

In addition, Work Choices further modified the 'allowable matters' by prescribing a number of matters, which were nonetheless 'non-allowable' and could not be included in awards, in addition to those provided for in the WR Act. These included:

- representation in dispute settlement by unions unless the union was an employee's chosen representative
- conversion from casual employment
- restrictions on training arrangements
- restrictions on the engagement of independent contractors and labour hire workers
- union picnic days
- enterprise flexibility clauses
- dispute resolution or trade union training leave.

Pre-existing terms about matters newly covered by the AFPCS, along with notice of termination, long service leave, jury service and superannuation, whilst not allowable, were preserved in their operation.

These new limits on awards came into effect immediately. The AIRC was required to undertake award simplification and rationalisation to reflect these changes; however, this ultimately did not take place.

As noted above, awards played a less significant role as a benchmark for the making of workplace agreements, with only protected award conditions being relevant. Further, workplace agreements permanently ousted the operation of awards save for protected award conditions. In addition, an award could not bind new employers unless the AIRC determined they had been unable to reach a workplace agreement.

#### 3.4.5 Transfer of business

Work Choices altered the previous rules about the applicability of awards and industrial instruments where a transmission of business occurred. Generally speaking, awards and workplace agreements only transmitted for a maximum of 12 months, after which time they ceased to have effect. In addition, the AIRC was expressly empowered to order that a transmitted instrument did not apply, or applied only in part, to a new employer.

Amendments to Work Choices in 2007 provided for redundancy entitlements to transmit for 24 months.<sup>22</sup>

#### 3.4.6 Right of entry

In comparison to the WR Act, Work Choices limited union right of entry in a number of ways.

First, right of entry to investigate a suspected breach of industrial laws was only permitted when the breach related to a member of the union. When an award or workplace agreement had been breached, entry was only allowed when the

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<sup>21</sup> *Redundancy Case* (2004) 129 IR 155; *Redundancy Case—Supplementary Decision* (2004) 134 IR 57.

<sup>22</sup> *Workplace Relations Amendment (A Stronger Safety Net) Act 2007*, Schedule 7.

union was bound by that instrument. In the case of an AWA, entry was only allowed when the employee party made a written request. Records that could be inspected were generally confined to those relating to the relevant member.

Second, right of entry to hold discussions with employees was granted when the employee carried out work covered by an award or agreement that also covered the union. This restriction had the effect of reducing entry rights for discussion purposes.

In each case, the employer could require a permit holder to comply with a reasonable occupational health and safety requirement and reasonable request to conduct interviews in a particular place, and to take a particular route to get to that place.

Work Choices also limited rights of entry related to OHS under state laws.

#### **3.4.7 Freedom of association**

Work Choices applied a similar approach to the WR Act's freedom of association provisions, with some new prohibitions inserted. These included prohibitions on misrepresentation about rights of entry and union membership obligations; prohibitions on coercion and inducements to become, or not become, a union member; and prohibitions relating to union bargaining fees.

#### **3.4.8 Unfair dismissal**

The major change Work Choices made to unfair dismissal laws was to exclude from the jurisdiction employees of businesses with 100 or fewer employees and employees with six months or less service.

Further, a new defence against unfair dismissal could be made when the dismissal was for reasons that included 'genuine operational reasons'. These covered reasons of an economic, technological, structural or similar nature relating to, or to a part of, the employer's undertaking, establishment, service or business. Previously a decision to make an employee redundant could constitute unfair dismissal when the process employed was harsh, unjust or unreasonable.

## **3.5 Development of the *Fair Work Act 2009***

### **3.5.1 The problems with Work Choices that the Government sought to remedy**

The Review's terms of reference do not limit our analysis of the FW Act to a simple comparison with Work Choices. Work Choices, while directly preceding the FW Act, was in place for only a short time. Further, as the content of this chapter demonstrates, it made many significant changes to the industrial relations framework that had developed in an evolutionary way to that point. For these reasons we consider that a straight comparison between the FW Act and Work Choices would present a distorted perspective of the impact of the FW Act. Our approach has been to view the FW Act in the context of the broader development of industrial relations in Australia since 1993, as we have described in this chapter.

However, as noted in 2.3, OBPR requirements for a PIR require us to identify the problems that the FW Act was intended to address and describe how the previous regulatory arrangements were not adequately addressing those problems. In this case, the previous regulation was Work Choices. The policy objectives of the FW Act are described in detail in each of the following chapters. Our review of these objectives demonstrates that in very many cases they were directly responsive to the problems with Work Choices identified by the Government. Drawing on relevant policy documentation, the Fair Work legislation's explanatory memoranda and advice from DEEWR, we have outlined the

problems with that legislation that the Government intended to remedy through the introduction of the FW Act in Appendix B. To summarise, they related to the following areas:

- **The national system:** While Work Choices took steps towards instituting a national system of industrial relations, the Government was concerned that there were gaps in its coverage, along with significant confusion and uncertainty about coverage of some employers and employees. Further, the mechanism by which employers and employees formerly covered by state systems were brought within the scope of the national system was considered to be unduly complex.
- **The safety net:** The Government regarded the safety net under Work Choices to be both inadequate and unduly complex. Further, it was concerned that the safety-net role of awards could be undermined or avoided, including through agreement making and agreement termination.
- **Bargaining and agreement making:** Work Choices favoured individual statutory agreements over collective agreements. The Government was concerned that individual statutory agreements resulted in lower wages and worse conditions for some employees. Work Choices contained complex and prescriptive regulation about agreement types, content and approval. This was considered to hinder agreement making, reduce employees' capacity to be represented in the workplace and led to agreement making outside the statutory scheme. The Government regarded Work Choices failure to positively facilitate bargaining at the enterprise level when a majority of employees wished to do so and its failure to provide a general mechanism for regulating bargaining conduct as problematic.
- **Industrial action:** Obtaining a secret ballot prior to taking industrial action was considered by the Government to be unnecessarily complex, prescriptive and time consuming and thereby unduly constrained employees' capacity to take industrial action. At the same time, it was concerned that Work Choices facilitated employer lockouts in a broad range of circumstances. Finally, Work Choices provided for termination of industrial action in some circumstances without providing a corresponding power to the tribunal to determine the bargaining dispute.
- **Right of entry:** While the procedures and rules for exercising right of entry under Work Choices were generally regarded by the Government as appropriate, Work Choices significantly restricted employees' rights to be represented in the workplace by limiting the circumstances in which right of entry could be exercised.
- **Transfer of business:** The Government was concerned that Work Choices only protected employees' conditions of employment in a limited range of business transfers. Further, those protections could be undermined in a number of ways and only applied for a limited time.
- **Unfair dismissal:** Work Choices did not provide any unfair dismissal rights for a large proportion of employees. Where unfair dismissal rights were provided, they were inadequate to protect employees in some respects. Further, there was a significant burden on business in defending a claim. Each of these aspects of Work Choices were regarded as problematic by the Government.
- **General protections:** Work Choices contained a number of protections against discrimination and unfair treatment; however, the Government considered that the scheme lacked regulatory coherency, involved duplication and contained inconsistencies.
- **Institutions and compliance:** The Government considered that the array of institutions operating under Work Choices resulted in overlap and confusion. The processes of some institutions were not transparent and resulted in significant administrative delays.

### 3.5.2 The broad policy objectives underlying the FW Act

Forward with Fairness, Labor's industrial relations policy for the 2007 federal election, advanced the primary objective of delivering a system that was 'fair to working people, flexible for business and which promote[d] productivity and

economic growth for the future prosperity of our nation’.<sup>23</sup> This objective is now formally reflected in s. 3(a) of the FW Act, which says:

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

- a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia’s future economic prosperity and take into account Australia’s international labour obligations ...

Forward with Fairness foreshadowed that collective bargaining at the enterprise level would be ‘at the heart of’ the system, supported by a safety net consisting of the National Employment Standards (NES), minimum wages and ‘modern, simple industry awards’.<sup>24</sup> It signalled that if a majority of employees at a workplace wished to bargain collectively their employer would be required to bargain in good faith. It outlined the proposed features of good faith bargaining and stated that bargaining participants would not be required to ‘make concessions or sign up to an agreement where they do not agree to its terms’.<sup>25</sup> It provided that employees would be free to be represented by a union or other representative in bargaining, and that they would have the right to seek advice, assistance and representation from their union in the workplace.<sup>26</sup> It outlined the ability of employees to take protected industrial action after a secret ballot of employees and of employers to lock out employees in response, as well as the capacity for Fair Work Australia (FWA) to resolve bargaining disputes causing harm to the parties or the wider economy or community.<sup>27</sup> It described a reformed unfair dismissal system, including a code for small business, along with unlawful termination and freedom of association provisions.<sup>28</sup> It announced the establishment of FWA, albeit structured differently to the body that eventuated under the FW Act.<sup>29</sup>

Forward with Fairness was followed three months later by Forward with Fairness—Policy Implementation Plan.<sup>30</sup> The Implementation Plan outlined further aspects of the policy, which are now reflected in the FW Act. These included an exclusion from award coverage for employees earning over \$100,000, individual flexibility clauses in awards, individual flexibility clauses in enterprise agreements, further detail regarding industrial action and retention of remedies for unprotected industrial action and unfair dismissal.<sup>31</sup>

A range of other policy statements made after this time further describe the objectives of the FW Act.<sup>32</sup> To facilitate an examination of whether the FW Act addresses the underlying problem it sought to remedy and whether it is operating as intended, in subsequent chapters the Report examines the policy basis for each aspect of the FW Act the Panel has reviewed, relying on relevant policy material that preceded the FW Act’s passage through parliament.

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<sup>23</sup> K Rudd & J Gillard, *Forward with Fairness—Labor’s plan for fairer and more productive Australian workplaces*, April 2007, p. 6.

<sup>24</sup> *ibid.*, pp. 10, 13.

<sup>25</sup> *ibid.*, pp. 14, 15.

<sup>26</sup> *ibid.*, pp. 12, 14.

<sup>27</sup> *ibid.*, p. 16.

<sup>28</sup> *ibid.*, pp. 12, 19–20.

<sup>29</sup> *ibid.*, p. 17.

<sup>30</sup> K Rudd & J Gillard, *Forward with Fairness—Policy Implementation Plan*, August 2007.

<sup>31</sup> FWFIP, pp. 9–12, 14, 18–22.

<sup>32</sup> See DEEWR discussion paper *National Employment Standards exposure draft*, 2008; J Gillard, ‘Introducing Australia’s new workplace relations system’, speech to the National Press Club, Canberra, 17 September 2008; Australian Government, submission to the Australian Industrial Relations Commission: ‘Exposure Drafts of Priority Modern Awards’, 10 October 2008; J Gillard, address to the Australian Labour Law Association’s fourth biennial conference, 14 November 2008; DEEWR submission to the Senate Education, Employment and Workplace Relations Committee inquiry into the Fair Work Bill, 9 January 2009; Fair Work Bill 2008 second reading speech.

### 3.5.3 The Transition Act

In late 2007, prior to the development of the FW Act, the Rudd Labor government passed some preliminary amendments to Work Choices with the *Workplace Relations Amendment (Transition to Forward With Fairness) Act 2008* (the Transition Act). The Transition Act implemented preliminary aspects of Forward with Fairness.

The five key features of the Transition Act were:

- the elimination of AWAs, coupled with a limited capacity to make statutory individual agreements called individual transitional employment agreements (ITEAs)
- the replacement of the 'fairness test' with a reinstated version of the 'no-disadvantage test' similar to that which existed previously under the WR Act
- the requirement that agreements commence operation from approval rather than lodgment
- provisions facilitating the making of modern awards by the AIRC
- the capacity to extend and vary certified agreements made under the WR Act, thereby allowing the collective agreement making provisions of Work Choices to be bypassed by many parties.

The Transition Act commenced operation on 28 March 2008 and ceased operation on 31 December 2009, at which time the FW Act commenced full operation. As the Transition Act operated for only a short time and no longer operates, there is little available evidence of its impact. We have set out specific data on its operation and analysed its impact in Appendix C. Based on the evidence available, the Panel concludes that the Transition Act was an effective piece of legislation that achieved its objectives. As well as commencing the successful process of award modernisation, it strengthened protections for employees and allowed pre-Work Choices collective agreements to continue, thereby addressing, in a transitional form, some of the key problems with the Work Choices regime pending the introduction of the FW Act.

### 3.5.4 Procedure for developing the FW Act

The development of the FW Act was subject to extensive stakeholder consultation, including through existing stakeholder bodies and a number of groups formed specifically to consult on the development of the legislation. The groups consulted about the drafting of the legislation included state and territory workplace relations ministers and officials and key workplace relations stakeholders, including all key employee and employer representatives. A detailed description of the composition and meetings of the entities was included in the Regulatory Analysis of the Fair Work Bill.<sup>33</sup> Some of these groups were established for a specific purpose, such as the small business and union working groups on the Small Business Fair Dismissal Code, and others had broader input, such as the business and workers advisory groups.

The consultation process also included consideration of the draft bill through the Committee on Industrial Legislation (COIL), a subcommittee of National Workplace Relations Consultative Council, whose role is to consider workplace relations and related legislation. State and territory government officials also participated in the COIL process, which provided the draft bill to participants over a period of two weeks to examine and refine it.

The Government also released a discussion paper, *National Employment Standards exposure draft*, and invited submissions on it.<sup>34</sup> Submissions were received from 129 stakeholders, including employer and employee representatives, community groups, businesses, state governments and individuals. The Government released the proposed NES following consideration of the submissions.<sup>35</sup>

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<sup>33</sup> EM, pp. vii–viii.

<sup>34</sup> DEEWR, discussion paper *National Employment Standards exposure draft*, 2008.

<sup>35</sup> EM, p. viii.



As far as the Panel is aware, the level of consultation undertaken in drafting the FW Bill was unprecedented in the Australian experience, as was the access to the draft legislation provided during the COIL process.

## 3.6 The provisions of the FW Act

The FW Act commenced operation in part on 1 July 2009 and in full on 1 January 2010. Chapters 5 to 12 describe its provisions in detail. Below we examine its major features.

### 3.6.1 The national system

While Work Choices took steps towards instituting a national system of industrial relations, the Government was concerned that there were gaps in its coverage, along with confusion and uncertainty about coverage of some employers and employees. Further, the mechanism by which employers and employees formerly covered by state systems were brought within the scope of the national system was unduly complex.

The FW Act continued to rely on Commonwealth constitutional powers, including the corporations power, to extend the operation of the laws as far as possible. The coverage of the FW Act was extended further when referrals of power to the Commonwealth were negotiated with all states except Western Australia. The referrals of power were given effect through state legislation passed by each referring state, along with the *Fair Work (State Referrals of Power and Consequential Amendments to Other Legislation) Act 2009* and *Fair Work Amendment (State Referrals and Other Measures) Act 2009* passed by the Commonwealth. With the exception of Victoria, state workplace relations legislation generally continues to cover public sector and local government entities, although many state and local government business enterprises remain covered by the federal system. Coverage of the FW Act extends to approximately 96 per cent of private sector employees.<sup>36</sup>

The FW Act largely addressed the residual overlap of federal and state workplace relations legislation. In referring states, it rectified the uncertainty associated with coverage of not-for-profit entities through state referrals of power. It also enabled certainty for corporate entities whose status as constitutional corporations was previously unclear by allowing states to clearly delineate coverage for particular state-owned corporations and local governments.

Access Economics conducted an economic cost-benefit analysis of moving to a single national workplace relations system for the private sector, examined further in 4.6.<sup>37</sup> It estimated the total net benefit to business and government to be \$4.83 billion in net present value terms over a decade from 2009–10.

### 3.6.2 Statutory minimum entitlements

The FW Act continued the model, introduced by Work Choices, of legislating minimum terms and conditions of employment. It continued to provide for maximum weekly hours of work, paid annual, personal, carers and compassionate leave, as under Work Choices, with a small number of additional benefits to employees (such as a right to request an additional 12 months unpaid parental leave). The NES also contain additional statutory minimum entitlements, including:

- the right to request flexible working arrangements
- community service leave
- long service leave
- public holidays

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<sup>36</sup> *Australia's Fair Work Act system factsheets: the Fair Work Act 2009—an overview*, Australian Government, Canberra, 23 December 2009, p. 5.

<sup>37</sup> Access Economics, *Economic analysis of a single national workplace relations system for the private sector*, final report for the Department of Education, Employment and Workplace Relations, 2009.

- notice of termination and redundancy pay
- provision of a Fair Work Information Statement.

The NES do not regulate minimum wages, which are set by FWA in annual wage reviews.

The NES provide minimum terms and conditions of employment for all national system employees. Modern awards and enterprise agreements may supplement, but not exclude, the NES.

Additional statutory minimum conditions relating to payment of wages and stand down are contained in Parts 2-9 and 3-5 of the FW Act respectively.

### **3.6.3 Modern awards**

Modern awards regulate minimum wages and additional conditions of employment not provided for under the NES, including skill-based classifications, types of employment, arrangements for when work is performed, overtime and penalty rates, annualised wage arrangements, allowances, leave arrangements, superannuation, consultation and representation procedures, outworker terms and industry-specific redundancy schemes.

Modern awards also contain a flexibility term permitting individual flexibility arrangements (IFAs) to be made to vary the effect of specified matters in the award.

As already noted, modern awards were created by the AIRC pursuant to the Transition Act. The process involved consideration of thousands of submissions and over 100 days of consultation. There are 122 modern awards under the FW Act, which replaced approximately 3700 state and federal awards, notional agreements preserving state awards (NAPSAs) and pay scales. Modern awards cover employees who perform work regulated by the award in the industry or occupation to which the award relates and their employers; however, modern awards do not apply while an enterprise agreement applies to that employment or to high-income employees as defined under the FW Act.

### **3.6.4 Minimum wages**

Minimum wages under the FW Act are determined annually by FWA. FWA is required to take into account various matters relating to the performance and competitiveness of the national economy, increased workforce participation, relative living standards and the needs of the low paid, and providing fair minimum wages for junior employees, trainees and employees with a disability.

The FW Act also includes updated equal remuneration provisions based on the right to equal pay for work of comparable value in addition to equal value.

### **3.6.5 Enterprise agreements**

The FW Act provides for ‘enterprise agreements’, which are collective agreements between an employer and a relevant group of employees. There is no provision for individual statutory agreements. No distinction is made between union and non-union enterprise agreements under the FW Act; however, one or more unions that is a bargaining representative for a proposed enterprise agreement may elect to be covered by that agreement by notifying FWA in writing. The FW Act continues to provide for greenfields agreements but does not provide for employer greenfields agreements.

Under the FW Act, enterprise agreements may contain terms about matters pertaining to the employment relationship and the relationship between the employer and employee organisation/s covered by the agreement, as well as terms about employee-authorised deductions from wages and terms about how the agreement will operate. The FW Act mandates the inclusion of flexibility terms (which provide for the making of individual flexibility arrangements),

consultation terms and dispute-settling terms. The FW Act removed the prohibited content restrictions introduced under Work Choices; however, there are a small number of 'unlawful terms' that cannot be contained in agreements.

The statutory minimum conditions prescribed in the NES continue to apply while an enterprise agreement applies. A relevant modern award does not apply while an enterprise agreement applies; however, the relevant modern award forms the benchmark against which the content of enterprise agreements is measured by FWA in considering whether to approve the enterprise agreement. The 'better off overall test' (the BOOT) requires FWA to be satisfied that each relevant employee would be better off overall under the agreement than under the relevant modern award.

Enterprise agreements are approved by FWA, which assesses whether the BOOT has been satisfied and whether other procedural requirements for agreement making have been met. Undertakings can be made during the approval process to address FWA concerns about an agreement. Enterprise agreements commence operation no earlier than seven days after they are approved.

The FW Act reinstated the substance of the agreement termination rules that applied prior to Work Choices and removed the capacity for a party to unilaterally terminate an agreement. Where an enterprise agreement ceases to apply to an employer and employee, a modern award that covers that employer and employee resumes its application.

### **3.6.6 Bargaining and industrial action**

#### **Good faith bargaining and other orders**

The FW Act introduced good faith bargaining requirements to establish standards of conduct for bargaining representatives in negotiations for an enterprise agreement. These include:

- attending, and participating in, meetings at reasonable times
- disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner
- responding to proposals made by other bargaining representatives for the agreement in a timely manner
- giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representatives' responses to those proposals
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining
- recognising and bargaining with the other bargaining representatives for the agreement.

Good faith bargaining does not mean parties have to make concessions during bargaining or agree on the terms to be included in an agreement. FWA can make bargaining orders requiring a party to comply with the good faith bargaining requirements. It can make orders where bargaining is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement.

FWA can also make majority support determinations, which require an employer to bargain where a majority of employees wish to do so, and scope orders, which determine the scope of a proposed enterprise agreement.

The FW Act introduced a low-paid bargaining stream to facilitate multi-employer bargaining in low-paid industries. A bargaining representative can make application to FWA for a low-paid bargaining authorisation. When an authorisation is in place, FWA is able to facilitate bargaining by the use of mediation and compulsory conciliation, can require third parties to be involved and ultimately can arbitrate, if the parties are unable to reach agreement, by making a workplace determination.

#### **Protected industrial action**

The protected industrial action provisions of the FW Act are similar in substance to Work Choices, with some minor amendments. Protected industrial action continues to be available only in support of claims about permitted matters

for an enterprise agreement. Common requirements for industrial action to be protected include that persons organising or engaging in industrial action must (among other things) be genuinely trying to reach an agreement and complying with any FWA orders. In addition, notification requirements must be met, the action must relate only to a single enterprise agreement, and action cannot be taken in pursuit of unlawful terms or occur before the nominal expiry date of an enterprise agreement. Action taken in support of pattern bargaining continues to be prohibited.

The FW Act retains the secret ballot requirements introduced by Work Choices, while making some changes to simplify the associated procedure. The FW Act allows protected action ballots to be conducted by the Australian Electoral Commission (AEC) or alternative approved ballot agents. The Commonwealth meets 100 per cent of the cost of ballots conducted by the AEC.

The FW Act limits an employer's capacity to lock out employees to where the action is in response to employee industrial action.

FWA is able to suspend or terminate protected industrial action on the safety and economy ground, as with previous legislative regimes, as well as where protracted action is causing or threatening to cause significant economic harm to both an employer and their employees. Action can be suspended where there is significant harm to a third party or for the purposes of a cooling-off period.

#### **Arbitration where agreement not reached**

The FW Act provides for workplace determinations to be made in four circumstances: where industrial action is terminated on the safety and economy ground, where industrial action is terminated because of significant economic harm to the bargaining parties, where FWA has made a 'serious breach declaration' in the event of a serious and sustained contravention of one or more bargaining orders (and where other relevant preconditions are satisfied), and where a low-paid authorisation has been made (and other relevant preconditions are satisfied).

#### **Strike pay**

The FW Act continues to require four hours' pay to be withheld for periods of unprotected industrial action but has removed the requirement introduced by Work Choices to withhold a minimum four hours' pay for protected industrial action. Under the FW Act, employers must deduct pay for the duration of the protected industrial action. In the case of protected partial work bans (other than overtime bans), the FW Act provides that, where certain prerequisites are met, an employer may reduce an employee's payments by a specified proportion, or withhold payments altogether where the employer refuses to accept partial performance.

#### **3.6.7 Transfer of business**

The FW Act introduced a new statutory test for determining whether a transfer of business has taken place. This captures a broader range of circumstances, such as when an employee moves between two associated entities in a corporate group structure.

In contrast with Work Choices, the FW Act does not provide for the automatic cessation of transmitted instruments after 12 months; instead, it restores the substance of the pre-Work Choices position that the transferring instrument will have ongoing operation. However, it enables parties to apply to FWA, which has broad powers to tailor the operation or prevent the transfer of instruments before or after a transfer of business.

#### **3.6.8 Right of entry**

Under the FW Act, right of entry is granted to permit holders to investigate suspected contraventions of the FW Act or a fair work instrument, as well as to hold discussions with employees.

Whether entering for discussions or to investigate a suspected contravention, a permit holder must comply with the same requirements that existed under Work Choices, including:

- holding a valid right of entry permit, which can only be issued to a 'fit and proper person'
- providing at least 24 hours advance notice of entry and entering only during working hours
- complying with any reasonable request from an employer that discussions or interviews take place in a particular part of the premises and that representatives take a particular route to reach that location.

In addition, the FW Act specifies that it would be unreasonable for an employer to request that discussions occur in a particular room if the room is not fit for the purpose of conducting the interviews or holding the discussions.

While the procedures and rules for exercising right of entry under the FW Act are broadly similar to those under Work Choices, the FW Act made a key change. A union's right to enter premises is now contingent on the right of a union to represent the industrial interests of the employees, rather than the applicability or otherwise of the relevant industrial instrument to the union.

### **3.6.9 General protections**

The FW Act consolidated a range of protections that previously existed under Work Choices, such as provisions covering freedom of association, discrimination, unlawful termination, sham contracting and payment of bargaining services fees. This consolidation was mostly structural in nature, maintaining protections rather than creating new protections. Some protections, however, have been broadened. In particular, the discrimination provisions extend protection from unlawful termination on discriminatory grounds to cover other types of adverse action short of dismissal, and the protection against adverse action when making a complaint or inquiry is broader than its predecessor. The general protections apply to both existing and prospective employees.

Under the general protections, it is unlawful for a person to take adverse action (such as dismissal, discrimination or prejudicial alteration of position) against another person because they have, or exercise, a workplace right. Workplace rights include being entitled to the benefit of a particular instrument, having a particular role or responsibility under a workplace instrument, the ability to initiate a process or proceeding under a workplace law or instrument, or the ability to make a complaint or enquiry. It is also unlawful for a party to take adverse action against another party because they are a member or official of an industrial association or because they engage or do not engage in certain industrial activities, such as participating in industrial action.

The general protections also proscribe adverse action for discriminatory reasons including race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

When a general protections claim involves a dismissal from employment, conciliation or mediation by FWA is generally mandatory before the claim can proceed to court. Where the general protections claim involves adverse action short of dismissal, conciliation by FWA is voluntary. FWA is able to advise the parties if it considers that a dispute has no reasonable prospect of success.

### **3.6.10 Unfair dismissal**

The FW Act restored unfair dismissal protections to employees of businesses with 100 or fewer employees and streamlined the process for resolving unfair dismissal claims. 'Genuine operational reasons' was removed as a defence to unfair dismissal. A six-month qualifying period applies to businesses with 15 or more employees and a 12-month qualifying period for employees of businesses with fewer than 15 employees. Casuals are subject to the same qualifying

periods as permanent employees and they must have been employed on a regular and systematic basis and have a reasonable expectation of continuing employment.

The FW Act introduced a lodgment period of 14 days, compared to 21 days under Work Choices, and FWA can only accept late claims in exceptional circumstances.

The FW Act also established the Small Business Fair Dismissal Code, which sets out the circumstances in which a summary dismissal may be warranted and includes a process for small business to follow when dismissing an employee. A dismissal is not unfair where FWA is satisfied that the small business employer has complied with the Code.

### 3.7 Conclusions

In this chapter we have reviewed the detail of the four industrial relations regimes that have operated in Australia over the last 20 years and have sought to place the development of the FW Act in the context of both Work Choices and the regimes that preceded it. During the 2007 election campaign, the Labor Party proposed changes to the legislative regime embodied by Work Choices. The changes were said to redress the imbalance of Work Choices and to place collective bargaining at the centre of the new regime.

The new regime was ultimately embodied in the FW Act. However, it did not involve a radical departure from the pre-existing laws and, in many ways, built upon them. Although individual workplace agreements were abolished, the collective bargaining mechanisms shared many features of the previous laws.

The two biggest changes concerned the role of unions and the imposition of good faith bargaining. No longer are there the two streams of agreement, a union stream and a non-union stream, that had existed since 1994. Instead, all enterprise agreements are made between employers and their employees, with unions playing an agency role as bargaining representatives for their members. Good faith bargaining has been reintroduced. It was introduced in 1994 but removed in 1996.

A new safety net of 10 National Employment Standards has been established, expanding the standards established by Work Choices. The number of awards has been radically reduced to 122 and their character altered. No longer are awards the product of the resolution of particular disputes but rather are akin to industry-specific delegated legislative regimes determined by the tribunal.

Finally, the rules limiting industrial action largely mirror the laws that were in place when the government changed in November 2007. Therefore, the FW Act has in large part followed the collective bargaining philosophy that has been in place for more than 25 years.

## 4 Contemporary industrial relations and the economy

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### 4.1 Economic issues and the terms of reference

In this chapter we discuss the links between Australian prosperity, the labour market and the legislative framework for industrial relations.

In its terms of reference the Panel is required to report on the extent to which the operation of the *Fair Work Act 2009* (FW Act) is consistent with the objects specified in s. 3 of the legislation. These objects include ‘productive workplace relations’, ‘national economic prosperity’, the promotion of ‘productivity and economic growth for Australia’s future economic prosperity’, and ‘achieving productivity and fairness’.

The Panel decided early that economic issues would therefore rank high in its assessment of FW Act’s operation in relation to its objectives, in the extent to which its objectives are being met, and in the Panel’s consideration of how the operation of the FW Act could be improved consistent with its objects.

The most widely discussed link between national prosperity and regulatory arrangements in the labour market is through productivity. There are other important links between the labour market, its regulatory arrangements and national prosperity. These include the overall growth rate of wages (which influences consumer price inflation), the response of wages to changes in demand for and supply of labour, the amount of industrial disputation and time lost associated with disputes, the regulatory burden imposed on employers, and the level of employment and participation in the workforce.

As described in the previous chapter, over the last two decades Australia’s industrial relations have shifted focus from the industry level to the enterprise level, from arbitration to workplace bargaining underpinned by an arbitrated safety net of industry awards and legislated minimum conditions, from a mixed system in which state systems had a key role to a predominantly national system, and from reliance on the conciliation and arbitration power of the constitution to reliance on the corporations power. As a result of this evolution, arbitrated decisions other than for the award safety net and annual minimum wage cases are today uncommon. Almost nine out of 10 employees are now covered by federal rather than state pay-setting arrangements.<sup>38</sup>

There have been four different legislative frameworks over the period, but there has also been a good deal of continuity both in the emphasis on market outcomes and in pertinent economic results.<sup>39</sup>

Because of this underlying continuity we have found it useful to consider economic issues in the context of the overall impact of the transition from compulsory arbitration since 1992. We begin this consideration by briefly discussing the changing workforce over the last two decades and the changing pattern of wage setting across the workforce. We then turn to the issue of productivity, before discussing other important links between the labour market, the framework of industrial relations legislation and national prosperity.

Charts prepared for the Panel show the relevant economic time series, with the sequence of industrial relations frameworks indicated. As readers will observe, there are significant differences in average outcomes of the variables over the different frameworks. The differences are not consistent, however, and in most cases not evidently linked to the particular characteristics of the framework. For example, the charts show that, on average, wages growth has been lower and the growth rate of labour productivity has been higher in the FW Act period than in the previous Work

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<sup>38</sup> ABS Cat. No. 6105.0 *Australian labour market statistics, July 2011*, Feature article: ‘Trends in employee methods of setting pay and jurisdictional coverage’.

<sup>39</sup> Richard Mitchell, Peter Gahan and co-authors concluded in a 2010 leximetric study of the evolution of labour law in Australia that ‘our results suggest that Australian labour law has been relatively stable ... and that the most significant changes occurred under the Keating government in 1993, rather than the more recent Work Choices or Fair Work reforms’. Mitchell et al., *Australian Journal of Labour Law*, vol. 23, 2010, pp. 1–31.

Choices period. The Panel's conclusion, based on the material provided in this chapter, is that these differences are probably not due to the differences in the legislative frameworks.

## 4.2 The changing workforce

The Panel considered the industrial relations framework and its economic impact in the context of a changing workplace. While the architecture of the system has changed over the last two decades, so too have the characteristics of the workforce. For example, in the last 20 years the proportion of the workforce that is female has increased from 42 per cent to 46 per cent, and the proportion of employed people working in service industries has increased from 67 per cent to 72 per cent. The mining and construction workforces have increased, while the manufacturing and agriculture workforces have declined. The average working week has declined but the rate of labour force participation of Australians has increased and the proportion of Australians with jobs has increased. Two-thirds of Australians aged 15 and over have a job or are looking for a job. Part-time work now accounts for close to a third of employment, compared with a little under a quarter two decades ago. In 1992 casual employees accounted for just over a fifth of employment. Today they account for just under a quarter.<sup>40</sup>

Over those 20 years the number of employees who are trade union members in their main job has fallen, not only as a proportion of the workforce but also as an absolute number. In 1992 there were 2.5 million employees who were trade union members in their main job. By 2011 the number was down to 1.8 million. In the private sector the number of employees who were trade union members in their main job fell from 1.4 million in 1992 to 1.1 million in 2011. Fewer than one in seven employees in the private sector are union members in their main job.<sup>41</sup> Four out of 10 union members are public sector employees.

The decline in union membership in both the public and the private sector is a long-term trend, and of significance to this Panel. The collective bargaining stream within all four industrial relations frameworks over the past two decades has depended to a considerable extent on union representation of employees. Over coming decades the manufacturing workforce will likely continue its long decline. As the current boom in new projects levels out, the rate of growth of the construction workforce will slow. The mining workforce will continue to expand but, even after doubling its relative size over the last decade, it remains (at 2 per cent) a small share of total employment. Most employment growth will continue to be in sectors that have typically had smaller trade union penetration (see Chart 4.1). With only occasional pauses, the decline in union membership has continued through all four frameworks in Australia over the last two decades.<sup>42</sup> The decline has slowed or stopped in recent surveys but it is unlikely to reverse.

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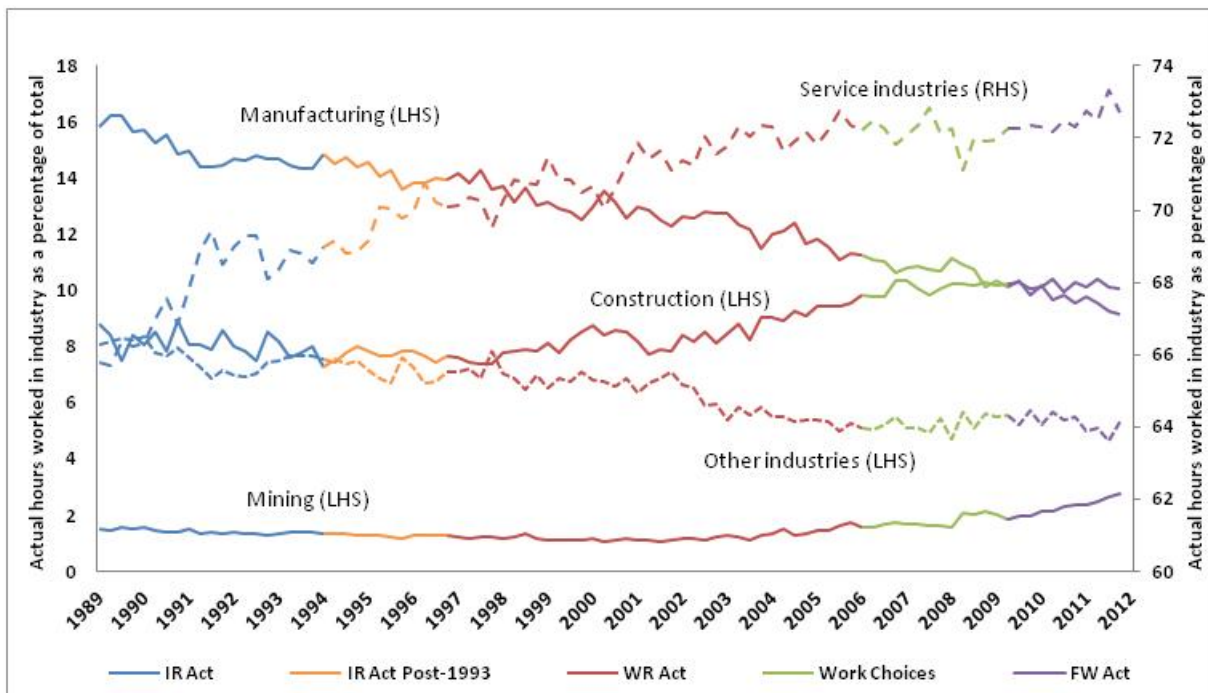
<sup>40</sup> ABS Cat. Nos 6291.0.55.003, 6310.0.

<sup>41</sup> ABS Cat. No. 6310.0 *Employee earnings, benefits and trade union membership, Australia, August 2011*.

<sup>42</sup> Nor is it peculiar to Australia. Though New Zealand now has a quite different industrial relations framework from Australia, and although its evolution over the past two decades has been markedly different, union density in New Zealand is the same as Australia's.



Chart 4.1—Share of hours worked, by industry



Source: ABS, *Labour force, Australia, detailed, quarterly* (Cat. No. 6291.0.55.003), Spreadsheet 11. 'Other Industries' includes the Agriculture, Forestry and Fishing industry and the Electricity, Gas, Water and Waste Services industry.

In its assessment of the operation of the FW Act the Panel has been conscious of these far-reaching changes in the industrial relations system and the workforce. Compared to 1992, a significantly higher proportion of Australians are covered by federal industrial relations laws, with almost all now covered by the federal jurisdiction rather than by state laws; a higher proportion of employees work in service occupations; more employees are in casual or part-time work; nearly half of employees overall are female; and the proportion of employees who are union members has fallen to less than one in five of all employees and less than one in seven of private sector employees.

### 4.3 Changing ways of setting pay

Responding both to the changed legal framework and to the changing workforce, methods of pay setting have altered. Compared to a decade ago, a somewhat higher proportion of employees are covered by collective agreements, a somewhat smaller proportion of employees are covered by individual agreements, and a markedly smaller proportion are paid at minimum award rates. As a result of the cumulative impact of Work Choices and the FW Act, all but a small minority of employees are covered by Commonwealth rather than state industrial relations legislation.

Comparing ABS surveys of wage setting methods in May 2002 and in May 2010<sup>43</sup>, the proportion of employees whose pay was set by the award fell from 20.5 per cent to 15.2 per cent, the proportion of employees whose pay was set by a collective agreement rose from 38.2 per cent to 43.4 per cent, and the proportion of employees whose pay was set by an individual agreement (including common law contracts, legacy AWAs and other individual arrangements) fell from 41.3 per cent to 37.3 per cent.

<sup>43</sup> ABS Cat. No. 6306.0.

There is some evidence in the ABS survey that the recorded expansion in the coverage of collective agreements was predominantly in the public sector rather than the private sector.<sup>44</sup> In both surveys around one-quarter of private sector employees were covered by collective agreements.<sup>45</sup>

The ABS survey covers all employees, whether under state or federal legislation. DEEWR *Trends in federal enterprise bargaining* covers only current federally registered collective agreements.<sup>46</sup> It does not include state agreements, unregistered collective agreements or federal agreements that have expired but not yet been replaced or terminated.

This data certainly shows an increase in the coverage of federal collective agreements. The number of employees covered by current federally registered collective agreements rose by 35 per cent between September 2008 and September 2011. Over this period employment as a whole rose by only 5 per cent. In those three years, however, employers registered a large number of agreements made under legislation preceding the FW Act (evident in a June quarter 2009 spike in approved federal collective agreements), and the federal jurisdiction increasingly incorporated former state collective agreements.

In the *Trends* data for September 2008, current federally registered collective agreements covered around one-sixth (16.3 per cent) of the total of persons employed in Australia. By 2011 they covered a little over one-fifth of all employees (21 per cent).<sup>47</sup> Over the three years the proportion of private sector employees covered by current federal collective agreements increased from 12.5 per cent to 16.2 per cent of total persons employed in Australia. This is a more conservative estimate than that provided by the ABS survey, which uses the total of non-managerial employees for its percentage calculations.<sup>48</sup>

The Panel concludes that over the last decade or so collective agreements have become a somewhat more important form of wage setting, and award minimums markedly less important. Individual arrangements have declined a little in importance.

On the data available to the Panel there does not appear to have been a strong trend increase in the national share of the private sector workforce covered by collective agreements over the last decade. While data is not yet available to confirm this, it is likely there has been some recent pick-up in private sector coverage under the FW Act, with the federal system now including a large number of private sector employees formerly covered by state systems. It is also the case that some major employers who resisted collective bargaining under the 1996 and 2006 legislation have now negotiated collective agreements. Examples include ANZ, the Commonwealth Bank, Rio Tinto, Telstra and Westpac.

On the data available to it, the Panel concludes that private sector collective bargains concluded under the FW Act cover a significant and possibly a modestly increased share of private sector workers. Many of its findings and recommendations therefore relate to the collective agreement stream under the FW Act.

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<sup>44</sup> The public-private split for the 2010 survey is not available but the change between 2002 and 2008 indicates the trend. In the August 2008 survey, the proportion of employees covered by collective agreements had risen by around 2 per cent of all employees, but of those the proportion who were in the private sector had fallen to half.

<sup>45</sup> In August 2008, 96 per cent of public sector employees were covered by registered collective agreements. The public sector accounted for 19 per cent of employees, and 39.8 per cent of employees were covered by registered or unregistered collective agreements. Of employees covered by collective agreements, nearly half were public employees. Twenty-six per cent of private sector employees were covered by collective agreements.

<sup>46</sup> According to ABS 6306.0, in 2010, 37 per cent of employees had their pay set by individual arrangements with their employer. The same survey indicates that 43 per cent of employees, or 3.9 million, had their pay set through collective agreements. The ABS survey includes state agreements and agreements that have nominally expired. Data on agreements collected by DEEWR suggests that active federally registered agreements covered 2.4 million employees as at 30 September 2011.

<sup>47</sup> By contrast, the ABS data indicates that more than double that share was covered by collective agreements. Non-current federal agreements and state public employee agreements presumably explain the difference.

<sup>48</sup> Around 85 per cent of public servants are employed by state or local government. The FW Act covers public employees in Victoria, the ACT and the Northern Territory. It does not cover public employees in NSW, Queensland, WA (other than those employed by corporations), South Australia or Tasmania (other than local government). There are, however, numerous exceptions. For example, universities, councils and public utilities such as water and energy are often covered by federal collective agreements. DEEWR data indicates that, as at 30 September 2011, 353,911 public sector employees outside of the Australian Public Service were covered by current federal collective agreements. Many of these were in universities.

Trade union density in the private and public sectors is unlikely to increase. On the evidence of the last decade, any significant expansion of the coverage of collective agreements will depend more on employer initiation than on union initiation. It is therefore prudent to expect that workplace relations will continue to depend to large extent on employer-initiated arrangements. The creation and enforcement of employee rights will depend at least as much on direct negotiation between an employee and their employer, on legislation and on regulatory authorities and courts as on trade unions as representatives of employees.

Accordingly, the Panel recognises that awards will remain an important part of the industrial relations framework, providing both minimums for the minority of employees who are paid at those rates and a reference set of pay scales and conditions for the great majority who are paid above them. It also follows that flexibility in awards is as important in removing impediments to high productivity as flexibility in the making of collective agreements. We assume periodic reviews of modern awards into the future will continue the trend to shorter and less prescriptive documents, removing some of the need for a capacity to vary awards for individual circumstances. Meanwhile, the Panel sees considerable merit in making existing flexibility provisions in awards easier to use. At the same time, the Panel recognises that an individual employee usually does not enjoy equality of bargaining power with an employer, and accordingly warrants some legislative support for his or her bargaining position. A fuller discussion and the relevant recommendations are in 5.3.2 and 6.4.5 of this report.

## 4.4 Australia's macroeconomic performance and the industrial relations framework

Though vigorous debate about industrial relations continues, since the transition to an enterprise bargaining framework at the beginning of the 1990s Australia has enjoyed a much stronger economic performance than it experienced in the three previous decades. The changed industrial relations framework is certainly not the only cause of Australia's long-running economic success, but in combination with other reforms it is widely agreed to have made a contribution. By moving the focus of industrial relations from arbitrated industry-level awards to bargaining at the enterprise level, the changes legislated in the early 1990s provided incentives to improve workplace productivity and to constrain wage increases overall within an enterprise's capacity to pay. All four frameworks since 1992 have shared an emphasis on market outcomes, agreement between employers and employees, and the minimisation of arbitration.

Since the early 1990s Australia has enjoyed a markedly lower average rate of growth of nominal wages, enabling sustained low consumer price inflation. Using the common standard metric of full-time male ordinary time earnings, wages increased at an average annual rate of 4.5 per cent from 1994–95 to 2010–11, compared to an average increase of 7.4 per cent between 1981–82 and 1991–92. Using the more recent Wage Price Index measure (excluding bonuses), wages have increased at an annual average rate of 3.6 per cent from 1997 to 2011 (see Chart 4.2).

Chart 4.2—Annual percentage change in the Wage Price Index



Chart 4.2 shows the annual (four-quarterly) percentage change in the quarterly Wage Price Index—ordinary time hourly rates of pay excluding bonuses in the private and public sector for all industries in original terms. As the series only begins in the September quarter of 1997, the period covering the IR Act and the IR Act post-1993 are excluded from this series. The horizontal lines in each legislative period represent the average annual rate of change in the Wage Price Index for each of the workplace relations periods. Source: ABS, *Labour price index* (Cat. No. 6345.0), Table 8B.

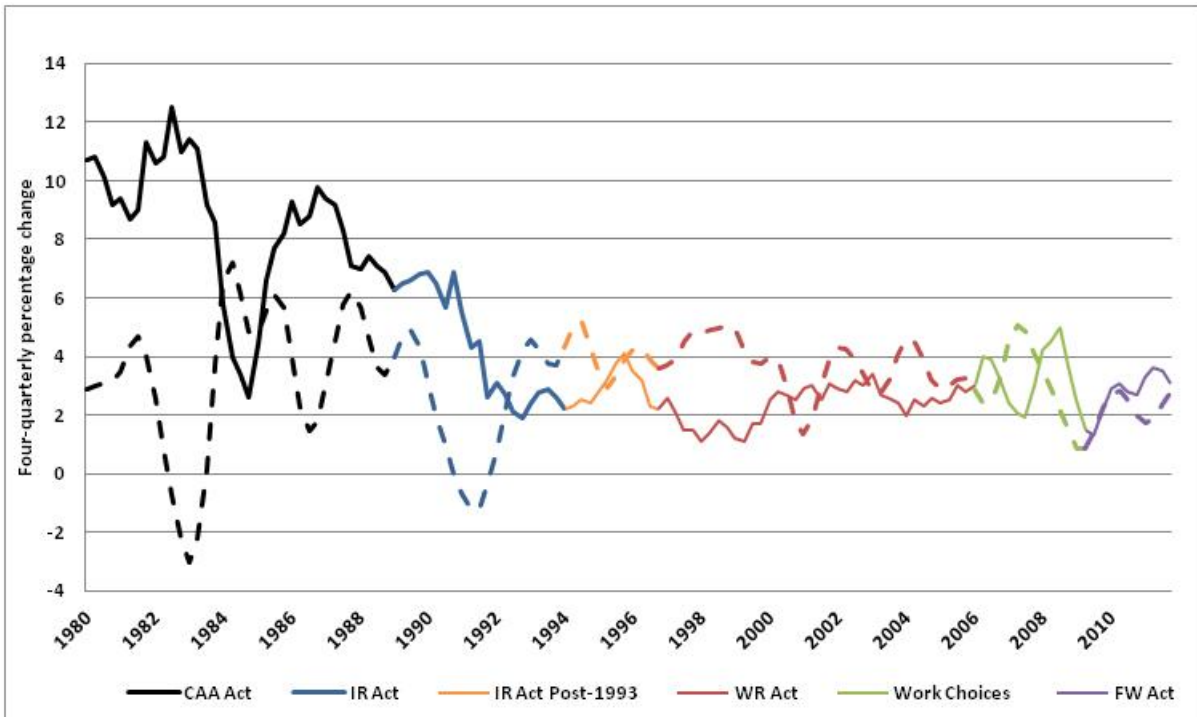
While the average weekly earnings measure has been more volatile, wage increases measured by the Wage Price Index have moved within a fairly narrow range from year to year.

Though nominal wages growth has been restrained, real wages have increased more than in earlier decades. Real wages did not increase in the period 1983–84 to 1991–92, compared to an annual average real increase of 1.8 per cent using male full-time AWOTE in the period 1994–95 to 2010–11.

The good consumer price inflation performance, underpinned by moderate growth in nominal wages, has in turn been congenial to a sustained economic upswing. In the 30 years from 1960 to 1990 Australia experienced six recessions. In the two decades since, it has enjoyed an uninterrupted expansion in output, with only a few scattered quarters in which output did not improve on the previous quarter (see Chart 4.3). Over those two decades the unemployment rate fell to a little over 5 per cent, and both the number of people with jobs and real per capita income increased half as much again. Labour force participation increased over the period by around two percentage points.<sup>49</sup>

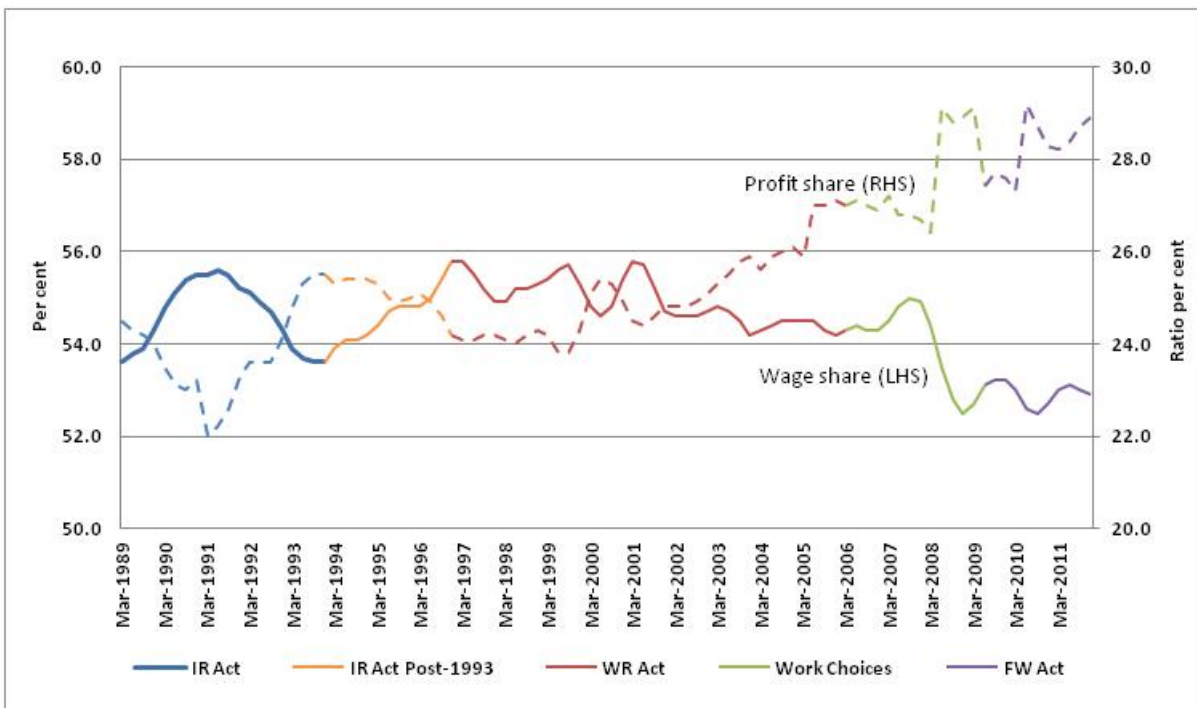
<sup>49</sup> To 65.2 per cent in April 2012 versus 62.9 per cent in April 1992. Using data from ABS Cat. No. 6202.0.

Chart 4.3—Growth in real GDP (dashed line) and RBA-adjusted CPI (solid line)



Sources: Real GDP statistics are from ABS, *Australian national accounts: national income, expenditure and product* (Cat. No. 5206.0), Spreadsheet Table 1. CPI statistics are from RBA (2012), *Statistics*, Table G1, ABS CPI series, adjusted by the RBA for 1999–2000 tax changes and changes in mortgage interest rates prior to the September quarter 1998, downloaded from [www.rba.gov.au](http://www.rba.gov.au).

Chart 4.4—Wage and profit shares of total factor income



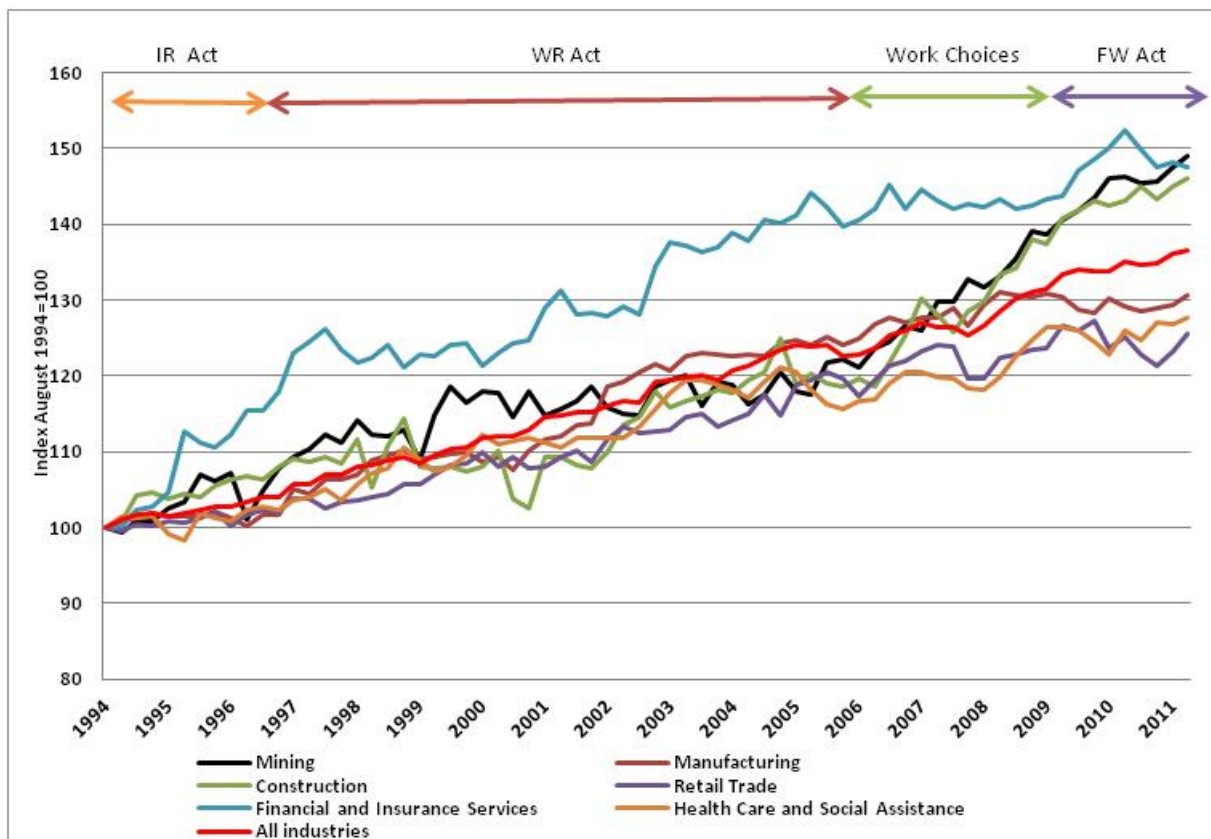
Source: ABS, *Australian national accounts: national income, expenditure and product* (Cat. No. 5206.0), Spreadsheet Table 20.

Though real wages have increased, the corporate profit share of total factor income has continued the trend increase as a share of factor incomes evident since the middle of the 1970s. The corporate profit share was 25 per cent when the enterprise bargaining system was introduced in 1993. It has risen to around 29 per cent in recent years, as shown in Chart 4.4.

In past decades high wage increases won through industrial pressure in certain industries were at times passed on more widely through arbitral relative wage justice decisions. The system was particularly vulnerable during periods of rapidly rising commodity prices. In the year to the June quarter 1975, male full-time average weekly ordinary time earnings (AWOTE) rose 28 per cent. In another burst of wage inflation, male AWOTE rose 18 per cent in the year to the September quarter 1982.<sup>50</sup> Both were periods of quite rapid increases in commodity prices.

Under the enterprise bargaining framework, wage increases in one industry do not necessarily flow to another. Over the last five years of historically high commodity prices, the average annualised growth rate of the Wage Price Index has been 3 ¼ per cent, as it has been for the last decade. The wage increases negotiated in new enterprise bargains have averaged 4 per cent over the same period.

Chart 4.5—Real AWOTE, selected industries



Sources and notes: Average weekly ordinary time earnings for adults working full time by industry in original terms from ABS, *Average weekly earnings, Australia* (Cat. No. 6302.0). These were deflated by the RBA adjusted CPI from Chart 4.3. Real wages were calculated as an index, with August 1994 = 100.

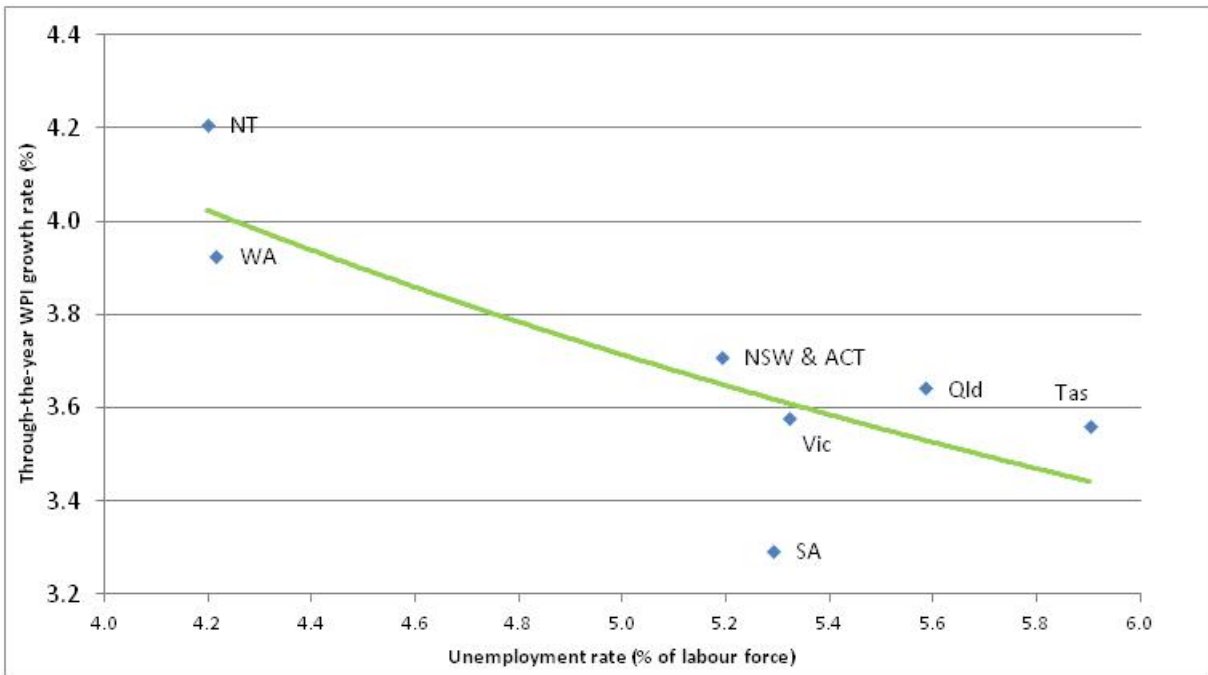
Within the overall outcome, however, there has been considerable dispersion by industry. In the six years to the December quarter of 2011, for example, a period which corresponds to markedly higher commodity prices and the beginnings of the boom in mining investment, the Wage Price Index for mining rose 33 per cent and for construction 29 per cent, while the increase for the workforce overall was 25 per cent. Using male average weekly ordinary time earnings the pattern was more emphatic, with mining increasing 53 per cent, construction 45 per cent and the all industries measure 33 per cent. In the decade to 2007 the ratio of the industry with the highest average weekly earnings to the industry with the lowest ranged around two. It has since increased to 2.4, again indicating a wider

<sup>50</sup> ABS Cat. No. 6302.0, June quarter 1976 and September quarter 1984. (The 1975 figure is for non-managerial adult male full-time workers, excluding paid overtime. The annual growth rate in average weekly earnings per employed male unit was also very high, at 22 per cent. The 1975 calculations are in seasonally adjusted terms, as reported by the ABS in the publication. The calculations for the year to the September quarter 1982 are in original terms (but as they are over four quarters, seasonality should not be problematic) as seasonally adjusted data for male AWOTE is not reported in the early 1980s issues of ABS Cat. No. 6302.0.)

dispersion of wage outcomes in response to structural change in the economy.<sup>51</sup> Chart 4.5 shows the dispersion by real wages, by industry, since 1994.

There is also a good deal of wages growth variation by region, again responding to supply and demand. Chart 4.6, prepared for the Panel, indicates that the rate of wage growth responds to the unemployment rate in the states and territories of Australia. There is faster wage growth and a lower unemployment rate in two of the most resource-rich regions of Australia (Western Australia and the Northern Territory) and slower wage growth in the less resource-rich regions (such as Tasmania). This is occurring in the context of moderate wage growth for Australia as a whole, indicating that fast wage growth in a state or territory with a tight labour market has not spilled over into fast wage growth in states or territories with slacker labour markets.

Chart 4.6—Growth in real WPI versus unemployment rate, by state/territory

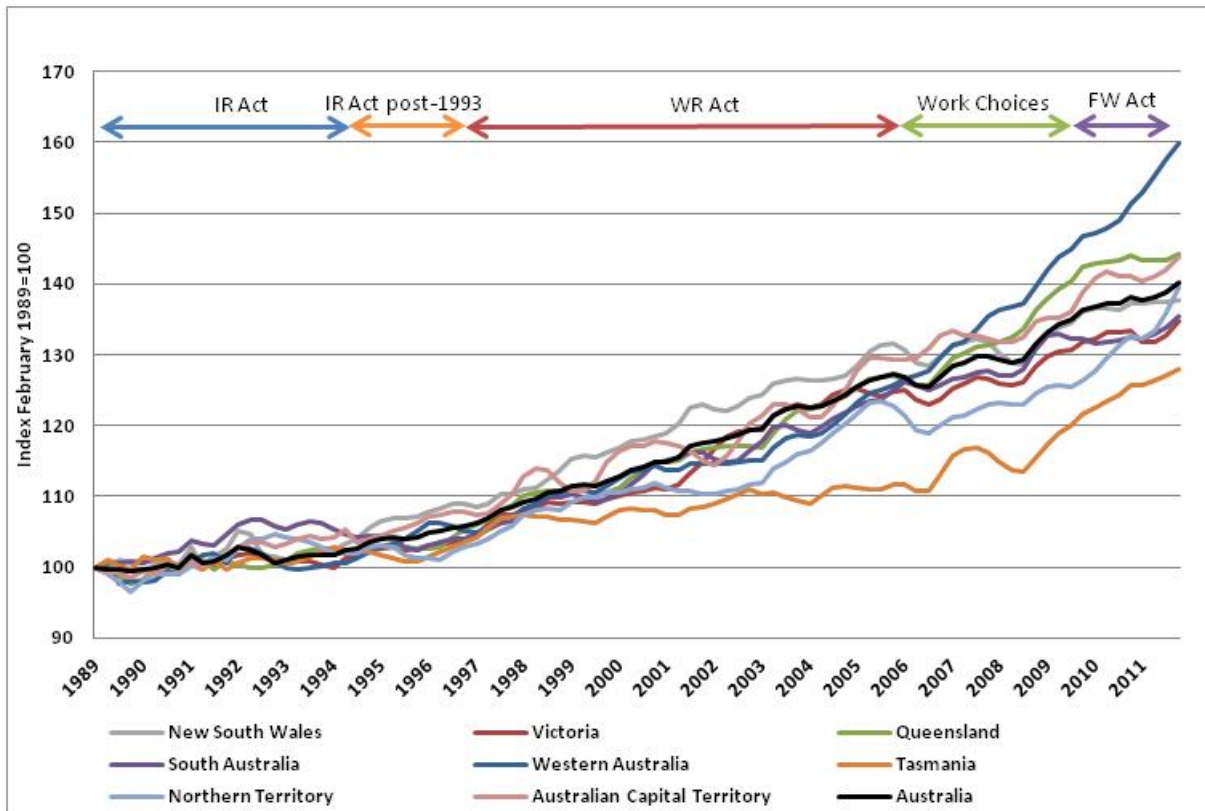


Sources: ABS (2012), *Labour force, Australia, March 2012* (Cat. No. 6202.0) for unemployment rates; ABS (2012), *Labour price index, Australia, December Quarter 2011* (Cat. No. 6345.0) for Wage Price Index (WPI). The WPI used is for total hourly rates of pay excluding bonuses, in original terms, for the four quarters to the December quarter 2011, while the unemployment rates are for November 2011.

The dispersion of wage outcomes by region is also apparent over time, as demonstrated in Chart 4.7, which shows real AWOTE by state and territory. Western Australia experienced considerable growth in wages compared to other states and territories. This is most likely due to the increases in wages and flow-on effects of the mining boom compounded by skill shortages.

<sup>51</sup> ABS Cat. Nos 6302.0, 6345.0.

Chart 4.7—Real AWOTE, by state and territory



Source: ABS, *Average weekly earnings, Australia* (Cat. No. 6302.0), Spreadsheet Table 11A to 11H, various issues; *Average weekly earnings, states and Australia* (Cat. No. 6302.0), various issues; and RBA CPI series. Data from November 1992 is in trend terms, while data prior to this date is in original terms.

The most striking labour market outcomes since the shift away from arbitration are the gradual but persistent decline in unemployment and the movement of wages growth within a relatively narrow range compared to previous experience. These twin outcomes suggest that the minimum rate of unemployment, consistent with steady as opposed to accelerating wages growth, has fallen markedly since the broad shift away from arbitration and towards agreement making. As Borland remarks<sup>52</sup> of this development, ‘Part of the explanation may be the shift to enterprise bargaining that occurred in the mid-1990s’. There have been periods in which an increase in wages growth was sufficiently concerning to the Reserve Bank that it added to the case for tightening policy. This appears to have been the case, for example, in 1994 and again in 2005. But in neither case was it necessary to force a major increase in unemployment to bring wages growth down to a rate consistent with the RBA’s inflation target.

More flexible labour market arrangements played a significant part in supporting continued strong growth without wage spillovers or inflationary pressures following the sharp improvement in the terms of trade after 2003, as well as limiting the impact of the global financial crisis (GFC) on unemployment by allowing for adjustments in hours worked rather than layoffs.<sup>53</sup>

Australia has seen favourable labour market outcomes over the past two decades, which have been pertinent to Australia’s extraordinary run of prosperity over the period. Because of the increase in jobs and real wages, the benefits of increasing prosperity in Australia have been widely shared. In considering proposals to change the industrial relations

<sup>52</sup> J Borland, ‘Industrial relations reform: chasing a pot of gold at the end of the rainbow?’, lecture given at the University of Melbourne on 19 March 2012 by Jeff Borland as returning Visiting Professor of Australian Studies at Harvard University.

<http://www.economics.unimelb.edu.au/staff/jib/documents/harvardtalk.pdf>.

<sup>53</sup> D Gruen, ‘A tale of two terms-of-trade booms’, presentation to the Australian Industry Group Economy 2006 Forum; M Plumb, M Baker & G Spence, ‘The labour market during the 2008–09 downturn’, *RBA Bulletin*, March quarter 2010, Reserve Bank of Australia, Sydney.



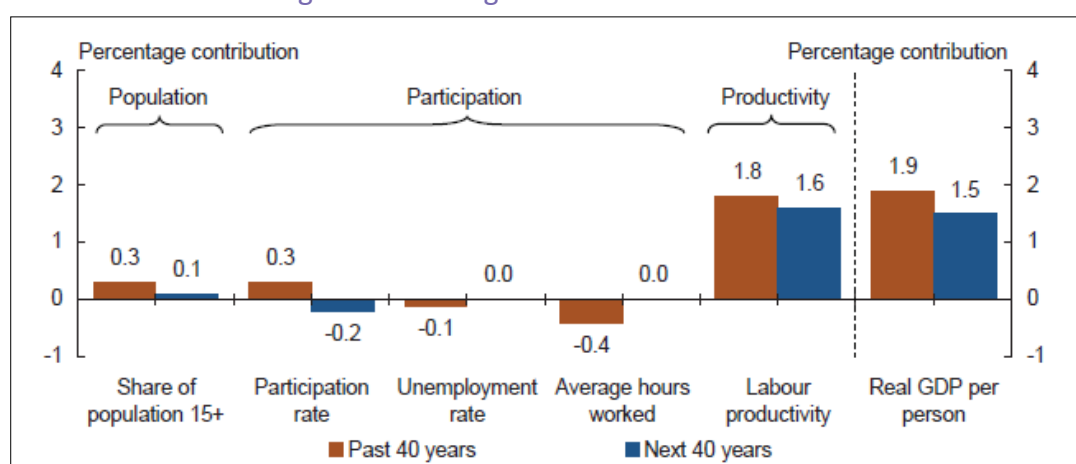
framework, an important criterion for the Panel has been to avoid recommending alterations that might threaten that success.

## 4.5 Productivity

Productivity measures output against inputs. In the long run, unless the growth of output exceeds the growth of labour inputs, living standards cannot improve. Labour productivity is the output produced per hour of work, and is one measure of productivity. Another is multifactor productivity (MFP), which is the output produced per unit of combined capital and labour.

Over the last 35 years Australia’s labour productivity growth has averaged 1.7 per cent per year and its GDP growth 3.2 per cent per year. The growth of output per hour worked therefore contributed to slightly more than half of the GDP growth rate. The remainder is additional hours worked, which averaged an annual increase of 1.5 per cent over the 35-year period. The growth of hours worked was close to the annual average growth of the population, which was 1.4 per cent.<sup>54</sup> At an annual average of 1.8 per cent, the growth rate of real income per head, or living standards, was therefore very close to the growth rate of labour productivity. In the Australian experience, as in that of most countries, the growth of labour productivity over the long term will closely match the growth of living standards or real income per person (see Chart 4.8).

Chart 4.8—Sources of growth in living standards



Source: Australian Treasury, *Australia to 2050: future challenges*, the 2010 Intergenerational Report—overview.

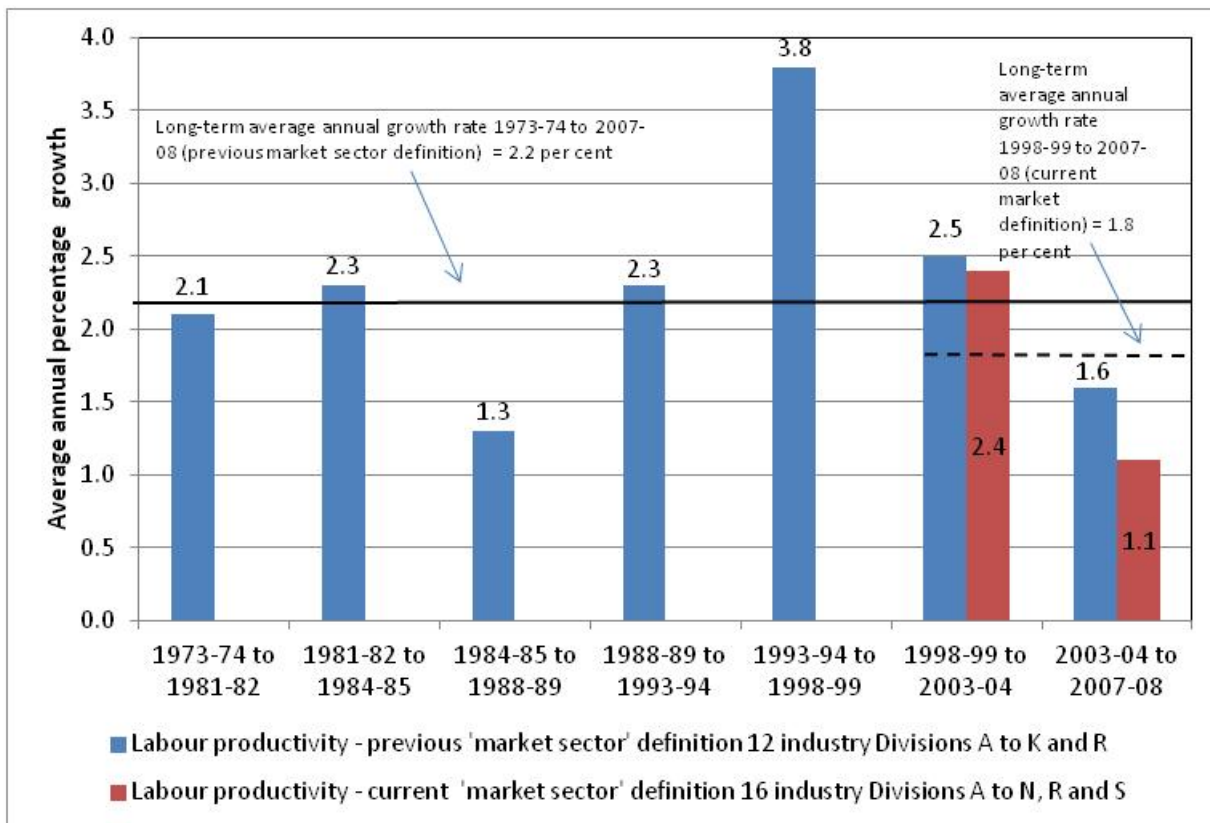
Australia’s productivity growth has slowed in recent years. The most reliable comparisons of productivity growth are based on productivity growth cycles. Chart 4.9 shows that during the most recent cycle, 2003–04 to 2007–08, annual growth in labour productivity averaged 1.1 per cent per year (in the ‘market sector’).<sup>55</sup> This is down on the average annual growth of 2.4 per cent recorded between 1998–99 and 2003–04, and is also below the long-term average growth rate of 1.8 per cent per year (1998–99 to 2007–08). While there has not been a completed productivity cycle since 2007–08, average annual growth in labour productivity from the June quarter 2008 to the March quarter 2012 was 1.7 per cent.<sup>56</sup>

<sup>54</sup> ABS Cat. No. 5204.0, 3101.0. The compound annual growth rates of both the labour force and employment averaged 1.9 per cent over the 35 years to the December quarter 2011 (ABS Cat. No. 6202.0, 6203.0), showing the influence of a growing share of part-time work. Over those years unemployment rose and then returned to close to its starting rate.

<sup>55</sup> This is based on the current 16-industry definition (divisions A to N, R and S) of ‘market sector’. The ABS’s adoption of the new definition of ‘market sector’ (16 industries—ANZSIC (2006) divisions A to N, R and S) follows implementation of new international standards. Sourced from ABS, *Australian system of national accounts* (Cat. No. 5204.0).

<sup>56</sup> ABS, *Australian national accounts: national income, expenditure and product* (Cat. No. 5206.0), trend labour productivity (market sector).

Chart 4.9—Labour productivity growth for growth cycles, 1973–74 to 2007–08



Sources: ABS, *Experimental estimates of industry multifactor productivity, 2010–11* (Cat. No. 5260.0.55.002); ABS, *Australian system of national accounts, 2010–11* (Cat. No. 5204.0).

#### 4.5.1 International comparisons

The measures are less reliable, but it appears Australian productivity growth has also faltered compared to international peers. Australia’s productivity performance improved markedly during the 1990s compared with other countries in the OECD. Australia’s average annual multifactor productivity growth rate rose from 12th among 16 OECD countries in the 1985 to 1994 period to fourth among a slightly expanded group of 18 countries between 1994 and 1999.<sup>57</sup> However, Australia’s productivity performance has since deteriorated, with Australia ranking 14th among 18 OECD countries in the 1999 to 2007 period.<sup>58</sup>

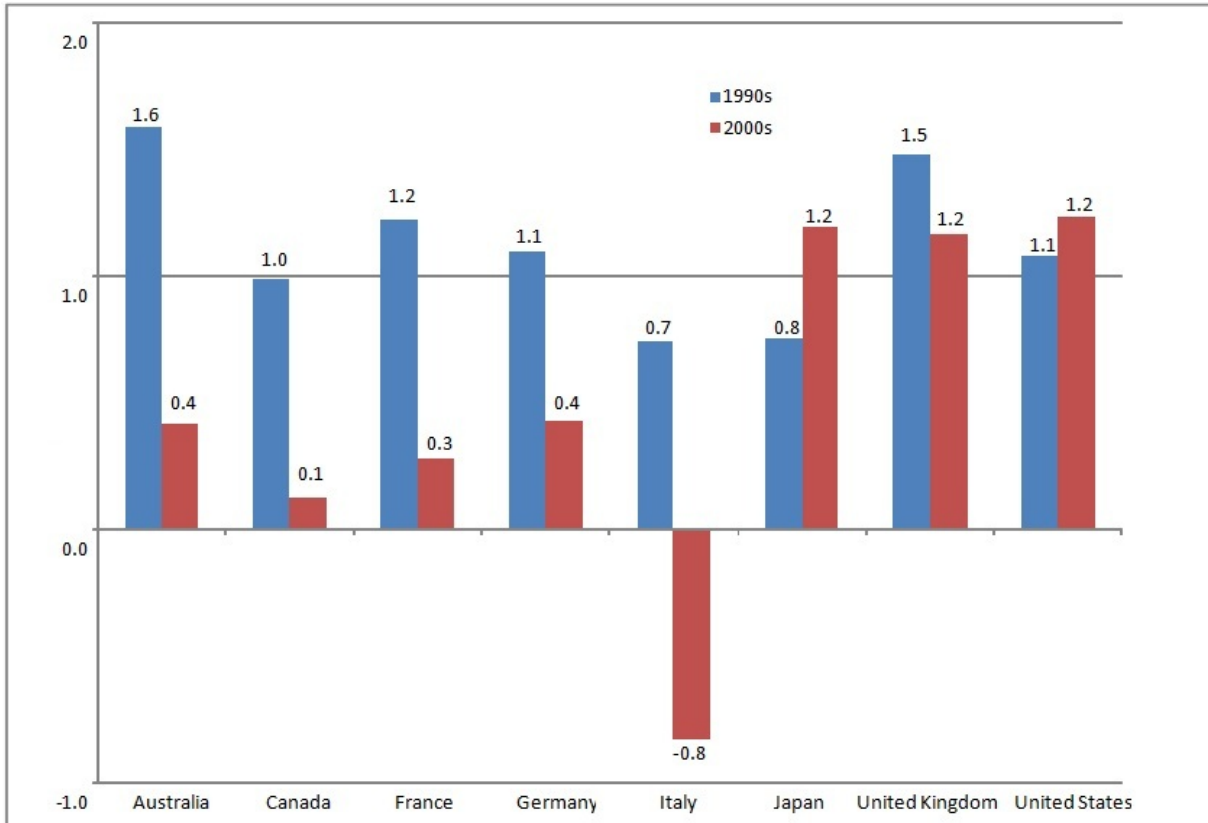
Chart 4.10, prepared for the Panel, shows an international comparison of growth rates of MFP for Australia and each member of the Group of Seven (G7) major countries. Based on OECD statistics<sup>59</sup>, the chart shows Australia’s average rate of change in MFP was substantially slower in the 2000s than in the 1990s. Australia’s average rate of change of MFP in the 2000s was well below the three top-performing countries (USA, UK and Japan).

<sup>57</sup> PC, submission to the House of Representatives Standing Committee on Economics, 2009.

<sup>58</sup> *ibid.*

<sup>59</sup> In a speech to the Melbourne Institute Economic and Social Outlook Conference titled ‘Sustaining growth in living standards in the Asian Century’, delivered on 30 June 2011, the Secretary to the Treasury, Martin Parkinson, conducted a similar international comparison to that provided in Chart 4.10. However, MFP statistics for Australia and the G7 have been revised extensively by the OECD since then.

Chart 4.10—G7 economies and Australia, annual average MFP growth rates, 1990s and 2000s

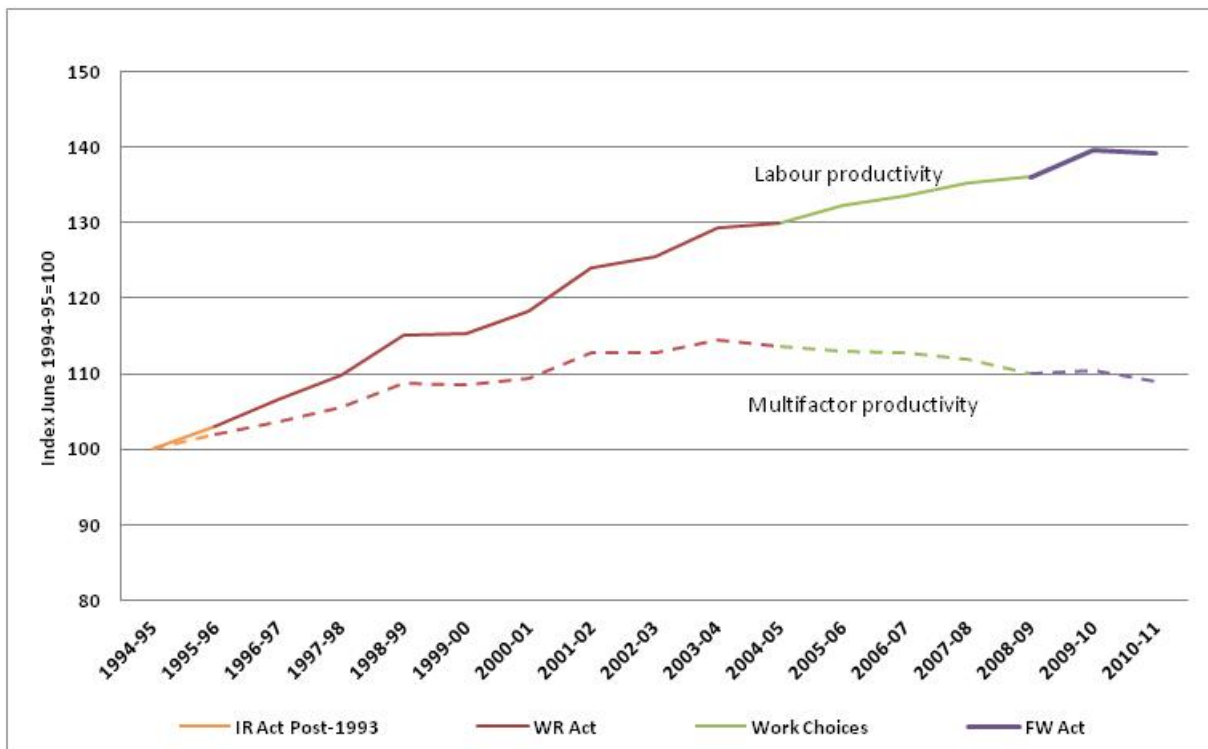


Source and notes: Calculated by DEEWR staff from statistics from the OECD’s Multifactor Productivity Dataset downloaded from OECD.Stat on 13 March 2012, with calculations based on the year-by-year percentage changes in MFP reported by the OECD. Compound average annual growth rates were based on whole decades, with the following exceptions necessitated by missing data in the OECD dataset: Germany in 1990s (1992 through 2000), UK in 2000s (2000 through 2007), Australia and Japan in the 2000s (2000 through 2008), and France and Italy in the 2000s (2000 through 2009). Partly as a result of the missing data for Australia, the estimate for Australia for the 2000s is different from the estimate calculated by DEEWR staff of 0.2 per cent per annum from the ABS *Annual system of national accounts 2010-11* (Cat. No. 5204.0).

#### 4.5.2 Labour productivity and multifactor productivity

The labour productivity and multifactor productivity measures tell somewhat different, though not contradictory, stories over the last two decades (see Chart 4.11). Both show rapid increases from the early to mid-90s through to the early years of the new decade, with labour productivity growing somewhat faster than multifactor productivity. Labour productivity growth then slowed but remained positive in each year until 2010–11, when the level of labour productivity declined. Multifactor productivity has been much weaker, with the level declining each year (except 2009–10) from 2003–04 through the latest available year, 2010–11.

Chart 4.11—Labour and multifactor productivity



Source: ABS, *Annual system of national accounts 2010–11* (Cat. No. 5204.0), Spreadsheet Table 13. The data is in original terms and the series begins in 1994–95. Both series are on an ‘hours worked’ basis (i.e. not the ABS analytical series, which has been adjusted for changes in labour quality).

#### 4.5.3 Causes of changes in productivity growth rates

Productivity growth is difficult to reliably measure because it comes from a variety of sources. It is calculated as a residual—the amount of output growth that remains after allowance is made for the contribution of growth in inputs. It is therefore subject to errors and uncertainties in the output and input measures. In the market sector, where prices provide an indicator of quality that can be used to compare the value of new goods and services to the old versions that they replace, it is possible to make useful estimates of productivity. The market sector comprises two-thirds of the economy. In the non-market sector—health, education, defence, government administration—it is difficult to separate price changes (the value of output) from changes in the quality and quantity of services (the level of inputs). With strong employment growth in the services sector and the non-market sector, it becomes increasingly difficult to determine the relative contributions of different sectors to aggregate productivity.<sup>60</sup> That said, it is possible to make some observations on the measures we have.

Much of the difference between the labour productivity and multifactor productivity measures is explained by the rapid acceleration of business investment and of capital formation more broadly from around 2001–02. While labour productivity compares additional output only to additional labour hours, multifactor productivity compares additional output to the joint contribution of additional labour *and* capital. After little change as a share in the 1990s, private business investment rose from 9 per cent of GDP in 2001–02 to 15 per cent of GDP in 2010–11. Through calendar year 2011 it reached 18 per cent of GDP in real terms and is probably headed higher. As a share of GDP, business investment thus doubled over the decade. The increase was accompanied by an abrupt and continuing decline in the productivity of capital in the market sector, which fell by 20 per cent from 2001–02 to 2010–11.<sup>61</sup> The rapid decline in capital productivity, or output per unit of capital services, indicates that over the period additional investment was not fully

<sup>60</sup> Inquiry into raising the level of productivity growth in the Australian economy, House of Representatives Standing Committee on Economics, April 2010, Canberra.

<sup>61</sup> ABS Cat. Nos 5204.0, 5206.0.

required by corresponding additional output. As major projects are completed, however, and the production phase of an investment boom succeeds the construction phase, the benefits of the previous investment will become more apparent in higher output and firmer growth in productivity.

Multifactor productivity measures what is left over in output growth after the contributions from additional capital and additional labour are accounted for. In the last decade there has been nothing left over. On the contrary, the joint input of labour and capital has been growing faster than output. In the decade to 2010–11, market sector capital services input rose 72 per cent, labour hours in the market sector rose 17 per cent and gross value added for the market sector increased 37 per cent.<sup>62</sup> Over that period the additional capital was not required by additional output.

Labour productivity growth is the sum of capital deepening plus the change in multifactor productivity. A decline in multifactor productivity is therefore likely to be associated with a decline in the rate of growth of labour productivity.

#### 4.5.4 Productivity in specific industries

The business investment boom is an important part of the broad explanation for the decline in multifactor productivity and the slowdown in labour productivity growth. There are also industry-specific contributions, some of which are partly related to the investment boom. See Chart 4.12 for a comparison of labour productivity by industry.

The mining industry has experienced high prices, increasing incentives to exploit lower quality and less productive sources of minerals and energy. At the same time it has experienced some depletion of mineral resource deposits, especially in coal, oil and gas extraction. High prices have also spurred additional investment, much of which has not yet been required in additional output. Finally, the rapid growth of the workforce has meant that the average workforce experience of a miner has been falling. These developments have sharply reduced the level of productivity in the industry over the last decade. Rising national income associated with the commodity price boom has led to higher prices and profits. The real price of labour measured by the GDP deflator has fallen, though it has increased when measured against the CPI. As a result, in recent years in some industries, such as mining, it has been profitable for businesses to increase employment despite declining productivity. In 2009, PC chairman Gary Banks noted that ‘with buoyant demand and tight labour markets, efforts are likely to have been made to satisfy demand even at the expense of increased input costs, as long as additional profits could be made’.<sup>63</sup>

The agriculture, forestry and fishing sector has not contributed as much as it otherwise could to Australia’s overall productivity performance because of the persistent drought over most of the last decade, followed more recently by flooding and cyclones over the last two years (especially Cyclone Yasi in North Queensland).

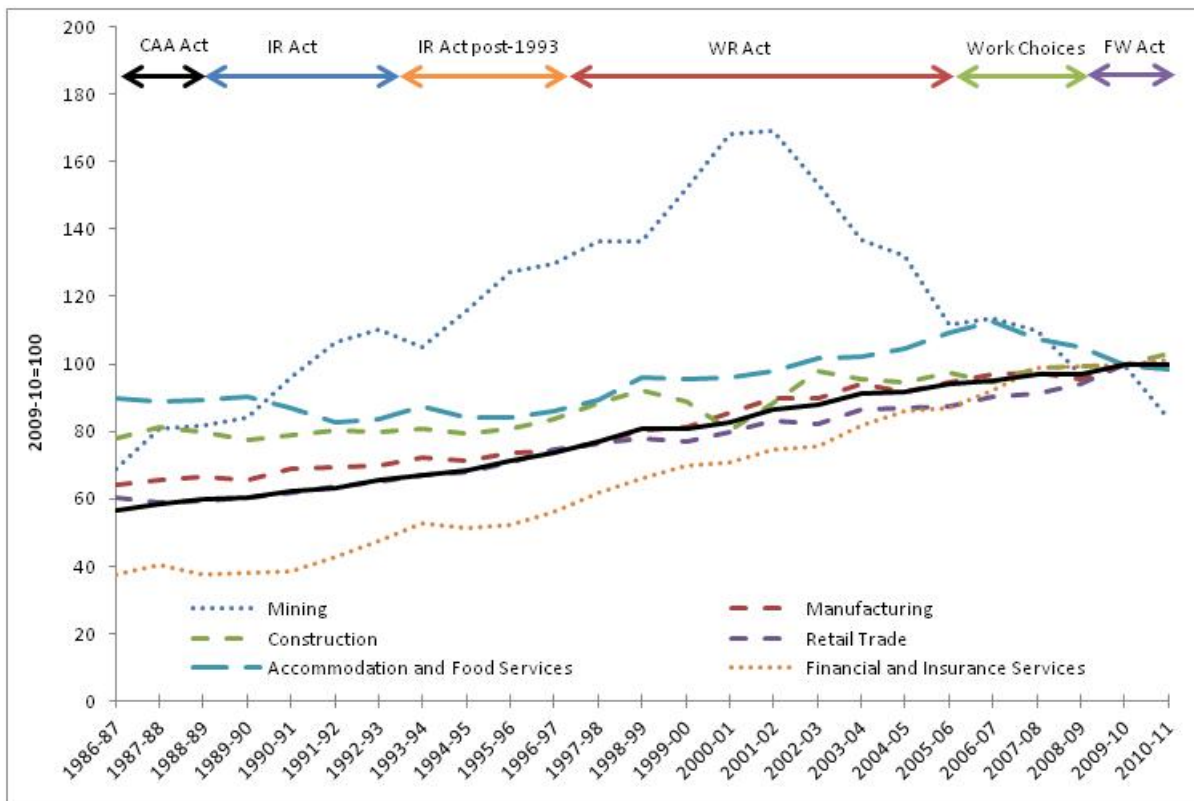
Productivity in the electricity, gas, water and waste industry has been affected by big increases in capital and labour inputs, together with significantly reduced output growth. Reduced rainfall has seen both a managed reduction in urban water consumption and new capital investments in recycling and desalination. Much electricity investment has been in peak load.

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<sup>62</sup> ABS Cat. No. 5204.0, Table 13.

<sup>63</sup> G Banks, ‘Back to the future: restoring Australia’s productivity growth’, presentation to the Melbourne Institute / Australian Economic and Social Outlook Conference, ‘The Road to Recovery’, 5 November 2009.

Chart 4.12—Labour productivity indices, by industry



Source: ABS, *Experimental estimates of industry multifactor productivity, Australia: detailed productivity estimates 2010-11* (Cat. No. 5260.0.55.002). All series are in original terms with a base of 2009–10=100.

#### 4.5.5 Changing composition of the workforce

Productivity growth in the economy as a whole depends not only on productivity growth in individual industries but also on the changing composition of the economy. Even if productivity within each industry is unchanged, for example, the productivity of the economy can change if the relative sizes of different industries and their workforces change. This was examined for the Panel using a shift share analysis of industry contributions to labour productivity growth in the 19 employing industries in Australia over the last two decades (details in Appendix D).

The analysis indicates that changes in industry composition have, on balance, been adding to rather than subtracting from labour productivity in the last decade.<sup>64</sup> Without changes in the relative size of industry employment, labour productivity over the whole decade would have been four percentage points lower than it was. The impact is most apparent in mining, where the overall sharp decline in labour productivity in the industry has been compensated for by the doubling of the industry workforce. Because mining has a high absolute level of productivity, the increase in its workforce offsets the decline in its productivity.<sup>65</sup>

On the other hand, an increase in the share of hours worked over the past decade in construction, health care and social assistance, and arts and recreations services reduced overall labour productivity growth because the absolute level of productivity in these industries is below the average for the economy as a whole. For the same reason, the

<sup>64</sup> That is, from calendar year 2001 to calendar year 2011.

<sup>65</sup> While we can, in an accounting sense, measure the contribution of productivity growth within an industry separately from the effect of its changing size, in reality the two are connected. This connection is represented in the shift share analysis in Appendix D by the interaction term between these two effects. Mining has a large negative interaction term because the fall in productivity has been combined with an increasing labour share. However, this negative interaction term is outweighed by the positive effect of the growth in the labour share in mining. Despite labour productivity in mining falling by more than half over the decade, it remains more than three times the all-industry average.

decline in the share of hours worked in the agriculture, forestry and fishing, retail trade, and accommodation and food services industries increased overall labour productivity growth.<sup>66</sup>

By contrast, the much stronger labour productivity growth over the previous decade<sup>67</sup> was driven by productivity growth within industries, while labour shifts among industries subtracted slightly from overall labour productivity growth. Over this time, labour productivity grew particularly strongly (i.e. greater than 50 per cent over the decade) in wholesale trade; financial and insurance services; mining; and electricity, gas, water and waste services.

#### 4.5.6 The impact of economic reform in the 1980s and 1990s

The poor productivity performance of the last decade is in sharp contrast to the excellent productivity performance for the previous decade. It is difficult to prove any particular factor caused changes in productivity. The transition to enterprise bargaining coincided with an upswing in productivity growth, though, as Borland remarks, 'We have very little direct evidence of [the] effects of labour market reform on labour productivity in the 1990s'.<sup>68</sup> Economic analysis suggests a link between bargaining and labour productivity,<sup>69</sup> but the work is by no means conclusive. While it is difficult to isolate the effect of labour market reform, the Panel accepts that Australia's productivity performance in the 1990s probably benefited from important economic reforms implemented then and in the prior decade. Reform began with liberalisation in financial markets and the floating of the exchange rate, and continued with substantial cuts to import tariffs. These reforms were followed by corporatisation and privatisation of government businesses, the major labour market reforms described earlier, competition reform, and the adoption of disciplined monetary and fiscal policies guided by targets.

It is widely, though certainly not universally, agreed among analysts that these economic reforms of the late 1980s and early 1990s, including the transition to enterprise bargaining in 1993, removed impediments to more efficient production. These reforms may account for a significant part of the upswing in productivity through the 1990s.

Changes in measurement may also have played a small part in the apparent decline in productivity growth.<sup>70</sup>

#### 4.5.7 Changes in the legislative framework for industrial relations

It follows from the preceding discussion that the sources of productivity growth are diverse. The shift share analysis just discussed, for example, demonstrates that an important source of labour productivity change is shifts in the composition of the workforce and output between industries with widely different levels of labour productivity. The discussion of the investment boom shows paradoxically that a period of very high investment may be associated with a

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<sup>66</sup> Labour productivity growth is decomposed into three parts: the within industry effect, the between industry effect and the interaction effect.

<sup>67</sup> That is, from calendar year 1991 to calendar year 2001. Labour productivity growth (real GVA per hour worked in seasonally adjusted terms) was slightly more than twice as strong at 25 per cent over this decade, compared with growth of 12 per cent over the most recent decade.

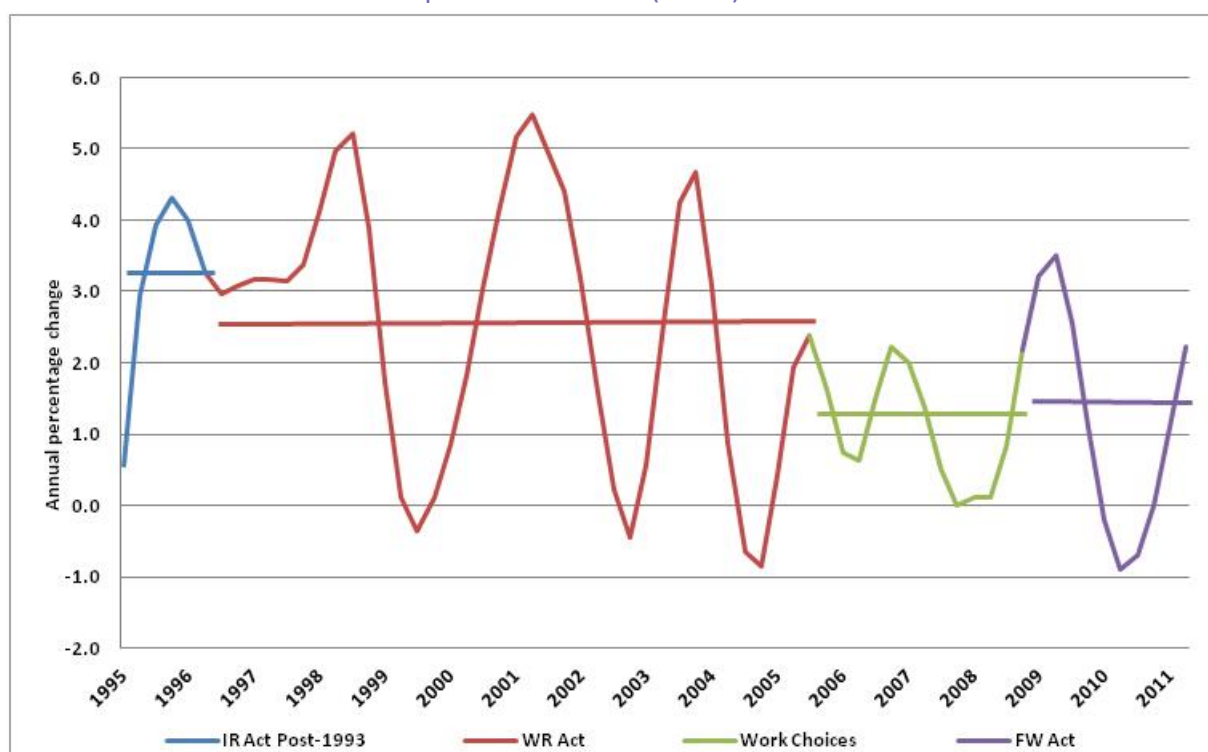
<sup>68</sup> J Borland, 'Industrial relations reform: chasing a pot of gold at the end of the rainbow?', lecture given at the University of Melbourne on 19 March 2012 by Jeff Borland as returning Visiting Professor of Australian Studies at Harvard University, p. 9.  
<http://www.economics.unimelb.edu.au/staff/jib/documents/harvardtalk.pdf>.

<sup>69</sup> Tseng and Wooden (2001), in *Enterprise bargaining and productivity: evidence from the Business Longitudinal Survey*, Melbourne Institute Working Paper no. 8/01, Melbourne Institute of Applied Economic and Social Research, University of Melbourne, Victoria, found that firms with employees covered by enterprise agreements had productivity levels that were higher than comparable firms with employees covered by awards. In a review of the evidence, Loundes, Tseng and Wooden, in 'Enterprise bargaining and productivity in Australia: what do we know?', the *Economic Record*, vol. 79 pp. 245–58, June 2003, found that the research to that date has been inconclusive in terms of causation. Connolly, Herd, Chowdhury and Kompo-Harms, in 'Enterprise agreements and other determinants of labour productivity', paper presented to the Australian Labour Market Research Workshop, University of Western Australia, 6–7 December 2004, estimated that the proportion of employees covered by federal registered agreements (and unregistered collective agreements) had a significant positive effect on labour productivity in the long term. This research was conducted at a time when federal and state agreements were generally moving in proportion with each other. In an as yet unpublished follow-up analysis in 2012, made available to the Panel, Connolly, Trott and Li estimate that the proportion of employees covered by federal and state registered agreements (and unregistered collective agreements) has a significant, lagged positive effect on labour productivity in the long run. The lag on the workplace agreements variable increases the probability that the relationship between these two variables is causal and not merely an association.

<sup>70</sup> The new expanded definition of the 'market sector' has resulted in the inclusion of more service industries in headline productivity measures. This in turn has resulted in lower multifactor productivity growth rates relative to past releases, as some service industries tend to have relatively lower multifactor productivity growth rates. Generally, this is seen as a minor explanation of the trend decline in productivity.

decline in multifactor productivity and a slowdown in labour productivity growth if the investment is not initially required by increased output.<sup>71</sup> There may be large gains in productivity from a suite of economic reforms, but the reforms will not necessarily lead to continuous productivity enhancements except to the extent they entrench competition and flexibility. To the extent productivity gains arise from removing workplace impediments and restrictions—for example, in over-manning or other restrictive workplace practices—they will also be one-off gains. Unique changes in particular industries, in this case mining and utilities, may have significant effects on national productivity. We know that technological innovation accounts for a good deal of multifactor productivity growth in the long run, and that increased human capital in the form of higher skills or greater adaptability to new tasks will increase the quality of labour inputs. Most of these diverse sources of productivity gains are unconnected or only loosely connected with changes in the workplace or with bargaining between employees and employers.

Chart 4.13—Growth in real GVA per hour worked (trend)



Source: ABS, *Australian national accounts: national income, expenditure and product* (Cat. No. 5206.0), Spreadsheet Table 1.

The case was argued in some submissions that the productivity pattern could be explained by the differences between the particular industrial relations frameworks over the period. The Panel was not satisfied that there is evidence to support this explanation. Productivity growth accelerated under the IR Act post-1993 and the early years of the WR Act but then slowed. Labour productivity continued to grow at a subdued pace under Work Choices, but multifactor productivity declined under both that framework and the FW Act. Over the two decades labour productivity growth was slowest under Work Choices, which arguably imposed the fewest constraints on management decisions (See Chart 4.13). Of the four frameworks, the FW Act is most similar to the IR Act post-1993. While productivity flourished in the IR Act post-1993 period, however, it has grown only slowly under the FW Act. Differences between the legislative frameworks evidently do not explain the differences in productivity growth over those periods.

While the productivity record over the last decade or so is disappointing, the Panel notes that recent quarterly numbers point to some improvement. For the four quarters to the March quarter of 2012, gross value added per hour worked in

<sup>71</sup> Dean Parham, in his recent PC paper *Australia's productivity growth slump: signs of crisis, adjustment or both?*, concludes that "Normal" rates of productivity growth can be expected to return, once the transitions to new productivity levels have run their course'. PC, April 2012.



the market sector (labour productivity) increased by 5.3 per cent—two and a half times the average through-the-year rate of growth of previous decades.<sup>72</sup> Treasury and Reserve Bank of Australia forecasts in May 2012 both looked to somewhat faster labour productivity growth over the next few years than the last few years. While far too early to suggest a recovery in productivity growth, the more recent experience is consistent with the upswing that may be expected as output picks up in industries such as mining and utilities and as investment over the past decade is required in higher output.

Though the Panel has seen no convincing evidence that the FW Act impedes productivity growth, it is concerned that productivity growth has slowed. In the long run and for the economy as a whole, productivity growth provides for sustained increases in real wages and in national living standards.

The Panel has therefore considered a range of changes both to the administration and the provisions of the FW Act that may contribute to restoring faster productivity growth than has been evident over the past decade. The proposals are discussed at the end of this chapter and developed in greater detail elsewhere.

## 4.6 Other aspects of industrial relations and economic performance

In this section we examine additional economic issues related to the operation of the FW Act that have been raised in submissions or in public debate. Where pertinent, we examine whether a significant difference between the provisions of the FW Act and the preceding Work Choices legislation may be affecting labour market performance.

### 4.6.1 Inflationary wage and salary increases

Some submissions to the Panel drew attention to the growth of labour costs.

For an unchanged profit share of factor income, it is not possible in the long run to maintain the Reserve Bank's target of annual consumer price inflation between 2 per cent and 3 per cent on average unless wages growth is between 2 per cent and 3 per cent per annum plus the growth of productivity per annum. The growth rate of wages minus the growth of productivity, or the growth of nominal labour costs per unit of output, is thus an important guide to the consistency of wages growth with the central bank's inflation target.

In the last two decades labour cost per unit of output, or nominal unit labour cost (see Chart 4.14), has on average increased 2.2 per cent a year. Between the decades, however, the outcome was quite different. From 1991–92 to 2001–02 nominal unit labour costs grew at an annual average of 1.3 per cent. From 2001–02 to 2010–11 they grew at an annual average of 3.3 per cent.

At first glance, the relatively high growth of unit labour costs over the last decade might suggest a problem, not only with the FW Act but with the two legislative schemes that preceded it.

Assessing the significance of changes in nominal labour costs is complicated, however, because of big increases in commodity prices and nominal national income over the period. Despite the somewhat higher average rate of growth of nominal unit labour costs between 2001–02 and 2010–11, headline CPI inflation over the period was just under 3 per cent on average. Not only was consumer price inflation broadly within the central bank target band (other than in

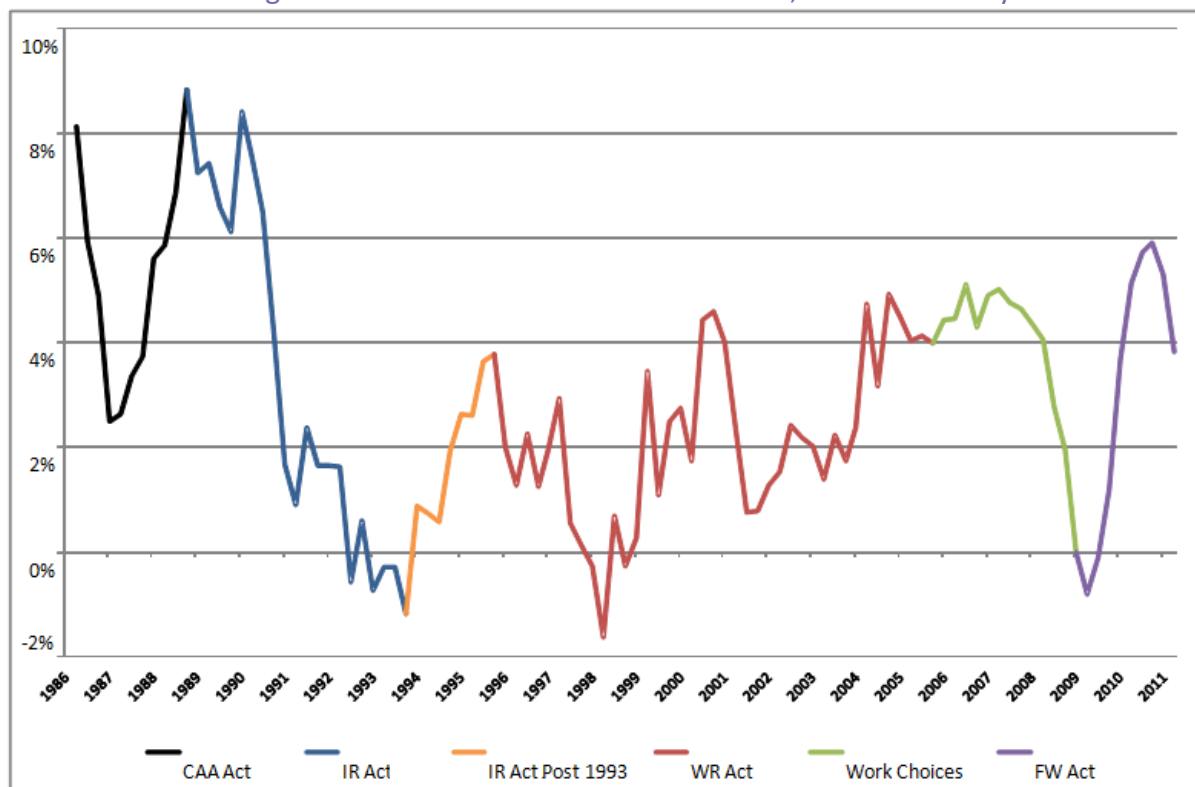
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<sup>72</sup> ABS, *Australian national accounts: national income, expenditure and product, March quarter 2012*, (Cat. No. 5206.0), Spreadsheet Table 1, using seasonally adjusted data. The March quarter National Accounts were released shortly before the finalisation of the report. The quarterly and annual rates of labour productivity growth should be interpreted with caution, as they are prone to volatile and cyclical effects and are often revised in subsequent releases as more information becomes available. Trend labour productivity in the market sector increased by 1.2 per cent over the March quarter 2012 and rose by 3.9 per cent over the year to the March quarter 2012. This was the highest annual result since the June 2004 quarter (4.7 per cent). The quarterly increase in trend labour productivity in the market sector was due to gross value added market sector rising by 0.9 per cent over the quarter, while hours worked in the market sector fell by 0.3 per cent over the same period. For all sectors, trend labour productivity increased by 2.8 per cent over the year to the March quarter 2012. In quarterly terms, trend labour productivity increased by 0.9 per cent over the March quarter 2012.

2008), but the corporate profit share of factor income increased over the period, as it has since the mid-1970s. The corporate profit share of factor income was 24.8 per cent in 2001–02, and 28.4 per cent in 2010–11.

The reconciliation of these apparently contradictory outcomes of stable average price inflation, higher average growth of nominal unit labour costs and a rising profit share is through the sharp increase in prices for Australian non-rural commodity exports over the period.

Chart 4.14—Annual growth rate of nominal unit labour costs, whole economy



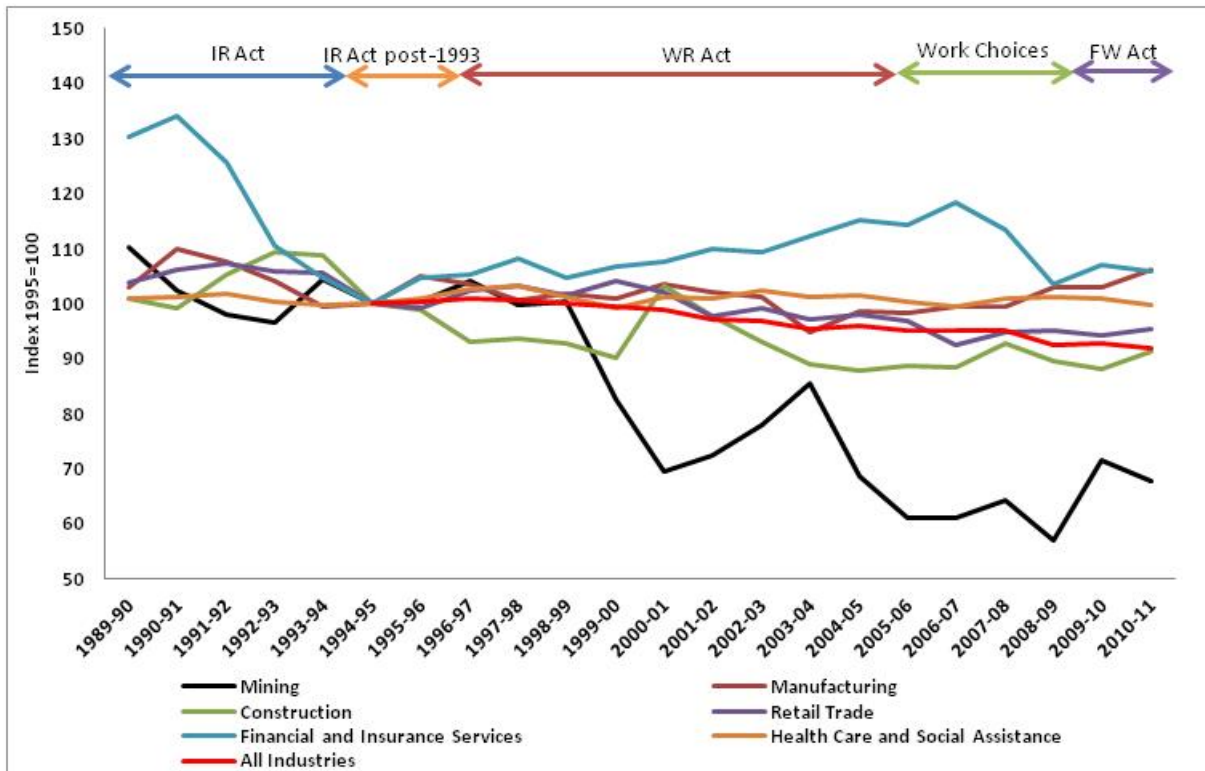
Source: ABS, *Australian national accounts: national income, expenditure and product December quarter 2011* (Cat. No. 5206.0), Spreadsheet Table 38. Data in trend terms, percentage change from same quarter in previous year.

From the end of 2002 to the end of 2011 the Wage Price Index increased 40 per cent. Reflecting the lack of labour productivity growth over the period, nominal unit labour costs rose 36 per cent. Consumer prices rose 29 per cent. But the broadest measure of price increases for Australian production, the non-farm GDP deflator, rose 44 per cent. This meant that while average real wages rose from the point of view of employees, the rate of increase in the cost of labour was less than the rate of increase in the value of production. The corporate profit share of factor income rose and real unit labour costs (nominal unit labour costs deflated by the GDP deflator rather than the CPI) fell by 6 per cent over the period. By comparison, and despite the much better increase in productivity and the much lower increase in nominal unit labour costs, real unit labour costs fell by 5 per cent in the decade to the December quarter 2002—only 1 per cent less than the following nine years.

The effect of commodity price increases is strikingly apparent in the mining industry. When nominal labour costs are adjusted by the deflator for that industry, real unit labour costs in mining have fallen quite markedly over the decade—despite a major fall in labour productivity (see discussion in 4.5.6) and relatively rapid growth in nominal wages.

Chart 4.15 shows annual indices of real unit labour costs by industry (1994–95=100, when the ‘All Industries’ series begins).

Chart 4.15—Real unit labour costs, selected industries



Source: DEEWR calculations based on ABS, *Annual system of national accounts 2010–11* (Cat. No. 5204.0), *Australian national accounts: income, expenditure and product, December quarter 2011* (Cat. No. 5206.0) and *Labour force, detailed, quarterly, Feb 2012* (Cat. No. 6291.0.55.003).

Commodity prices have since stabilised, however, and may well decline in coming years. In the medium and long term—and again assuming stabilisation in the profit share of factor income—the Panel accepts that, for wages growth to continue at its long-term average of 4 per cent, labour productivity growth needs to average at least 1.5 per cent to be consistent with inflation no higher than 2.5 per cent.

Since wages growth has been reasonably stable, the variations in the growth rate of nominal unit labour costs reflect changes in productivity growth, as discussed in the previous section. The Panel’s recommendations on productivity by implication also cover the issue of unit labour costs.

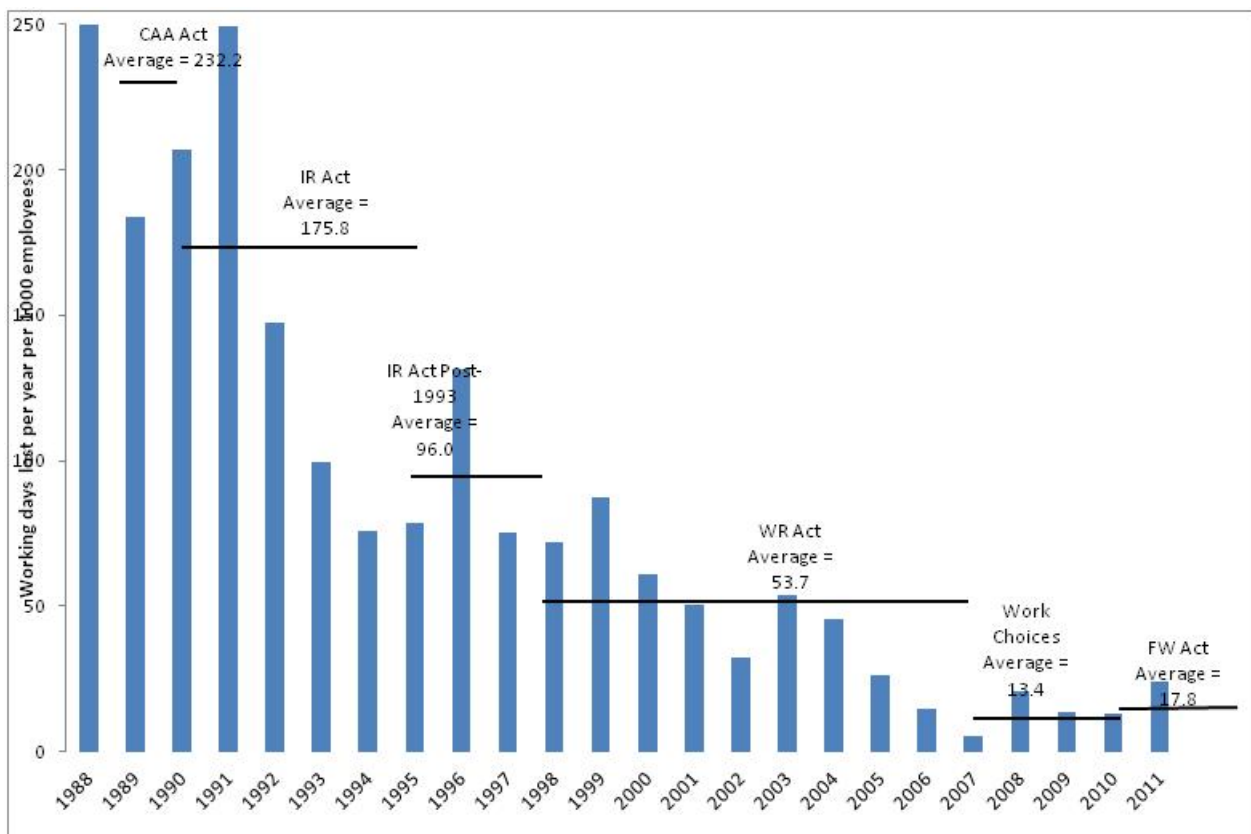
#### 4.6.2 Industrial disputes

Measured as days lost, the level of industrial disputation today is a small fraction of the experience of the 1980s, let alone earlier decades. In 2011, 241,000 working days were lost in industrial disputes. The average level during the 1980s was around six times higher.

Some employers contended in their submissions that the introduction of the FW Act has led to a large increase in industrial disputation. For example, the Ai Group submitted that ‘over the past year there has been a huge increase in the level of industrial action. A significant proportion of the industrial action relates to union claims which would have been prohibited under the *Workplace Relations Act 1996*’.<sup>73</sup> Chart 4.16, which is modelled on a similar one by Professor Jeff Borland, shows average working days lost per thousand employees over each of the legislative frameworks.

<sup>73</sup> Ai Group submission, p. 24.

Chart 4.16—Industrial disputes, Australia, 1988–2011



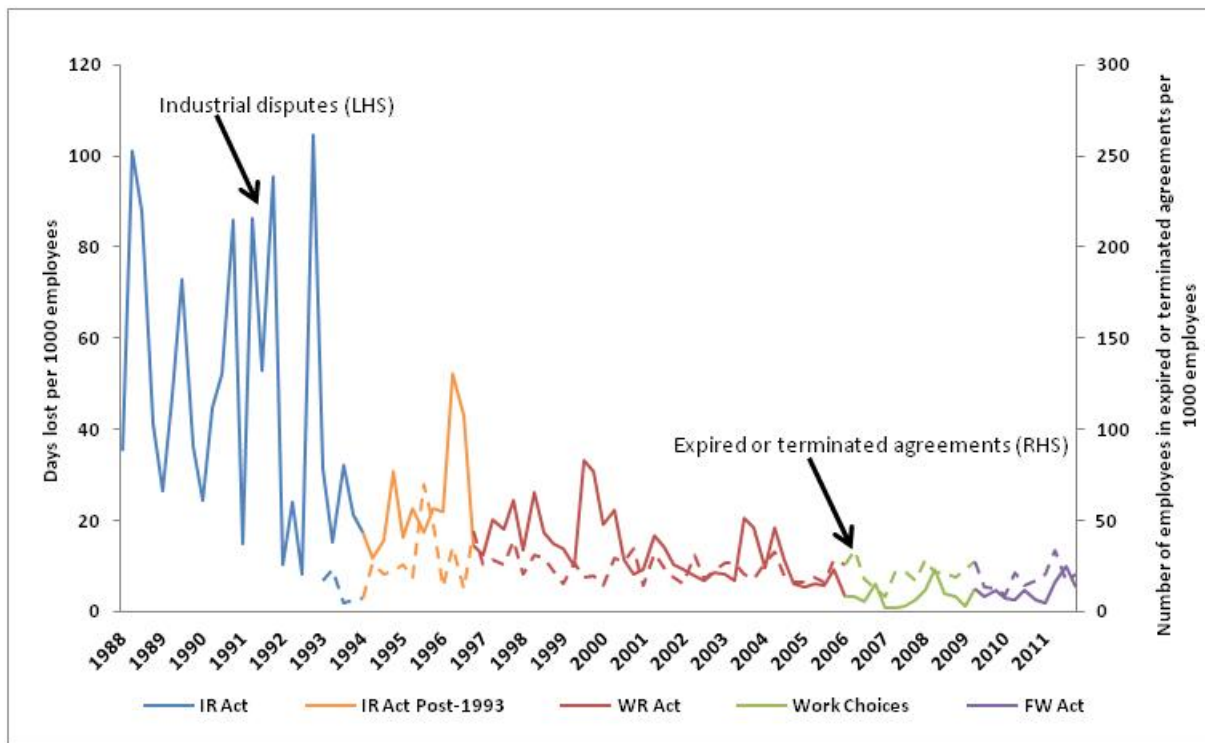
Sources and notes: DEEWR calculations from ABS 6291.0.55.003 & 6321.0.55.001. Based on, and extending, Figure 15, ‘Industrial relations reform—chasing a pot of gold at the end of the rainbow?’, lecture by Prof. Jeff Borland given on 19 March 2012 at University of Melbourne. The averages calculated for the Work Choices (2006 to mid-2009) and Fair Work Act 2009 (mid-2009 onwards) periods are different from Prof. Borland’s estimates because the estimates in the chart presented here are based on weighted averages for the quarters covered by these workplace relations arrangements, whereas Prof. Borland’s estimates appear to be based on calendar-year averages. Figures for 2011 were raised by industrial disputes among public servants working for the NSW Government, who were not covered by the FW Act.

On the other hand Forsyth and Stewart submitted that the official figures on days lost to industrial action disclose no significant increase in industrial action since the FW Act took effect. They say that ‘industrial action has all but disappeared in most parts of the private sector and only a minority of Australian businesses now experience co-ordinated work stoppages’.<sup>74</sup>

The Panel notes that the number of days lost to industrial action under the FW Act has remained within the band of historically low levels (127,000 in 2010 and just over 240,000 in 2011, compared to an average of around 230,000 over the previous 10 years) that have prevailed over the last decade. Taking into account that the number of agreements being renegotiated in 2011 (8,335) was significantly higher than in 2010 (5,133), the 2011 dispute level is not out of line with recent experience. Of days lost in 2011, one-third were in the education and health category and are likely to have been largely due to teacher and hospital disputes in NSW and hospital disputes in Victoria. The NSW teacher and hospital disputes were not under the FW Act.

<sup>74</sup> Forsyth & Stewart submission, p. 21.

Chart 4.17—Industrial disputes and employees in expired/terminated agreements



Source: ABS, *Industrial disputes, Australia* (Cat. No. 6321.0.55.001), Spreadsheet Table 3B, Workplace Agreements Database, and *Labour force, Australia* (Cat No. 6202.0), Spreadsheet 1.

A total of 18,315 agreements covering 2.44 million employees were approved under the FW Act between 01 July 2009 and 31 March 2012.<sup>75</sup> Negotiation of only a small minority of these agreements occasioned strikes or lockouts. For example, the ABS industrial disputes data for the March quarter 2012 shows that 36 disputes commenced and a total of 43 disputes occurred in the quarter. Not all of these disputes related to the renegotiation of federal agreements. In the same quarter, 2105 federal enterprise agreements were approved.

In a recent analysis<sup>76</sup> Peetz concludes that ‘the level of industrial conflict under the early FW Act is more like that under Work Choices than like any system that preceded it, and it is much lower than under the EB Accord or the period preceding the move to enterprise bargaining’.<sup>77</sup> Peetz’s data indicates that strike density under the early FW Act was a quarter of the level of the WR Act period and almost 90 per cent lower than in the period 1991–96. He notes that the fall in strike density is much greater than the decline in union density over the same period.<sup>78</sup>

As Chart 4.17 indicates, the level of disputation is related to the expiry and renewal of collective agreements and may be elevated when a large number of agreements come up for renewal within the same period.

#### 4.6.3 Flexibility and mobility

Some submissions argued that the FW Act impedes flexibility in work patterns and the organisation of work, and thus diminishes productivity. In a variety of ways a number of employer submissions argued that flexibility would be enhanced by a return to individual arrangements between employers and employees which could undercut particular provisions of awards or agreements and be made a condition of employment. In various submissions these proposed

<sup>75</sup> DEEWR Workplace Agreements Database.

<sup>76</sup> ‘Industrial conflict with awards, choices and fairness’ in the forthcoming publication *Rediscovering collective bargaining: Australia’s Fair Work Act in international perspective*.

<sup>77</sup> Peetz, supplementary, attachment 2, p. 16.

<sup>78</sup> *ibid*.

arrangements might or might not be subject to a no-disadvantage test in respect of the underlying award agreement. The Panel has rejected this approach.

That said, the Panel sees considerable scope for increased use of individual flexibility arrangements, and recommends changes intended to encourage their wider adoption. These recommendations are summarised at the conclusion of this chapter and discussed in detail in the relevant section of the report.

More broadly, the Panel observes that the Australian industrial relations system exhibits a reasonably high degree of flexibility and mobility. This observation is based on a number of important indicators, as follows:

- Both the extended national character of the FWA and the modernisation of awards in its jurisdiction have permitted greater flexibility than was possible in the combination of state and federal systems, and under the older style of awards. The number of awards and related instruments has been reduced from 3175 to 122, and the provisions of awards have been made less prescriptive. A number of submissions to the Panel commented on the improvement in the structure that had come with the replacement of state awards by a much smaller set of national awards, and of detailed and prescriptive awards with less prescriptive awards.
- The transition from arbitration and the legislative frameworks since have evidently been compatible with increasing diversity in work patterns. In August 1992, 21 per cent of employees (excluding owner-managers of incorporated enterprises) were casual according to the ABS definition. By August 2011 the proportion had increased to 24 per cent.<sup>79</sup> Part-time employment has also increased, from 24 per cent of employment in 1992 to 30 per cent in 2012.<sup>80</sup>
- As several studies<sup>81</sup> have pointed out, the Australian labour market adjustment to the global downturn in 2001 and the 2009 GFC took the form of changes in hours worked more than it did changes in employment. This suggests a recent capacity to reach flexible arrangements to cope with what may be temporary downturns in output and demand.
- The Australian labour force is more mobile than the workforces of many comparable economies. OECD research based on survey data for 2007 shows Australian residential mobility over a two-year period was the second highest of the countries examined.<sup>82</sup> With respect to mobility between employers, the ABS measure of labour mobility is invariant to the IR framework.<sup>83</sup>

#### 4.6.4 Impact of award minimums on employment

Some submissions argued that minimum wage increases under the FW Act have contributed to unemployment. The ACCI, for example, provided member survey results showing a high proportion of members had cut hours worked or employed fewer staff as a result of increases granted by FWA in the 2010 Annual Wage Panel.<sup>84</sup>

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<sup>79</sup> ABS Cat. No. 6310.0 (various issues) and unpublished data purchased from the ABS. The incidence of casual employment (defined as the percentage of casual employees in all employees, excluding owner-managers of incorporated enterprises) rose sharply from the early to mid-1990s and rose slowly after that to peak at 25.7 per cent in 2004. While falling slightly since then, it has remained at around or just below 25 per cent. The incidence of casual employees in particular years was:

1992:	21.3%
1998:	24.2%
2004:	25.7%
2007:	24.7%
2009:	24.4%
2011:	24.2%

<sup>80</sup> ABS, *Labour force, Australia, April 2012*, ABS Cat. No. 6202.0, downloaded from [www.abs.gov.au](http://www.abs.gov.au).

<sup>81</sup> M Plumb, M Baker & G Spence, 'The labour market during the 2008–09 downturn', *RBA Bulletin*, March quarter 2010, Reserve Bank of Australia, Sydney; and Borland, *The Australian labour market in the 2000s: the quiet decade*, Reserve Bank of Australia.

<sup>82</sup> CA Sánchez & D Andrews, *To move or not move: what drives residential mobility rates in OECD countries?*, Economics Department Working Papers No. 846, OECD, 2011. The calculations of residential labour mobility are based on data collected from various surveys from member countries. The dataset does not allow for distinguishing between local residential moves and long distance residential moves.

<sup>83</sup> ABS, *Labour mobility, Australia* (Cat. No. 6209.0), various issues.

<sup>84</sup> ACCI submission, pp. 92–93.

Table 4.1 shows that, while the increase to the minimum wage in real terms in 2010 (2.67 per cent) appears high relative to the years since 2001, it followed two years of decline in 2008 and 2009. Real minimum wages in 2011 (\$589.30) are only marginally higher than they were in 2007 (\$586.97), an increase of 0.40 per cent.

**Table 4.1—Real minimum wages and percentage change, 2001 to 2012**

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Real \$	550.89	559.00	565.82	575.53	582.00	586.91	586.97	582.32	575.07	590.43	589.30	598.90
Change %	-2.62%	1.47%	1.22%	1.72%	1.12%	0.84%	0.01%	-0.79%	-1.25%	2.67%	-0.19%	1.60%

Source: Nominal minimum wage compiled from FWA, AFPC and AIRC decisions. Real wages in June quarter 2011 dollars, deflated by CPI from ABS Cat. No. 6401.0. The 2012 real minimum wage was estimated by deflating the nominal minimum wage of \$606.40 per week to the June quarter 2011 by using the Treasury 2012-13 Budget CPI forecast of 1.25% over the year to June quarter 2012.

The table suggests that there has been only a modest increase in the real minimum wage over the last seven years.<sup>85</sup> While not accepting the contention that the FW Act had encouraged a higher real increase in the minimum wage than the Work Choices mechanisms had permitted, the Panel was prompted by these submissions to look at the issue of award minimums in their broader economic context.

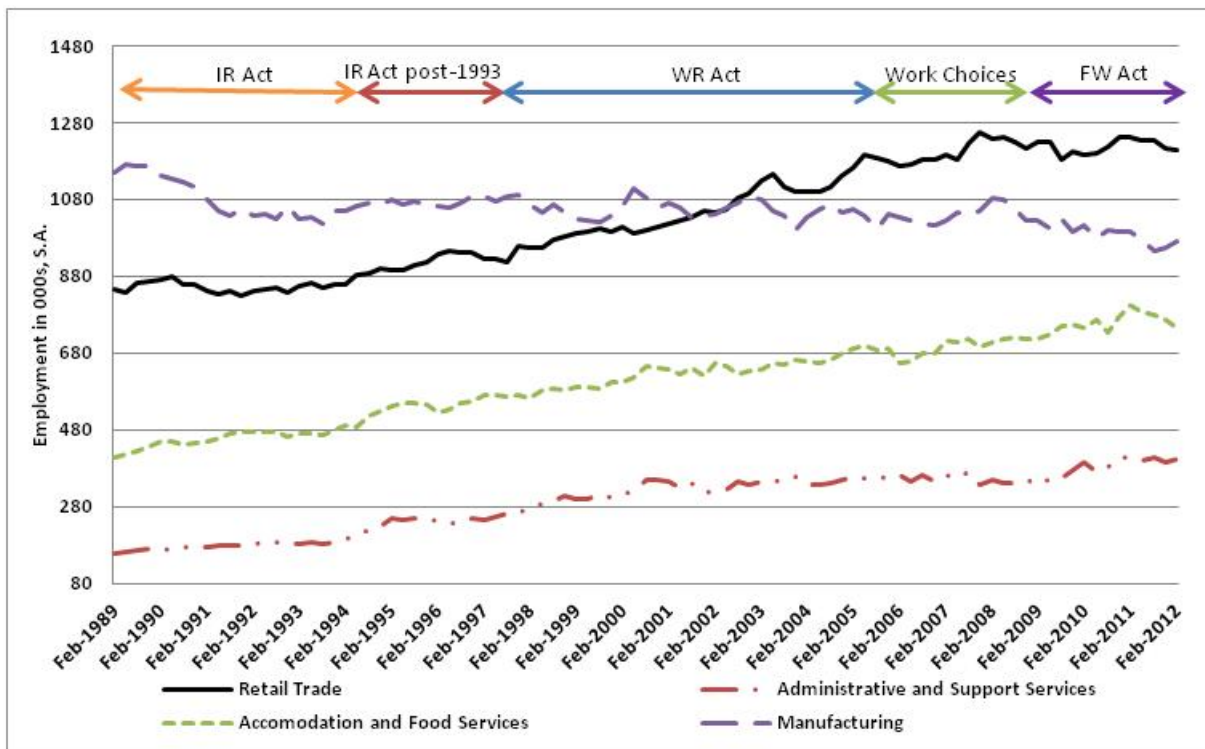
Award minimum wages continue to be higher relative to median wages than in many comparable countries, including the US and the UK (though not New Zealand). However, award minimum wages as a proportion of the median earnings have declined over the last one and a half decades. The minimum award rate (as defined by classification C14 in the Manufacturing Award) was 62 per cent of median full-time earnings in 1997, and had fallen to 54 per cent in 2010. T

Though the Australian system has higher minimum rates in relation to average rates than some comparable systems, it is also characterised by relatively low minimum rates for juniors. The minimum wage for an eighteen-year-old is two-thirds of the adult minimum, and for a second year apprentice three-quarters of the minimum. This characteristic eases the access of young entrants to the workforce. Australia's youth unemployment rate in 2010 (based on the latest data available from the OECD) is well below the OECD average for Spain, New Zealand and most of the Group of Seven major countries, though above the average for Japan and Germany.

Chart 4.18 shows employment levels for several industries that employ a relatively high proportion of low skilled workers. Other than manufacturing (which is affected by structural economic change including currency appreciation), employment levels have been steady or increasing under the FW Act.

<sup>85</sup> On 1 June 2012, shortly before this report was finalised, Fair Work Australia released its decision to increase the National Minimum Wage by 2.9 per cent from 1 July 2012.

Chart 4.18—Employment in four selected industries, Australia



Source: ABS (2012), *Labour force, Australia, detailed, quarterly, February 2012* (ABS Cat. No. 6291.0.55.003). Data is in seasonally adjusted terms.

The employment impact of minimum wages in Australia needs to be considered in the context of the social security safety net. The national minimum wage of \$589.30 a week (before income tax) for the financial year 2011–12 is more than twice the Newstart Allowance paid to a single person (\$243.40 as at January 2012) or a single person with a dependent child or children (\$263.30 as at January 2012), though that payment is effectively tax free and the recipient may also receive other benefits. The national minimum wage is closer to the partnered Newstart Allowance, \$439.40 a week per couple. As at January 2012, for a couple on Newstart, the additional household disposable income from one household member finding a full-time minimum wage job was just under \$215 per week.<sup>86</sup> Newstart Allowance is lower than the minimum wage and effectively acts as a floor to the minimum wage. Given the need to compensate people for the disutility of working and the associated travel time and cost, reducing the minimum wage relative to Newstart Allowance would erode work incentives and make employment at the minimum wage less attractive.

Some submissions pointed out that unemployment rates and underemployment rates have fallen more among younger (and typically more award dependent) workers than among older workers since 2009 (although the data is somewhat volatile), and employment in award-dependent industries has (except for retail) been stronger than the average, suggesting that minimum wage increases and the transition to modern awards have not slowed job creation. The unemployment rate has fallen in most Australian states since the FW Act came into effect.

At an aggregate level, the Wage Price Index shows that wage growth since 2009 is around its decade-long average, which suggests that the introduction of the FW Act has not of itself changed the trend in wages growth.

Overall, Australia has a relatively low unemployment rate compared to countries with low minimum wages such as the US and the UK, which demonstrates that overall economic performance, including the performance of the labour market overall, is evidently more significant than differences in minimum wages.<sup>87</sup>

<sup>86</sup> Australian Government, submission to the Fair Work Australia Annual Wage Panel 2012, 16 March 2012.

<sup>87</sup> Research into the effect of statutory minimum wages (applying equally to both the federal minimum wage and award minimums) on employment has been mixed. One comprehensive literature review (D Neumark & W Wascher, *A review of evidence from the new minimum wage research*, NBER Working Paper No. 12663, National Bureau of Economic Research, 2006) found that the evidence supported the conclusion that higher minimum wages reduce employment.



#### 4.6.5 Wider coverage for unfair dismissals

The impact of the unfair dismissal provisions is covered in detail in Chapter 10. In this section we look only at the evidence of impact on overall employment.

Work Choices extended coverage of federal industrial relations law but at the same time removed small businesses from the operation of unfair dismissal provisions and defined small business as 100 or fewer employees, compared to 15 or less in the 1993 and 1996 Acts. A number of submissions argued that the FW Act's restoration of unfair dismissal provisions similar to those in the IR Act post-1993 and the WR Act increased cost burdens on employers and discouraged them from hiring new staff.

Support for this contention was presented in the form of papers commissioned by the former Government in 2002<sup>88</sup> and by ACCI in 2007.<sup>89</sup> The former suggested that if unfair dismissal protections were abolished about 77,000 new jobs would be created, a number that was relied on to justify the removal of unfair dismissal protections under Work Choices. This figure and the methodology have since been the subject of some criticism.<sup>90</sup> A more recent study suggests that the effect is much more modest, with around 11,600 jobs potentially created if unfair dismissal laws were completely removed, or 600 jobs if businesses with less than 100 employees were exempted.<sup>91</sup>

While the behaviour of individual firms may vary, as Forsyth and Stewart note, at a macro level 'there has been no evidence of any adverse impact on employment levels or economic performance'.<sup>92</sup>

Forsyth and Stewart cite ABS statistics and an Australian survey of small business to argue that unfair dismissal costs have not been overly onerous on business.<sup>93</sup> The survey, undertaken just before the introduction of the 100-employee exemption in 2006, found that unfair dismissal laws 'had minimal influence on job creation in the respondent businesses' and that there was 'no evidence' to suggest that the new exemption would affect their long term plans for job creation.

Recent research by Borland<sup>94</sup> found that the introduction of neither Work Choices nor the FW Act had had a discernible effect on changes in the rate at which people moved from unemployment to employment, or from employment to unemployment. He concluded, 'Any effects of the IR system on flows into employment or out of employment are being swamped by other influences'.

The Panel finds that it is not possible to show a clear connection between the unfair dismissal regime and the overall level of employment, and that influences such as the policy stance of the central bank or the global financial crisis adequately explain the patterns of employment change.

Although the number of unfair dismissal cases increased to 13,488 in 2011, the Panel noted that this was a very small fraction of the two million separations that occur each year in today's workforce. The total compensation paid to

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However, analysis by Fair Work Australia found that the evidence was somewhat less clear, with results varying from a small positive effect to a substantial negative effect (L Nelmsy & C Tsingas, *Literature review on social inclusion and its relationship to minimum wages and workforce participation*, Research Paper 2/2010, Fair Work Australia).

<sup>88</sup> D Harding, *The effect of unfair dismissal laws on small and medium sized businesses*, Melbourne Institute of Applied Economic and Social Research, Melbourne, 2002.

<sup>89</sup> Econtech Pty Ltd, *The economic effects of industrial relations reforms since 1993*, paper prepared for ACCI, Canberra, 2007.

<sup>90</sup> See, for example, WM Robbins, G Voll, 2005, 'The case For unfair dismissal reform: a review of the evidence', *Australian Bulletin of Labour*, vol. 31, no. 3, p. 237.

<sup>91</sup> B Freyens & P Oslington, 'Dismissal costs and their impact on employment: evidence from Australian small and medium enterprises', *Economic Record*, vol. 83, 2007, pp. 1–15.

<sup>92</sup> Forsyth and Stewart submission, p. 28.

<sup>93</sup> Forsyth and Stewart submission, pp. 28–30.

<sup>94</sup> J Borland, 'Industrial relations reform: chasing a pot of gold at the end of the rainbow?', lecture given at the University of Melbourne on 19 March 2012 by Jeff Borland as returning Visiting Professor of Australian Studies at Harvard University, p. 7. <http://www.economics.unimelb.edu.au/staff/jib/documents/harvardtalk.pdf>.

successful complainants was in the order of \$28.1 million in 2011.<sup>95</sup> While an individual payment is significant to a small employer, the total is insignificant compared to total labour costs of \$690.3 billion.<sup>96</sup>

The Panel concludes that, while there may be a presumption that employers consider the existence of unfair dismissal protections when they think about hiring additional staff, there is no evidence that the FW Act's unfair dismissal framework has made a discernible difference to overall employment, compared to the prior framework.

While sceptical of the overall employment impact of the unfair dismissal provisions, the Panel is concerned by some aspects of the operation of the provisions. Chapter 10 discusses these issues, together with the Panel's recommendations.

#### 4.6.6 Greenfields agreements

Written and oral submissions to the Panel argued that the requirement for unions to be involved when a greenfields agreement is made is a major impediment of the FW Act compared to the immediately preceding legislation, which permitted the employer to unilaterally propose pay and conditions under which future employees would work. These unilateral 'agreements', which could cover employees and also deny recourse to protected action, were explicitly rejected in Labor's industrial relations reforms proposed for the 2007 federal election.

The Panel accepts that the Work Choices framework conferred greater freedom on employers to unilaterally determine wages and conditions. It is less clear that the economically relevant outcomes are very different. For example, the Panel was not presented with evidence that any significant project had not proceeded for want of an agreement. There is evidence that the gap between wage outcomes under greenfields agreements and the average wage in all agreements has widened, though the average wage increase under greenfields agreements remains under 5 per cent.<sup>97</sup> The somewhat wider gap may reflect the increasing number of remote minerals and energy construction projects in recent years. From the beginning of 2009 to the end of 2011 the volume of engineering construction completions rose by over 40 per cent. Over the same period the value of engineering construction work yet to be done by the private sector rose two and a half times. These were much greater increases than in previous years.

The Panel is concerned, however, that the existing provisions confer on a union (or unions) with coverage of the majority of prospective workers a significant capacity to frustrate the making of an appropriate greenfields agreement at all or at least in a timely way. While the Panel was not presented with evidence that this power is abused, it concluded that the potential risk to projects of national significance should be mitigated. The Panel's recommendations are detailed in 6.5.

#### 4.6.7 Regulatory and compliance costs

Some submissions argued that the transition to the new workplace relations system has increased compliance costs, particularly in the five-year transition period for modern awards. Some businesses report that they are now required to refer to the old award, the modern award and the transitional pay rate when seeking to establish the correct wages to pay their staff.

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<sup>95</sup> Internal DEEWR calculations based on conciliated and arbitrated outcomes data from Fair Work Australia. Note that settlement figures related to conciliated outcomes may include amounts for underpayment of wages, outstanding entitlements and other matters (for example, discrimination matters).

<sup>96</sup> Compensation of employees (in current price, seasonally adjusted terms) from Spreadsheet 7 from the ABS quarterly *National Accounts* (Cat. No. 5206.0) was used as the estimate of total labour costs. While this is an underestimate of total labour costs because it does not include all labour on-costs, such as payroll taxes, it is a reasonable representation of the relative sizes of total labour costs and the direct cost of unfair dismissals.

<sup>97</sup> In 2004–05, under the WR Act, the greenfields average annualised wage increase (AAWI) was 4.5 per cent, compared to 4.4 per cent for all agreements. They made up 5.4 per cent of all agreements. In the period 2006–08, 57 per cent of greenfields agreements were employer greenfields agreements and 43 per cent were union greenfields agreements. The AAWI for non-union greenfields agreements was 4.1 per cent and for union greenfields was 4 per cent, compared with all agreements, which were 4.1 per cent and 3.8 per cent union/non-union respectively. Greenfields made up 9.2 per cent of all agreements. In 2009–11, under the FW Act, greenfields AAWI was 4.7 per cent compared to 3.9 per cent of all agreements and 4.0 per cent for all agreements that cover a union. They made up 6.4 per cent of all agreements. Source: DEEWR Workplace Agreements Database.

Some submissions complained of the complexity of the system, adducing surveys of their members as evidence. For example, in a survey undertaken by the Chamber of Commerce and Industry Queensland, 58 per cent of respondents indicated the FW Act had increased the regulatory burden on their business.<sup>98</sup> In a similar survey, 66 per cent of respondents indicated they had major or critical concerns about the complexity of the system. The Australian Human Resources Institute survey for 2012 found that 63 per cent of human resource professionals surveyed believed the level of record keeping had increased. The Panel was not, however, presented with persuasive evidence of the existence of onerous compliance costs, compared with earlier legislative frameworks.

Access Economics conducted an economic cost-benefit analysis of moving to a single national workplace relations system for the private sector.<sup>99</sup> The average survey participant reported a reduction of 2.2 per cent in workplace relations (WR) compliance costs. Benchmarked against an estimate for annual WR compliance costs of \$484 per worker, this translates to an annual saving of \$10.45 per employee. The total benefit to firms from WR reforms is estimated to be \$287.59 per worker per year. This can be compared with the \$118 per worker it costs firms to move to the new system, except that the benefits are ongoing while the transition cost is a one-off.<sup>100</sup> Thus, Access Economics found that moving to a national WR system delivered small net benefits.

The Panel recognises that there are transition costs in moving from state awards and arrangements to the federal system. It is satisfied, however, that the benefits are considerable and that the movement to a national system is strongly supported by most employer organisations and by employees and their unions.

#### **4.6.8 Other economic issues**

##### **• Wider range of permitted issues**

Work Choices placed more restrictions on matters that could be negotiated between parties to an agreement and included in the agreement. The FW Act withdrew some, though not all, of these restrictions. This issue attracted more adverse comment in employer submissions than most other issues. The Panel's detailed legal analysis of this issue is in 6.4.2.

##### **• General protections**

Some employer submissions argued that the general protections provisions have created an avenue through which vexatious claims can be made against employers, particularly by staff affiliated with unions. It is argued that the risk of an adverse action claim is impeding employers from making necessary structural changes in their business, with feedback from employers indicating that employers continue to pay 'go away' money to settle claims out of court. This issue is dealt with in Chapter 11.

##### **• Better off overall test versus minimum national standards**

Some submissions cited employers who negotiated enterprise agreements with their staff (or their representatives) believing that they would increase productivity only to have them rejected by FWA because they did not meet the BOOT.<sup>101</sup> The example was given of retailers having to roster staff on days and hours they do not prefer in order to meet the requirements of the BOOT. Business submissions also said there are particular problems with the requirement that every individual be better off and with the focus on financial, as opposed to non-financial, benefits and costs. The BOOT test is discussed in detail and with recommendations in 6.4.6.

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<sup>98</sup> This evidence is based on responses to a survey of CCIQ members undertaken in 2012 (with 576 respondents).

<sup>99</sup> Access Economics, 'Economic analysis of a single national workplace relations system for the private sector', final report for the Department of Education, Employment and Workplace Relations, 2009.

<sup>100</sup> Identified as costs were the adjustment costs to business of understanding and applying a different set of regulations and the additional recourses required to enforce national WR regulations and education activities. The benefits included the reduced compliance costs and potential for improved productivity over time from having a single WR system and the savings at state government level from reduced WR monitoring activities.

<sup>101</sup> ANRA submission, p. 8.

## 4.7 Encouraging a more productive workplace

In its consideration of the economic aspects of the FW Act the Panel concludes that since it has come into force important outcomes such as wages growth, industrial disputes, the responsiveness of wages to supply and demand, the rate of growth of employment and the flexibility of work patterns have been favourable to Australia's continuing prosperity, as indeed they have been since the transition away from arbitration two decades ago. The exception has been productivity growth, which has been disappointing in the FW Act framework and in the two preceding frameworks over the last decade. As explained in this chapter, the Panel is not persuaded that the legislative framework for industrial relations accounts for this productivity slowdown.

The Panel recognises, however, that productivity growth provides the means for rising living standards. Accordingly, the Panel has looked for ways to minimise constraints on flexibility in the FW Act that were not intended, or which impede productivity enhancement and could be removed without significant harm to fairness and equity. In the course of this report the Panel makes a number of recommendations about the role of FWA, the BOOT, IFAs, Greenfields agreements, good faith bargaining and access to protected industrial action, and unfair dismissal provisions, all of which are intended to increase flexibility and remove impediments to productive workplace relations without materially diminishing fairness. For example in later chapters the Panel recommends the removal of some existing impediments to the use of individual flexibility arrangements in awards and agreements, and changes to the greenfields agreements provisions to better ensure reasonable and expeditious outcomes.

The Panel has also concluded that there is scope to increase the emphasis on the encouragement of productivity in the operation of the institutions created under the legislation.

It is less than a decade since Australia moved to a national industrial relations framework, which has enhanced the coverage and authority of national industrial relations institutions. It is only in more recent years that FWA has been able to substantially complete the determination of modern awards to replace thousands of state and federal instruments. The Panel believes that there is now an opportunity to extend the role of the national industrial relations institutions. It recommends an enhanced and active role for FWA and the FWO in encouraging more productive workplaces.

A broader industry engagement role for FWA is discussed in Chapter 12. The Panel observes here, however, that there is ample warrant within the FW Act<sup>102</sup> for FWA and the FWO to initiate programs to support productivity enhancement within enterprises. The General Manager is currently required to report in some detail on the operation of FWA, pointing to the availability of a good deal of relevant information on how the system is functioning. FWA also maintains a considerable body of data on the provisions of agreements, as does DEEWR. In its presidential members and commissioners and in other staff these organisations command a wide knowledge of enterprises and sectors. The Panel recommends that FWA and the FWO play a more active role in encouraging productivity awareness and best practice. These initiatives may take the form of identifying productivity enhancing provisions in agreements, and making them more widely known to employers and unions. The Panel was much encouraged to see that FWA is itself initiating a wider and more active role in respect of industry engagement.

The Panel recognises that the development of a more active role for FWA and the FWO in encouraging the adoption of best practice in productive work place relations will over time require significant changes in the method of operation. The organisations would need to develop expertise in industrial organisation, innovation and productivity

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<sup>102</sup> Economic issues are specified as among the objects of key divisions of the FW Act. In relation to the modern awards 'objective' (s. 134) FWA is asked to take into account 'the need to promote flexible modern work practices and the efficient and productive performance of work' (s. 134 (1) d). FWA should also take into account 'the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden ...'(s. 134(1)(f)) and 'the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy' (s. 134(1)(h)). In relation to enterprise agreements, the objects section includes the object 'to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits' (s. 171(a)).

enhancement. They would need to recruit or engage as consultants experts with different skill sets. They would need to extend their work beyond the requirements of managing disputes and making determinations on pay and conditions to circumstances in which there may be no disputes but much that can be improved in workplace cultures. They would need to adapt to working with state and federal government agencies and private businesses also active in the field of workplace productivity improvement. Accordingly, the Panel recommends that the new direction be explored using existing resources before a judgement is made on the scope for further development and the resources required to effect it.

**Recommendation 1:** The Panel recommends that the role of the Fair Work institutions be extended to include the active encouragement of more productive workplaces. This activity may, for example, take the form of identifying best-practice productivity enhancing provisions in agreements and making them more widely known to employers and unions, encouraging the development and adoption of model workplace productivity enhancing provisions in agreements, and disseminating information on workplace productivity enhancement through conferences and workshops. The Panel does not consider that amendments to the FW Act are required to implement this recommendation.

## 5 The safety net

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### 5.1 Introduction

Forward with Fairness foreshadowed that the *Fair Work Act 2009* (FW Act) would contain a two-part safety net to underpin collective enterprise bargaining and common law arrangements. This would comprise the National Employment Standards (NES) and awards.<sup>103</sup> A key objective of the Government was to address public concern about the adequacy of the safety net under the previous workplace relations system.<sup>104</sup> The provisions were also intended to support bargaining by acting as a clear starting point for negotiations between employers and employees.<sup>105</sup> These aims were confirmed in s. 3(b) of the FW Act, which provides:

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by: ...

b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders.

The structure of the FW Act reflects this policy, with the NES contained in Part 2-2 and provisions governing the making and operation of modern awards in Part 2-3. The safety net is supplemented by the minimum wage provisions in Part 2-6 and the equal remuneration provisions in Part 2-7.

The ACTU submitted that the safety net is much more comprehensive, stable and effective than that provided under Work Choices.<sup>106</sup> It did, however, express concern that it does not capture a large number of workers not classified as employees—for example, contractors and outworkers—and that casual employees may be denied access to some elements, such as leave provisions.<sup>107</sup> The ACTU was also concerned about threats to the safety net, including individual flexibility arrangements (IFAs) and employer proposals in the context of FWA’s review of modern awards.<sup>108</sup>

ACCI indicated its support for ‘a genuine safety-net of minimum employment terms and conditions’ but said it would like to see greater flexibility in some NES conditions and, while indicating some support for the rationalisation of awards, also sought more flexibility in modern awards.<sup>109</sup> The Ai Group noted several areas of the NES and modern awards where it would like to see amendments made.<sup>110</sup>

Overall, the Panel’s view is that the NES and modern award framework are largely meeting their legislative intention, which was to establish a safety net of employment terms and conditions that would ensure basic rights and entitlements for workers in the national system and protect the most vulnerable members of the workforce from exploitation. While a range of stakeholders, including employer, employee and community sector representatives, pointed to a number of areas for improvement, the Panel has made relatively few recommendations; however, it believes the recommendations it has made will improve the operation of the relevant provisions. A range of submissions raised concerns with the content of modern awards, which are the subject of a separate review by FWA, and outside our terms of reference.

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<sup>103</sup> FWF, pp. 3, 7.

<sup>104</sup> Explanatory Memorandum, Fair Work Bill 2008, Australian Government, 2008, p. x.

<sup>105</sup> *ibid.*, p. xxvi.

<sup>106</sup> ACTU submission, p. 38.

<sup>107</sup> *ibid.*, pp. 38–39.

<sup>108</sup> *ibid.*, pp. 38–39.

<sup>109</sup> ACCI, pp. 53–87.

<sup>110</sup> Ai Group, pp. 49–59.

## 5.2 The National Employment Standards

### 5.2.1 General

The NES are contained in Part 2-2 of the FW Act. Forward with Fairness provided that the NES would comprise 10 legislated standards that would apply to all Australian employees and that could not be removed or replaced.<sup>111</sup> A discussion paper and exposure draft of the proposed NES (NESDP) was released for public comment in March 2008. The NES were intended to be ‘as simple as possible so that all employees and employers can understand and comply with their rights and obligations’, and ‘contain only those application and machinery rules that are essential to the effective operation of an entitlement, rather than lengthy, detailed and inflexible rules’.<sup>112</sup> All entitlements contained in the NES have had their wording and structure streamlined to make them easier to read and interpret. The 10 standards are contained in 72 sections of the FW Act,<sup>113</sup> in contrast with the five Australian Fair Pay and Conditions Standards (AFPCS) of Work Choices, which ran to 149 sections.<sup>114</sup>

The inclusion of an additional five terms and conditions of employment under the NES, as supplemented by modern awards, was the Government’s response to the ‘dramatic weakening of protective regulation in Australia’<sup>115</sup> under the Work Choices legislation. The AFPCS included only five statutory minimums. All other safety net provisions could potentially be removed with little or no compensation through bargaining. The Government was concerned that this meant that employees, particularly those in low paid and low skilled sectors, were vulnerable to being forced into statutory agreements below the safety net and with only the barest minimum protections. The impact of improving the safety net for these employees would be an enhancement in their conditions of employment. Improving the safety net would involve additional costs to employers that previously had agreements in place paying below the safety net.

A range of stakeholders indicated support for a legislated safety net to provide certainty about minimum conditions of employment.<sup>116</sup> The ACTU noted that ‘the Act guarantees a strong safety net of wages and conditions (consisting of the NES and awards) which cannot be undercut by individual agreements’<sup>117</sup>, while ACCI expressed concerns around the flexibility of the NES, suggesting that NES provisions should be subject to bargaining.<sup>118</sup>

Some specific issues which received attention, such as the right to request flexible working arrangements, payment of annual leave loading on the termination of employment, parental leave, averaging of hours, payment for public holidays and long service leave, are examined in the sections that follow.

### 5.2.2 Definition of service

A number of stakeholders, including Ai Group, said they had difficulties with the interpretation of s. 22 of the FW Act, which provides definitions of ‘service’ and ‘continuous service’ for a number of purposes, including accrual of entitlements and protection against unfair dismissal.<sup>119</sup> In its submission, the Ai Group raised unpaid leave and the definition of service in s. 22(2) of the FW Act. Having examined the provisions, the Panel does not recommend that this provision be recast at this time.

However, one aspect of unpaid leave a majority of the Panel wish to comment on is the interaction between unpaid leave and payments from another party—in other words, situations where an employee is on leave and not receiving

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<sup>111</sup> FWF, pp. 3 & 7; PCS.

<sup>112</sup> NESDP, pp. 2–3.

<sup>113</sup> FW Act, ss. 59–131.

<sup>114</sup> Work Choices, ss. 171–320.

<sup>115</sup> P Waring, A de Ruyter & J Burgess, ‘Advancing Australia Fair: the Australian Fair Pay and Conditions Standard’, *Journal of Australian Political Economy*, vol. 56, pp. 105, 111.

<sup>116</sup> See, for example, MBA, p. 14; SA Government, p. 10; MUA, p.2.

<sup>117</sup> ACTU, p. 35.

<sup>118</sup> See ACCI, pp. 53–54.

<sup>119</sup> Ai Group, pp. 42–43; Forsyth and Stewart, pp. 6–7.

payment from the employer but is receiving payments from another party, such as a workers' compensation insurer or under a transport accident scheme. Section 130 of the FW Act allows employees to accrue and take leave if provided for under the relevant Commonwealth, state or territory workers' compensation legislation. This represented a change to arrangements under Work Choices where an employee on workers' compensation did accrue and could take leave unless it was prevented by the workers' compensation legislation they were covered by.<sup>120</sup> The changes to s. 130, which were anticipated in the NESDP, mean that fewer employees are able to accrue and take leave while on workers' compensation, ensuring that the express intention of the relevant workers' compensation legislation has primacy over the FW Act provisions. This represents a benefit to employers under relevant jurisdictions.

A number of employer submissions argued that the capacity to accrue or take leave while on workers' compensation if permitted by the relevant jurisdictions' compensation legislation under s. 130 of the FW Act should be removed.<sup>121</sup> Some unions, in contrast, argued that the right should be extended to all employees, not just those covered by relevant legislation.<sup>122</sup> The MBA argued that the right should only be available if provided under an award or agreement,<sup>123</sup> while submissions from ACCER and Bartier Perry requested an amendment to confirm past arrangements for the accrual of leave in NSW.<sup>124</sup>

Section 130 of the FW Act is, regrettably in the majority of the Panel's view, not clearly worded. Under s. 130(2) an employee who is receiving workers' compensation payments under a Commonwealth, state or territory workers' compensation law may accrue annual leave if the relevant workers' compensation law permits this type of accrual. This is an exception to a general rule posited under s. 130(1) that an employee is not entitled to accrue any leave or absence entitlement if they are absent from work because of a personal illness or injury for which they are receiving compensation payable under a Commonwealth, state or territory compensation law. Advice from the FWO is that only the Commonwealth's and Queensland's workers' compensation laws unequivocally allow the accrual of annual, personal and long service leave, and that Queensland is the only jurisdiction that allows workers to take all of these leave types while on workers' compensation. Tasmania is the only other state that unequivocally allows workers to take leave (annual and long service) while on workers' compensation.

The situation for the remaining jurisdictions is that the accrual or taking of leave is either equivocal or not permitted. For employers and employees covered by workers' compensation schemes in South Australia, the Australian Capital Territory and Tasmania, the ability to accrue some types of leave is unclear. This is confusing for affected parties and may involve costs—for example, in obtaining legal advice. The confusion as to what arrangements apply in each jurisdiction was noted by ACCI, the Ai Group and the MBA in their submissions.<sup>125</sup> The effect of the provision is that employees covered by the Commonwealth or Queensland workers' compensation legislation accrue leave while on workers' compensation, which represents an additional cost to their employer relative to other jurisdictions. They would, however, have been subject to these costs under Work Choices.

When employees are absent from work because of injury and/or disease, workers' compensation insurance is but one of several compensatory mechanisms that are now available. In some jurisdictions, for example, employees who have suffered transport accidents will receive payments through accident compensation schemes. The Australian Government has announced that it will implement a National Disability Insurance Scheme, and state and territory governments appear willing to participate as partners in this new and innovative strategy for people with disabilities. Given these changes, it does appear to the majority of the Panel to be a little anomalous that employees in two jurisdictions may accrue annual leave while receiving workers' compensation payments, whereas under the remaining schemes this may not be available. Furthermore, if the employee is receiving other injury payments or social security

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<sup>120</sup> Work Choices, s. 237.

<sup>121</sup> ACCI, pp. 70–71; AFEI, p. 4; Ai Group supplementary, p. 18; AHA, pp. 11–12; HIA, p. 13.

<sup>122</sup> ANF, p. 4; CFMEU C&G, p. 10.

<sup>123</sup> MBA, pp. 20–21.

<sup>124</sup> ACCER, pp. 12–13; Bartier Perry, p. 4.

<sup>125</sup> ACCI, pp. 70–71; MBA, pp. 20–21; Ai Group supplementary, p. 18.



support, accrual of annual leave is not permitted. In the majority of the Panel's view this situation should be clarified by amending the FW Act to prevent employees accruing annual leave while receiving workers' compensation payments, despite what is written to the contrary in state or territory workers' compensation laws.

The Panel does not, however, wish to amend s. 22 of the FW Act to reverse the effect of the case law relating to the qualifying period of continuous service required for protection from unfair dismissal. This case law establishes a principle that absences are considered to be paid for the purpose of s. 22 if there is a sufficient connection between the payments made to the employee and the employment relationship<sup>126</sup> and that this extends to casual employees employed on a regular and systematic basis who have a reasonable expectation of continuing employment on that basis.<sup>127</sup>

**Recommendation 2:** The Panel recommends that s. 130 be amended to provide that employees do not accrue annual leave while absent from work and in receipt of workers' compensation payments.

### 5.2.3 Hours of work

Forward with Fairness provided that the standard working week for a full-time employee would be 38 hours, with capacity for employees to be required to work additional hours which were not unreasonable.<sup>128</sup> The NESDP stated that the proposed NES would not include rules dealing with the averaging of hours, as such arrangements were considered by the Government to be better dealt with under modern awards on an industry-specific basis.<sup>129</sup> The content of Part 2-2 Division 3 of the FW Act largely reflects this policy. It also provides for averaging of hours over an unlimited period in an award or enterprise agreement, and over a maximum period of 26 weeks by agreement in writing for award/agreement-free employees.

The averaging of hours arrangements under Work Choices were regarded as problematic by the Government. Whilst the AFPCS purported to 'lock in maximum ordinary hours of work of 38 hours a week, an accepted community standard'<sup>130</sup>, the capacity to average working hours over a 12-month period effectively permitted unlimited weekly hours. This was because a separate requirement that 'additional hours' be 'reasonable' did not apply to averaging arrangements. Work Choices contained a general requirement that an employee was only required to work 'reasonable' additional hours beyond 38 hours in a week, taking into account matters including occupational health and safety risks, personal circumstances including family responsibilities, operational requirements, the amount of notice provided and the employee's hours of work over the preceding four weeks. However, this general requirement did not apply to additional hours beyond 38 hours in a week required by an employer as a result of the averaging of hours provisions. There was, accordingly, no capacity for an employee to refuse a requirement by an employer that the employee work excessive hours as a result of averaging arrangements, even where the requirement was imposed with little or no notice, the hours risked the employee's health and safety or the hours conflicted with the employee's family responsibilities. Although there is no evidence of employers requiring employees to effectively work weekly hours of unlimited duration, there is evidence that some employers were implementing agreements that permitted hours beyond 38 to be worked in any week, with no requirement that those hours be reasonable.<sup>131</sup> Serious concerns about the effect of allowing employers to require more than 38 ordinary hours to be worked in any one week, without any requirement that these additional hours be 'reasonable', were raised in the Senate inquiry into the Work Choices bill.

<sup>126</sup> *Barend Badenhorst v Teys Bros Pty Ltd* [2011] FWA 5622

<sup>127</sup> *Bambach v WorkPact Pty Ltd* [2012] FWA 670

<sup>128</sup> FWF, p. 7.

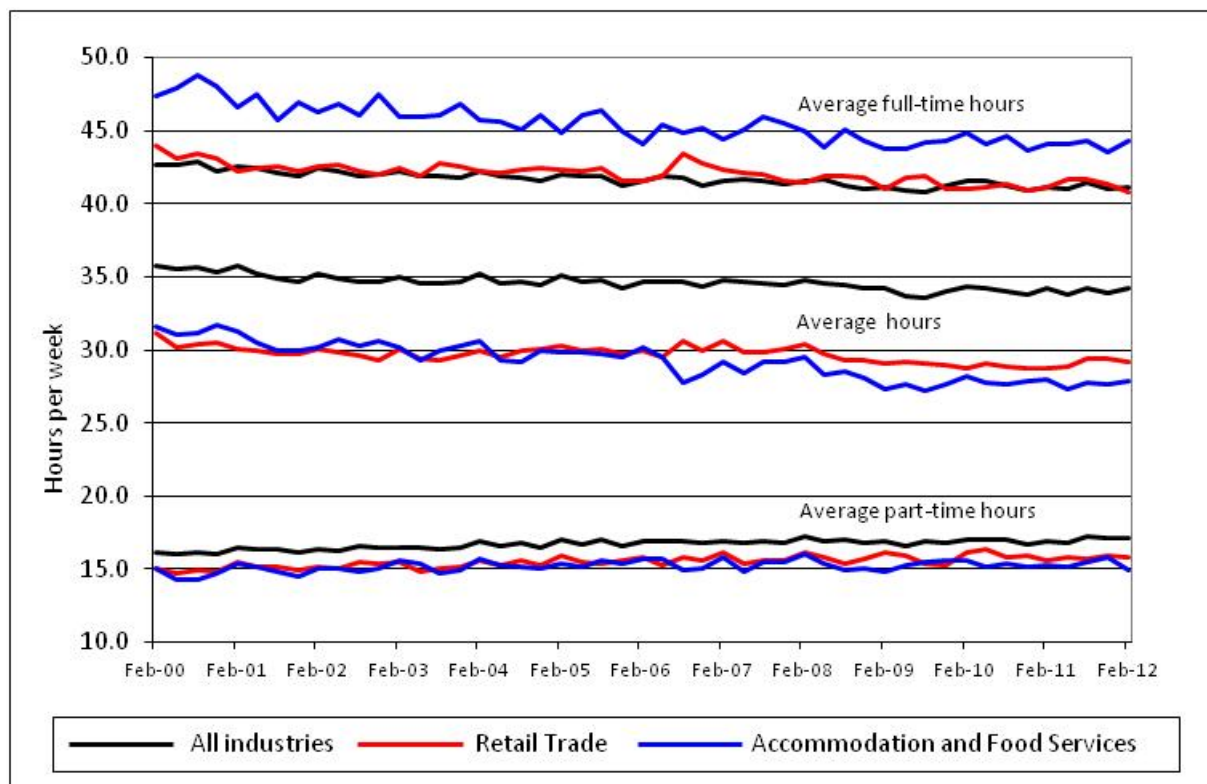
<sup>129</sup> NESDP, p. 7.

<sup>130</sup> Australian Government, *Work Choices—A New Workplace Relations System*, p. 15.

<sup>131</sup> See, for example, 'Annualised hours could abolish overtime in Esselte AWAs: NUW', *Workplace Express*, 26 May 2006; D Swan, I Asbury & J Thompson, *Final report: inquiry into the impact of Work Choices on Queensland workplaces, employees and employers*, Queensland Industrial Relations Commission, Brisbane, 2007, p. 70.

These were noted in the Senate committee’s report.<sup>132</sup> For example, the Shop Distributive and Allied Employees Association (SDA) provided evidence to the inquiry of a Bunnings agreement that provided averaging of hours over 52 weeks. The submission described how Bunnings applied the averaging provisions in its agreement ‘in a way which created severe difficulties for employees attempting to manage their work, family life and social responsibilities’, noting that the employer could ‘not ask or request, but require’ workers to work rosters made up of excessively large hours in peak trading weeks.<sup>133</sup>

Chart 5.1—Average hours worked in all and selected industries



Supertable E05\_Aug94\_ANZSIC06 from ABS, *Labour force, Australia, detailed, quarterly* (Cat. No. 6291.0.55.003).

Chart 5.1 shows that average working hours across the economy have remained largely unchanged between the frameworks under the WR Act, Work Choices and the FW Act. The chart also shows that working hours in low-paid industries including Retail Trade and Accommodation and Food Services have also followed long-term trends.

While Chart 5.1 does not show that average aggregate hours worked changed markedly under the Work Choices legislation, a number of studies indicated that Work Choices had the potential to negatively impact or was negatively impacting working hours, work–life balance and payment for overtime.<sup>134</sup>

<sup>132</sup> Australian Senate, Employment, Workplace Relations and Education Legislation Committee, *Report of the inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005*, p. 67; Shop Distributive and Allied Employees Association submission to the Senate Employment, Workplace Relations and Education Legislation Committee inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005, pp. 18–19, 34–40; Group of 151 Industrial Relations, Labour Market and Legal Academics, *Research evidence about the effect of the Work Choices Bill*, 2005, p. 10.

<sup>133</sup> Shop Distributive and Allied Employees Association submission to the Senate Employment, Workplace Relations and Education Legislation Committee inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005, pp. 35–36.

<sup>134</sup> See, for example, J Elton & B Pocock, *Not fair, no choice: the impact of Work Choices on twenty South Australian workers and their households*, Centre for Work + Life, University of South Australia, Adelaide, 2007; J Evesson, et al., (2008) *Lowering the standards: from awards to Work Choices in retail and hospitality collective agreements: synthesis report*, report prepared for the Queensland, NSW and Victorian governments, Workplace Research Centre, Sydney, 2008; J Elton et al., *Women and Work Choices: impacts on the low pay sector*, Centre for Work + Life, University of South Australia, Adelaide, 2007; C Sutherland, *Agreement making under Work Choices: the impact of the legal framework on bargaining practices and outcomes*, Monash University, Melbourne, 2007; D Swan, I Asbury & J Thompson, *Final report: inquiry into the impact of Work Choices on Queensland workplaces, employees and employers*, Queensland Industrial Relations Commission, Brisbane, 2007.

Section 62 of the FW Act provides for maximum weekly hours of 38 hours for full-time employees unless additional hours are reasonable. Employees may refuse to work additional hours if they are unreasonable under s. 62(2). Section 62(3) provides a list of 10 matters to be considered in determining whether additional hours are reasonable or unreasonable. The provisions include some additional considerations, compared with Work Choices, to ensure working hours are reasonable. These include consideration as to whether the employee is entitled to be paid for additional hours worked, the usual working hours in the relevant industry, whether the hours are in accordance with an averaging arrangement, the employee's role and level of responsibility and any other relevant matter.

The FW Act provides under s. 64 for the averaging of hours for award and agreement-free employees over a maximum of 26 weeks, subject to a requirement that excess hours are 'reasonable' in accordance with s. 62(1). Section 63 also provides that modern awards and enterprise agreements may provide for the averaging of hours, also subject to the reasonableness test under s. 62(1). The Government's intention was to allow tailoring of averaging arrangements at the industry, occupation or enterprise level, subject to the protections afforded by the maximum weekly hours provisions.<sup>135</sup> This was in response to the situation under Work Choices where hours could be averaged over 12 months by agreement in writing between the employee and employer, meaning that employees could be pressured into agreeing to such an arrangement without fully understanding its implications for access to payment for overtime or predictability of hours.<sup>136</sup>

Some submissions raised the issue of reasonable additional hours under s. 62, arguing that employees should be able to refuse work in excess of 38 hours.<sup>137</sup> Professor David Peetz examined the issue extensively in his submission, arguing that the reasonable additional hours provision can impose an unreasonable burden that is difficult to resist on employees working in some industries.<sup>138</sup> Professor Peetz discussed the example of the coal industry, highlighting surveys which show many employees 'are working these long hours without having any say in their hours and against their expressed preferences'.<sup>139</sup> More recent data from the Australian Work and Life Index 2010 found that mining had the longest working hours of the industries surveyed.<sup>140</sup> Professor Peetz did, however, acknowledge that the provisions are yet to be fully tested and that case law mainly reflects the experience under Work Choices.<sup>141</sup> Several submissions sought further clarity as to what constitutes reasonable additional hours.<sup>142</sup>

Some employers argued that the working hours provisions are unduly restrictive, for example the Restaurant and Catering Industry Association submitted that standardisation of working hours is not appropriate for the hospitality industry.<sup>143</sup> The ACCI submitted that additional hours that form part of an averaging arrangement should be deemed 'reasonable' for the purposes of s. 62.<sup>144</sup> A number of employer representatives also argued for the averaging of hours over a period of 52 weeks<sup>145</sup>, bringing the relevant provisions back into line with Work Choices arrangements. The NSW Business Chamber & Australian Business Industrial proposed that where averaging is otherwise not provided under an industrial instrument, averaging should be permitted over a four-week period.<sup>146</sup> The ACTU argued that averaging should not exceed arrangements provided under the relevant modern award.<sup>147</sup>

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<sup>135</sup> NES discussion paper, Australian Government, 2008, pp. 3, 7.

<sup>136</sup> Work Choices, s. 226.

<sup>137</sup> ASU, p. 28; D Peetz, pp. 18–26; NWWC, p.4.

<sup>138</sup> D Peetz, pp. 18–26.

<sup>139</sup> N Skinner & B Pocock, *Work, life & workplace culture: the Australian work and life index 2008*, Centre for Work + Life, University of South Australia, Adelaide, 2008; B Pocock, N Skinner & R Ichii, *Work, life & workplace flexibility: the Australian work and life index 2009*, Centre for Work + Life, University of South Australia, Adelaide, 2009, cited in D Peetz, p. 20.

<sup>140</sup> B Pocock, N Skinner & S Pisaniello, *How much should we work? Working hours, holidays and working life: the participation challenge*, Centre for Work + Life, University of South Australia, Adelaide, 2010, p. 58.

<sup>141</sup> *ibid*, p. 18.

<sup>142</sup> SDA, p. 42; R&CA, p. 8; NWWC, p. 4; BIG, pp. 5, 8–9.

<sup>143</sup> RCA, p. 8.

<sup>144</sup> ACCI, p. 52.

<sup>145</sup> Under s. 226; See, for example, ACCI, p. 54; AAA, pp. 5–6; AFEI, 3; MBA, p. 15.

<sup>146</sup> NSW & ABI, p. 22.

<sup>147</sup> ACTU, p. 52.

No evidence was provided during the Review that quantified the costs and benefits of the hours of work provisions under the FW Act as compared to Work Choices. The impact would be expected to include additional wages costs for those employers that took advantage of the Work Choices provisions, as employees have greater capacity to resist working unreasonable additional unpaid hours and averaging arrangements. However, the capacity to impose unlimited unpaid overtime on employees was a feature of Work Choices but not of the two legislative regimes which preceded it. The clear benefit to employees is that they have far greater capacity to resist working hours above 38 hours per week, have more predictable working hours and an increased likelihood of being paid for overtime worked. The changes under the FW Act are of particular benefit to low-paid employees, such as those working in the retail and hospitality industries, who generally have little bargaining power and are usually subject to hourly pay rates rather than salaried positions.

The Panel has not been convinced by arguments to either remove the concept of ‘reasonable additional hours’ or further define what constitutes reasonable or unreasonable in this context. The Panel’s view is that the provisions adequately balance the need for employer flexibility on the one hand, with employee protections against possible exploitation on the other, and that the matters provided for at s. 62(3) are extensive and appropriate. The Panel does however note concerns raised in the area and recommends the Government continue to closely monitor the operation of the provisions to ensure they continue to be properly applied.

The Panel is also not convinced that the weight of evidence supports upsetting existing arrangements for averaging of hours. The Panel notes that the high levels of flexibility for employers can result in significant uncertainty and hardship for employees. The Panel has been presented with little evidence that current arrangements are unduly restricting operational efficiency for business. The Panel believes that if averaging arrangements under modern awards are considered inappropriate, parties can raise their concerns during FWA’s review of modern awards or change arrangements through enterprise bargaining. We therefore do not recommend changes to these provisions.

#### **5.2.4 Parental leave**

Forward with Fairness foreshadowed up to 24 months unpaid parental leave, by providing for each parent to take a period of 12 months unpaid leave, or one parent to request an additional 12 months leave, which could only be refused by an employer on reasonable business grounds.<sup>148</sup> The parental leave standard would facilitate taking concurrent parental leave for up to three weeks within the first six weeks of the birth, at a time to be negotiated with the employer.<sup>149</sup> These measures were intended to maintain the links between new parents and the workforce, to ‘ensure strong workforce participation of parents to the benefit of business and the overall economic prosperity of Australia’.<sup>150</sup> The Parental Leave and Related Entitlements standard in Part 2-2, Division 5 of the FW Act is consistent with this policy.

A range of submissions about the FW Act parental leave provisions were examined during the Review.<sup>151</sup> The key issues are described further below.

The FW Act allows one parent to make a request for an additional 12 months unpaid parental leave, which can only be refused by an employer on reasonable business grounds. An employee accessing a period of unpaid parental leave has a guaranteed right to return to the position they held before taking leave or, if that position no longer exists, to a position similar in status and pay. There was nothing to prevent an employee from requesting an additional period of unpaid parental leave under the previous legislation; however, there was no statutory requirement for such a request to be given due consideration.

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<sup>148</sup> FWF, pp. 7–8.

<sup>149</sup> DEEWR submission to the FW Bill inquiry, pp. 60–61.

<sup>150</sup> NESDP, p. 14.

<sup>151</sup> See, for example: AWU, p. 2; SDA, pp. 33, 35–36; SDA supplementary, p. 9; ANRA, p. 3; WFPR, p. 9; Ai Group supplementary, p. 14; CCIQ, p. 7.

The Government introduced the new provision in recognition that many families want to provide all or most of the care to their children in their first two years of the child's life.<sup>152</sup> The provision may also contribute to overall productivity outcomes by allowing employees to maintain their employment while meeting their caring responsibilities.

Some submissions proposed changes to the eligibility requirements for parental leave under the FW Act, with the ACTU seeking alignment with the *Paid Parental Leave Act 2010* (PPL Act), which was opposed by the Ai Group.<sup>153</sup> The ACCI sought alignment of the PPL Act eligibility requirements with those of the parental leave provisions of the FW Act.<sup>154</sup> The PPL Act is administered in the Families, Housing, Communities Services and Indigenous Affairs portfolio, and provides an entitlement for eligible working parents to receive 18 weeks of government-funded parental leave pay at the rate of the National Minimum Wage.<sup>155</sup> The concerns raised by some stakeholders in this regard relates to the apparent conflict in eligibility requirements, which may mean that an employee entitled to receive paid parental leave under the PPL Act does not meet the eligibility requirements for taking parental leave under the NES. The employee may therefore be forced to access another type of leave or potentially resign.

A number of submissions also proposed that 'reasonable business grounds' be defined or clarified for the purposes of refusing a request to extend unpaid parental leave for up to 12 months, and that such decisions should be subject to appeal.<sup>156</sup> FWA conducted employee and employer surveys in 2011. These included questions about the requests for extending unpaid parental leave and the right to request flexible working arrangements under the NES. The surveys found that 2.5 per cent of employers had considered a request to extend unpaid parental leave and that less than 0.1 per cent of employees had made such a request.<sup>157</sup> Of the employer respondents, 95 per cent that had received one such request granted it without variation, 2.7 per cent granted the request with variation and 2.7 per cent refused the request. Of the employers that had received more than one request, 93 per cent granted all requests without variation, 3.6 per cent granted some or all requests with variation and 3.6 per cent were refused. Of the five employee respondents who requested extended unpaid leave under the NES, four reported that their request was granted, and one responded that their request was accepted with variation (although was uncertain whether the request was made under the NES).

FWA's statistics are currently the most authoritative available on the right to request provisions under the NES. While FWA's survey indicates that requests for additional unpaid parental leave are rare, the results demonstrate that the provisions have been used to good effect by employees, with most achieving their desired outcome. The results indicate that the provisions are allowing working parents to exercise their desire to care for their children in important formative years without having to resign their positions. For employers this means they are able to retain such staff, helping to ensure they have a skilled and experienced workforce. Agreeing to a request to extend unpaid parental leave may mean that an employer has to fill the position temporarily, resulting in recruitment and training costs; however, employers can decline such requests on reasonable business grounds. No material has been presented during the Review that would allow quantification of potential costs and benefits of the provisions.

The PPL Act has deliberately wider eligibility criteria than the unpaid parental leave provision in the NES in order to maximise access to the PPL scheme and include women on lower incomes and in non-traditional employment arrangements. The PPL scheme is also targeted at a broader range of workers, such as the self-employed and contractors. Most employees who are eligible for paid parental leave will also be eligible for the NES. However, the Productivity Commission (PC), in its 2009 inquiry report *Paid parental leave: support for parents with newborn children*, made a deliberate decision that the work test under the PPL Act would deviate from the NES to enable more workers to qualify for the scheme.

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<sup>152</sup> FWF, p. 7.

<sup>153</sup> ACTU, p. 59; Ai Group supplementary, p. 13.

<sup>154</sup> ACCI, p. 63.

<sup>155</sup> [www.familyassist.gov.au](http://www.familyassist.gov.au), Family Assistance Office, Australian Government.

<sup>156</sup> SDA, pp. 30–31; RCT, pp. 7–8; MEAA, pp. 2–3; D Peetz, pp. 33–34, LIV, p. 3.

<sup>157</sup> FWA, 2011 Surveys of individual flexibility arrangements (IFAs) and provisions under the National Employment Standards (NES).

The PC recognised that 12 continuous months with a single employer has been accepted as a reasonable qualifying period to balance the burden on the employer to provide a significant period of leave and a return-to-work-guarantee. It reflects an award standard that has been recognised since 1990 for full-time and part-time employees and since 2001 for long-term casuals. Employees who do not qualify for unpaid parental leave may access paid leave while receiving parental leave pay. Alternatively, they can negotiate with their employer for unpaid leave and a return to work guarantee; however, the employer is not obliged to agree to the employee's proposal.

As the NES provides employees with a leave entitlement and return-to-work guarantee, rather than a payment, it is appropriate that a long-term employment relationship between the employee and employer is established. The material provided did not convince the Panel that a departure from the longstanding existing eligibility requirements is justified. It therefore considers that they should remain unchanged. It is noted that the difference in eligibility criteria between the NES and PPL scheme will be considered as part of the scheduled review of the PPL Act, which is to commence by 31 January 2013.

The Panel does not consider that 'reasonable business grounds' requires definition or that a right to appeal such decisions should be provided in the legislation. Our reasoning for not accepting these suggestions is the same as our reasoning about similar changes to the right to request flexible working arrangements provisions outlined below. We do however recommend that a requirement be included in the legislation for the employer and the employee to hold a meeting to discuss the request, unless the employer agrees immediately to the request, for the same reasons we make this recommendation about the right to request flexible working arrangements.

**Recommendation 3:** The Panel recommends that s. 76 be amended to require the employer and the employee to hold a meeting to discuss a request for extended unpaid parental leave, unless the employer has agreed to the request.

### 5.2.5 Special maternity leave

An issue of concern for the Panel in relation to special maternity leave was noted by the SDA in its supplementary submission.<sup>158</sup> The unpaid special maternity leave provisions at s. 80 provide that eligible employees who have a pregnancy-related illness and have exhausted paid sick leave entitlements can take special maternity leave, with a corresponding reduction in the 12 months unpaid parental leave that can be taken under s. 80(7). Employees can also access special maternity leave if they have a pregnancy-related illness or the pregnancy has ended within 28 weeks of the expected birth. Other than being streamlined and simplified, the special maternity leave provisions reflect the corresponding provisions under Work Choices.<sup>159</sup>

We understand that the reduction in unpaid parental leave is to ensure that the maximum time an employer is required to maintain an employee's position during unpaid leave is not extended because of special maternity leave. In our view the current arrangements exhibit policy confusion. While the special maternity leave provision is clearly intended to protect a pregnant employee's position when she has exhausted her paid leave entitlements, the employee is then penalised for accessing this leave by the consequent reduction in unpaid parental leave. We note that there would be no consequent reduction in unpaid parental leave if the employee were able to simply take ordinary paid or unpaid personal leave. Given the purpose of unpaid parental leave is to allow a parent to care for their child during an important developmental period, we consider that there is little justification for its reduction due to an employee previously accessing special maternity leave. The Panel therefore recommends that s. 80(7) be repealed.

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<sup>158</sup> SDA supplementary, p. 9.

<sup>159</sup> Work Choices, ss. 265–67.

**Recommendation 4:** The Panel recommends that s. 80(7) be repealed so that taking unpaid special maternity leave does not reduce an employee’s entitlement to unpaid parental leave under s. 70.

### 5.2.6 Right to request flexible working arrangements

Forward with Fairness provided that the Government would ‘guarantee’ a right for parents to request flexible work arrangements until their child reaches school age, which could only be refused on reasonable business grounds.<sup>160</sup> The NESDP provided that ‘whether a business has reasonable business grounds for refusing a request for flexible working arrangements will not be subject to third party involvement under the NES’, on the basis that United Kingdom experience suggested that simply encouraging discussion was successful in promoting flexible arrangements.<sup>161</sup> Accordingly, the intention of the standard was ‘to promote discussion and agreement between employers and employees about the issue of flexible working arrangements’.<sup>162</sup> The Explanatory Memorandum (EM) provides that it was envisaged that FWA would provide guidance as to what constitutes reasonable business grounds<sup>163</sup>, and provides that they may include the effect on the workplace including financial impact, efficiency, productivity and customer service; the inability to organise work amongst existing staff; the inability to replace the employee or the practicality of arrangements that would need to be put in place to accommodate the request.<sup>164</sup>

Section 3(d) of the FW Act provides:

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by: ...

- d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements.

Part 2-2, Division 4 of the FW Act contains the right to request flexible work arrangements. The right applies to employees who have completed at least 12 months continuous service, or are long-term casuals with an expectation of continuing employment. More beneficial state and territory laws that provide entitlements to flexible work arrangements are not excluded by the FW Act right to request provisions.<sup>165</sup> The right was first introduced under the FW Act. The previous legislation did not preclude employees from seeking flexible working arrangements; however, there was no requirement for an employer to give due consideration to such a request and no requirement that the request could only be rejected on reasonable business grounds.

Submissions made by employee representatives, academics and other organisations about the right to request flexible working arrangements generally sought to broaden and strengthen the provisions. Peak employer representatives advocated maintaining the status quo in relation to the right to request.

The ACTU asserted that the provision does little to help balance work and family life, as access to the provisions is too narrow, excluding ‘workers who care for school-aged children; those caring for adult dependants with a disability; and those caring for elderly parents—despite the fact that these workers constitute a significant proportion of those employees with caring responsibilities’.<sup>166</sup> The Australian Human Rights Commission (AHRC) called for the provisions to be extended ‘to employees with children of all ages and to encompass all forms of family and carer responsibilities such as disability and elder care’.<sup>167</sup> Carers Australia recommends bringing the scope of carer into line with the provisions of

<sup>160</sup> FWF, p. 8.

<sup>161</sup> NESDP, p. 10.

<sup>162</sup> DEEWR submission to the FW Bill inquiry, p. 61; see also EM, p. 44.

<sup>163</sup> EM, p. xii.

<sup>164</sup> EM, pp. 44–45.

<sup>165</sup> FW Act, s. 66; see also DEEWR submission to the FW Bill inquiry, p. 50.

<sup>166</sup> ACTU, p. 54.

<sup>167</sup> AHRC, pp. 9–10.

the *Carer Recognition Act 2010*, extending coverage to carers of people with a disability, serious medical condition, mental illness or the frail and aged, to better reflect the diversity of unpaid carers in the community.<sup>168</sup> A number of other submissions supported similar broadening of the caring situations to which the right to request applies.<sup>169</sup> A further expansion sought by the Australian Law Reform Commission and supported by the ACTU included that the right be extended to employees experiencing family violence or providing care or support for a person experiencing family violence, in line with similar measures overseas, due to the prevalence of the problem.<sup>170</sup> Forsyth and Stewart indicated in principle support for broadening the scope of the provisions but cautioned that it may be prudent to await the outcomes of FWA's research on the issue before making any changes.<sup>171</sup>

Removing restrictions on who can request flexible working arrangements is supported by the Centre for Employment and Labour Relations Law (CELRL), which argued that the provisions 'disproportionately exclude employment arrangements that are dominated by women of child-bearing age' such as casuals.<sup>172</sup> Carers Australia also proposed removing restrictions and extending the provisions to prospective employees.<sup>173</sup> A range of other submissions also called for removing or diluting restrictions on employees to which s. 65 applies. The AHRC also advocated removing the restrictions and further recommended that employees with a disability be allowed to make a request to better accommodate their personal needs.<sup>174</sup>

The ACTU argued that the right should be enforceable, as employers do not have to show they have properly considered a request, and employees can only appeal a decision if provided for under an enterprise agreement.<sup>175</sup> A large number of other submissions also argued that an employer's decision in relation to s. 65 should be appealable or otherwise subject to the dispute settling provisions of modern awards.<sup>176</sup> A number of stakeholders proposed that reasonable business grounds for an employer's right to refuse a request should be defined or guidance provided in the legislation, including the NSW Business Chamber & Australian Business Industrial.<sup>177</sup>

The ACCI, on the other hand, argued that the right to request should not be broadened due to the additional resources required to consider requests and increased regulatory burden.<sup>178</sup> This view was supported by the Ai Group, which argued that the provisions were subject to extensive consultation and strike the right balance, and noted that employees who do not have a formal entitlement under the provisions still can request flexible working arrangements outside the provisions.<sup>179</sup> The Ai Group submitted that 'every day in hundreds of workplaces requests for flexible work arrangements are made and granted. In the vast majority of cases the provisions of the FW Act are not needed or used. Most employers try very hard to accommodate reasonable requests from their employees for flexible work arrangements'.<sup>180</sup>

The Panel has given this issue much consideration and is persuaded by some of the arguments put by employee representatives, academics and other advocates.

FWA's 2011 survey encompassing consideration of the right to request under the NES found that 3.8 per cent of employers surveyed had considered a right to request flexible working arrangements to care for a child and that 0.9 per cent of employees surveyed had made such a request.<sup>181</sup> Of the employer respondents, 81 per cent that had received

<sup>168</sup> Carers Australia, pp. 7–8.

<sup>169</sup> See, for example, SA Govt, pp. 10–12; D Peetz, pp. 26–28; Forsyth and Stewart, p. 6; Jobwatch, pp. 13–19; Carers NSW, pp. 4; CELRL, pp. 4–5; SDA, p. 10

<sup>170</sup> ALRC, pp. 6–7; ACTU, p. 54. See also Kingsford Legal Centre, p. 10 and Victims of Crime Assistance League, p. 5.

<sup>171</sup> Forsyth and Stewart, p. 6.

<sup>172</sup> CELRL, pp. 5–6.

<sup>173</sup> Carers Australia, p. 8.

<sup>174</sup> AHRC, pp. 10–11.

<sup>175</sup> ACTU, p. 54.

<sup>176</sup> See, for example, AHRC, p. 10; SA Govt, pp. 11–12; D. Peetz, p. 32; Forsyth and Stewart, p. 6; CELRL, pp. 5–6; Jobwatch, p. 20; SDA, pp. 29–30; ANF, p. 3; ASU, p. 31; MEAA, p. 3; National Working Women's Centres, p. 6; WFP, p. 8.

<sup>177</sup> NSWBC & ABI, p. 23. See also D Peetz, p. 31; Jobwatch, p. 19; Kingsford Legal Centre, p. 6; Ryan Carlisle Thomas, p. 6.

<sup>178</sup> ACCI, p. 64.

<sup>179</sup> Ai Group supplementary, pp. 12–13.

<sup>180</sup> *ibid.*, p. 13.

<sup>181</sup> FWA, 2011 Surveys of individual flexibility arrangements (IFAs) and provisions under the National Employment Standards (NES).



one such request granted it without variation, 8.4 per cent granted the request with variation and 10.8 per cent refused the request. Of the respondents that had received more than one request, 53 per cent granted all requests without variation, 47.5 per cent granted some or all requests with variation and 25 per cent were refused. Of the 16 employee respondents who had made a right to request under the NES, 13 reported that their request was granted, two were accepted with variation and one was refused. A further 13 respondents were unsure if their request was made under the NES. Of these responses, eight advised that their request was granted, four answered that their request was granted with variation and one was refused.

FWA's survey results are the most authoritative data source on the operation of the right to request flexible working arrangements that we are aware of. The results indicate that the right to request provisions are used quite sparingly, as could be expected given the relatively narrow situations to which the provisions apply. The high percentage of requests that lead to flexible working arrangements being put in place, and the comparatively low rate of refusals, indicates employers are taking the provisions seriously and that they are being used effectively by employees to alter their working arrangements to suit their circumstances. FWA's survey results are supported by the Work and Family Policy Roundtable (WFPR), which noted that research has shown the provisions to be beneficial to working families.<sup>182</sup>

The provisions are beneficial to employees, as they can negotiate flexible working arrangements to meet the needs of their families, for example working a shorter week or only working school hours. Putting in place such arrangements means that employees can maintain their employment with their current employer, ensuring they retain skills and experience, which is of benefit to both the employee and employer. Agreeing to flexible working arrangements may mean that an employer has to hire additional staff, resulting in recruitment and training costs; however, employers can decline such requests on reasonable business grounds. No evidence has been presented during the Review that would allow us to measure the costs and benefits of the provisions.

International research indicates that workplaces offering flexible working arrangements can achieve benefits in productivity and employee relations. A 2007 United Kingdom survey found that 47 per cent of employers thought that flexible working and leave arrangements had a positive effect on productivity.<sup>183</sup> Only 12 per cent of employers reported a negative effect, with the remainder reporting no impact. The survey also asked about the impact of flexible working on employee relations, motivation and commitment, recruitment, labour turnover and absenteeism and found that, for the most part, flexible working and leave arrangements had a positive effect or no effect on employee relations and human resources management. Other research undertaken in the UK has shown that family friendly employment practices, including recognising the needs of carers of adults, have important business benefits.<sup>184</sup>

As noted above, a number of stakeholders indicated concern that the application of the right to request provisions to carers of children under school age and children with a disability under 18 years old was too narrow. The ACTU submitted that the right to request provisions should be extended to all workers who care for or support a person who reasonably relies on them.<sup>185</sup> The South Australian Government supported expanding the right, noting the right to request flexible working hours under the United Kingdom's *Employment Rights Act 1996*.<sup>186</sup> The provisions under the UK model introduced in 2003 were originally similar to those under the FW Act but were expanded in 2007 to include carers of adults and in 2009 to carers of children of 16 years of age and under.<sup>187</sup> The CELRL noted the similarity of the United Kingdom's system and its influence on Australian debate.<sup>188</sup> In New Zealand, employees with at least six months

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<sup>182</sup> WFPR, p. 7.

<sup>183</sup> Cited in United Kingdom Department for Business, Innovation and Skills, *Impact assessment: extending flexible working to parents of children aged 17*, October 2010, pp. 11–12.

<sup>184</sup> M Baird & A Heron, University of Sydney, submission to the inquiry of the House of Representatives Standing Committee on Education and Employment into the Fair Work Amendment (Better Work/Life Balance) Bill 2012.

<sup>185</sup> ACTU, p 54.

<sup>186</sup> SA Govt, p. 22. See also WFPR, p. 7.

<sup>187</sup> House of Commons Library, 2011, *Flexible working*, pp. 3–9. Also noted in CERCL, p. 8.

<sup>188</sup> CELRL, p. 5.

service who are responsible for the care of any person can apply for a variation to their hours, days or place of work.<sup>189</sup> The request can be refused only on the basis of 'recognised business grounds' and a review of the provisions in 2011 found that employers had not experienced any significant costs with the process.<sup>190</sup>

The WFPR recommended that the arrangements be extended to a broader range of caring situations, noting that 'analysis of ABS data about work–life outcomes for carers of frail, aged and other non-child dependants suggests that they suffer more work–life strain than carers of young children'.<sup>191</sup> It is noted that the Australian Government is currently consulting through the National Carer Strategy, launched in August 2011, on extending the right to request provisions to employees caring for older Australians and those caring for a person with a serious long-term illness or disability.<sup>192</sup>

The CELRL noted that research suggests that employers are already providing broader right to request schemes.<sup>193</sup> The CELRL further argued that expanding the groups to which the right applies may reduce discrimination and resentment towards people currently able to request flexible arrangements, an argument supported by Professor David Peetz.<sup>194</sup> The WFPR also noted that international evidence suggests a broader category of workers to which right to request provisions apply has not created difficulties for employers.<sup>195</sup>

The Panel has formed the view that, while the introduction of the right to request flexible working arrangements represented an important development in providing additional rights to certain types of working carers, the scope of the caring arrangements under the current provisions should be expanded to reflect a wider range of caring responsibilities. Given that an object of the FW Act is to help employees balance their work and family responsibilities by providing flexible working arrangements, and the importance of maintaining a skilled workforce who may have caring responsibilities, the Panel recommends extending the right to request.

The Panel has considered the question of whether a decision to refuse a request for flexible working arrangements should be able to be appealed. Section 146 outlines the requirements for dispute settling terms under modern awards and includes a note that FWA or a person must not settle a dispute about whether an employer had reasonable business grounds to refuse a request for flexible working arrangements under s. 65(5) or a request for extending unpaid parental leave under s. 76(4). While providing an appeal mechanism may help ensure that a request for flexible working arrangements is given proper consideration and that a refusal is indeed due to reasonable business grounds, this still would not provide a guarantee that a right to request would eventually succeed.

FWA's previously noted survey results indicate that employers are taking requests seriously and that in most cases employees can negotiate flexible arrangements despite the absence of an appeal mechanism. Given that the policy rationale of the provision is to facilitate discussion about flexible working arrangements, the Panel is not convinced on the weight of evidence that the policy is currently not meeting its objective and therefore does not recommend that such an appeal mechanism is adopted. In this regard the Panel is also mindful that employees may negotiate for a right to appeal a refusal of a request for flexible working arrangements under an enterprise agreement dispute settling procedure.<sup>196</sup>

While the Panel has declined to recommend an appeal mechanism, it recognises the experience of some stakeholders with employers refusing a right to request without due consideration.<sup>197</sup> The Panel therefore recommends that the FW Act be amended to provide an additional requirement that a request can only be refused after the employer has held at

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<sup>189</sup> [www.dol.gov.nz](http://www.dol.gov.nz): New Zealand Department of Labour.

<sup>190</sup> New Zealand Department of Labour, Review of Part 6AA: Flexible Working Arrangements, 2011, p. 2.

<sup>191</sup> See B Pocock, N Skinner & P Williams, *Time bomb: work, rest and play in Australia today*, NewSouth Publishing, Sydney, 2012, cited in WFPR, p. 8.

<sup>192</sup> [www.fahcsia.gov.au](http://www.fahcsia.gov.au): Australian Government.

<sup>193</sup> CELRL, p. 4.

<sup>194</sup> *ibid.*, p. 5; D Peetz, p. 28.

<sup>195</sup> WFPR, p. 6.

<sup>196</sup> FW Act, see Note 2 at 186(6).

<sup>197</sup> ACTU, p. 54.

least one meeting with the employee to discuss the request. The Panel's view is that such a meeting should already form part of considering a right to request in most workplaces; however, we consider that codifying the requirement will ensure a conversation about, and due consideration of, such requests in workplaces not currently meeting this standard. The Panel considers that this would be consistent with the overall policy intentions of the legislation and will help meet the specific policy intent of facilitating conversations about flexible working arrangements.

**Recommendation 5:** The Panel recommends that s. 65 be amended to extend the right to request flexible working arrangements to a wider range of caring and other circumstances, and to require that the employee and the employer hold a meeting to discuss the request, unless the employer has agreed to the request.

The Panel was not persuaded by arguments that a definition of 'reasonable business grounds' for refusing a request for flexible working arrangements should be included in the legislation. We note the Government's clear decision that 'the reasonableness of the grounds is to be assessed in the circumstances that apply when the request is made'.<sup>198</sup> The EM further provides examples of what reasonable grounds may be and notes that 'it is envisaged that FWA would provide guidance on the issue'.<sup>199</sup> While the Panel is not certain that the interpretation of reasonable business grounds has been unreasonable or out of alignment with the Government's intention, it may be appropriate for FWA to provide further guidance on the issue if this emerges as an issue.

The Panel notes that broadening the range of caring situations and further changes it has recommended to the right to request provisions may involve a minor additional compliance burden for employers. It is, however, of the view that good practice would mean that such processes would generally be followed anyway in the majority of workplaces, and that the benefits of the proposed changes would nevertheless outweigh any negatives.

### 5.2.7 Annual leave loading on termination

A principal concern raised by stakeholders about annual leave provisions under the NES is the payment of annual leave loading on termination, an issue that has received some public attention recently and was raised in many submissions and meetings with the Panel. The concern arises with the interpretation of s. 90(2), which provides:

- (2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

The provision has been interpreted by the FWO, based on advice from Senior Counsel<sup>200</sup>, as requiring the payment of an annual leave loading entitlement, even where award or agreement provisions specifically preclude payment of the loading.<sup>201</sup> Stakeholders including the ACCI and the Ai Group propose amendment to the legislation to clarify that leave loading is only payable on termination if provided for in the relevant industrial instrument.<sup>202</sup>

The provision of annual leave loading was originally to compensate employees for the notional loss of overtime earnings while on leave, although the benefit then spread to most sectors of the workforce, including areas not generally subject to overtime payments.<sup>203</sup> A common feature of award leave loading provisions historically was that leave loading was not payable on termination. Advice tendered to the Senate's Education, Employment and Workplace Relations Committee by the FWO was that 112 modern awards include provision for annual leave loading, 29 of which

<sup>198</sup> EM, p. 44.

<sup>199</sup> EM, p. 45.

<sup>200</sup> Senate Education, Employment and Workplace Relations Committee, Additional Budget Estimates 2010–11, p. 47.

<sup>201</sup> *Final Pay*, Fair Work Ombudsman, www.fwo.gov.au.

<sup>202</sup> ACCI, p. 55; Ai Group, pp. 50–52. See also ACCER, p. 14; AFEI, p. 3; AMIC, pp. 8–9; AMIF, pp. 9–10; ANRA, pp. 12–14; BIG, p. 5; Business SA, p. 11; CCIQ supplementary, p. 6; CCIWA, p. 67; PIAA, p. 7.

<sup>203</sup> Creighton & Stewart, *Labour law*, 5th edn, 2010, p. 397.

either explicitly or implicitly provide that the loading is not payable on termination of employment, a further nine provide that it is payable and 74 are silent on the issue.<sup>204</sup>

While it is not clear beyond doubt whether s. 90(2) was intended to preserve existing arrangements for the payment of leave loading on termination, the interpretation of the provision by the FWO, in contradistinction to the interpretation by many employer representatives, has meant that longstanding arrangements under awards and enterprise agreements have been disturbed.

For employers who traditionally have not had to pay annual leave loading on termination, they have incurred an additional cost in paying out the annual leave on termination. Leave loading typically amounts to 17.5 per cent on the base rate of pay, depending on the relevant modern award or enterprise agreement. It is impossible to quantify the cost of this change to the economy overall, as there is no way to gauge how much leave is owed to employees whose employment has been terminated, what their base rate of pay is, what the relevant leave loading is, how many employees are covered by awards or agreements that provide leave loading and whether all employers have been meeting the new requirement. It is, however, noted that the interpretation of the requirement would have the most negative impact on affected small businesses. The benefit to employees covered by instruments that previously had not attracted leave loading on separation is that they are entitled to be paid leave loading on top of leave owed to them when leaving their employment.

Backed with the weight of past practice and to provide certainty on the issue, the Panel therefore recommends that s. 90(2) of legislation be amended to provide that leave loading is only payable on separation where expressly provided under the relevant modern award or enterprise agreement for both new and existing employees.

**Recommendation 6:** The Panel recommends that s. 90 be amended to provide that annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect.

### 5.2.8 Prepayment of leave

A number of employee submissions, including the ACTU, AMWU and TCFUA, indicated concern with the interpretation of the NES annual leave provisions in reference to the decision of FWA in *Mr Irving Warren; Hull-Moody Finishes Pty Ltd; Mr Romano Sidotti*.<sup>205</sup> The decision has allowed the relevant enterprise agreement to prepay annual leave through a loaded base rate of pay with the effect that when employees take annual leave they do not receive payment from the employer during that time. The development is cost-neutral, as it simply means that employees receive a loaded hourly rate in place of paid time off when they take annual leave. Employer representatives, including the Ai Group and MBA, support keeping the provisions as they stand because the employee has been compensated for foregoing payment of leave when the leave is taken.<sup>206</sup> Employee submissions generally took the view that the interpretation of the provisions in *Hull-Moody* undermine the intention of the paid annual leave provisions and are a significant disincentive for taking annual leave, in line with the dissenting judgment in the matter.<sup>207</sup>

The Panel has considered this issue and is of the view that the arguments on both sides are finely balanced, and as such, does not recommend any change to the provisions at this stage. It is unclear whether the parliament intended for agreements to provide prepayment for leave in this manner; however, the Panel would be concerned if agreements became an avenue for the widespread avoidance of payment for annual leave. The Panel therefore recommends that

<sup>204</sup> Senate Education, Employment and Workplace Relations Committee, Additional Budget Estimates 2010–11, p. 48.

<sup>205</sup> [2011] FWAFB 6709. See, for example, ACTU, p. 59; CFMEU C&G, pp. 5–9; LIV, pp. 3–4; AMWU, pp. 53–55; Kingsford Legal Centre, p. 7.

<sup>206</sup> MBA supplementary, p. 2; Ai Group supplementary, p. 14.

<sup>207</sup> AMWU, pp. 53–54; CFMEU C&G, pp. 7–9.

the Government closely monitor developments in this area with a view to possibly amending legislation at a later stage if necessary.

### 5.2.9 Long service leave

Forward with Fairness expressed a commitment to work with states and territories to develop a nationally consistent long service leave scheme, and to make provision for a transitional long service leave standard which would reflect existing long service leave arrangements in state and territory laws or federal awards and federal agreements, so as not to disadvantage employees.<sup>208</sup> The preservation of state and territory laws is achieved through s. 29(2) of the FW Act, which has the effect that modern awards and enterprise agreements operate 'subject to' state or territory long service leave laws. The transitional NES provision in Part 2-2 Division 9 of the FW Act preserves award-derived long service leave entitlements, and applicable agreement-derived long service leave entitlements in circumstances where FWA determines that the relevant entitlements operated in more than one state or territory and, considered on an overall basis, are no less beneficial to an employee than a relevant state or territory long service leave entitlement.

The current long service leave provisions were dealt with in a number of submissions and in discussions with the Panel, mainly in relation to the complexity of current arrangements and the need to implement a national standard.<sup>209</sup> Several state governments noted the issue as important, and the Victorian and South Australian government's submissions noted that the process toward a national standard appeared to have stalled.<sup>210</sup> The Ai Group called for the Panel to recommend a standard to Government<sup>211</sup> and some employers, including the ACCI and the Ai Group, called for the ability to bargain over long service leave entitlements.<sup>212</sup>

The concerns raised about the current provisions generally centred on determining the entitlements of employees, given the various instruments and legislation from which the entitlement may be derived. This may be a particularly complex issue for companies operating across state borders. The issue is likely to involve additional administrative costs for employers and a consequent level of uncertainty as to whether entitlements have been correctly calculated for both employers and employees, although no submission sought to quantify the extent of any additional costs in this regard. The transitional arrangements were, however, designed to protect an employee's existing entitlements, which is clearly to the benefit of employees, albeit a cost-neutral one from their perspective. Concerns with the existing NES long service leave arrangements would be overcome by putting in place a simple national standard, as foreshadowed in Forward with Fairness and the NES discussion paper.<sup>213</sup>

The Panel notes Government's commendable goal of introducing a national standard long service leave entitlement and the broad support for such a standard in discussions and submissions during the Review. The Panel notes the significant concern of parties about the complexity and confusion surrounding the transitional arrangements currently in place, and also the advice of two state governments that the standardisation process appears to have stalled.<sup>214</sup> While we note suggestions that we should ourselves develop a national long service leave standard, we consider that the processes already in place for doing so are the most appropriate. The Panel does, however, recognise the importance of this issue to stakeholders and strongly recommends that the Government, together with its state and territory counterparts, expedite negotiations for a long service leave NES with a view to introducing it by 1 January 2015.

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<sup>208</sup> FWF, p. 9.

<sup>209</sup> Ai Group, pp. 53–54; ACTU, p. 60; ATEC, p. 2; AMWU, p. 3; R&CA, p. 15.

<sup>210</sup> SA Govt, p. 13; Vic Govt, pp. 52–53; WA Govt, p. 7.

<sup>211</sup> Ai Group supplementary, pp. 16–17.

<sup>212</sup> ACCI, p. 67; Ai Group supplementary, p. 16. See also PHIEA supplementary, p. 9.

<sup>213</sup> FWF, p. 9; NES discussion paper, p. 43.

<sup>214</sup> SA Govt, p. 13; Vic Govt, p. 53.

**Recommendation 7:** The Panel recommends that the Commonwealth, state and territory governments should expedite the development of a national long service leave standard with a view to introducing it by 1 January 2015.

#### 5.2.10 Public holidays

Forward with Fairness provided a guarantee of public holidays including Christmas Day, Boxing Day, New Year's Day, Australia Day, Anzac Day, Queen's Birthday, Good Friday and Easter Monday. Public holidays prescribed in state and territory law such as Labour Day, Easter Saturday, Easter Tuesday, and local public holidays like Cup Day, were to be recognised in those jurisdictions in which they are prescribed. Payment while absent on a public holiday was to be at the employee's base rate of pay<sup>215</sup> whereas penalty rates or other compensation for working on a public holiday would be determined by awards.<sup>216</sup>

The FW Act includes an entitlement under the NES to eight public holidays, as well as any further days prescribed as public holidays under state or territory legislation, and provides a right to be absent (subject to a reasonable request to work) and paid at the base rate on a public holiday (ss. 114–116). Penalty rates for working on a public holiday are provided for in industrial instruments, principally modern awards and enterprise agreements, rather than in the FW Act. Modern awards and enterprise agreements typically provide for a penalty rate payable for working on any public holiday.

Work Choices defined public holidays as those days declared by a law to be generally observed within the state or territory or region, other than union picnic days, or substitutes for such days.<sup>217</sup> Perhaps the major difference with the treatment of public holidays under Work Choices was the ability to trade off penalty rate entitlements for little or no compensation in bargaining. States and territories therefore had the capacity to declare additional public holidays under Work Choices, as they can under the FW Act. While the FW Act does not similarly preclude recognition of union picnic days, we are not aware of any such days being declared by the states or territories since its commencement.

A large number of employers indicated concern about arrangements for the payment of public holidays. Employers' concerns were generally about the ability for state and territory governments to declare additional public holidays under s. 115 (1)(b) of the FW Act to those provided under s. 115 (1)(a), and the resultant increase in wage costs due to penalty rates then applying under modern awards.<sup>218</sup> Some employer and employee representatives indicated that the current system had resulted in confusion and called for a national standard to be developed.<sup>219</sup>

The ability for state and territory governments to declare additional public holidays has a fairly significant impact on wages costs for employers who operate on such days, due to public holiday penalty rates typically involving a loading of 200 per cent or 250 per cent of base rates of pay (in recognition of the unsocial nature of working on such days). Employers affected by the penalty rates typically include those operating in the hospitality, retail and tourism sectors. Employers may alternatively elect that it is not economic to open on the particular day (unless they are obliged to open on such days, due to, for example, lease requirements), which would mean forgoing any takings for the particular day. Additional public holidays also impose costs for businesses that decide not to operate on such days, as they may be required to pay employees even though the employees have not had to work.

A Regulation Impact Statement (RIS) prepared by the ACT Government on the introduction of a new public holiday estimated that the cost to the local economy for each additional public holiday was \$29.8 million in 2007.<sup>220</sup> It should

<sup>215</sup> NESDP, p. 49.

<sup>216</sup> FWF, p. 8.

<sup>217</sup> Work Choices, s. 183(6).

<sup>218</sup> See, for example, ACCI, pp. 64–67; AHA, p. 33; ANRA, p. 4; CCIQ, p. 7; CCIWA, p. 66.

<sup>219</sup> See, for example, ACTU, p. 59; Ai Group supplementary, p. 17; ANRA, supplementary, p. 2.

<sup>220</sup> *The economic impact of declaring a new public holiday on Melbourne Cup Day*, Econtech Pty Ltd, 18 April 2007.

however be noted that this estimate assumed there was full employment, ignored increased demand in some industries on public holidays and did not consider any social or productivity gains associated with a public holiday.

Employees who work on public holidays receive the benefit of additional loading payable on their base salary. Employees are entitled to be absent on the public holiday, and may refuse an employer's request to work on a public holiday if the request is not reasonable or the refusal is reasonable<sup>221</sup>, thereby being paid their normal salary while not having to work, unless they are casual employees.

The issue of public holidays was identified as important for many stakeholders in submissions and discussions with the Panel. Current arrangements have meant that the number of public holidays in each jurisdiction can vary widely. For example, in 2012 the number is expected to range from between 10 and 13 days, depending on the state or territory. The uncertainty with current arrangements for employees and employers and the potential additional costs for employers concerns the Panel. To overcome these concerns, the Panel's view is that under the NES, there should be a nationally consistent number of public holidays each year for which penalty rates are payable, and that the number of days for which penalty rates are payable should not be able to be increased by declaring additional or substitute days by state and territory governments. This would not prevent employers and employees entering agreements to provide for penalty rates to be payable on a greater number of public holidays, nor to specify additional days as public holidays.

**Recommendation 8:** The Panel recommends that the Government consider limiting the number of public holidays under the NES on which penalty rates are payable to a nationally consistent number of 11.

#### 5.2.11 Fair Work Information Statement

Part 2-2 Division 12 of the FW Act makes provision for the preparation and distribution of the Fair Work Information Statement (FWIS) as foreshadowed in Forward with Fairness.<sup>222</sup>

Several employers sought the removal of the requirement to provide new employees with a copy of the FWIS or to otherwise amend the statement. The ACCI argued that the obligation represented an unnecessary regulatory and cost burden on employers.<sup>223</sup> The ACCI noted that 'the red-tape burden is not insignificant' and that 'Myer has indicated to the PC inquiry into the retail industry that it spent \$10,000 in distributing the FWIS' to its over 13,000 employees<sup>224</sup>, which equates to a cost of around 77 cents per employee. It is not clear whether the estimated cost for Myer of 77 cents per employee for distributing the Fair Work Information Statement is typical of industry experience; however, given that the requirement is simply to provide a printed notice to employees, this seems to be a reasonable estimate. If Myer's figure were used to extrapolate the cost of providing the statement to the approximately 7.8 million<sup>225</sup> employees covered by the FW Act on its commencement, the total cost would be around \$6.006 million. The ACTU submitted that providing information to employees about their rights under the FW Act was entirely consistent with the objects of the FW Act.<sup>226</sup>

It is also noted that there was a previous requirement under Work Choices for employers to provide new and existing employees a copy of the Workplace Relations Fact Sheet, containing information about the legislation.<sup>227</sup>

The Panel has considered the requirement to provide employees with the FWIS and is not convinced of the need to recommend changes to existing arrangements. These appear to be working entirely consistently with the Government's

<sup>221</sup> FW Act, s.114(3).

<sup>222</sup> FWF, pp. 8–9.

<sup>223</sup> ACCI, pp. 69–70. See also: HIA, pp. 12–13; NRA, p. 9; R&CA, pp. 12 and 15; AHA supplementary, p. 4.

<sup>224</sup> PC inquiry at p. 345, cited in ACCI, p. 70.

<sup>225</sup> ABS, *Employee earnings and hours, Australia* (Cat. No. 6306.0). Note the employment figure used is for all employees covered by the federal system in May 2010 rather than on 1 January 2010.

<sup>226</sup> ACTU supplementary, p. 18.

<sup>227</sup> Work Choices, Division 3A, Part 5. This was removed by the Transition Act.

policy intentions. While there may be some minor administrative costs for meeting this NES requirement, the Panel believes the benefits of improving employees' understanding of their rights under the FW Act clearly outweigh these costs.

### 5.2.12 Other NES provisions

A range of submissions raised issues with NES provisions including: personal/carer's and compassionate leave;<sup>228</sup> community service leave;<sup>229</sup> and notice of termination and redundancy pay<sup>230</sup>. The Panel has determined that the provisions appear to be operating as intended and has not made any recommendations on these.

## 5.3 Awards

### 5.3.1 General

The second element of the two-part safety net envisaged by Forward with Fairness was modern awards, which would contain 'a further 10 minimum employment standards ... tailored to the needs of the industries, occupations or enterprises they cover'.<sup>231</sup> The basis for this was a view that 'minimum terms and conditions will vary depending on the needs of particular industries, occupations or enterprises and cannot be reduced to a "one size fits all" approach'; however, they should remain 'an important safety net and effective floor for collective bargaining'.<sup>232</sup>

The additional entitlements to be regulated by modern awards included minimum wage rates, the type of work performed, arrangements for when work is performed, overtime and penalty rates, annualised salary arrangements, allowances, leave, superannuation and consultation, representation and dispute settlement.<sup>233</sup> In addition, awards could build on, and provide industry specific detail related to, the NES.<sup>234</sup> The Policy Implementation Plan outlined how awards would be modernised, simplified and reduced in number<sup>235</sup>, with reviews every four years to 'ensure they are responsive to the needs of Australia's dynamic market economy and are keeping up with community standards of what constitutes a fair minimum safety net'.<sup>236</sup>

Establishing modern awards under the FW Act was a response to the previous legislation, which the Government considered had significantly diminished the capacity of awards to act as a viable safety net. Work Choices placed significant limits on the content of awards, which meant that a range of previously applicable protections for employees were lost. It provided very limited capacity to update awards to reflect changed community standards. Awards under Work Choices were also difficult to apply because restrictions on award content in the legislation were never reflected in the published awards themselves, and pay scales were removed from awards and were also largely unpublished. This meant that employers and employees had great difficulty in discerning what safety net entitlements actually applied.

The AIRC award modernisation process, provided for under the Transition Act, involved reviewing more than 1500 awards and other instruments, holding over 100 days of consultation and evaluating thousands of submissions for stakeholders. It also included issuing exposure drafts of modern awards for comment. The process resulted in 122

<sup>228</sup> See, for example, ACTU, pp. 38 & 59; TCFUA, p. 12; ACCI, pp. 67–69; Ai Group, pp. 13–14; AFEI, p. 6; PHIEA supplementary, p. 10; Carers Australia, p. 9; CCNT, pp. 1–2; AIER, p. 21; AHRC, p. 15; ALRC, p. 9; NWWC, p. 30.

<sup>229</sup> SDA, p. 40; Ai Group supplementary, p. 16.

<sup>230</sup> See, for example, ACCI, pp. 57–63; Ai Group, p. 14; Ai Group supplementary, p. 14; HIA, p. 11; VECCI supplementary, p. 10; CCF, p. 24, HIA, p. 12; MBA, pp. 21–22; BIG, p. 14, AWU, p. 3; D Peetz, pp. 34–36; TCFUA supplementary, pp. 13–14; SDA, p. 81.

<sup>231</sup> FWF, p. 7.

<sup>232</sup> FWF, p. 10.

<sup>233</sup> *ibid.*, p. 10; PCS.

<sup>234</sup> FWF, pp. 10.

<sup>235</sup> FWFIP, pp. 15–16.

<sup>236</sup> PCS.



industry and occupation-based modern awards to replace approximately 3700 state and federal awards, NAPSAs and pay scales.

In creating modern awards the AIRC sought to set a fair benchmark that was balanced and appropriate for the needs of each industry or occupation from the diverse range of conditions contained in pre-modern awards. Making modern awards was not intended to reduce the take-home pay of employees, or to increase costs for employers. It was, however, acknowledged in the FW Act and in the award modernisation request that the modernisation and consolidation of so many awards may result in some changes to conditions. To allow businesses time to adjust to modern awards, five-year transitional arrangements apply in most modern awards, involving a phasing-in of changes to pay related matters. Under the model transitional arrangements phasing-in is occurring in five equal instalments, one each year.

While some wage costs may have increased for some employers as a result of the introduction of modern awards, others will have decreased, albeit incrementally, due to the five-year phase-in period. It is, however, noted that the content of awards is a matter for FWA's review of modern awards. On the other hand, the reduction in regulation as a result of award modernisation noted above is a significant benefit to employers nationally.

Issues raised about modern awards during the Review included flexibility terms, dispute resolution, minimum wages and the variation of modern awards. Related issues of setting minimum wages and equal remuneration provisions also received some attention and are considered here. The Panel noted some significant support for the massive reduction in regulation and complexity achieved through the award modernisation process, and commends this achievement as a substantial and lasting reform. While acknowledging there are costs and some complexity for business in moving to the new arrangements, the Panel is confident of the long-term benefits of award modernisation. The Panel has made a small number of recommended changes affecting modern awards, reflecting our view that they were carefully considered at the drafting stage and that it is still relatively early days in their implementation.

We note that some submissions raised issues relating to the content of modern awards, including 'common issues' the Full Bench of FWA is addressing. FWA's review process is the appropriate forum for addressing these matters. As we noted earlier, these matters are outside our terms of reference. On 27 April 2012 the President of FWA, Justice Iain Ross, issued a statement outlining the process for dealing with FWA's review of modern awards.<sup>237</sup> The statement noted that 282 applications to vary modern awards were received as part of the review process, and that a Full Bench would be constituted to deal with common issues, and single members would deal with the remainder. The common issues to be dealt with by the Full Bench include: penalty rates in the retail, hospitality, fast food, restaurant, hair and beauty and banking awards; apprentices, trainees and junior rates; award flexibility; annual leave; and public holidays.

### **5.3.2 Individual flexibility arrangements**

The Implementation Plan indicated that all awards would be required to contain a flexibility clause that would 'enable arrangements to meet the genuine individual needs of employers and employees'. A model flexibility clause would be developed, which could be modified if required for a particular industry. It would be simple to understand, would not disadvantage individual employees and would permit genuine agreements between the employee and employer without coercion or duress. Written agreements would be required and a copy required to be provided to the employee.<sup>238</sup> DEEWR's submission to the FW Bill Inquiry identified the matters to which the award flexibility term related as arrangements for when work is performed, overtime rates, penalty rates, allowances and leave loading. It described additional safeguards, namely that an employee must be better off overall than if the arrangement was not

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<sup>237</sup> [2012] FWA 3514.

<sup>238</sup> FWFIP, pp. 11–12.

agreed, and that the flexibility arrangement must be able to be terminated by either the employee or employer providing written notice of not more than 28 days.<sup>239</sup>

To give effect to this policy, the FW Act requires the inclusion of a 'flexibility term' in all awards and enterprise agreements which permits the making of an individual flexibility arrangement (IFA). Sections 144 and 203 of the FW Act respectively mandate specified content for the term, including that the employee and employer genuinely agree to any IFA, the employee will be better off overall, that it be in writing, that it specify the terms of the award or agreement which are being varied and that it address how the arrangement can be terminated. We note, parenthetically, that whether the present legislative provisions result in the creation of a minimum period of termination of only 28 days is far from clear having regard to the way the provisions are framed. Currently, FWA can determine the standard flexibility clause, including matters to which an IFA can relate. In 2008, during the award modernisation process, the AIRC determined a model award flexibility clause, which permitted flexibility about arrangements for when work is performed, overtime rates, penalty rates, allowances and leave loading.<sup>240</sup> The model term now appears in all modern awards, with occasional variations.<sup>241</sup> It is important that the power resides in FWA to determine what matters are covered by the model flexibility term. The result is that FWA can monitor, over time, the operation of the model flexibility term and can adjust its content having regard to workforce and industrial relations demands as they may change in the future.

The FW Act also provides that if the purported IFA does not satisfy those requirements the arrangement has effect but the employer may have contravened the relevant award or agreement term with certain legal consequences including exposure to liability for underpayment.<sup>242</sup>

The Panel has given the issue of IFAs extensive consideration and made a series of recommendations on their operation under both modern awards and enterprise agreements. Discussion of IFAs in both contexts is covered in this chapter, while a further issue confined to IFAs under enterprise agreements is discussed in Chapter 6.

Many employers submitted that a return to statutory individual agreements is essential to meet their concerns about achieving individual flexibilities in the workplace.<sup>243</sup> Similarly, many unions submitted that IFAs should not be part of the Fair Work system.<sup>244</sup> We are not persuaded by either of these submissions. The impact of statutory individual agreements was perceived to be a major problem with Work Choices. The FW Act specifically sought to address this. The FW Act, however, carried the concurrent objective of providing for individual flexibilities. IFAs were intended to provide these individual flexibilities while maintaining protections for employees. We have therefore considered the operation of IFAs with these two key objectives in mind.

The submissions we received indicated that neither employers nor unions are happy with present arrangements concerning IFAs in agreements.

The Ai Group submitted that use of IFAs is low because, in their view, IFAs do not provide meaningful flexibility.<sup>245</sup> A number of options for addressing this were proposed. Many employers and employer organisations submitted that IFAs should be able to be offered as a condition of employment.<sup>246</sup> Some employers also submitted that the model clause

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<sup>239</sup> DEEWR, p. 62. See also SRS.

<sup>240</sup> *Request from the Minister for Employment and Workplace Relations—28 March 2008 Award Modernisation Statement* [2008] AIRC 387.

<sup>241</sup> See, for example, *Textile Clothing and Footwear and Associated Industries Modern Award 2010*, clause 7.

<sup>242</sup> FW Act, s. 145, s. 204.

<sup>243</sup> See, for example, AMMA, p. 9, rec. 4; *Shipping Australia Ltd*, p. 2; IPA, p. 3; VECCI supplementary, p. 18.

<sup>244</sup> HSU, p. 10; SDA, pp. 55–56; TCFUA, p. 10.

<sup>245</sup> Ai Group, p. 68.

<sup>246</sup> Ai Group, pp. 17, 68; AMMA, p. 10; AHA, 4.13.1; BCA, p. 48; CCIWA, pp. 14, 63; CAI, pp. 9–10; NFF, p. 30; PIAA, p. 5; Rio, p. 15; VECCI supplementary, p. 18.

should permit flexibility on a greater number of matters<sup>247</sup>, or all matters pertaining to the employment relationship<sup>248</sup> or changes to the NES.<sup>249</sup>

The capacity for an employee to unilaterally terminate an IFA with 28 days notice was cited by many as a key disincentive to use IFAs.<sup>250</sup> There were various proposals as to the appropriate duration of an IFA or termination notice period, such as six months<sup>251</sup>, one year<sup>252</sup>, no less than 24 months<sup>253</sup>, four years<sup>254</sup> or indefinitely.<sup>255</sup> Many employers submitted that IFAs should not be able to be unilaterally terminated.<sup>256</sup> Some argued that IFAs should continue notwithstanding an enterprise agreement lapsing.<sup>257</sup> Others, such as AMMA, submitted that employees subject to an IFA should not be able to take industrial action<sup>258</sup>, a proposal rejected by the ACTU as being inconsistent with ILO obligations and collective bargaining rights.<sup>259</sup>

Another key issue employers identified with IFAs was the lack of certainty as to whether they pass the better off overall test (BOOT).<sup>260</sup> Some submitted that the model term lacks clarity about what can be varied<sup>261</sup>, and some argued that the application of the BOOT was an unnecessary restriction on IFAs.<sup>262</sup> Some parties proposed a registration or approval system with FWA or the FWO, either compulsory or optional, to provide certainty that a proposed IFA would not be considered invalid in future.<sup>263</sup> Some unions also proposed that IFAs should be registered with or recorded by FWA<sup>264</sup>, including for the purpose of allowing data as to their use and abuse, and to allow an objective assessment to inform stakeholders of their efficacy and areas of concern.<sup>265</sup> The Australian National Retailers Association (ANRA), in its supplementary submission, suggested a proper analysis would need to be conducted to determine whether FWA has the capacity to take on this massive administrative task.<sup>266</sup> An alternative suggestion of the Australian Institute of Employment Rights was to empower FWA to deal with disputes about the making and application of IFAs.<sup>267</sup>

Finally, some employer submissions suggested that it should be permissible to use IFAs to implement identical arrangements across a group of employees. AMMA submitted that problems with the capacity to terminate IFAs with 28 days notice 'include the potential for a multitude of industrial arrangements to be operating across a single enterprise at any given time'.<sup>268</sup> The Australian Newsagents' Federation submitted that 'model' IFAs should be provided as examples.<sup>269</sup> APESMA provided evidence during consultations of the use of 'template' IFAs in the pharmacy industry, a matter that was also observed by the FWO in its audit report of the Queensland Pharmacy Industry.<sup>270</sup> The ACTU, in its supplementary submission, argued that a desire to use IFAs to employ people on the same arrangements is not true individual flexibility.<sup>271</sup>

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<sup>247</sup> MPMCANSW, point 7; NFF, p. 30; VECCI supplementary, p. 18; Ai Group, pp. 17, 68.

<sup>248</sup> AHA, p. 28; BIG, pp. 7, 31–34; CCIWA, pp. 14, 64; MBA, pp. 68–70.

<sup>249</sup> CCIWA, pp. 13, 63.

<sup>250</sup> AHA, 4.13.1. See also BHP, p. 5; CAI, pp.10–11; NFF, p. 30; WA Govt, p.7.

<sup>251</sup> IPA, p. 4.

<sup>252</sup> NRA, p. 7.

<sup>253</sup> ACCI, rec. 7.7.

<sup>254</sup> AMMA, p.10, rec. 8.

<sup>255</sup> CAI, pp. 10–11.

<sup>256</sup> Ai Group, pp. 17, 68; AFEI, p. 34; CCIWA, pp. 13, 63; CAI, pp.10–11; Graham Smith p. 2; VECCI supplementary, p. 18.

<sup>257</sup> IPA, p. 4.

<sup>258</sup> Shipping Australia Ltd, p. 2; AMMA, p. 64; VECCI, p. 18.

<sup>259</sup> ACTU supplementary, p. 10.

<sup>260</sup> ACCI, p. 12.

<sup>261</sup> CAI, pp. 5–6; MPMCANSW, point 7.

<sup>262</sup> NRA, p. 7; NFF, p. 30; PIA, p. 5.

<sup>263</sup> ACCI, p. 12; Australian Newsagents' Federation, p. 16; CCIWA, pp. 13, 63; MBA, p. 8.

<sup>264</sup> TCFUA, p.10; SDA, p. 56.

<sup>265</sup> SDA, pp. 12, 2.

<sup>266</sup> ANRA supplementary, p. 4.

<sup>267</sup> AIER, p. 27.

<sup>268</sup> AMMA, p.58.

<sup>269</sup> Australian Newsagents' Federation, pp. 16–17.

<sup>270</sup> FWO, Qld—*Pharmacy Industry Audit Program Report 2011*—Final Report, 2012 (Commonwealth of Australia, February 2012).

<sup>271</sup> ACTU, supplementary, p. 10.

The ACTU, noting the union movement's opposition to IFAs, argued that the provisions under awards and contracts of employment already provide ample scope for flexible working arrangements and that if further flexibilities are required in a workplace they should be negotiated collectively.<sup>272</sup> The ACTU also indicated concern about reports of IFAs being made a condition of employment and/or clearly not meeting the BOOT, and argued that they should be registered and made publicly available with identifiers removed.<sup>273</sup> The SDA argued for the abolition of IFAs or, failing that, for them to be recorded with FWA.<sup>274</sup>

The FW Act presently provides for IFAs which can, in certain circumstances, modify the operation of a modern award or an enterprise agreement. Any particular IFA must satisfy the BOOT, which has two separate and distinct fields of operation in the FW Act. One concerns these IFAs and the other concerns the approval of enterprise agreements by FWA. The application of the BOOT in the second context is discussed in Chapter 6.

There is limited empirical data about the extent to which employers and employees have agreed to IFAs since the FW Act came into force. A 2011 survey by FWA found that, of the employers surveyed, six per cent had used IFAs, although more than a third of these entities had only made one such arrangement.<sup>275</sup> Around 3.5 per cent of employees surveyed had entered into an IFA. Employers and employees reported that IFAs were generally used to alter arrangements for when work is performed, overtime, penalty rates, leave loading, allowances and leave loading. A significant proportion of the IFAs also included 'other changes'.

Consistent with employer submissions, FWA's survey indicates that the incidence of IFAs is not great. The Panel believes such arrangements should provide a mechanism, with appropriate safeguards, giving employers and employees some flexibility to accommodate the particular circumstances of an individual employer and an individual employee. To this end, the Panel considers the FW Act should be amended in several respects.

Submissions from employer groups argued that the comparatively low incidence of IFAs was the result of the relatively short notice period for their termination. Further, the uncertainty attending the operation or scope of the BOOT has the effect that employers are potentially exposed to claims for underpayment and penalties if attempts were made to satisfy the BOOT, but were found wanting. They also argue that the prohibition on allowing an employer and employee to enter an IFA at the time of engagement is unnecessary and undesirable.<sup>276</sup>

The Panel believes that to create a greater opportunity for employers and employees to make individual flexibility arrangements while ensuring adequate and appropriate protection for the employer and the employee the following should be done:

- The operation of the BOOT, as a minimum, in this statutory context (in contradistinction to the enterprise agreement approval process), should be clarified in certain respects. It should be made clear that the BOOT can be satisfied by the provision of a non-monetary benefit to an employee in exchange for a monetary benefit provided that the non-monetary benefit is proportionate to the monetary benefit foregone and the latter is relatively insignificant. This formulation of the minimum requirements of the BOOT is intended to draw together various elements of the test referred to in an illustrative example provided on page 137 of the EM. Of course, the employee foregoing a monetary benefit need not be an element of the arrangement between the employer and the employee. Many such arrangements, we would expect, would not have this element. However, if it is present, there should be a requirement that the written record of the IFA estimate the value of the monetary benefits foregone.

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<sup>272</sup> ACTU, pp. 37–38.

<sup>273</sup> ACTU, pp. 38, 60.

<sup>274</sup> SDA, pp. 55–56. See also UV, p. 12.

<sup>275</sup> FWA, Surveys of individual flexibility arrangements (IFAs) and provisions under the National Employment Standards.

<sup>276</sup> FW Act, s. 341(3).

- The maximum notice period for unilateral termination of an IFA should be extended to 90 days. If the individual flexibility arrangement is the product of genuine agreement, the Panel sees no need to provide what is in effect a comparatively short termination period as a protective mechanism for the employee.
- The Panel is not persuaded that it is appropriate or desirable for the employer and employee to enter an IFA at the time of the engagement of the employee. This is important. An essential underpinning of our recommendations is that the arrangement is genuinely agreed to by the employee. At the point of engagement, it is extremely unlikely that the employee will genuinely agree by engaging in an assessment of the potential worth of benefits foregone with the benefits gained. At this point, a potential employee may feel he or she has no real choice other than to accept employment on the terms offered. These circumstances would not involve genuine agreement of the type we consider must be associated with IFAs. For the sake of clarity, the Panel considers that ss. 144 and 203 should be amended to include the prohibition currently under s. 341(3) preventing a prospective employer making an offer of employment conditional on entering into an IFA.
- Employers should be required to notify the FWO in writing of any IFA entered into at the time this occurs, providing particulars of the name of the employee, the date of entry and the relevant award or enterprise agreement. The notification could be by email. This would enable the FWO to investigate, as and when required at its absolute discretion, whether the opportunity afforded by the FW Act to make these arrangements was being abused by a particular employer or employers in a particular industry. Notification would have the additional benefit of providing data about the incidence of IFAs. It would be desirable for the FWO to maintain an electronic database of these notifications.
- An employer should have a statutory defence to any claim for underpayment and penalties made after entering into an IFA, namely that the employer had notified the FWO, believed the arrangement satisfied the statutory preconditions (including the BOOT) and there was a reasonable basis for this belief.

**Recommendation 9:** The Panel recommends that the better off overall test in s. 144(4)(c) and s. 203(4) be amended to expressly permit an individual flexibility arrangement to confer a non-monetary benefit on an employee in exchange for a monetary benefit, provided that the value of the monetary benefit foregone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate.

**Recommendation 10:** The Panel recommends that the FW Act be amended to require an employer, upon making an individual flexibility arrangement, to notify the FWO in writing (including by electronic means) of the commencement date of the arrangement, the name of the employee party and the modern award or enterprise agreement under which the arrangement is made.

**Recommendation 11:** The Panel recommends that the FW Act be amended to provide a defence to an alleged contravention of a flexibility term under s. 145(3) or s. 204(3) where an employer has complied with the notification requirements proposed in Recommendation 10 and believed, on reasonable grounds, that all other statutory requirements (including the better off overall test) had been met.

**Recommendation 12:** The Panel recommends that s. 144(4)(d) and s. 203(6) be amended to require a flexibility term to require an employer to ensure that an individual flexibility arrangement provides for termination by either the employee or the employer giving written notice of 90 days, or a lesser period agreed between the employer and employee, thereby increasing the maximum notice period from 28 days to 90 days.

**Recommendation 13:** The Panel recommends that s. 144 and s. 203 be amended to include the prohibition currently under s. 341(3) preventing a prospective employer making an offer of employment conditional on entering into an individual flexibility arrangement.

### 5.3.3 Dispute resolution

Forward with Fairness foreshadowed that the FW Act would provide ‘access to an effective procedure to resolve grievances and disputes’.<sup>277</sup> This is reflected insofar as the objects of the FW Act in s. 3(e) refer to ‘enabling fairness ... at work ... by... providing accessible and effective procedures to resolve grievances and disputes’. The Government’s award modernisation submission in October 2008 provided some detail of the nature of this procedure. It referred to some examples of dispute resolution clauses in agreements under Work Choices which were ‘effectively “an appeal unto Caesar”’; that is, the end point of the dispute was a decision of the local HR Manager’ and accordingly under the FW Act, dispute settlement procedures in agreements would be required to involve either FWA or another person or body independent of the parties and would be required to provide for the representation of employees in the process.

The then Deputy Prime Minister’s Australian Labour Law Association speech in November 2008 (ALLA Speech) indicated that FWA was to ‘play an important role in dealing with the kind of day-to-day disputes that arise not in the bargaining context, but under awards and enterprise agreements’. At the request of one party, FWA would be able to ‘exercise a full suite of alternative dispute resolution powers, such as: calling compulsory conferences of the parties; conciliating; mediating; expressing opinions; informing itself about the circumstances of the dispute and making recommendations’. FWA would be empowered to determine a binding outcome ‘where the parties agree’.<sup>278</sup>

Modern awards are required to include a dispute resolution clause under s. 146 of the FW Act. The AIRC developed a model dispute resolution clause for inclusion in modern awards. It provides that, after the workplace-based steps for dispute resolution are completed, a party may refer the dispute to FWA and may agree on the process to be used by FWA, including mediation, conciliation and consent arbitration. Where the matter in dispute remains unresolved, FWA ‘may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute’. The FW Act only authorises arbitration pursuant to a modern award dispute procedure ‘if, in accordance with the term, the parties have agreed that FWA may arbitrate (however described) the dispute’ (s. 739(4)). Accordingly, FWA may only arbitrate disputes arising under an award where the parties agree.

Under the previous legislation, awards were required to include a model dispute resolution process in the terms specified in the legislation.<sup>279</sup> The model dispute resolution process specified the range of matters it could cover and focused on resolution at the workplace level. If resolution at this level failed, the provisions said that the parties could agree on a provider to undertake alternative dispute resolution, which may have been the AIRC, but severely curtailed the AIRC’s ability to effectively settle a dispute. For example, the AIRC could not compel a person to do anything, including attend a dispute resolution proceeding, and could not arbitrate or make enforceable orders on a dispute, even if the parties agreed that the AIRC should.<sup>280</sup>

A number of employee organisations raised concerns about terms for settling disputes under modern awards. The ACTU argued that under the current terms FWA can only conciliate a dispute about matters arising under the award, not any other disputes that may arise in the workplace, and cannot exercise arbitral powers.<sup>281</sup> Employees could alternatively seek court orders for breaches of award provisions, which is often both costly and time-consuming.<sup>282</sup> The

<sup>277</sup> FWF, p. 12.

<sup>278</sup> ALLA Speech.

<sup>279</sup> WR Act, s. 514 & Division 2, Part 13.

<sup>280</sup> WR Act, s. 706(4).

<sup>281</sup> ACTU, p. 45.

<sup>282</sup> ACTU, p. 45.

ACTU and other unions therefore called for FWA to be able to arbitrate disputes under awards, with the ability to make orders to help prevent further disputes.<sup>283</sup> The AMWU provided several case studies outlining difficulties due to the lack of arbitration.<sup>284</sup> The SDA additionally argued for NES provisions to be subject to arbitration for disputes such as working on public holidays.<sup>285</sup> The Ai Group noted the importance of the dispute settling provisions and its strong support for them.<sup>286</sup> It also argued that allowing compulsory arbitration for disputes under awards would be a retrograde step and lead to parties being more likely to become entrenched in their views.<sup>287</sup>

The FW Act’s reinvigoration of the tribunal’s powers to deal effectively with disputes about safety net entitlements is a benefit to both employees and employers. Employees have the benefit of being able to have disputes that cannot be settled at the workplace level dealt with by FWA, which may exercise a broad range of powers to resolve the matter, including consent arbitration. The FW Act addresses the Government’s concern that previously an employer could simply elect to not attend a proceeding before the tribunal, which meant that employees had little capacity to have disputes about their workplace rights and entitlements heard, let alone settled. This was viewed as particularly problematic for low-paid and other vulnerable workers where an imbalance of power was already evident. The new powers of FWA to settle disputes is also a positive for employers, who have the benefit of access to a low-cost dispute resolution authority equipped with a range of powers to effectively settle disputes.

Chart 5.2 shows the dramatic decrease in dispute notifications to the tribunal as a result of Work Choices, and a corresponding increase in notifications under the FW Act back to levels similar to those before Work Choices. The figures clearly demonstrate FWA’s restored capacity to deal with disputes as the provisions have been more widely utilised than under Work Choices. Clearly there would be additional costs of participating in dispute resolution before FWA for employers who may have previously exercised their right not to attend proceedings. Employer submissions were, however, largely silent on the operation of the dispute settling procedures, and we have taken this to mean that they are generally happy with how the provisions are working.

Chart 5.2—Dispute notifications



Source: FWA Annual report 2009–10 and Annual report 2010–11.

Note: From 2009–10, includes disputes in relation to bargaining, right of entry, general protections disputes not involving dismissal and disputes notified under dispute resolution procedures in an enterprise agreement.

<sup>283</sup> ACTU, p. 45; SDA, pp. 9, 85; TCFUA, pp. 5–8.

<sup>284</sup> AMWU, pp. 55–59.

<sup>285</sup> SDA, pp. 19–20.

<sup>286</sup> Ai Group, pp. 139–140.

<sup>287</sup> Ai Group supplementary, p. 21.

The Panel appreciates the importance of dispute resolution under awards for many employees and that the absence of arbitration may lead to difficulties for employees in some circumstances. Consistent with our view in relation to dispute resolution under enterprise agreements, we are however not inclined to recommend that disputes under modern awards be subject to mandatory arbitration as a last resort. The Parliament's clear intention in relation to disputes under modern awards was for FWA to be able to exercise a range of its powers to assist the parties to resolve their differences, with arbitration only being available with the agreement of the parties. The Panel's view is that it is not clear at this point that the lack of automatic access to arbitration is undermining the ability to resolve disputes to such an extent that a departure from current policy is warranted.

#### 5.3.4 Award variation and review

An issue of consensus emerged between the ACCI and the ACTU on award variation applications being made without proper legislative grounds, which unnecessarily take up FWA's time and that of intervening organisations.<sup>288</sup> The ACTU proposed that such applications should be able to be struck out by FWA on conventional grounds adopted by the courts.<sup>289</sup> The ACCI said that it would welcome discussion on a process allowing FWA to deal with such matters without the need for other parties to become unnecessarily involved.<sup>290</sup>

A number of stakeholders sought amendment to the provisions for four-yearly reviews of modern awards. The Ai Group proposed that any such variations must be necessary to achieve the modern award objective, and that variations should be able to be retrospective in exceptional circumstances.<sup>291</sup> The ACTU argued that FWA should have to take into account pay equity as part of its considerations.<sup>292</sup> A range of other stakeholders sought the ability to vary awards outside the four-yearly review process if special circumstances are met, for example where economic benefits can be demonstrated.<sup>293</sup>

The ACTU advocated for an amendment to the FW Act to clarify that modern awards can supplement the NES, noting that such provisions which were common to some industries were removed in the modernisation process.<sup>294</sup> The AMWU and SDA both supported such an amendment, with the SDA also advocating the capacity for modern awards to deal with industry and state-specific issues.<sup>295</sup>

On recommendations for amendment to the provisions relating to award variations, the Panel notes the Government's policy intention of establishing a stable safety net, including by only providing for four-yearly reviews and otherwise limited capacity for variation. Given that the first four-yearly review of modern awards is still some time away and FWA's interim award review has yet to be finalised, the Panel is unable to justify making recommendations that would upset arrangements for general reviews of modern awards. On calls for increased ability to seek variations outside of general reviews, such a move would be counter to the policy of maintaining a stable safety net and is likely to result in increased speculative claims to deal with short-term concerns of both employers and employees, and the Panel therefore does not recommend amendments in this area.

The Panel does, however, note the mutual concern of the ACTU and the ACCI about the apparent inability of FWA to strike out speculative and unmeritorious award variation applications. The impact of this apparent oversight is that employee and employer representatives that would be affected by such variation applications must intervene in these cases, incurring costs for preparing submissions and being represented in hearings. The Panel's view is that it is

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<sup>288</sup> ACTU, p. 60; ACCI supplementary, pp. 10–11.

<sup>289</sup> ACTU, p. 60.

<sup>290</sup> ACCI supplementary, pp. 10–11.

<sup>291</sup> Ai Group, pp. 55–57.

<sup>292</sup> ACTU, p. 60.

<sup>293</sup> R&CA, p. 15; ATEC, p. 2; BMIA, p. 4.

<sup>294</sup> ACTU, p. 60. See also ASU, pp. 4–5.

<sup>295</sup> AMWU, pp. 50–52; SDA, pp. 46–47.



anomalous that FWA is not able to strike out applications that do not have a proper legislative basis and recommends that legislation be amended to rectify the issue.

**Recommendation 14:** The Panel recommends that the FW Act be amended to expressly empower FWA to strike out an award variation application that is not made in accordance with the FW Act, is frivolous or vexatious or which has no reasonable prospects of success.

The Panel has also become aware of a recent case where FWA found the Ai Group not to have standing to make an application under s. 160 to vary a modern award to remove ambiguity or uncertainty or correct error, as it was not covered by the award.<sup>296</sup> The Ai Group also applied under s. 158 of the FW Act in the same matter and was found to have standing, although ultimately was unsuccessful in its claim. The Panel believes that it is incongruous that an organisation able to make application under s. 158 to vary, revoke or make a modern award, on the basis that it is entitled to represent the industrial interests of employees or employers covered by the award, should not be able to make an application under s. 160. For the sake of consistency and to enable such organisations to effectively represent their members' interests, the Panel recommends that s. 160 be amended accordingly to allow such representation.

**Recommendation 15:** The Panel recommends that s. 160 be amended to provide that the parties entitled to bring an application to make, vary or revoke a modern award under s. 158 can also apply to vary a modern award to remove an ambiguity or uncertainty.

## 5.4 Minimum wages

Forward with Fairness provided that FWA would determine the minimum wage 'in an open and transparent process conducted once a year', taking into account a range of economic and social factors. These factors, variously stated, were to include whether the minimum wage was 'fair to Australian working families, promotes employment growth, productivity, low inflation and downward pressure on interest rates' as well as 'the needs of the low paid and the performance and competitiveness of the national economy'.<sup>297</sup> A specialist Minimum Wages Panel was to be established within FWA empowered to commission research on minimum wage variations, and required to publish wage rates to take effect on 1 July each year.<sup>298</sup>

The policy on minimum wages was responsive to the system of minimum wage reviews under Work Choices, which provided for minimum wages to be set by both the Australian Fair Pay Commission and the Australian Industrial Relations Commission, with increases taking effect on varying dates, and under which many pay scales were not reduced to writing and published, creating uncertainty about wages obligations.<sup>299</sup> The processes of the AFPC were also considered to lack transparency, which undermined stakeholders' confidence in how minimum wages were determined under Work Choices.

The FW Act establishes the Minimum Wage Panel under s. 620 to undertake an annual wage review each financial year in accordance with s. 617. In the conduct of the annual wage review the Minimum Wage Panel must ensure that all persons and bodies have a reasonable opportunity to make written submissions for consideration in the review and

<sup>296</sup> [2012] FWA 2556.

<sup>297</sup> FWF, p. 11; PCS.

<sup>298</sup> FWF, p. 3. See also p. 11.

<sup>299</sup> DEEWR submission to the FW Bill inquiry, pp. 17–18.

comment on such submissions.<sup>300</sup> The Minimum Wage Panel must take into account the ‘minimum wages objective’ under s. 284, which provides:

- (1) FWA must establish and maintain a safety net of fair minimum wages, taking into account:
  - a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
  - b) promoting social inclusion through increased workforce participation; and
  - c) relative living standards and the needs of the low paid; and
  - d) the principle of equal remuneration for work of equal or comparable value; and
  - e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

Employer and employee representatives made a range of submissions on the conduct of annual wage reviews by the Minimum Wage Panel. The ACCI called for a requirement that modern awards each be assessed separately so as to be able to consider the particular economic conditions of each sector.<sup>301</sup> The ANRA similarly argued that minimum wages decisions should have greater scope to consider the economic conditions of specific sectors, noting the recent difficult conditions in the retail sector.<sup>302</sup> Some submissions called for greater consideration of the impact of minimum wages on issues such as employment and productivity.<sup>303</sup>

Several employer associations argued that the FW Act must be amended to reduce increases in annual wage review decisions to reflect the proposed increase in compulsory superannuation contributions from 9 per cent to 12 per cent.<sup>304</sup> The Ai Group and NSW Business Chamber & Australian Business Industrial also sought to have the date of effect of annual wage review decisions moved back to allow more time to advise employers of changes.<sup>305</sup>

The ACTU contended that employer complaints of wages being too high, particularly in sectors such as retail and hospitality, were not supported by international comparisons.<sup>306</sup> The ACTU cited the PC’s recent report into the retail industry in support of its arguments, which found that Australian retail wages are low in comparison to the USA and some European countries when factors such as exchange rates and purchasing power are considered.<sup>307</sup> United Voice recommended that the Minimum Wage Panel be required to consider the special needs of part-time and casual workers in making its decision due to the cost of living pressures faced by such workers.<sup>308</sup>

In relation to concerns that the annual wage review process does not adequately take account of economic conditions by industry, we note that FWA’s annual wage review decisions detail extensive consideration of different industry conditions.<sup>309</sup> We also note that the 2010–11 and 2011–12 annual wage review decisions specifically considered differing commencement dates and wage increases for some industries at the request of some employer representatives, which were ultimately rejected by FWA.<sup>310</sup> We therefore see no need to upset existing provisions in this regard.

Chapter 4 includes further consideration of minimum wages, and indicates there is no evidence that the FW Act has substantially altered real minimum wages compared with previous years. While several employer representatives have raised concerns with either the process or outcomes of the annual wage review, the Panel believes the minimum wage objective, outlining the matters which must be considered in the annual wage review, is fulsome and appropriate, and

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<sup>300</sup> FW Act, s. 289.

<sup>301</sup> ACCI, pp. 10, 90.

<sup>302</sup> ANRA, pp. 14–15.

<sup>303</sup> See, for example, ACCI, pp. 10, 90–91; CCIWA, pp. 105–06.

<sup>304</sup> ACCI, p. 11; BCA, p. 73; AHA, pp. 30–32; CCIQ, pp. 6–12.

<sup>305</sup> See, for example, Ai Group, pp. 81–82; NSWBC & ABI, p. 28.

<sup>306</sup> ACTU, pp. 35–36.

<sup>307</sup> Productivity Commission, *Economic structure and performance of the Australian retail industry*, 2011, p. 328, cited in ACTU, pp. 35–36.

<sup>308</sup> UV, pp. 9–10.

<sup>309</sup> [2010] FWAB 4000; [2011] FWAB 3400; [2012] FWAFB 5000.

<sup>310</sup> [2011] FWAB 3400, p84; [2012] FWAFB 5000, pp69–72.

that the Minimum Wage Panel is the right body to conduct the process. The Panel therefore recommends that no changes be made to the annual wage review process.

However, we note that as this Report was being finalised the FWA Minimum Wage Panel in the 2012 Annual Wage Review decision suggested we could examine legislative provisions that, in the view of FWA, constrain its practical ability to vary minimum wage orders by industry or establishment after the Review has been completed.<sup>311</sup> FWA has necessary powers to vary the application of minimum wage orders, but believes itself to be constrained in hearing argument for variations by the required schedule for the annual minimum wage decision. While recognising this timing consideration could be significant, we were unable to assure ourselves we had sufficient time to fully understand the perceived problems or to explore the implications of the various options for addressing the issue. Since FWA has now brought it publicly to the attention of the Minister and DEEWR, however, we suggest the issue be considered along with those subject to explicit recommendations by this Review.

## 5.5 Equal remuneration

Forward with Fairness committed to giving effect to ‘important workplace rights that are essential to a functioning democracy’ including ‘equal remuneration for work of equal value’.<sup>312</sup> The FW Act ‘strengthens the equal remuneration provisions to include the principle of equal remuneration for work of comparable value’.<sup>313</sup> This includes providing for FWA to make equal remuneration orders and including the equal remuneration principle in the Modern Award Objective and Minimum Wage Objective.

The FW Act included some important changes to the equal remuneration provisions to overcome historical obstacles to successful claims. Prior to the FW Act, 16 equal remuneration applications had been brought in the federal system and all were unsuccessful. This was due to the requirement that the application produce a comparator group that performed work of ‘equal value’<sup>314</sup>, which effectively meant that discrimination on the basis of gender needed to be found for an equal remuneration claim to proceed. The FW Act removed the requirement for applicants to prove discrimination as a prerequisite to an equal remuneration claim, and broadened the provisions to allow comparisons between different, but comparable, work for the purpose of assessing a claim.

The policy behind including work of ‘comparable’ value in the equal remuneration principle was:

- to enhance the scope and effectiveness of the equal remuneration provisions by removing historic obstacles to successful claims in the federal jurisdiction
- to provide for consistency with equal remuneration principles in New South Wales, Queensland, Western Australia, South Australia and Tasmania
- to allow work traditionally performed by women to be assessed against comparable work traditionally performed by men to identify gender-based variations, without the need to establish discrimination on the basis of sex.<sup>315</sup>

A number of employer associations sought changes to the equal remuneration provisions, mainly to increase the hurdles before an equal remuneration order can be made by FWA. Unions and other advocates generally welcomed the amendments to the provisions under the FW Act and sought some further strengthening. In its submission the ACTU noted that the inclusion of ‘comparable value’ in the work value test under Part 2-7 facilitated the recent successful equal remuneration case brought by the ASU for social and community sector workers.<sup>316</sup> The AHRC noted the important role equal remuneration orders can have in addressing the gender pay gap and argued that the provisions be

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<sup>311</sup> [2012] FWAFB 5000 at [283]–[285].

<sup>312</sup> FWF, p. 12.

<sup>313</sup> SRS.

<sup>314</sup> WR Act, Part 12, Division 3.

<sup>315</sup> DEEWR submission to the FW Bill inquiry, pp. 46–47. See also EM, p.189.

<sup>316</sup> ACTU, pp. 55.

amended to clarify that there is no requirement for a male comparator to make an equal remuneration order.<sup>317</sup> The WFPR recommended a series of changes to further strengthen pay equity under the legislation, including making it an explicit objective in the consideration of modern awards, enterprise agreements and minimum wage panel deliberations.<sup>318</sup>

By comparison the ACCI argued that there should be a requirement for a male and female comparator to ensure disparities in wages are directly due to gender<sup>319</sup>, and the Ai Group argued for a requirement that FWA must be satisfied that the unequal remuneration is due to gender-based discrimination.<sup>320</sup> Other employer representatives sought a requirement that there be comparators with other groups of employees,<sup>321</sup> and the Ai Group and AFEI sought the removal of 'comparable' from the test.<sup>322</sup> ACCI and Ai Group further argued that orders should only be sought for individual workplaces.<sup>323</sup>

On 1 February 2012 FWA handed down its decision in the equal remuneration case for the social and community services sector (SACS).<sup>324</sup> The decision awarded wage increases of between 19 and 41 per cent to 150,000 of Australia's lowest paid workers. As part of the decision, FWA has ordered that the wage increases be phased in over an eight-year period starting on 1 December 2012, to be paid in nine equal instalments ending on 1 December 2020. The decision also provides for a loading of 4 per cent, to be phased in over nine equal instalments, in recognition of impediments to bargaining in the industry and to provide national consistency with Queensland rates. The equal remuneration application for the social and community services sector was the first successful claim in the federal jurisdiction.

As an example of the impacts of the decision, a SACS classification level 4.1 worker, who helps people with mental illness, children and young people needing out of home care and people living with a disability, is currently paid \$42,979 per year. When fully implemented, their pay will be about \$55,000 in today's terms. By 2020 they will have also received an additional 4 per cent loading on top of this amount.

The Australian Government made a commitment of over \$2 billion to fund the Commonwealth's share of the wage increases awarded by FWA. The Victorian Government committed \$400 million over four years and the Tasmanian Government committed \$3 million in 2012–13 and \$12 million over the forward estimates to 2015–16. Estimated costs of the decision are unavailable for the remaining jurisdictions and for employers. It should be noted that the exact cost of the decision to governments and service providers will not be clear until FWA hands down its final order giving effect to the decision.

While noting the concerns of employers about the equal remuneration provisions, the Panel is not convinced of the need to amend the existing provisions. There has only been one case finalised under the provisions and while some employer submissions indicate a level of concern with the decision, the Panel is not convinced that it departs from the intended operation of the legislation. Relevant submissions of employee representatives and others were highly supportive of the provisions and at least one supplementary submission noted that the changes sought by some of the employer representatives would have meant that the social and community sector's pay equity case would most likely not have been possible.<sup>325</sup> The Panel therefore declines to make any recommendations about the equal remuneration provisions.

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<sup>317</sup> AHRC, p. 5.

<sup>318</sup> WFPR, p. 11.

<sup>319</sup> ACCI, p. 15. See also AFEI, p. 28.

<sup>320</sup> Ai Group, pp. 83–87.

<sup>321</sup> CCIWA, pp. 91–92; NSWBC & ABI, p. 65.

<sup>322</sup> Ai Group, pp. 85–87; AFEI, p. 28.

<sup>323</sup> ACCI, p. 15; Ai Group, pp. 85–87.

<sup>324</sup> [2012] FWAFB 1000.

<sup>325</sup> ASU supplementary, pp. 2–6.

## 6 Enterprise bargaining and agreement making

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### 6.1 Introduction

This chapter examines the operation of Part 2-4 of the *Fair Work Act 2009* (FW Act).

Forward with Fairness provided that '[c]ollective enterprise agreement making and democracy' would be 'the heart' of Labor's industrial relations system. Enterprise bargaining was considered to be 'the best way to ensure working arrangements are tailored to suit the needs of an individual business and its employees', to deliver benefits to employees above and beyond the safety net, and to be the most efficient and productive form of workplace arrangements for business.<sup>326</sup> Further, the FW Act was intended to provide 'a fair and simple framework'<sup>327</sup> for achieving this. These aims are expressed in s. 3(f) of the FW Act, which says:

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by: ...

f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

As noted elsewhere in the Report, the principal focus in the Review is whether the FW Act is achieving its objectives and whether it can be improved. However, in light of our responsibility to meet the requirements of a post-implementation review, we must make a direct comparison between the FW Act and the preceding Work Choices legislation, and it is necessary for us to identify the 'problem that the regulation was intended to address'. The provisions of Part 2-4 were introduced to address a number of problems identified by the Government with the previous bargaining and agreement making framework. The problems identified were as follows. First, that framework favoured individual statutory agreements over collective agreements. For some employees this resulted in lower wages and worse conditions. The Panel examines this problem and the impact of the FW Act in addressing this in 6.2. Second, the previous system did not positively facilitate bargaining at the enterprise level when a majority of employees wanted it, and did not provide a general mechanism for regulating bargaining conduct.<sup>328</sup> We examine the impact of the FW Act in addressing this in 6.3. Third, Work Choices contained complex and prescriptive regulation about agreement types, content and approval, which hindered agreement making, reduced employees' capacity to be represented in the workplace and led to agreement making outside the statutory scheme. We examine the impact of the FW Act in addressing this in 6.4. Fourth, Work Choices allowed employers to unilaterally determine the terms and conditions that would apply in a greenfields agreement. The Panel examines the impact of the FW Act in addressing this in 6.5.

Some stakeholders, particularly unions, expressed general support for the enterprise bargaining and agreement making regime in the FW Act.<sup>329</sup> The ACTU noted that major employers who had previously refused to bargain have successfully concluded enterprise agreements since the FW Act commenced.<sup>330</sup> The BCA noted that the bargaining model and good faith bargaining obligations in the FW Act avoid many of the pitfalls of similar legislation in international jurisdictions, such as being overly prescriptive and technically complex.<sup>331</sup>

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<sup>326</sup> FWF, pp. 3, 13.

<sup>327</sup> DEEWR submission to the FW Bill inquiry, p. 16.

<sup>328</sup> See Appendix B for a further description of the nature and extent of the problems with the previous bargaining and agreement making framework to which 6.3, 6.4 and 6.5 relate.

<sup>329</sup> See, for example, ACTU, p. 40; ASU, p. 15; SDA, p. 4; SA Government, p. 14.

<sup>330</sup> ACTU, p. 40.

<sup>331</sup> BCA, p. 35.

Other stakeholders, primarily employer groups, were critical of aspects of Part 2-4. The Ai Group said there should be a return to ‘voluntary bargaining’.<sup>332</sup> AMMA argued that workplaces should have the capacity to opt out of the laws entirely via a two-thirds majority vote of employees in favour of self-regulation, and described the advantages of a ‘direct relationship’ approach.<sup>333</sup> Some employers called for a return to statutory individual agreement making<sup>334</sup> or the reintroduction of non-union enterprise agreements at the election of the employer.<sup>335</sup>

Forsyth and Stewart submitted that, notwithstanding an increase in enterprise agreement ‘making’ in line with long-term trends, there has been little impact on collective bargaining, which is usually limited to large, unionised workplaces in the public sector and some private sector industries.<sup>336</sup> Consistent with this observation, some employer groups suggested that little bargaining or agreement making occurs in the industries they represent.<sup>337</sup>

The Panel has taken note of all submissions on the nature of enterprise bargaining and agreement making under the FW Act. These submissions have ranged far and wide over the scope and rationale of collective bargaining as a means of workplace regulation. However, we recognise that the current form of enterprise bargaining and agreement making as embodied in Part 2-4 of the FW Act, with its mechanisms of majority support determinations and good faith bargaining obligations, lies at the very heart of this new statute. These mechanisms were introduced to overcome specific problems with previous regulatory regimes. To the extent that it is possible to assess their performance after only two years of operation, we consider that the measures in Part 2-4 have been largely successful in addressing those problems. We are not persuaded to make wholesale change. For example, we do not recommend revisiting prior systems of voluntary bargaining or individual statutory agreements. However, we are nonetheless focused upon the operation and effectiveness of the current scheme.

## 6.2 Individual statutory agreements

Forward with Fairness unequivocally stated that ‘AWAs and statutory individual contracts will not be a part of Labor’s fair and balanced workplace laws’.<sup>338</sup> Consistent with the policy, the FW Act makes no provision for statutory individual agreements but instead primarily provides for individual flexibilities through the use of individual flexibility arrangements (IFAs). We have examined the role and operation of IFAs separately in Chapter 5. Here we examine the impact of eliminating statutory individual agreements in favour of a collective enterprise bargaining system.

### 6.2.1 AWAs under Work Choices

The Work Choices agreement making framework included individual statutory agreements. An employer could require an employee to enter an AWA as a condition of an offer of employment. When an AWA was in force, it excluded the operation of all other instruments that would otherwise have applied to the employee, such as a relevant award or a collective agreement.

Initially, Work Choices did not use awards as the benchmark for agreement content. Instead, five statutory minimum conditions applied. A prescribed list of ‘protected award conditions’ relating to rest breaks, leave loading, penalty rates, allowances, bonuses and public holidays which would otherwise have applied could be expressly excluded or modified by the AWA. In 2007, the introduction of the fairness test meant that AWAs were required to be assessed as providing fair compensation to the employee for the removal of protected award conditions. However, as detailed further in Appendix B, the Government considered that the fairness test did not provide adequate protections for employees.

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<sup>332</sup> Ai Group, pp. 17, 78.

<sup>333</sup> AMMA, pp. 9, 44.

<sup>334</sup> See, for example, Ai Group, pp. 16, 40.

<sup>335</sup> See, for example, ACCI, p. 103; IPA, p. 3.

<sup>336</sup> Forsyth and Stewart, p. 11.

<sup>337</sup> PIAA, p. 3; BIG, p. 3; BMIAA, p. 4.

<sup>338</sup> FWF, p. 3.

## 6.2.2 The problem with AWAs

As noted above, it was the Government's clear policy intention to abolish AWAs. For the purposes of the post-implementation review, we are required to identify the 'problem' that the Government intended to address in doing so. The policy was intended to address the problem, as identified by the Government at the time, that the previous framework promoted individual statutory agreements over other forms of workplace regulation, which resulted in lower wages and worse conditions for some employees, particularly vulnerable employees. The problem that the Government intended to address is further described below.

## 6.2.3 Coverage of AWAs under Work Choices

### Proportion of employees covered

The former Workplace Authority and the Australian Bureau of Statistics are the two main sources of statistics on the number of employees paid according to an AWA.

When the ABS conducted the employee earnings and hours survey in May 2006, shortly after the introduction of Work Choices, it estimated that federally registered individual agreements (AWAs) covered 2.9 per cent of employees (compared to 19.0 per cent on awards only, 41.2 per cent on a collective agreement and around 37 per cent on another type of individual agreement, such as a state registered individual agreement or unregistered agreement).

In comparison, the Workplace Authority estimated that around 560,000 employees (6.7 per cent of all employees) were on AWAs at that time. The significant discrepancy is a result of the Workplace Authority's methodology, which did not account for dynamism in the labour market (it assumes that no employee on an AWA resigns, gets promoted, is dismissed or otherwise replaced within the three-year period of their AWA). At the end of December 2007, the latest data available, the Workplace Authority estimated that around 880,000 employees (9.6 per cent) were on AWAs. Taking into account other estimates of AWA coverage available at the time and the shortcomings of the Workplace Authority's methodology, DEEWR estimated that around 5 per cent to 7 per cent of Australian employees were covered by an AWA as of February 2008.<sup>339</sup>

### Industry

Data on AWA coverage by industry during the time of Work Choices is not available from ABS. However, DEEWR does provide some data on lodgment of AWAs by industry<sup>340</sup>, which provides an indication of take-up of AWAs by different industries. Take-up of AWAs varied significantly across industries and the distribution across industries differs prior to and after the introduction of the fairness test (see Chart 6.1). At the time, the mining industry represented around 1 per cent to 2 per cent of total employment in the Australian economy, but 7 per cent to 14 per cent of AWAs and ITEAs registered were for employees in the mining industry. This indicates that the mining industry had an above average density of AWAs.

On the other hand, although the Education and Training and Health Care and Social Assistance industry sectors represent a large share of total employment (close to 20 per cent in recent years), only around 6 per cent of AWAs and ITEAs were registered in those sectors. This most likely reflects collective bargaining arrangements in state public services (particularly hospitals) and universities.

### Business size

When analysed by business size, the bulk of AWAs were taken up by larger businesses (those with more than 100 employees). While ABS data indicates that 47 per cent of Australians are employed in businesses with fewer than 20

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<sup>339</sup> DEEWR submission to the inquiry of the Senate Standing Committee on Education, Employment and Workplace Relations into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, pp. 7–8

<sup>340</sup> DEEWR, *Agreement making under the Workplace Relations Act: 2007 to 2009, 2010*.

employees and 70 per cent in businesses with fewer than 100 employees, only around 10 per cent of AWAs were in businesses with fewer than 20 employees and 35 per cent in businesses with fewer than 100 employees.

#### 6.2.4 Effect of AWAs on employee wages and conditions

While there was much anecdotal evidence of the negative impact on some employees' wages and conditions arising from the use of AWAs under Work Choices, comprehensive data is not available as the Office of the Employment Advocate (OEA) ceased collecting such data after a short time. The analysis below is based on the available data.

##### Conditions

As noted above, AWAs could exclude or modify protected award conditions. The rate at which conditions were being removed under Work Choices AWAs was significantly higher than for pre-Work Choices AWAs, most likely because AWAs lodged between the commencement of Work Choices and introduction of the fairness test did not have to meet a no-disadvantage test against the relevant award.

Analysis of a sample of 250 AWAs (out of 6263 lodged between 27 March and 30 April 2006) by the OEA<sup>341</sup> showed that all AWAs removed at least one protected award condition and 16 per cent excluded all protected award conditions. The high rate of removal of protected award conditions continued over 2006. Further data compiled by the Workplace Authority show that 89 per cent of the 1,748 AWAs lodged between April and September 2006 removed at least one protected award condition, 71 per cent excluded four or more, 52 per cent excluded six or more and 2 per cent excluded all protected award conditions. The protected conditions that were removed included shift work loadings (70 per cent), annual leave loadings (68 per cent), removal of rest breaks (31 per cent) and declared public holidays (25 per cent).<sup>342</sup>

Employees on AWAs who had their protected award conditions removed were typically provided with some compensation through increases in their base rate of pay, but this compensation may not have been sufficient to avoid a net loss in take-home pay. In the highly publicised case of Spotlight, employees were offered AWAs that removed a range of protected award conditions with compensation of only two cents per hour.<sup>343</sup> It is likely that many employees, in particular those who relied on such protected award conditions for a significant proportion of their take-home pay, would have been financially worse off on an AWA than if they were under the relevant award.

Many AWAs that did contain protected award conditions provided for those conditions at reduced levels compared with the relevant award.<sup>344</sup> For example, some AWAs retained provision for overtime payments but at lower penalty rate or ordinary time rates, with no subsequent increase in the ordinary rate of pay.

##### Wages

In some instances, employees on AWAs—for example, highly skilled workers in high-paid jobs—were well remunerated. However, a significant amount of research indicates that many other employees, including low-skilled vulnerable workers, were worse off under an AWA than other industrial instruments. The average hourly ordinary time earnings of employees on federally registered individual agreements were higher than those of employees on federally registered collective agreements in only four out of 18 industries.<sup>345</sup>

At a hearing of the Senate Standing Committee on Education, Employment and Workplace Relations in 2008, the former director of the Workplace Authority outlined findings from a sample of 670 AWAs lodged between May and July 2007 that failed the fairness test.<sup>346</sup> They give an indication of the extent to which take-home pay was

<sup>341</sup> Senate Employment, Workplace Relations and Education Legislation Committee, 29 May 2006, pp. 138–139.

<sup>342</sup> The Hon Julia Gillard MP, *AWA Data the Liberals claimed never existed*, media release, 20 February 2008.

<sup>343</sup> See, for example, <http://www.theage.com.au/news/NATIONAL/Job-seeker-offered-twocent-rise-in-AWA/2006/05/24/1148150322539.html>.

<sup>344</sup> DEEWR submission to the inquiry of the Senate Standing Committee on Education, Employment and Workplace Relations into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, p. 14.

<sup>345</sup> DEEWR, RAM 2007–09, p. 35.

<sup>346</sup> Sample of 670 of the 5,259 AWAs that failed the fairness test. 'AWAs paid more than \$500 below the required rate', *Workplace Express*, 21 February 2008.



reduced through the loss of protected award conditions that, in many cases, would have been allowable under Work Choices before the fairness test was introduced. Of the AWAs in the sample, 45 per cent underpaid employees by between \$1 and \$49 per week, 50 per cent by between \$50 and \$199 per week, 5 per cent by between \$200 and \$499 per week, and 0.5 per cent underpaid employees by more than \$500 per week.

There was significant concern about the impact of AWAs on low-skilled vulnerable workers. There were cases of employers unilaterally reducing pay or changing working hours, and pressuring employees to sign individual agreements.<sup>347</sup> One paper outlined the example of a hotel that introduced pro forma AWAs for new staff that removed penalty rates for work on weekends and public holidays by providing a flat rate of pay. This resulted in wage reductions of around \$90 per fortnight for the existing staff who remained on the award, because their working time on weekends and public holidays was reduced.<sup>348</sup>

Take-up of AWAs was relatively high in the Retail Trade industry and also initially in the Accommodation and Food Services industries compared to other industries. ABS data shows that wage growth in the Retail Trade and Accommodation and Food Services industries was lower than the all-industry average after the introduction of Work Choices.<sup>349</sup> This reflected the continuation of a long-term trend.<sup>350</sup> The proportion of managerial employees in the Retail Trade and Accommodation and Food Services industries is approximately 20 per cent, compared to 34 per cent overall. In light of this, it is likely that the increased use of AWAs in those industries was not concentrated among managerial employees but extended to lower paid employees.

AWAs could be made under the regulatory regime before Work Choices, for which much greater safeguards existed. Even so, a study by Peetz and Preston based on an unpublished ABS survey in May 2006<sup>351</sup> found that:

- median AWA earnings in 2006 were 16.3 per cent below median earnings for collective agreement employees (15.4 per cent for non-managerial men and 18.7 per cent for non-managerial women)
- median earnings for non-managerial workers on AWAs grew by 7.9 per cent between 2004 and 2006 compared with 9.9 per cent growth over the same period for workers on collective agreements
- the wage gap between AWAs and collective agreement employees was greater in smaller organisations, with the disparity widening the smaller the organisation, and greater for women than for men
- wages of labourers and related workers<sup>352</sup> on AWAs were 17 per cent lower than wages of workers on collective agreements, with the most disadvantaged group being female labourers and related workers (26 per cent lower)
- AWA rates were only higher than collective agreement rates in communication services (50 per cent), government administration and defence (33 per cent), finance and insurance (22 per cent), and retail trade (18 per cent—reflecting the structure of awards and agreements in the industry).

Further, there was evidence that in many industries characterised by low skilled, low paid employment, such as the cleaning and retail trade, the shift towards individual agreements on a ‘take it or leave it’ basis expanded managerial prerogative.<sup>353</sup>

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<sup>347</sup> C Sutherland, *Agreement-making under WorkChoices: the impact of the legal framework on bargaining practices and outcomes*, Work and Employment Rights Centre, Monash University, Melbourne (commissioned by the Victorian State Government), 2007; South Australian Industrial Relations Commission, 2007, *Inquiry into the impact of Work Choices and the independent contractors legislation on South Australian workplaces, employees and employers*, Adelaide (in response to a ministerial direction from the South Australian Government); *Glenn Jordan v Mornington Inn Proprietary Limited* [2007] FCA 1384 (12 September 2007); *Smith v Granada Tavern & Ors (No.3)* [2007] FMCA 1548 (19 September 2007); *Brobbel v Darrell Lea Chocolate Shops Pty Ltd* [2008] FMCA 714 (13 June 2008); *Smith v Zinifex Australia Limited* [2008] FCA 532 (24 April 2008); *Smith v Prescott & Ors* [2008] FMCA 1672 (15 December 2008).

<sup>348</sup> P Stanton & S Young, ‘Workers, corporations and community: facing choices for a sustainable future’, *Proceedings of the 22nd Conference of the Association of Industrial Relations Academics of Australia and New Zealand*, p. 238.

<sup>349</sup> ABS, *Labour price index, Australia, March 2012*, 2012 (ABS Cat. No. 6345.0).

<sup>350</sup> See Chart E.1 in Appendix E.

<sup>351</sup> D Peetz & A Preston, *AWAs, collective agreements and earnings: beneath the aggregate data*, Department of Innovation, Industry and Regional Development, Victoria, March 2007, pp. i–iv.

<sup>352</sup> ABS ASCO classification.

<sup>353</sup> B Ellem, M Baird, R Cooper & R Lansbury, ‘“Work Choices”: myth making at work’, *Journal of Australian Political Economy*, vol. 56, December 2005, pp. 13–31; EM, p. xxxi.

## 6.2.5 Industry breakdown of AWAs and the fairness test

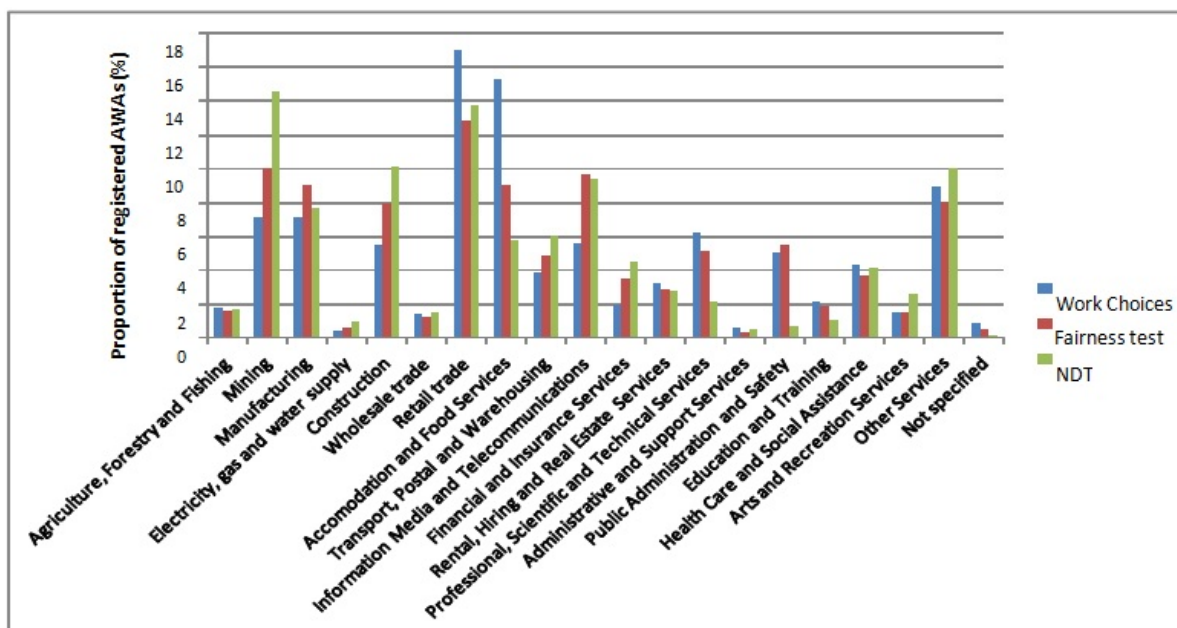
Table 6.1—AWAs under Work Choices, pre- and post-fairness test

	Work Choices pre-fairness test		Work Choices post-fairness test	
	Total	Per month	Total	Per month
Retail	22,397	5,333	35,191	3,302
Accommodation and Food Services	20,081	4,781	24,786	2,325

Source: *Agreement making in Australia under the Workplace Relations Act: 2007 to 2009*, DEEWR.

Table 6.1 demonstrates that after the introduction of fairness test the number of AWAs lodged per month for employees in the Retail Trade and Accommodation and Food Services industries fell below pre-fairness test levels. Data from the Workplace Agreements Database displayed in Chart 6.1 shows other changes in the distribution of take-up of AWAs across industries due to the introduction of the fairness test. It may be that the introduction of the fairness test made AWAs less appealing to employers who were using them as a means to reduce conditions, because the capacity to remove protected award conditions without some compensation was reduced. This was observed in practice for some industries, such as Retail Trade and Accommodation and Food Services.

Chart 6.1—AWA and ITEA coverage, by industry, 2007 to 2009



Source: *Agreement making in Australia under the Workplace Relations Act: 2007 to 2009*, DEEWR.

The suggestion that employers in the Retail Trade and Accommodation and Food Services industries decreased use of AWAs in the latter stages of Work Choices and immediately after the prohibition on making new AWAs, despite having an initially high take-up of them, is supported by ABS data in Table 6.2, which shows methods of setting pay.

Table 6.2 shows that, in May 2006, employees in the Retail Trade and Accommodation and Food Services industries were more likely than other workers to be employed under an award, less likely to be employed under a certified agreement and slightly less likely to be employed under an individual agreement. From May 2006 to August 2008, this overall pattern did not change. However, Retail Trade industry employees went against the all-industry trend and were

more likely to be employed under an award in 2008 than they were in 2006. Over the same time, employees in both industries went against the all-industry trend. In 2008 they were more likely to be employed under a certified agreement and less likely to be employed under an individual agreement than they had been in 2006.

This data suggests that employers in these industries who ceased using AWAs after the introduction of the fairness test or introduction of the Transition Act instead started using collective agreements.

**Table 6.2—Methods of setting pay, by industry, by year**

Sector	Award (%)			Collective agreement (%)			Individual agreement (%)		
	2006	2008	Change	2006	2008	Change	2006	2008	Change
Retail	28.7	28.9	+0.2	34.8	36.2	+1.4	32.1	31.1	-1.0
Accom	57.2	50.3	-6.9	8.8	19.3	+10.4	30.6	28.4	-2.2
All	19.0	16.5	-2.5	41.2	39.8	-1.4	34.8	38.7	+3.9

Source: ABS (2010), *Employee earnings and hours, Australia, May 2010* (Cat. No. 6306.0)

Notes: This does not include individuals who are working proprietors of an incorporated business. 'Individual agreement' includes both registered and unregistered agreements.

**Table 6.3—AWAs under Work Choices, pre- and post-fairness test, by industry**

	Work Choices pre-fairness test		Work Choices post-fairness test	
	Total	Per month	Total	Per month
Mining	9,505	2,263	27,382	2,569
Construction	7,296	1,737	21,698	2,035
Information Media and Telecommunications	7,299	1,738	26,716	2,506

Source: *Agreement making in Australia under the Workplace Relations Act: 2007 to 2009*, DEEWR.

In contrast to the findings for low skilled workers, Table 6.3 demonstrates that the use of AWAs in industries such as Mining, Construction and Information Media and Telecommunications increased significantly even after the introduction of the fairness test, both in number of AWAs lodged monthly and share of total AWAs. This suggests that the requirement to meet the fairness test was not an impediment to the making of AWAs in those industries.

The Mining, Construction and Information Media and Telecommunications industries are characterised by highly skilled workers, skills and labour shortages and highly profitable businesses. Compared with employees in the Retail Trade and Accommodation and Food Services industries, employees in these skilled industries would have been in a better position to negotiate pay and conditions well above those in the relevant award. AWAs that removed protected award conditions such as penalty rates but over-compensated employees in ordinary rates of pay would also have had advantages for employers, such as attracting skilled workers and providing labour cost stability over time. Employers benefitting from the mining boom would have been in a better position to afford generous AWAs than would retailers.

It is likely that workers in more highly skilled industries were just as well off, if not better off, under AWAs than under the relevant award. Under these conditions, one would not have expected the introduction of the fairness test to affect the number of AWAs lodged, and this was the case. The increase in the use of AWAs after the fairness test was introduced suggests there was a rush to sign off on AWAs before the making of new AWAs was prohibited.

In summary, only a small proportion of employees, around 5 per cent to 7 per cent, were covered by an AWA at the time the making of new AWAs was prohibited. For those on AWAs, the evidence of widespread removal of protected award conditions suggests that a significant number were worse off compared with the relevant award, with some

workers in some industries particularly worse off, but that some highly skilled workers would have been better off than the relevant award.

#### **6.2.6 Prohibition on making new AWAs and introduction of National Employment Standards**

From 28 March 2008, the Transition Act prohibited making new AWAs, implementing the Government's commitment to abolishing AWAs. Existing AWAs remained in effect until they were terminated or replaced. The changes only affected the small proportion of the workforce that was covered by an AWA and the employers who employed them.

##### **Impact on employees**

There was no impact of this change on employees who were not previously employed under an AWA.

The impact for employees who were previously employed under an AWA depended on whether their AWA provided them with wages and conditions that were higher or lower than the safety net. It also depended on what type of arrangement they were subsequently employed under.

Due to transitional arrangements, some employees remained on AWAs. It is not possible to identify how many employees are in this category; however, Appendix C, which deals with the Transition Act, contains some detail about the termination of these instruments. The FW Act impacted these employees by requiring their employer to apply the National Employment Standards (NES) and current minimum wage rates, notwithstanding that the AWA provided to the contrary. This impact was felt only by employees whose AWA provided for lower wages and/or conditions than the FW Act minimum wages and NES requirements.

For those employees who are no longer employed on an AWA, there are a number of possible outcomes.

Some employees may continue to be employed on individual common law contracts. For those employees who were employed on AWAs that provided them with take-home pay at or above the safety net, such as those in Mining, Construction and Information Media and Telecommunications, their beneficial conditions were able to continue under common law arrangements. There is nothing in the FW Act that prohibits employment conditions above the safety net. Further, for employees earning above \$100,000 any applicable modern award can be excluded under the high-income employee provisions. However, for those employees whose AWAs provided wages and conditions that were lower than the FW Act safety net, a common law contract cannot operate to maintain those lower conditions. The FW Act NES and the relevant modern award would apply as a minimum, above which additional benefits could be contained in the common law contract.

Some employees may have shifted from AWAs to be employed only on the FW Act safety net, consisting of the NES and the relevant modern award. For those whose AWA provided for conditions below the safety net, the move to the safety net of the NES and the relevant modern award made them better off. Where an employee's AWA provided flexible working arrangements, individual flexibility arrangements (IFAs) under modern awards enable variation of the operation of some provisions in order to meet the genuine needs of the employee and employer covered by the award. In 5.3 we have examined the operation of IFAs in meeting this objective.

Some employees may have shifted from AWAs to be covered by enterprise agreements. For employees on AWAs that were above the safety net, there is nothing to preclude such conditions being replicated in an enterprise agreement. For those whose AWA provided for conditions below the safety net, the enterprise agreement will have resulted in improved conditions, as it is an approval requirement for enterprise agreements that each employee is better off overall than they would be under the relevant modern award. Enterprise agreements may also contain significant flexibilities for employers. These flexibilities can be either positive or negative for employees. In some cases, the flexibilities are mutually beneficial (for example, a compressed working week may provide an employee with an extra day away from work, and provide the employer with access to longer hours of work from that employee without the requirement to pay penalty rates for overtime). In other cases, they involve immediate detriment to employees, such as the forfeiting of an entitlement to take a break from work after a specified period of time.

The overall impact on employees from the abolition of AWAs cannot be quantified; however, some facts can be confidently stated. Because of the limited coverage of AWAs, the overall impact upon employees has been small. Of the relatively few employees on AWAs, the extent to which they gained or lost from moving to the Fair Work system varied. More highly skilled workers, such as those in Mining, and Information Media and Telecommunications, likely received little or no benefit or detriment from the abolition of AWAs. On the other hand, it is likely that low-skilled vulnerable workers who lost penalty rates and other protected award conditions under Work Choices AWAs have benefited.

### Impact on employers

Changes in employee wages and conditions from moving from AWAs under Work Choices to FW Act arrangements obviously had a corresponding impact on employers. Employers who used AWAs that were more generous than the safety net, such as those in highly skilled industries, would likely have incurred no noticeable change in labour costs. On the other hand, employers who used AWAs that were less generous than the safety net, such as those in low-skill industries, may have incurred increases in labour costs from increasing wages to meet the new safety net conditions, such as paying penalty rates for weekend and overtime work.

From a simplistic point of view, the impact above has no direct net economic benefit or cost. It is a transfer of wealth from business profits to employee wages. The transfer is likely to have been non-existent or negligible in businesses in high-skill industries that used AWAs but more noticeable in businesses in low-skill industries that used AWAs. Overall, because of the limited use of AWAs across the labour market and the transfer only being significant in low-skill industries, the total transfer is likely to be very small.

There is anecdotal evidence that many employers who previously used AWAs have moved to enterprise agreements. In the early days of operation of the FW Act, and indeed prior to its commencement, several employers who had previously used AWAs commenced enterprise bargaining.<sup>354</sup> For example, in September 2010 the Commonwealth Bank of Australia and the Finance Sector Union made the first enterprise agreement since the bank commenced using AWAs eight years earlier.<sup>355</sup> Prior to the FW Act, Telstra had favoured AWAs under both Work Choices and the WR Act and refused to enter negotiations for a collective agreement. In May 2009, Telstra returned to the bargaining table, with an enterprise agreement covering the Communications Electrical Plumbing Union (CEPU) and Community and Public Sector Union (CPSU) resulting in September 2010.<sup>356</sup> Telstra and relevant unions are now negotiating for a single enterprise agreement to replace existing agreements and potentially replace many more individual statutory instruments that are still in force.<sup>357</sup> More recently, it has been reported that BHP Billiton, which had previously utilised individual agreements, has invited its train drivers and operations workers in Port Hedland to nominate their union or another bargaining agent to discuss upcoming pay deals.<sup>358</sup> Overall, the number of enterprise agreements made under the FW Act is higher than the number made under Work Choices. In July 2009, at the commencement of the FW Act, there were 22,371 current collective agreements covering almost 2.05 million employees. As at 30 September 2011, there were 22,769 agreements covering 2.42 million employees.<sup>359</sup>

In Mining, where AWAs were prevalent, anecdotal evidence suggests that in some cases AWAs have continued to operate and in others enterprise agreements have been made. In its submission to the Review, Rio Tinto described the 'wide array' of industrial instruments across its operations, including AWAs still in term, enterprise agreements negotiated either with unions or directly with employees, enterprise and modern awards and common law contracts.<sup>360</sup> It has recently been reported that an industrial relations specialist with the Inpex gas project has foreshadowed that as the expiry dates for AWAs made just prior to commencement of the FW Act approach, unions will seek to negotiate 'really big claims', particularly in offshore dredging and construction. However, the specialist was reported to have said

<sup>354</sup> See Anthony Forsyth, 'The impact of "good faith" obligations on collective bargaining practices and outcomes in Australia, Canada and the United States', *Canadian Labour & Employment Law Journal*, vol. 16, no. 1, p. 45.

<sup>355</sup> 'Relations thaw between CBA and FSU with first enterprise deal in eight years', *Workplace Express*, 14 September 2010; See [2010] FWAA 7467.

<sup>356</sup> 'Telstra workers to vote on deal', *Workplace Express*, 6 August 2010; Telstra Enterprise Agreement 2010–12 [2010] FWAA 7304; see also 'Will new IR laws deliver a union agreement in Telstra?', CPSU, 8 April 2009, <http://www.cpsu.org.au/campaigns/news/12817.html>.

<sup>357</sup> 'Telstra seeks to move workers onto single agreement', *Workplace Express*, 30 April 2010.

<sup>358</sup> 'BHP to start pay talks', *West Australian*, 22 May 2012.

<sup>359</sup> DEEWR, *Trends*, September quarter 2011.

<sup>360</sup> Rio Tinto, p. 7.

that ‘where the project rates and conditions are set at the right level, then agreements can be reached’, citing BHP Billiton and Rio Tinto as being ‘very successful’ at doing so in Western Australia.<sup>361</sup>

### *Flexibility*

Since the introduction of the FW Act, some employers have claimed that the loss of ability to make statutory individual agreements such as AWAs has reduced flexibility.<sup>362</sup> Payment of penalty rates has been raised as an issue.<sup>363</sup> As noted above, penalty rates could be removed under AWAs, initially with no compensation to an employee and, after the introduction of the fairness test, by providing the employee with ‘fair compensation’. Under the FW Act, penalty rates are required to be paid under modern awards. However, the operation of award penalty rate provisions may be varied using an IFA or through an enterprise agreement. Accordingly, there are mechanisms available to employers to arrange their work practices without paying penalty rates—for example, by increasing the base rate of pay to compensate for the reduction in penalty rates—provided that the arrangement leaves the employee better off overall. There may be a cost impact associated with this change for employers who previously cut penalty rates without providing equivalent compensation and who now either pay penalty rates under a modern award or do not pay penalty rates but provide greater compensation to employees for their removal. This is particularly likely to affect those trading at night or on weekends. However, even though there may be some isolated cases where businesses have modified trading hours, there is no evidence of widespread changes in trading hours and other business practices solely to accommodate the move from AWAs to awards or enterprise agreements under the FW Act.

Flexibility is also related to management’s ability to make changes to work practices (such as shift length, rostering and meal times). There is evidence that in some industries AWAs expanded managerial prerogative<sup>364</sup>, thereby permitting management to make unilateral changes to working arrangements. Enterprise agreements and awards contain provisions that limit employers’ ability to make unilateral changes to some work practices by requiring consultation with employees and/or relevant unions. For employers who utilised AWAs to unilaterally impose changes to work practices, the FW Act has resulted in loss of flexibility. This loss of flexibility may have some economic costs if it prevents employers from implementing more productive work practices, but may prevent social costs for workers from unfavourable working conditions. The extent to which employers have suffered loss of flexibility is unknown but, again, with the limited coverage of AWAs any impact on the economy was small.

Further, enterprise agreements under the FW Act themselves provide significant flexibility. DEEWR conducted a comparison of collective agreements made under Work Choices and enterprise agreements made under the FW Act to examine their flexibility. The data from this comparison is contained in Appendix E.

The data demonstrates that the percentage of agreements containing flexible methods of engagement has remained very similar under the FW Act compared to collective agreements under Work Choices, with a small increase in provisions for job sharing and a small decrease in provisions for part-time work. However, the percentage of employees who are subject to provisions for flexible methods of engagement has increased in each category of flexible engagement. Further, there is an overall increase in the incidence of provisions facilitating flexible working arrangements. The increase is most pronounced in respect of:

- provisions that facilitate negotiation of hours (from 16.1 per cent of agreements applying to 18.8 per cent of employees to 41.6 per cent of agreements applying to 68.8 per cent of employees)
- provisions that allow management to alter hours after consultation (from 10.1 per cent of agreements applying to 8 per cent of employees to 28.9 per cent of agreements applying to 30.4 per cent of employees).

The only flexible work practice that has decreased in frequency to any significant degree is the capacity for employees to take breaks at flexible times (from 20.2 per cent of agreements covering 24.4 per cent of employees to 7.6 per cent

<sup>361</sup> ‘Offshore resource projects facing “really big claims” as Work Choices deals expire’, *Workplace Express*, 25 May 2012.

<sup>362</sup> See, for example, AMMA, pp. 52–53.

<sup>363</sup> ‘MasterChef slams Fair Work pay rates’, <http://www.smh.com.au/national/masterchef-slams-fair-work-pay-rates-20120109-1pri2.html>.

<sup>364</sup> B Ellem, M Baird, R Cooper & R Lansbury, “‘Work Choices’: myth making at work”, *Journal of Australian Political Economy*, vol. 56, December 2005, pp. 13–31; EM, p. xxxi.

of agreements covering 8.4 per cent of employees). However, this category of flexibility refers to where an *employee* can determine the time of their break. In contrast, the incidence of provisions requiring breaks to be taken so as to allow for an uninterrupted work flow or continuous running of machines, thereby providing for *employer-driven* flexibility, has increased (from 21.9 per cent of agreements applying to 24.4 per cent of employees to 33.3 per cent of agreements applying to 26.6 per cent of employees).

The incidence of provisions allowing for a loaded hourly rate has also decreased (from 12.6 per cent of agreements applying to 5.4 per cent of employees to 8.3 per cent of agreements applying to 2.8 per cent of employees). However, the incidence of provisions allowing for annualised salaries has increased (from 7.6 per cent of agreements applying to 11.5 per cent of employees to 10.3 per cent of agreements applying to 22.1 per cent of employees).

The impact of these provisions for employers is positive, as they facilitate flexibility within the terms of an enterprise agreement relating to hours of work (for example, allowing employees' hours to be varied after consultation), method of payment (for example, facilitating an annualised salary or a loaded hourly rate rather than payment by the hour, with allowances and loadings in addition) and the timing of breaks (for example, requiring an employee to delay a break until a particular process has been completed).

Accordingly, for employers who utilised AWAs to unilaterally impose changes to work practices there may be economic costs associated with a loss of flexibility. This is partially mitigated by flexibilities available under FW Act enterprise agreements.

#### *Administration costs*

There is no available evidence on the actual administrative costs to employers from the abolition of AWAs.

Administration costs may have changed because of the move from Work Choices to the FW Act; however, whether employers have experienced a benefit or cost will likely depend on the extent to which they engaged in genuine bargaining with employees when negotiating AWAs. Where employers engaged in genuine bargaining, there will likely have been some variation in the AWAs of their workforce. These employers are likely to have benefited from reduced administrative costs because they now have to administer a single agreement or award rather than several AWAs.

There was some evidence that employers did not engage in genuine bargaining with employees under Work Choices. 'Template' AWAs were presented to new employees on a take-it-or-leave-it basis, such as in the case of the aforementioned hotel.<sup>365</sup> For these employers, moving from AWAs to an enterprise agreement may have meant increased administrative costs, as they are now required to engage in genuine bargaining with their workforce whereas previously they were not. Further examination of the impact of the FW Act bargaining framework is contained in 6.3.9.

#### *Conclusion*

Overall, given the small coverage of AWAs, the cost to employers of moving from AWAs to collective agreements or modern awards under the Fair Work system has been relatively small. For employers who utilised AWAs to unilaterally impose changes to work practices there may be economic costs associated with a loss of flexibility, but these are partially mitigated by flexibilities available under FW Act enterprise agreements. The cost has been felt most by those employers who used the system to drive wages and conditions below the award safety net. A key rationale for the introduction of the Fair Work system was to prevent this from occurring.

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<sup>365</sup> P Stanton & S Young, 'Workers, corporations and community: facing choices for a sustainable Future', *Proceedings of the 22nd Conference of the Association of Industrial Relations Academics of Australia and New Zealand*.

## 6.3 Good faith bargaining, majority support determinations and scope orders

### 6.3.1 Introduction

The legislation in place prior to the FW Act did not facilitate bargaining at the enterprise level when a majority of employees wished to do so and contained no general mechanism for regulating bargaining conduct.<sup>366</sup> The FW Act sought to address this by positively promoting good faith collective bargaining at the enterprise level. The EM acknowledged that ‘most employers and employees in Australia voluntarily and successfully bargain collectively’ and that the new bargaining mechanisms introduced by the FW Act were ‘focused on facilitating the bargaining processes in situations where an employer and their employees are unable to successfully bargain together’.<sup>367</sup> This was intended to include workplaces where a majority of employees wanted to bargain collectively and this choice was not respected by their employer.<sup>368</sup>

It was intended that FWA would have discretion over the method used to determine support for collective bargaining—for example, by ‘using evidence of union membership, petitions or a secret ballot of employees’.<sup>369</sup> Good faith bargaining was not intended to ‘require bargaining participants to make concessions or sign up to an agreement where they do not agree to the terms’, but rather to encourage and assist ‘consideration of the issues central to bargaining’ and to assist parties to ‘work efficiently towards making an agreement’.<sup>370</sup> It was intended that parties could take a tough stance in negotiations<sup>371</sup>, with bargaining orders to be available where bargaining went ‘off the rails’.<sup>372</sup>

FWA’s general role in facilitating bargaining is set out in Part 2-4, Division 8 of the FW Act, which prescribes six good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet. These are:

- attending, and participating in, meetings at reasonable times
- disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner
- responding to proposals made by other bargaining representatives for the agreement in a timely manner
- giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative’s responses to those proposals
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining
- recognising and bargaining with the other bargaining representatives for the agreement.<sup>373</sup>

The good faith bargaining requirements do not require parties to make concessions for the agreement or to reach agreement on the terms to be included in an agreement.<sup>374</sup>

The FW Act provides three mechanisms by which an employer can be required to bargain. First, it facilitates the making of a majority support determination where FWA is satisfied that a majority of employees want to bargain.<sup>375</sup> Consistent with the policy, FWA is permitted to use any method it considers appropriate to determine majority support.<sup>376</sup> Second, FWA can make a scope order where bargaining is not proceeding efficiently or fairly because the scope of the proposed

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<sup>366</sup> See Appendix B.

<sup>367</sup> EM, p. xxxi.

<sup>368</sup> FWF, p. 14.

<sup>369</sup> *ibid.*

<sup>370</sup> *ibid.*, p. 15.

<sup>371</sup> PCS, ALLA Speech.

<sup>372</sup> ALLA Speech; FWF, p. 15.

<sup>373</sup> FW Act, s. 228(1).

<sup>374</sup> FW Act, s. 228(2).

<sup>375</sup> FW Act, ss. 236, 237.

<sup>376</sup> FW Act, s. 237(3).



enterprise agreement is not appropriate.<sup>377</sup> Third, FWA can make a low-paid authorisation (see 6.3.8). Where the relevant preconditions are met, FWA can make orders requiring a bargaining representative to comply with the good faith bargaining requirements. It can also make orders where bargaining is not proceeding efficiently and fairly because there are multiple bargaining representatives for the agreement.<sup>378</sup>

The views of both employers and unions on these aspects of the bargaining framework were mixed.

Many unions regarded the good faith bargaining provisions positively, submitting variously that they bring the benefits of bargaining to a wider group of workers, enhance relations between parties and have a positive industrial impact.<sup>379</sup> The ACTU considered that the reach of the new provisions is still being worked out through FWA and court decisions.<sup>380</sup> However, other unions regarded the provisions as having been construed narrowly by FWA so as to render them of limited effect.<sup>381</sup>

Many employers expressed concern about the good faith bargaining requirements, with AMMA stating they were the top concern of its members.<sup>382</sup> The BCA submitted that the need to adjust to the requirements has increased administrative costs, as has an overly bureaucratic approach to many matters by FWA. BCA also submitted that the requirements have not improved the bargaining behaviour of unions, noting that, while remedies exist under the FW Act, employers lack confidence in the timeliness and likely outcomes in the tribunal of these provisions.<sup>383</sup> Rio Tinto considered that the current good faith bargaining provisions have operated effectively.<sup>384</sup> Along with VECCI, they submitted that the current provisions were best left free of further regulation and should be considered on a case-by-case basis by FWA.<sup>385</sup> NSW Business Chamber & Australian Business Industrial submitted that FWA, when faced with a bargaining order application, should instead focus on the substance of the dispute.<sup>386</sup>

The introduction of good faith bargaining requirements and associated bargaining mechanisms constituted a significant change from the collective bargaining regimes of the previous legislation, summarised in Chapter 3. While the IR Act post-1993 allowed orders to be made to ensure parties negotiated in good faith, to promote the efficient conduct of bargaining and to facilitate the making of agreements, these provisions did not require an employer to bargain.<sup>387</sup> In contrast, the regime introduced by the FW Act explicitly requires an employer to bargain where the majority of employees wish to do so.<sup>388</sup>

The Panel is conscious that in the period since the FW Act commenced operation, FWA and the courts have considered and decided many matters relating to good faith bargaining and associated provisions. Different decision-makers have reached different conclusions according to the circumstances of the cases before them. The operation of these provisions is still very much in its infancy and the law as to what conduct is and is not proscribed is far from settled. In our view, in these circumstances there would need to be a strong case for any precipitous legislative change. While we have considered all submissions, we note for completeness that we do not directly address each of them here. For example, we do not deal expressly with submissions that serious breach declarations should be abolished<sup>389</sup>, that good faith bargaining should be extended to third parties<sup>390</sup>, or that current requirements about the provision of information

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<sup>377</sup> FW Act, ss. 238–39.

<sup>378</sup> FW Act, ss. 229–31.

<sup>379</sup> ACTU, p. 43; CPSU PSU, p. 3; CFMEU M&E, pp. 3–4, ANF, pp. 7–8.

<sup>380</sup> ACTU, p. 40, ANF, pp. 7–8.

<sup>381</sup> AWU, p. 6.

<sup>382</sup> AMMA, pp. 87; see also Restaurant and Catering Australia, p. 11.

<sup>383</sup> BCA, p. 36–37.

<sup>384</sup> Rio Tinto, pp. 4, 9–10.

<sup>385</sup> Rio Tinto, pp. 4, 9–10; VECCI supplementary, pp. 5, 22–23.

<sup>386</sup> NSWBC & ABI, p. 55.

<sup>387</sup> *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union* (1995) 59 IR 385; [1995] AIRC 2565 (1 March 1995).

<sup>388</sup> FWF, p. 14.

<sup>389</sup> Ai Group, pp. 18, 75.

<sup>390</sup> See, for example, ANF Vic, pp. 5–9.

should be altered.<sup>391</sup> Our view regarding such submissions is consistent with our general view that, at this early stage of the FW Act's operation, no case for change has been made out.

### 6.3.2 Majority support determinations

Prior to the FW Act, there was no obligation on employers to bargain collectively, even if such an arrangement was fully supported by employees. Majority support determinations require an employer to bargain when a majority of employees wish to do so. They are a significant feature of the bargaining regime. Of the three compulsory 'gateways' to the application of the good faith bargaining obligations, they have been the most widely used. In the first two years of the FW Act, there were 204 majority support determination applications, compared with 79 scope order applications and three low-paid authorisation applications.<sup>392</sup> Chart 6.2 contains further data about majority support determination applications and determinations made since July 2010.

Some unions expressed support for majority support determinations.<sup>393</sup> Forsyth and Stewart observed that majority support determinations have generally been an effective way to make employers bargain, particularly in light of the flexibility provided to FWA in determining whether there is majority support. They questioned, however, whether this simply gets an employer to the bargaining table as opposed to facilitating the conclusion of an agreement.<sup>394</sup>

Many employer groups argued that a secret ballot process should be required to determine support for bargaining,<sup>395</sup> and that an employer should be permitted to oppose the application by putting a 'no' case.<sup>396</sup> Some also submitted that employers should be permitted to apply to reassess majority support after protracted bargaining,<sup>397</sup> or that a majority support determination should expire after a specified period unless extended by agreement.<sup>398</sup>

The availability of majority support determinations has demonstrably encouraged enterprise bargaining.

DEEWR reviewed all of the available majority support determination decisions on the FWA website as at 17 May 2012. The decisions are listed in Appendix E. In total the decisions related to 49 matters. Of those 49 matters:

- thirty-six determinations were made, and in three other cases the employer agreed to bargain, meaning that bargaining could commence in 80 per cent of cases
- no majority support was found in seven, or 14 per cent, of cases.<sup>399</sup>

There is some evidence that employers who had not previously bargained under Work Choices (and in some cases the WR Act) have been brought to the bargaining table by a majority support determination. After a majority support determination was made in respect of IT workers at IBM in Sydney, enterprise bargaining commenced with that employer for the first time anywhere in the world.<sup>400</sup> Similarly, a majority support determination was made and bargaining commenced at Cochlear 'after several years of trenchant opposition by the company to collective bargaining',<sup>401</sup> although that bargaining has not resulted in an agreement being made.

Further, in some cases a union informally indicating majority support for bargaining has led to voluntary bargaining without the need to make a majority support determination application.<sup>402</sup>

<sup>391</sup> ACTU, p. 61; TCFUA, pp. 17–18; TWU, p. 12; AIPA, p. 4 and Qantas supplementary, pp. 1–2.

<sup>392</sup> FWA, Annual report 2009–10, p. 75, and Annual report 2010–11, p. 80.

<sup>393</sup> See, for example, APESMA, p. 16; ANF, p. 9.

<sup>394</sup> Forsyth and Stewart, p. 12.

<sup>395</sup> Ai Group, pp. 17, 70–71; Rio, p. 4; BCA p. 40; BHP, p. 10; NSWBC & ABI, p. 55; Business SA, p. 8.

<sup>396</sup> BHP, p. 10.

<sup>397</sup> Ai Group, p. 71; BCA pp. 40–41.

<sup>398</sup> BHP, p. 10.

<sup>399</sup> In the remainder of cases, the determination was refused based on other reasons, such as the eligibility of the bargaining representative to make the application.

<sup>400</sup> Creighton and Stewart, *Labour Law*, Federation Press, 2010, p. 745.

<sup>401</sup> *ibid.*

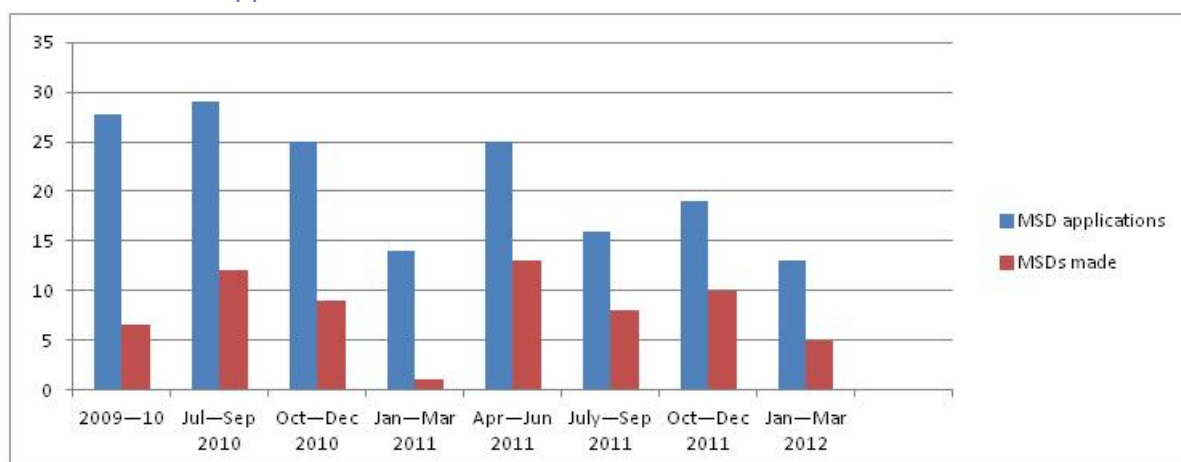
<sup>402</sup> See, for example, ANF, p. 9.

There is also anecdotal evidence that the mere availability of a majority support determination has encouraged bargaining.<sup>403</sup> In a speech to the Industrial Relations Society of Victoria in October 2010, Westpac’s then head of employee relations and policy said that the FW Act had encouraged Westpac to return to enterprise bargaining after a five-year pause. Westpac was ‘not particularly excited’ at having to face a majority support determination if it refused to bargain, and finalised an agreement in 2010.<sup>404</sup> It is also possible that the availability of majority support determinations to compel bargaining contributed to the decision of the companies referred to in 6.2 to voluntarily commence doing so.

Chart 6.2 displays the number of majority support determination applications compared to the number of majority support determinations made. Well over half of these applications do not result in majority support determinations being made. While FWA data does not indicate the reason for this, it is reasonable to infer that in at least some cases the lodgment of a majority support determination application has itself led to an employer agreeing to bargain, thereby removing the need to pursue the application.

The FW Act provides that FWA may determine whether a majority of employees want to bargain using any method FWA considers appropriate.<sup>405</sup> Forsyth identifies FWA’s discretion in determining majority support as a reason majority support determinations are proving so effective, in contrast with the systems reliant on employee ballots (such as in Canada and the US), as it limits the opportunities for ‘union busting’ and other types of opposition to bargaining.<sup>406</sup> The DEEWR decision analysis referred to above found that petitions, surveys and other methods for determining majority support were used in 71 per cent of cases, whereas secret ballots were used as the first or final method for determining majority support in 22 per cent of cases.

Chart 6.2—MSD applications and MSDs made



Source: Fair Work Australia, *Quarterly report*, Report to the Minister Jul-Sep 2010, Sep-Dec 2010, Jan-Mar 2011, Apr-Jun 2011, Jul-Sep 2011, Oct-Dec 2011, Jan-Mar 2012. Figures for 2009-10 represent the quarterly average for the financial year 1 July 2009 to 30 June 2010. FWA advised that 22 majority support determinations were made in that year.

Many employers asserted that the method employed to determine majority support should be a mandatory secret ballot. However, little evidence has been advanced to suggest that alternative voting methods have produced skewed or unrepresentative results. Ai Group provided a case study involving BlueScope Steel Lysaght, in which the AWU based a majority support determination application on a petition signed by 30 of 48 employees. Bluescope claimed the employee signatories had been misled and presented further petitions and material opposing the AWU petition. FWA ordered a secret ballot, in which only two employees voted in favour of bargaining, and the application was

<sup>403</sup> See, in addition to the examples that follow, *LHMU v Coca Cola Amatil (Aust) Pty Ltd* [2009] FWA 153, [6].

<sup>404</sup> ‘Westpac negotiator gives inside account of bargaining’, *Workplace Express*, 13 October 2010. See Westpac Group Enterprise Agreement 2010 [2010] FWA 4996.

<sup>405</sup> FW Act, s. 237(3).

<sup>406</sup> Anthony Forsyth, ‘The impact of “good faith” obligations on collective bargaining practices and outcomes in Australia, Canada and the United States’, *Canadian Labour and Employment Law Journal*, vol 16, no. 1, 2011, p. 37.

dismissed.<sup>407</sup> BHP Billiton referred to a majority support determination made in July 2010.<sup>408</sup> Again, the employer contended that the petition relied upon had been obtained by misinformation, which was disputed. FWA resolved the dispute by requiring the employer to circulate a letter to relevant employees allowing them to indicate their support or otherwise by direct confidential email communication with an FWA vice president's chambers.<sup>409</sup> A majority support determination was ultimately issued on 8 July 2010.<sup>410</sup>

Each of these case studies suggests that FWA's discretion in determining majority support is working effectively. In each case the employer was able actively to contest the method of establishing majority support, present its own evidence as to the views of employees, and ultimately have the issue resolved. In one case, it was via secret ballot; in the other, it was via confidential communication with FWA. Ai Group notes the expense and delay associated with defending a disputed application. However, conducting a secret ballot in every contested majority support determination application would result in additional delay and cost, particularly in light of the frequency with which less formal mechanisms are used.

In our view, the above evidence firmly suggests that the majority support determination provisions are successfully addressing employer reluctance to bargain in circumstances where a majority of employees wish to do so.

### 6.3.3 Application of the good faith bargaining principles

The good faith bargaining principles were intended to provide a framework for bargaining behaviour in order to promote effective agreement making.<sup>411</sup> In the first year of operation of the FW Act there were 121 applications for bargaining orders to enforce the good faith bargaining obligations.<sup>412</sup> In the period between 1 July 2010 and 30 March 2012, there were 168 applications for bargaining orders, from which 20 bargaining orders were made.<sup>413</sup> AMMA suggested that the 'relative lack of utility of bargaining orders' could be seen through the limited number of applications made.<sup>414</sup> However, Rio Tinto considers the small number of orders made to be reasonable evidence that bargaining is occurring appropriately and there is no case for change to the process.<sup>415</sup>

Many parties called for the FW Act to contain greater prescription concerning what is or is not good faith bargaining. Examples from employers included:

- no requirement to respond to proposals not pertaining to the employment relationship<sup>416</sup>
- a requirement that parties comply fully with an existing enterprise agreement<sup>417</sup>
- a requirement to consider whether the negotiation process has been exhausted<sup>418</sup>
- a requirement to consider whether industrial action has been taken prematurely<sup>419</sup>
- a requirement to include productivity and efficiency enhancing measures in any claims.<sup>420</sup>

Examples from unions included:

- a requirement not to use replacement labour during a bargaining dispute<sup>421</sup>

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<sup>407</sup> Ai Group, p. 70.

<sup>408</sup> BHP, p. 10, referring to determinations of Vice President Lawler in transcript B2010/3117, APESMA (Collieries' Staff Division) and Endeavour Coal Pty Ltd, 1 July 2010.

<sup>409</sup> B2010/3117, APESMA and Endeavour Coal Pty Ltd, transcript, 1 July 2010, PN644–PN711.

<sup>410</sup> PR999054, 8 July 2010. See also *APESMA v Endeavour Coal [2010] FWA 7497* in which communication with the tribunal, followed by a secret ballot, was used.

<sup>411</sup> FWF, p. 15. See Appendix B for the problem these changes were intended to address.

<sup>412</sup> FWA, Annual report 2009–10, p. 75.

<sup>413</sup> Fair Work Australia, *Quarterly report*, Report to the Minister Jul–Sep 2010, Sep–Dec 2010, Jan–Mar 2011, Apr–Jun 2011, Jul–Sep 2011, Oct–Dec 2011, Jan–Mar 2012.

<sup>414</sup> AMMA, p. 93.

<sup>415</sup> Rio Tinto, pp. 10–11.

<sup>416</sup> POAGS, p. 5.

<sup>417</sup> SAL, p. 2.

<sup>418</sup> *ibid.*

<sup>419</sup> *ibid.*

<sup>420</sup> Business SA, p. 7.

- a requirement to facilitate contact between foreign workers and unions if more than one-third of workers to be covered by the agreement are foreign residents<sup>422</sup>
- prohibition of employer-initiated ballots unless FWA finds a bargaining impasse exists<sup>423</sup>
- a requirement not to make unilateral workplace changes during bargaining<sup>424</sup>
- a requirement to conduct all bargaining interactions, communications and correspondence through bargaining representatives.<sup>425</sup>

Some unions called for the introduction of a bargaining code that could deal with some or all of these matters.<sup>426</sup> Forsyth and Stewart considered a code could provide further guidance on what is acceptable conduct in bargaining, submitting that the current scheme allows some tactics which could be considered counter to good faith bargaining.<sup>427</sup> Some employers, such as the Ai Group, opposed a bargaining code, preferring the flexibility of the current framework and arguing that further prescription would promote an undue focus on process rather than outcomes.<sup>428</sup> However, the Ai Group also argued for greater limits by prohibiting bargaining orders that restrict an employer's capacity to deal directly with its employees, put agreements to vote at a time of its choosing and make changes in the workplace while bargaining is ongoing.<sup>429</sup>

The various proposals put to the Panel largely reflected a view that the FWA decisions stakeholders supported should be enshrined and those they opposed should be reversed. We have already indicated our general reluctance to make changes in light of the relatively early stage of operation of these provisions and the unsettled nature of many of the matters at issue. Further, we think there are advantages to a less prescriptive approach. Retaining discretion allows FWA to address a wide and disparate range of conduct, much of which cannot be predicted in advance. FWA can consider the nuances of a particular bargaining situation and its circumstances and tailor an order accordingly. Finally, the Panel agrees that making detailed rules could lead to a focus on process to the detriment of substance.

We note the submission of some parties that FWA decisions to date have run contrary to accepted notions of good faith bargaining in other jurisdictions.<sup>430</sup> We have extensively examined the application of the good faith bargaining requirements, and key decisions of FWA, since the FW Act commenced operation on 1 July 2009 in relation to five of the most significant areas of bargaining conduct raised with us.

### Direct communication with employees

While the law is still developing in this area, FWA decisions generally<sup>431</sup>, albeit not exclusively<sup>432</sup>, have determined that direct communication with employees does not offend the good faith bargaining provisions.

In *Tahmoor Coal*, a Full Bench found that, after a long period of negotiation in which parties were unable to agree, an employer meeting directly with small groups of employees about the company's position in bargaining, and sending related material to their homes 'to explain its negotiating position to the employees directly' was not capricious or unfair. It did not matter that the company 'may have been trying to influence employee views'. Relevantly, the Full Bench found that the meetings were not oppressive for employees, the material presented was consistent with what

<sup>421</sup> ACTU, p. 57.

<sup>422</sup> ACTU, p. 61.

<sup>423</sup> ACTU, p. 61; ASU, p. 17. See BHP supplementary, p. 3, for a rejection of this proposal.

<sup>424</sup> AWU, p. 6.

<sup>425</sup> AIER, p. 26. See, in contrast, BHP supplementary submission that the current situation is a reasonable and workable balance (pp. 2–3).

<sup>426</sup> AMWU, p. 38; CFMEU M&E, p. 4; HSU, pp. 8–9.

<sup>427</sup> Forsyth and Stewart, pp. 13, 15.

<sup>428</sup> Rio Tinto, pp. 10–11; Ai Group supplementary, p. 26; Qantas, p. 5; BHP supplementary, p. 4.

<sup>429</sup> Ai Group, pp. 18, 72–74. See also AMWU supplementary, p. 2, for a contrary view.

<sup>430</sup> See the union submissions referred to above and also Forsyth and Stewart, p. 14.

<sup>431</sup> *LHMU v Mingara Recreation Club Ltd* [2009] FWA 1442; *NUW v Patties Foods Ltd* [2011] FWA 4103; *ASU v Global Telesales* [2011] FWA 3916.

<sup>432</sup> See, for example, *ASU v NCR Australia Pty Ltd* [2010] FWA 6257; *AMWU v Transfield Australia Pty Ltd* [2009] FWA 93 (in which a relevant recommendation was made, but no bargaining orders).

had been presented to the bargaining representatives and was not deceptive, misleading or otherwise objectionable, there was no evidence that employees had been threatened, bargaining meetings continued during the relevant period and the employees' bargaining representatives themselves had adequate access to the workforce.<sup>433</sup>

While a prohibition on direct communication exists under New Zealand's good faith bargaining system<sup>434</sup>, North American good faith bargaining systems permit some forms of direct communication, such as providing information about the progress of negotiations and defending their bargaining position to employees.<sup>435</sup> The Panel regards it as important that the developing good faith bargaining jurisprudence has appropriate regard for the Australian context in which it operates. In this context, we note that *Tahmoor* identifies some significant limitations on the nature of direct communications that are permissible, and protections to preserve the role of bargaining representatives.

### The timing of employee ballots

The FW Act permits an employer to make an agreement with employees provided a notice of employee representational rights is provided<sup>436</sup>, a request for employees to vote on the agreement occurs at least 21 days later<sup>437</sup>, and access to the proposed agreement and an appropriate explanation of its terms is provided during the seven-day period prior to the vote.<sup>438</sup> Bargaining representatives are not required to agree to the proposed agreement, and there is no general capacity for FWA to refuse to approve an agreement because good faith bargaining requirements have not been met.<sup>439</sup> Some parties submitted that this allows the collective bargaining rights of employees and their representatives to be circumvented by the agreement making rules.<sup>440</sup> In these circumstances, bargaining representatives have sought to utilise bargaining orders in order to delay ballots and require further bargaining.

In *Tahmoor*, discussed above, the employer put an agreement to ballot after 50 meetings with bargaining representatives over 15 months. The Full Bench found that 'although there may be circumstances in which the conduct of a ballot without the agreement of other bargaining agents constitutes a breach of the good faith bargaining requirements, it will not always be so'. They found that there is 'no absolute requirement for the agreement of the bargaining agents prior to the conduct of a ballot' and found no breach of good faith bargaining requirements.<sup>441</sup> In *ASU v Global Tele Sales Pty Ltd* the employer presented employees with the proposed agreement alongside the notices of employee representational rights, held information sessions, and notified employees of a vote to be held 23 days later. In an application by the ASU for bargaining orders including the withdrawal of the ballot, Vice President Watson found that 'the essence of the ASU complaint is the speed at which GTS has commenced a process with its employees and moved to propose a vote of employees in favour of making the agreement'. While observing that it was 'fair to say that GTS has not delayed in conducting the agreement making process' and was 'at or close to the minimum time permitted by the Act' for doing so, and noting that the circumstances in *Tahmoor* were quite different, he found that 'the negotiations had reached a stage that the employer was entitled to put its proposal to its employees for a vote'.<sup>442</sup>

In contrast to this approach, FWA has ordered an employer to delay taking steps towards a ballot in a number of cases both before and since *Tahmoor*.<sup>443</sup> In April 2012, a FWA Full Bench issued an interim order delaying various Victorian

<sup>433</sup> *CFMEU v Tahmoor Coal Pty Ltd* [2010] FWA 3510, [28]–[29].

<sup>434</sup> A Forsyth, 'The impact of "good faith" obligations on collective bargaining practices and outcomes in Australia, Canada and the United States', *Canadian Labour and Employment Law Journal*, vol. 16, no. 1, 2011, p. 25.

<sup>435</sup> *ibid.*, p. 245.

<sup>436</sup> FW Act s. 173.

<sup>437</sup> FW Act s. 181.

<sup>438</sup> FW Act s. 180.

<sup>439</sup> FW Act s. 187(2) limits consideration of this matter to circumstances where a scope order is in place.

<sup>440</sup> Forsyth and Stewart, pp. 16–17. See also *AMWU*, p. 18.

<sup>441</sup> *CFMEU v Tahmoor Coal Pty Ltd* [2010] FWA 3510, [30].

<sup>442</sup> *ASU v Global Telesales Pty Ltd* [2011] FWA 3916, [26] – [27], [43].

<sup>443</sup> For example, *ASU v QTAC* (2009) 185 IR 371; *National Union of Workers v Defries Industries Pty Ltd* (PR 988841, 10/8/09); *CFMEU v Australian Precast Solutions Pty Ltd and Abigroup Contractors Pty Ltd* [2009] FWA 53.

health services and the Victorian Hospitals Industrial Association (VHIA) from taking any steps towards seeking the approval of an agreement pending the determination of an application for bargaining orders against them.<sup>444</sup> Also in April 2012, FWA made a bargaining order preventing Coates Hire from proceeding with a ballot, including because the proposed agreement was offered together with benefits not canvassed through bargaining representatives.<sup>445</sup>

FWA's power to make bargaining orders is restricted by s. 255(1)(c), which prohibits an order that requires, or has the effect of requiring, an employee to approve, or not approve, a proposed enterprise agreement. In *NUW v CHEP Australia Ltd*, Watson VP found that while orders regarding process issues could infringe this limitation, 'an order that delays a vote, provided it be only for a short time and does not in substance deny employees the opportunity to vote for an agreement, is not precluded'.<sup>446</sup> While bargaining orders have been effective in some cases to address premature balloting of employees, in order to assess their ongoing utility, a conclusive determination of the impact of s. 255(1)(c) will be necessary.

### **Unilateral changes at the workplace**

FWA decisions on an employer's capacity to make unilateral changes at the workplace during bargaining are also mixed.

In *LHMU v Coca Cola Amatil (Aust) Pty Ltd* a decision by the employer to convert certain positions to salaried staff positions outside the scope of enterprise agreement negotiations did not breach the good faith bargaining requirements.<sup>447</sup> In contrast, in *FSU v Commonwealth Bank of Australia* the employer breached good faith bargaining requirements by giving employees who were the subject of bargaining a unilateral pay increase while maintaining during bargaining negotiations that it would not discuss wage increases until other matters were first discussed or agreed. Commissioner Smith considered 'without travelling more broadly into the concept of unilaterally altering terms and conditions of employment during bargaining, it cannot be that an employer is negotiating in good faith if it is able to alter terms and conditions or employment of persons, on whose behalf bargaining is taking place, for reasons other than those advanced to the bargainers'.<sup>448</sup>

The recent Full Bench decision of *Endeavour Coal* confirms that bargaining orders can significantly limit an employer's capacity to make unilateral changes in the workplace about matters that are the subject of bargaining. The Full Bench upheld an order preventing the employer from unilaterally determining or altering the terms of employees' common law contracts outside of the enterprise bargaining process. The order was 'directed towards preserving the integrity of the bargaining process by ensuring that changes are not made unilaterally in relation to matters which are still the subject of negotiation between the parties'. The Full Bench described the order as preserving 'the status quo' during bargaining.<sup>449</sup>

### **Changing position on previously agreed matters**

Again, FWA decisions about late changes in a bargaining position, or alleged renegeing on previously agreed matters, are mixed.

In *Capral Ltd v AMWU and Ors*, bargaining representatives applied for scope orders varying the scope of an agreement due to be voted upon. The employer sought a bargaining order precluding the application. FWA found that while the unions had disputed scope early in negotiations they did not act upon this 'until they resiled from their position at the latest stage in the bargaining'.<sup>450</sup> This conduct was found to be capricious and a bargaining order was issued against the unions. Similarly, in *ASU v NCR Australia Pty Ltd*, FWA observed that the ASU's conduct in revising its wages claim from

<sup>444</sup> *Health Services Union v VHIA and Ors* [2012] FWAFB 2901.

<sup>445</sup> *AMWU v Coates Hire Operations Pty Ltd, t/as Coates Hire Limited* [2012] FWA 3357.

<sup>446</sup> *NUW v CHEP Australia Ltd* [2009] FWA 202, [42]–[43]. See also *TWU v Veolia Transport Queensland Pty Ltd* [2011] FWA 5691.

<sup>447</sup> [2009] FWA 153, [47]–[48].

<sup>448</sup> [2010] FWA 2690, [66]–[68].

<sup>449</sup> [2012] FWAFB 1891, [55].

<sup>450</sup> [2010] FWA 3818, [42], [46].

5 per cent to 10 per cent was ‘against rather than towards agreement’<sup>451</sup>, and found the ASU had breached the good faith bargaining requirements in s. 228(1)(d).

However, in *Queensland Nurses’ Union of Employees v Tricare Ltd* the employer’s actions in unilaterally making an offer to staff that removed some beneficial terms from a previous offer did not breach the good faith bargaining requirements.<sup>452</sup> Similarly, in *CFMEU v Shinagawa Refractories Australasia P/L* FWA refused to issue bargaining orders delaying a ballot, notwithstanding that the document submitted to vote did not reflect bargaining negotiations over several months, on the basis that the employer’s economic and competition circumstances had changed. Commissioner MacDonald found that the good faith bargaining requirements ‘do not impose an obligation on a party to take a particular approach to negotiations or prescribe the use of tactics. There is no prescription against say, the withdrawal by one party of previously agreed terms, clauses or conditions’.<sup>453</sup>

### Surface bargaining

Many unions submitted that the good faith bargaining provisions do not adequately address circumstances where a bargaining representative ‘goes through the motions’ of bargaining without intending to reach agreement, known as ‘surface bargaining’.<sup>454</sup> Proposals for remedying this included a requirement that bargaining parties must be ‘genuinely trying to reach agreement’<sup>455</sup>, or a requirement to conclude an agreement unless there is a genuine reason not to based on reasonable grounds, as in New Zealand.<sup>456</sup> The CFMEU Mining and Energy Division submitted that there is already a substantive obligation to bargain in good faith, and notes, that while the jurisprudence of FWA is developing in this area, there are signs that this view is prevailing.<sup>457</sup> The Ai Group disputed allegations of surface bargaining and, together with VECCI, opposed any dilution of the right of parties not to make concessions or enter an agreement.<sup>458</sup> The Minerals Council of Australia proposed further strengthening these rights.<sup>459</sup> BHP expressed the view that the FW Act has an ‘integrated approach to the circumstances in which parties can be compelled to bargain’ and argued against any further compulsion.<sup>460</sup> Below we examine two case studies from submissions about surface bargaining.

#### *Endeavour Coal*

At Endeavour Coal, APESMA is the bargaining representative for a group of employees, colloquially known as ‘staff’ employees<sup>461</sup>, who historically have not been covered by an enterprise agreement and are employed under common law contracts.<sup>462</sup> After a majority support determination was issued, 12 bargaining meetings took place<sup>463</sup> without Endeavour making any substantive proposals.<sup>464</sup> FWA issued a bargaining order on the basis that Endeavour was “‘bargaining” with APESMA with no real intention to negotiate an enterprise agreement’, which ‘cannot constitute bargaining in good faith in the terms envisioned by subclause 228(1)(d) of the Act’.<sup>465</sup> Relevantly, the bargaining order required Endeavour to:

- provide to APESMA a list of matters it would be prepared to include in an enterprise agreement
- tell APESMA what aspects of the APESMA proposed enterprise agreement were agreed
- tell APESMA what changes to the APESMA proposed enterprise agreement were desired

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<sup>451</sup> [2010] FWA 6257, [13]–[14].

<sup>452</sup> [2010] FWA 7416.

<sup>453</sup> [2011] FWA 8304, [25].

<sup>454</sup> CPSU SPSF, pp. 16–17; ASU, p. 16; AMWU, pp. 18–20, 28–32; APESMA, p. 4.

<sup>455</sup> AMWU, pp. 18, 32.

<sup>456</sup> AMWU, p. 32; ANF, p. 8.

<sup>457</sup> CFMEU M&E, p. 4.

<sup>458</sup> Ai Group supplementary, p. 27; VECCI supplementary, p. 6.

<sup>459</sup> MCA, p. 22.

<sup>460</sup> BHP supplementary, p. 13.

<sup>461</sup> [2012] FWAFB 1891, [2].

<sup>462</sup> BHP supplementary, p. 3.

<sup>463</sup> [2012] FWAFB 1891, [2].

<sup>464</sup> [2012] FWA 13, [7].

<sup>465</sup> [2012] FWA 13, [11].



- propose terms of an enterprise agreement that it would be prepared to enter into.<sup>466</sup>

The bargaining order was largely confirmed on appeal, with one exception.<sup>467</sup> The Full Bench found that good faith bargaining obligations require parties to ‘take reasonable steps and make reasonable efforts towards making an enterprise agreement’. They described the scheme as ‘one which seeks to promote agreement making but which does not compel parties to make concessions or to reach agreement’, observing that there is ‘nothing inconsistent’ between these two considerations.<sup>468</sup> They held that ‘[i]f the conduct of an employer in engaging in the bargaining process is a mere sham or pretence, such as going through the motions of bargaining without any real intention to enter into an agreement, then this would be contrary to the good faith bargaining requirements’.<sup>469</sup> While we note this decision is under appeal, it appears to us to substantially limit the capacity for a party to engage in surface bargaining.

### *Cochlear*

The FW Act was expressly intended to address certain aspects of the Cochlear dispute, which had been ongoing for over two years prior to the FW Act’s commencement. Many submissions referred to the Cochlear dispute, with some observers regarding it as a litmus test of the effectiveness of the good faith bargaining provisions.<sup>470</sup>

Cochlear employees and the AMWU have been attempting to negotiate a collective agreement since 2007.<sup>471</sup> Between 2007 and 2009, employees indicated majority support for a union agreement on three occasions. Cochlear instigated a ballot on two non-union agreements during this time, both of which were unsuccessful.<sup>472</sup> In August 2009 a majority support determination was obtained after a further secret ballot of employees.<sup>473</sup> Between August and November 2009 no substantive discussions took place whilst Cochlear appointed a bargaining representative.<sup>474</sup> Between November 2009 and August 2010, no substantive discussions took place while the parties developed a bargaining protocol. A series of bargaining meetings were subsequently held without progress, until August 2011. The AMWU applied for bargaining orders including to remove the bargaining protocol<sup>475</sup>, which it described as a ‘rod to beat the AMWU’ and a ‘roadblock’ to negotiations.<sup>476</sup> Cochlear also applied for bargaining orders seeking compliance with the protocol.<sup>477</sup> Those applications were part heard in March 2012. It was reported that prior to the hearing Cochlear agreed to a series of meetings and to provide a further response to the AMWU and employees’ claim.<sup>478</sup>

There are clearly many controversies about why, despite five years of trying, agreement at Cochlear has not been reached. The Panel is not convinced, however, based on the decision in *Endeavour Coal*, that the FW Act does not already provide the mechanisms for addressing and remedying deficiencies in bargaining conduct alleged by either party, should they be substantiated. The parties are presently in the process of applying these mechanisms. It would be premature for us to propose changes in these circumstances.

<sup>466</sup> [2012] FWA 13, [14]–[17].

<sup>467</sup> [2012] FWAFB 1891, [67].

<sup>468</sup> [2012] FWAFB 1891, [26].

<sup>469</sup> [2012] FWAFB 1891, [30].

<sup>470</sup> See, for example, VECCI supplementary, p. 25; Rae Cooper and Bradon Ellem, ‘Fair Work and the re-regulation of collective bargaining’, *Australian Journal of Labour Law*, vol. 22, 2009, pp. 284, 285–86; A Forsyth, ‘The impact of “good faith” obligations on collective bargaining practices and outcomes in Australia, Canada and the United States’, *Canadian Labour and Employment Law Journal*, vol. 16, no. 1, 2011, pp. 42–43.

<sup>471</sup> AMWU, p. 29.

<sup>472</sup> AMWU, p. 29.

<sup>473</sup> [2009] FWA 125.

<sup>474</sup> AMWU, pp. 29–30.

<sup>475</sup> B2011/4085.

<sup>476</sup> B2011/4085 and B2011/4101, transcript, 19 March 2012, PN 447–448.

<sup>477</sup> B2011/4101, transcript, 19 March 2012, PN 483.

<sup>478</sup> ‘Cochlear fails to narrow AMWU’s proposed bargaining order’, *Workplace Express*, 19 March 2012.

## Conclusion

Applications for bargaining orders have been made in only a very small number of matters relative to the number of agreements that have been made under the FW Act. This suggests to the Panel that most parties voluntarily conduct bargaining in accordance with the principles.

We reiterate our view that, as the law on good faith bargaining is still developing, it would be precipitous to recommend any significant changes to the good faith bargaining regime. However, our examination of the operation of the good faith bargaining principles above demonstrates that where bargaining orders have been sought the principles appear to be operating effectively to promote positive bargaining. Decisions to date demonstrate that the FW Act good faith bargaining principles are flexible and responsive to the particular bargaining circumstances being considered. On a number of occasions bargaining orders have been issued to rectify failures to bargain in good faith. However, the provisions have not been applied in a rigid or formulaic manner. Instead, they have operated to allow the substance of a bargaining situation, rather than just the formal processes, to be considered. In some cases employers' arguments about the operation of the provisions have been accepted; in other cases the arguments of employees and unions have been accepted. This demonstrates that the principles encompass a balanced approach to regulating bargaining conduct. We are not convinced that any case has been made for further prescription of good faith bargaining requirements based on the operation of these principles to date.

### 6.3.4 Scope orders

The FW Act provides a mechanism for FWA to determine the scope of a proposed enterprise agreement, if a party requests it, where the parties themselves are unable to agree on it. The availability of scope orders was intended by the Government to address a deficiency in the Work Choices framework of voluntary bargaining whereby the only mechanism for employees to press a claim for their preferred scope was to take industrial action.<sup>479</sup> Under the FW Act, parties can apply for a 'scope order' when bargaining is not proceeding efficiently or fairly because a proposed agreement does not cover the appropriate group of employees.<sup>480</sup> FWA may issue a scope order where it is satisfied that the bargaining representative who made the application is meeting the good faith bargaining requirements, that making the order will promote the fair and efficient conduct of bargaining, that the group of employees who will be covered by the proposed scope was fairly chosen and that it is reasonable in all the circumstances to make the order.<sup>481</sup>

A range of views were expressed in submissions about the effectiveness and operation of scope orders. The Ai Group proposed the abolition of scope orders, arguing that scope is a matter to be bargained over by the parties.<sup>482</sup> AMMA argued that the employer's preferred scope should be favoured unless it is held to be unfair or capricious.<sup>483</sup> The National Union of Workers (NUW), in contrast, suggested that the FW Act would operate more efficiently if enterprise wide bargaining was the default position and scope orders were only required if an employer sought to implement site level agreements.<sup>484</sup> The AWU submitted that scope orders favour employers, and suggested that a majority support determination should be available as a way to avoid the substantial evidentiary material and legal argument required for a scope order application,<sup>485</sup> a suggestion rejected by BHP in its supplementary submission.<sup>486</sup> APESMA suggested that an employer should be required to issue a Notice of Employee Representational Rights to all employees so as to reflect the broadest possible scope and not disenfranchise some employees.<sup>487</sup> Each of these proposals was opposed by

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<sup>479</sup> See Appendix B for further detail regarding the problem these changes were intended to address.

<sup>480</sup> FW Act, s. 238(1).

<sup>481</sup> FW Act, s. 238(4).

<sup>482</sup> Ai Group, pp. 17, 71.

<sup>483</sup> AMMA, p. 13.

<sup>484</sup> NUW, p. 14.

<sup>485</sup> AWU, p. 7.

<sup>486</sup> BHP supplementary, pp. 17–18.

<sup>487</sup> APESMA, [16].

Ai Group, who argued that the APESMA proposal would involve initiating negotiations with the entire workforce and would prolong bargaining.<sup>488</sup>

The CFMEU submitted that the requirement to notify all other bargaining representatives of a scope order application acts as an overly technical obstacle to the operation of these provisions.<sup>489</sup>

In the first two years of operation of the FW Act there were 79 scope order applications and 13 scope orders made, 12 of which were made in the first year of operation.<sup>490</sup> In the applications made, scope orders have rarely been issued. In the 2010–11 financial year there were 31 scope order applications and only one scope order made.<sup>491</sup> Data provided by FWA indicates that in the 2010–11 financial year eight applications were refused by FWA and 15 were withdrawn.

The very small number of scope order applications demonstrates that in the overwhelming majority of bargaining situations the parties determine the scope of their proposed agreement themselves. Of the applications made, scope orders are rarely issued, with a far greater number refused than granted. This suggests to the Panel that the threshold for satisfying FWA that it should intervene to positively determine the scope of a proposed agreement is high. Further, the high proportion of applications refused does not lead us to a negative conclusion about the scope order process. We consider that refusal to grant a scope order may in many cases help to resolve a dispute, as it may make the unsuccessful applicant more likely to accept the scope that the other bargaining party wants. DEEWR examined five of the unsuccessful scope order applications in the 2010–11 period and found that agreements were ultimately concluded in each case.<sup>492</sup> We also note that the number of applications withdrawn in the same period was almost half of the number of applications made. This suggests to us that in many cases agreement on scope was reached by the parties subsequent to a scope order application being made.

We were not persuaded by employer submissions that employers should determine scope, nor by union submissions that scope should be determined by employees. Nor do we consider that scope should be entirely a matter for bargaining. Based on the data referred to above, we believe that scope orders play a minor, but not insignificant, part in the bargaining framework, primarily as a vehicle for assisting the parties to resolve scope issues between themselves.

We do not recommend changes to the scope order provisions, with one exception. We have reviewed the decision of *CFMEU v Veolia Environmental Services Australia Pty Ltd*. Notwithstanding the lack of evidence of attempts to establish the identity of other bargaining representatives in that case<sup>493</sup>, we are concerned that the requirement in s. 238 to notify all relevant bargaining representatives may in some cases be impossible to meet. This is particularly so because the identity of all relevant bargaining representatives may not be known to a party seeking a scope order. We note that the absolute obligation in s. 238(3) is in contrast with, for example, the obligation on an employer, when giving a Notice of Employee Representational Rights under s. 173, to ‘take all reasonable steps’. We consider that the obligation to notify relevant bargaining representatives of a scope order application should be constructed in similar terms.

**Recommendation 16:** The Panel recommends that s. 238(3) be amended to require an applicant for a scope order to ‘take all reasonable steps’ to notify all other relevant bargaining representatives of the application.

<sup>488</sup> Ai Group supplementary, p. 25.

<sup>489</sup> CFMEU C&G, pp. 10–11.

<sup>490</sup> Fair Work Australia, Annual report 2009–10 and Annual report 2010–11; Fair Work Australia, *Quarterly Report*, Report to the Minister, Jul–Sep 2010, Sep–Dec 2010, Jan–Mar 2011, Apr–Jun 2011. FWA have advised that for the 2009–10 financial year 12 scope orders were made.

<sup>491</sup> Fair Work Australia, *Quarterly Report*, Report to the Minister, Jul–Sep 2010, Sep–Dec 2010, Jan–Mar 2011, Apr–Jun 2011, Jul–Sep 2011, Oct–Dec 2011, Jan–Mar 2012.

<sup>492</sup> [2010] FWA 6428, (31 August 2010)—see AG2010/17526, (23 September 2010); [2010] FWA 5653, (27 July 2010)—see AG2010/10075, (3 November 2010); [2011] FWA 2914, (25 May 2011)—see AG2011/12071, (11 October 2011); [2010] FWA 9211, (30 November 2010)—see AG2010/7796, (10 May 2011); [2011] FWA 2897, (2 June 2011)—see AG2011/2729, (24 October 2011).

<sup>493</sup> [2010] FWA 9211, [15].

### 6.3.5 Consistent application of good faith bargaining provisions

Our general approach to good faith bargaining has been to ‘wait and see’ because the good faith bargaining provisions appear to be working as intended. However, we are concerned that good faith bargaining obligations presently do not apply in two particular bargaining contexts under the FW Act. This gives rise to an inconsistency in how the FW Act is operating in practice and is also inconsistent with the objectives of the FW Act.

First, good faith bargaining obligations cannot be enforced through a bargaining order until an existing enterprise agreement has 90 or fewer days to run until its nominal expiry date, unless the proposed agreement has been submitted to employees for a vote.<sup>494</sup> The EM provided that this was ‘to uphold the integrity of existing agreements’.<sup>495</sup> The AMWU’s submission refers to two case studies in which an employer has commenced and concluded bargaining for a new agreement prior to 90 days before the nominal expiry date of an existing agreement, meaning that the good faith bargaining obligations cannot be enforced through a bargaining order until a proposed agreement is submitted to employees for voting.<sup>496</sup>

While there is no evidence that this practice is currently widespread, this provision has unintentionally created an incentive for employers to initiate and conclude bargaining prior to 90 days before the nominal expiry date of an existing agreement. We can see no basis for excluding good faith bargaining requirements in these circumstances. The FW Act good faith bargaining provisions aim to make bargaining parties meet certain standards of bargaining conduct, in contrast to the absence of any bargaining standards under the previous legislation. The current provision provides an avenue for avoiding good faith bargaining, which is inconsistent with the objects of the FW Act.

The supplementary submission of Ai Group raised concerns that discussions about employment conditions, changes to operational requirements or other matters during the life of an agreement could be characterised as ‘bargaining’.<sup>497</sup> However, we are not persuaded that this would occur. In order to obtain a bargaining order, the applicant must establish that one or other of the requirements in s. 230(2) has been met. Discussions of a nature referred to in the Ai Group’s submission would not meet those thresholds.

There are presently no restrictions on obtaining a majority support determination based on the nominal expiry date of an existing agreement. This may need to be addressed as a consequence of the change we are proposing.

**Recommendation 17:** The Panel recommends that s. 229(3)(a) be deleted so bargaining representatives can apply for bargaining orders where bargaining commences more than 90 days before the nominal expiry date of an existing enterprise agreement.

Second, while the good faith bargaining requirements apply to the making of an enterprise agreement, they do not apply to the variation of an agreement. Bargaining representatives are appointed in respect of, and the good faith bargaining obligations apply to, proposed enterprise agreements. They do not apply to proposed variations of enterprise agreements.

We note the submission of the CFMEU Construction and General Division that good faith bargaining requirements should apply to proposed variations of enterprise agreements.<sup>498</sup>

In *Samaras Structural Engineers*<sup>499</sup> FWA considered a proposed variation to an agreement to delay scheduled pay increases for six months. The CFMEU was not involved in discussions with employees about the proposed variation or

<sup>494</sup> FW Act s. 229(3)(a).

<sup>495</sup> EM, p. xxxviii.

<sup>496</sup> AMWU, pp. 12–15; see also AFAP, p. 3; ANF, p. 8.

<sup>497</sup> Ai Group supplementary, pp. 29–30.

<sup>498</sup> CFMEU C&G, p. 12.

its execution, despite being a bargaining representative for, and covered by, the agreement to be varied.<sup>500</sup> The vote in favour of the variation was conducted by two employees nominated by management, who telephoned individual employees.<sup>501</sup> The CFMEU alleged that employees were reluctant to oppose the variation, as they were daily hire employees and felt insecure about their employment status.<sup>502</sup>

Deputy President Bartel approved the variation. While she considered that the good faith bargaining obligations were relevant to consideration of whether the variation had been genuinely agreed<sup>503</sup> and the failure to involve the CFMEU was 'at least unwise and potentially problematic'<sup>504</sup>, she observed that there was no apparent provision for appointment of bargaining representatives in the negotiation of a variation of an enterprise agreement.<sup>505</sup>

The absence of an extension of good faith bargaining obligations to proposed variations of enterprise agreements appears to the Panel to have been an omission. It facilitates the setting of terms and conditions in an enterprise agreement in a way that avoids good faith bargaining obligations. Again, there is no evidence that the practice of varying an enterprise agreement to reduce conditions without the good faith bargaining principles applying is widespread. However, the decision just discussed indicates that it can occur, and indeed has occurred. The FW Act good faith bargaining provisions were intended to get bargaining parties to meet certain standards of bargaining conduct, in contrast to the absence of any bargaining standards under the previous legislation. It is inconsistent to apply good faith bargaining obligations to the making of an agreement yet allow the agreement to be subsequently varied without their application. This omission ought to be rectified to ensure the integrity of the good faith bargaining scheme.

The submission of Master Builders Australia took issue with the CFMEU's characterisation of *Samaras Structural Engineers* and argued that the current test is sufficient, as it allows the genuineness of employees' consent to be considered.<sup>506</sup> We have based our recommendation on our own review of the decision in question. We note that the requirement that employees 'genuinely agree' to a variation is derived from the identical requirement that employees genuinely agree to the making of an enterprise agreement.<sup>507</sup> Good faith bargaining obligations supplement this requirement for proposed enterprise agreements but not for proposed variations of enterprise agreements. We think this inconsistency should be rectified.

**Recommendation 18:** The Panel recommends that the FW Act be amended to apply the good faith bargaining obligations in s. 228 to proposed variations of enterprise agreements under Part 2-4, Division 7, with any necessary modifications.

### 6.3.6 Bargaining representatives

#### Unions as bargaining representatives

Forward with Fairness provided that employees and employers would be free to choose their representative in collective bargaining, with union members able to be represented by an eligible union. All bargaining participants would be required to respect that choice and bargain in good faith with chosen representatives.<sup>508</sup> This policy was intended to address the problem identified by the Government that, under Work Choices, employees who sought to

<sup>499</sup> [2012] FWA 751.

<sup>500</sup> [2012] FWA 751, [3].

<sup>501</sup> [2012] FWA 751, [13].

<sup>502</sup> [2012] FWA 751, [20].

<sup>503</sup> [2012] FWA 751, [39].

<sup>504</sup> [2012] FWA 751, [44].

<sup>505</sup> [2012] FWA 751, [40].

<sup>506</sup> MBA supplementary, p. 3.

<sup>507</sup> FW Act, ss. 211(1)(a), s. 186(2)(a), s. 188.

<sup>508</sup> FWF, p. 14.

negotiate a collective agreement with the assistance of their union had little capacity to require the employer to recognise and bargain with their chosen representative.<sup>509</sup>

The FW Act reflects this policy by making unions the default bargaining representatives for their eligible members<sup>510</sup> unless the default appointment is revoked<sup>511</sup> or the employee appoints another person in writing.<sup>512</sup> A union bargaining representative for an enterprise agreement can apply to be covered by the relevant agreement<sup>513</sup>; however, their consent to its terms is not required.<sup>514</sup>

Several employers submitted that unions should not be the default bargaining representative of their members but should be actively appointed.<sup>515</sup> The ACCI, referring to the ACTU Bargaining Kit, argued that union bargaining strategies undermine genuine agreement outcomes.<sup>516</sup> Woodside submitted that union bargaining representatives should be required to act as an agent, rather than an independent party, in the bargaining process.<sup>517</sup> The HR Nicholls Society proposed a broader range of workplace representation models.<sup>518</sup>

The CPSU submitted that the FW Act has created clearer rights about representation that employers have to respect.<sup>519</sup> The ANF submitted that the default bargaining system means bargaining is not delayed by unnecessary arguments about union involvement, and representation is more effective.<sup>520</sup> The Maritime Union of Australia (MUA) and other unions submitted that union members ‘opt in’ for representation by their union when they become members, and representation of a member in bargaining is a straightforward proposition.<sup>521</sup> Some union submissions proposed further enhancing the role of registered organisations in collective bargaining.<sup>522</sup> Unions NSW submitted that peak union bodies should be eligible to be appointed as bargaining representatives.<sup>523</sup>

**Table 6.4—Union and non-union collective agreements since 1993**

	IR Act post-1993		WR Act		Work Choices		FW Act	
	Agts	Employees	Agts	Employees	Agts	Employees	Agts	Employees
Non-union	482 (4.5%)	91,707 (2.6%)	8,780 (13.7%)	534,837 (7.2%)	15,335 (54.3%)	728,484 (27.0%)	4,658 (32.6%)	142,492 (7.4%)
Union	10,147 (95.5%)	3,392,091 (97.4%)	55,280 (86.3%)	6,928,818 (92.8%)	12,927 (45.7%)	1,966,641 (73.0%)	9,624 (67.4%)	1,795,215 (92.6%)
Total	10,629	3,483,798	64,060	7,463,655	28,262	2,695,125	14,282	1,937,707

Source: FW Act data to 30 September 2011.

Note: Unions are coded for union coverage by FW Act agreements rather than union involvement in bargaining. Data about unions covered by agreements made under the FW Act may not accurately reflect union involvement in bargaining because it is possible for a union to have been involved in bargaining for an agreement and then not be covered by the approved agreement. It is also possible for a union to be covered by an agreement because it was a bargaining representative, even if it did not take an active role in the negotiations.

<sup>509</sup> See Appendix B.

<sup>510</sup> FW Act s. 176(1)(b).

<sup>511</sup> FW Act s. 178A.

<sup>512</sup> FW Act s. 176(1)(c).

<sup>513</sup> FW Act ss. 183, 201(2).

<sup>514</sup> FW Act s. 182(1).

<sup>515</sup> MBA, pp. 41–42; ACCI, p. 13; MCA, p. 22; NSWBC & ABI, p. 55; POAGS, p. 6; AFEI, p. 31; AMIC, p. 12; ARTIO, p. 5; COSBOA, pp. 15–16, 24; CCIWA, pp. 10, 46–47; Rio, pp. 4, 11–12; BHP, pp. 8–9; AMMA, p. 13; CCF, p. 15; Institute for Private Enterprise, p. 2; NECA, pp. 3–4; SAWIA, p. 5.

<sup>516</sup> ACCI, pp. 108–110.

<sup>517</sup> Woodside, p. 15.

<sup>518</sup> HR Nicholls, pp. 15–16 of Attachment C.

<sup>519</sup> CPSU, p. 4.

<sup>520</sup> ANF, p. 5.

<sup>521</sup> MUA supplementary, p. 4; AMIEU supplementary, p. 11.

<sup>522</sup> ASU, pp. 15–16; see also PFA, pp. 3–4.

<sup>523</sup> Unions NSW, pp. 14–15.

Table 6.4 shows the number and proportion of agreements that did and did not cover a union under each of the four industrial relations regimes the Panel has examined, and the number and proportion of employees those agreements applied to. With the exception of Work Choices, union agreements have outnumbered non-union agreements across each of the legislative regimes since the IR Act post-1993. Under the FW Act, 32.6 per cent of agreements made do not cover a union, compared to 13.7 per cent under the WR Act and 4.5 per cent under the IR Act post-1993. Non-union agreements are therefore a far more prevalent form of agreement under the FW Act than under each of those previous two regimes.

In light of the more restricted role for unions under Work Choices, it is not surprising that non-union agreements outnumbered union agreements under that regime. The lodgment-only process and the weaker fairness test under Work Choices encouraged industries that traditionally relied on awards, such as retail and hospitality, and smaller, non-unionised workplaces to enter into agreements without union involvement. However, it is notable that, even though the number of non-union agreements exceeded the number of union agreements, the vast majority of employees (73 per cent) continued to be covered by union agreements.

The FW Act was expressly intended to allow employees to be represented by their union in bargaining and agreement making. The change in the proportion of union agreements between Work Choices and the FW Act may in part reflect this change. It is also likely that the change to a single stream of agreements, addressed at 6.4.1 below, has contributed to this change. In addressing the problems associated with the Work Choices regime, the FW Act has not disproportionately or unduly increased the role of unions in agreement making in comparison with previous regimes.

An examination of the average annualised wage increase (AAWI)<sup>524</sup> on a quarterly basis over two years under each of the FW Act, Work Choices and the WR Act demonstrates that the AAWI for union agreements has on almost all occasions been higher than the AAWI for non-union agreements.<sup>525</sup> This trend appears to be impervious to the legislative framework in operation at the relevant time. However, the differential has changed somewhat under the different legislative frameworks. Under the FW Act, the AAWI differential between enterprise agreements that covered one or more unions and those that did not cover a union ranged from 0.2 per cent to 0.6 per cent in favour of union agreements. Under Work Choices, the AAWI differential ranged from 0.2 per cent in favour of non-union agreements to 0.8 per cent in favour of union agreements. Under the WR Act, the AAWI differential between union agreements and non-union agreements ranged from 0.1 per cent and 1.5 per cent in favour of union agreements.

While union agreements under the FW Act therefore provide for a higher AAWI than non-union agreements, it is also more common for union agreements to contain 'commitment to productivity' clauses. DEEWR's Workplace Agreements Database contains data on clauses in enterprise agreements that are explicitly related to productivity commitments.<sup>526</sup> In all but three industries (Electricity, gas, water and waste services; Education and training; and Health care and social assistance), agreements that covered a union were more likely to include such a productivity clause.

In light of the above, the Panel is not persuaded that there needs to be any change to the provisions of the FW Act providing for unions as default bargaining representatives and allowing unions to be covered by enterprise agreements.

We have considered the particular proposal that unions should not be bargaining representatives of their members by default but through some positive act of appointment. We tend to agree with submissions from unions that becoming a union member itself represents a positive act of appointment, given that bargaining for wages and conditions is such a fundamental activity for a union to engage in on behalf of its members. We consider that requiring a union member to actively appoint his or her union as a bargaining representative would add an unnecessary procedural requirement to

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<sup>524</sup> See Appendix E for a description of AAWI.

<sup>525</sup> In the following paragraphs, 'FW Act' refers to the period 1 October 2009 – 30 September 2011, 'Work Choices' refers to the period 1 April 2006 to 31 March 2008, and 'WR Act' refers to the period 1 January 2004 to 31 December 2005.

<sup>526</sup> It is important to note that the inclusion of a productivity clause does not in itself definitively indicate that the relevant workplace is more productive than a workplace without such a clause.

the bargaining system and tend to result in an undue focus on the appointment procedure rather than the substantive issues in bargaining.

### Effectiveness of notice of employee representational rights

A number of unions submitted that modifications and additions to the Notice of Employee Representational Rights contained in Schedule 2.1 of the FW Regulations should not be permitted under the FW Act. Some examples were provided in which it was alleged that employers had sought to encourage employees to extinguish their right to be represented by their union.<sup>527</sup> The SDA submitted that there should be additional notification obligations in respect of known representatives, or alternatively that the notice should be amended to make clear to an employee that the representative is not being independently advised of the bargaining.<sup>528</sup> The TCFUA submitted that there should be an ongoing obligation to provide the notice to employees subsequently employed.<sup>529</sup>

The Ai Group submitted that the current approach of FWA, requiring only substantial compliance with the notice requirements, is adequate.<sup>530</sup>

The Notice of Employee Representational Rights provided for in s. 173 and s. 174 of the FW Act and its attendant regulations alert employees to their statutory right to be represented in bargaining. Employers are required to take all reasonable steps to give their employees the s. 173 notice.

There have been a number of FWA decisions concerning the content of the s. 173 notice. The most significant decision is *Galintel Mills Pty Ltd t/a The Graham Group*.<sup>531</sup> In this matter, the employer placed a slip at the foot of the bargaining notice which employees could sign to appoint a bargaining representative. The Full Bench held that, as the notice did contain all of the requirements, the notice was valid. Put briefly, the case law allows employers to substantially comply with the notice requirements.

There is evidence of employers modifying the content or form of the Notice of Employee Representational Rights, both from stakeholders, as referred to above, and in several FWA decisions.<sup>532</sup> While the evidence does not demonstrate that the practice is widespread, the Panel is concerned that there have been several instances of this conduct.

The s. 173 notice is an integral element in the bargaining regime. To eliminate confusion and any opportunities for malpractice, we recommend that the Government amend s. 174 of the FW Act to make it clear that a bargaining notice may only contain the requirements as specified in the section and its attendant regulations.

**Recommendation 19:** The Panel recommends that s. 174 be amended to provide that a bargaining notice must address only the matters specified in that section and the regulations made under it.

Unions submitted that the policy intention of the s. 173 notice is not being met, as it does not always result in members informing their union that bargaining will be taking place. This has led to instances where the formal agreement making processes are substantially complete, including arrangements for a vote on a proposed agreement, before a union bargaining representative has become aware that bargaining is underway. In some cases this has occurred without any actual 'bargaining' taking place. Agreements have been made without employees being represented by their union in

<sup>527</sup> AWU, p. 4; SDA p. 50; TCFUA, p. 16.

<sup>528</sup> SDA, pp. 51–52; see also TCFUA, p. 15.

<sup>529</sup> TCFUA, p. 15.

<sup>530</sup> Ai Group, p. 24.

<sup>531</sup> [2011] FWAFB 6772

<sup>532</sup> See, for example, *Cement Australia Pty Limited* [2011] FWA 6917 (14 October 2011); *Regent Taxis Pty Limited T/A Gold Coast Cabs* [2011] FWA 3683 (10 June 2011); *Melsteel Constructions Pty Ltd* [2010] FWA 7731 (5 October 2010); *Reliable Enterprises Pty Ltd T/A Southern Starr Fire Protection* [2012] FWA 2950 (4 April 2012); *Capricornia Pty Ltd t/a Quality Hotel Batman's Hill on Collins* [2011] FWA 727 (10 February 2011); *Royal Australian College of General Practitioners* [2010] FWA 7881 (4 April 2012); *Leane Electrical Pty Ltd* [2010] FWA 1605 (5 March 2012).



the process. Again, while there is no evidence that this problem is widespread, the Panel is concerned based on stakeholder evidence and decisions of FWA.<sup>533</sup>

In this respect the s. 173 notice is not operating as intended. The Panel has considered the various proposals to address this issue that were submitted, such as wider distribution of the s. 173 notice, provision of the notice to unions known to the employer, and changes to the notice to indicate that the employee is responsible for informing their bargaining representative of the employer's intention to make an enterprise agreement.

A straightforward solution would be for the FW Act to provide that an employer notify FWA when it issues notices under s. 173, and for FWA to publish that notification on its website. Notifying FWA of the commencement of bargaining in this manner is somewhat similar to notification of a 'bargaining period' under the three previous industrial relations regimes over the last 20 years. This would ensure that access to information about where agreement making is taking place will be available to any relevant bargaining representative. It would also mean FWA has the necessary information to take a greater role in resolving bargaining disputes through, for example, the exercise of 'own motion' powers, as the Panel proposes in respect of s. 240 of the FW Act.<sup>534</sup> While this measure would result in an additional administrative obligation for employers, it is unlikely to be significant because the employer is already required to produce and distribute the notice to its employees.

In addition, a formal notification process would allow the collection of data on aspects of the operation of the FW Act that are not presently assessable. For example, it would allow analysis of the number of times bargaining is initiated and ultimately concluded by agreement—or not, as the case may be. It would allow the duration of bargaining to be measured. It would allow an analysis of the extent to which the scope of agreements reflects the original proposal. All of this information is important for assessing the ongoing effectiveness of the FW Act.

**Recommendation 20:** The Panel recommends that bargaining notices issued by employers under s. 173 should be lodged with FWA and made available through publication on FWA's website.

### **Union officers as bargaining representatives in their personal capacity**

A number of employers submitted that the FW Act should expressly prohibit individual members or officers of unions acting as bargaining representatives for employees who are not eligible to be members of their union.<sup>535</sup> BHP argues that this practice legitimises unions representing employees outside their eligibility and within the coverage rules of a competing union.<sup>536</sup> CCIWA submitted that this practice allows unions to expand their coverage without needing to amend their rules.<sup>537</sup>

The ACTU submitted that, as there have been challenges to the rights of union officials to act as bargaining representatives in their own right, the regulations requiring 'independence' of bargaining representatives need amendment.<sup>538</sup>

The key decision of FWA dealing with this issue is *Technip Oceania Pty Ltd v Tracey*.<sup>539</sup> The issue arose when a good faith bargaining order was sought by Mr Tracey (an Assistant Branch Secretary of the West Australian Branch of the MUA) in agreement negotiations with Technip Oceania. Mr Tracey was appointed as a bargaining representative in writing by employees who were not eligible to be members of the MUA. The Australian Mines and Metals Association

<sup>533</sup> See, for example, *ASU v Global Tele Sales* [2011] FWA 3916; AMWU, p. 13; SDA, pp. 51–52.

<sup>534</sup> See 6.3.7.

<sup>535</sup> BHP, p. 9; AMMA, p. 13; Woodside, p. 15; Rio, p. 12; NSWBC & ABI, p. 56; CCIWA, pp. 10–11, 51.

<sup>536</sup> BHP, p. 9.

<sup>537</sup> CCIWA, p. 51.

<sup>538</sup> ACTU, p. 61.

<sup>539</sup> [2011] FWA 6551.

(AMMA), acting for the employer, would not recognise Mr Tracey. At first instance a bargaining order was issued, on the basis that Mr Tracey had been legitimately appointed in his capacity as an individual rather than as an MUA official.<sup>540</sup>

The Full Bench reversed this decision by a 2–1 majority, finding that, on the evidence, Mr Tracey was acting as an MUA official and not in his personal capacity. This evidence included:

- use of the MUA signature block in correspondence
- a log of claims containing ‘unmistakeable indications’ that Mr Tracey’s representation was ‘inextricably linked to the MUA’
- Mr Tracey’s operation from the MUA’s premises using MUA resources
- the address and contact details of the MUA on the application for bargaining orders.

The *Tracey* decision is consistent with the earlier single member decision of *Heath v Gravity Crane Services Pty Ltd*.<sup>541</sup> Based on these cases, whether a union official is acting as a bargaining representative in his or her personal capacity or on behalf of the union is a question of fact to be determined on the particular facts and circumstances of each case. These are questions of fact over which reasonable minds may and will often differ.

*Tracey* and *Heath* are the only instances we are aware of in which an individual union officer has sought to represent non-eligible employees.

While we have generally proposed that the Government await clarification from further case law developments before dealing with uncertainties in the bargaining regime, this is an occasion where a straightforward legislative amendment could alleviate confusion. Although the problem is not widespread, we believe this practice undermines the operation of s. 176(3), which prohibits a union from being a bargaining representative of an employee when they are not entitled to represent that employee. In our view, s. 176 of the FW Act should be amended to make it clear that an officer or employee of a union cannot be a bargaining representative for employees who are ineligible to join that union. In the long run, this straightforward rule will help to facilitate bargaining and avoid unnecessary litigation and potential demarcation issues.

**Recommendation 21:** The Panel recommends that s. 176 be amended to prevent an individual union official being a bargaining representative for employees for whom the official’s union does not have coverage.

### 6.3.7 Conciliation and arbitration of bargaining disputes

#### Arbitration of bargaining disputes

While the bargaining regime described in *Forward with Fairness* was intended to encourage bargaining and agreement making, it was not intended to require an employer or employees to sign up to an agreement whose terms they did not agree to. The policy recognised that bargaining participants would not always reach agreement. In these circumstances a range of options would be available to the parties, including walking away or jointly requesting that FWA help them reach agreement or determine particular matters.<sup>542</sup> Alternatively, FWA would have the power to ‘end ... industrial action and determine a settlement between the parties for their workplace’ in certain limited circumstances.<sup>543</sup> Accordingly, while the FW Act sought to address the problems associated with voluntary bargaining through the good

<sup>540</sup> *Tracey v Technip Oceania Pty Ltd* [2011] FWA 3509.

<sup>541</sup> [2010] FWA 7751.

<sup>542</sup> FWF, p. 16.

<sup>543</sup> *ibid.*

faith bargaining requirements, it does not make general provision for terms and conditions to be imposed upon bargaining parties.

Forward with Fairness envisaged that FWA would play a voluntary conciliation or arbitration role to assist bargaining, meaning that the parties could avail themselves of these dispute resolution processes by agreement.<sup>544</sup> Forward with Fairness also foreshadowed compulsory arbitration of bargaining disputes in four limited circumstances. First, when protracted industrial action was causing significant harm to the bargaining participants and, second, when threatened or actual industrial action was causing or could cause significant harm to the wider economy or the safety or welfare of the community. The power to determine a settlement would flow from a power to end the industrial action.<sup>545</sup> The policy position underlying the availability of arbitration in these circumstances was that ‘ongoing industrial dispute [was] not in the interests of employees, employers, families, communities or the economy’.<sup>546</sup> The first circumstance was newly introduced by the FW Act. It was to have a high threshold for access and be warranted in ‘a small number of disputes in Australia where industrial action continues for many months; where the employees and the employer suffer greatly and yet the parties are so stubborn and entrenched in their positions that they cannot achieve a breakthrough’.<sup>547</sup> The second circumstance had existed in a similar form in industrial legislation for many years. Third, arbitration would be possible ‘for the very unusual case where a party flouts the [good faith bargaining] law’. The threshold for arbitration was to be high, and it was intended to apply only to ‘the kind of rogue conduct’ which happens ‘on a handful of occasions each decade’.<sup>548</sup> Fourth, access to arbitration would be possible through the new multi-employer low-paid bargaining stream to ensure the scheme delivered effective bargaining.<sup>549</sup>

The FW Act provides for workplace determinations related to industrial action in Part 2-5, Division 3, low-paid workplace determinations in Part 2-5 Division 2 and workplace determinations related to bargaining, following the making of a ‘serious breach declaration’ in Part 2-5, Division 4.

The ACTU and many unions called for an expansion of FWA’s capacity to arbitrate bargaining disputes in circumstances where, for example, vulnerable workers are involved, the parties are bargaining for their first agreement, an employer is ‘surface bargaining’, or negotiations are protracted and there is no reasonable prospect of reaching agreement.<sup>550</sup> A number of unions observed that currently employers can inflict damage on the economy via a lockout to achieve an arbitrated outcome in bargaining when they perceive an advantage in doing so. Unions felt this would lead to arbitration on the employer’s terms.<sup>551</sup> Other parties, such as the Australian Road Transport Industrial Organisation<sup>552</sup>, the Australian Shipowners Association<sup>553</sup> and Farstad<sup>554</sup>, also favoured an expansion of FWA’s arbitration capacity.<sup>555</sup>

Forsyth and Stewart suggested a less ‘fault’ based approach and focus on whether or not further negotiations between parties are likely to be productive. They suggested ‘first contract’ arbitration as a starting point for this.<sup>556</sup> The WA Government proposed a role for a strong and independent umpire to resolve prolonged and intractable bargaining disputes, including where appropriate by arbitration.<sup>557</sup>

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<sup>544</sup> *ibid.*

<sup>545</sup> *ibid.*

<sup>546</sup> *ibid.*

<sup>547</sup> ALLA Speech.

<sup>548</sup> *ibid.*

<sup>549</sup> *ibid.*

<sup>550</sup> ACTU, pp. 46–7, 57; AIMPE, p. 2; APESMA, pp. 4–5; HSU, pp. 8–9; CPSU (SPSF), pp. 4, 7–8, 18–20; AEU, pp. 8–11; ASU, pp. 7–9.

<sup>551</sup> See, for example, TWU, p. 4; CFMEU M&E, p. 13; ASU, p. 16; Unions WA, p. 8.

<sup>552</sup> ARTIO, p. 7.

<sup>553</sup> ASA, p. 17.

<sup>554</sup> Farstad, p. 5.

<sup>555</sup> Terry Brosnan, p. 5.

<sup>556</sup> Forsyth and Stewart, pp. 24, 26, 27.

<sup>557</sup> WA Govt, p. 5.

The Ai Group opposed any expansion of FWA’s powers to arbitrate, noting that an outcome should not be arbitrated if agreement is not reached.<sup>558</sup> The Minerals Council of Australia submitted that arbitration must be a last resort and then only where there is a national interest test.<sup>559</sup>

There are three common features to the circumstances in which the FW Act allows for arbitration of bargaining disputes. First, in all circumstances the threshold for access to arbitration is very high. Second, each circumstance in some way aims to protect the integrity of the bargaining process by ensuring it cannot be circumvented through disproportionate economic pressure or structural impediments. Third, in each circumstance there is a public interest consideration that justifies FWA’s arbitration powers.<sup>560</sup> Alongside this very clear position that arbitration is to be the exception rather than the rule is a bargaining framework that, while strongly promoting agreement making, expressly does not require parties to make concessions or reach agreement.<sup>561</sup> Accordingly, we are reluctant to recommend a general expansion of compulsory arbitration powers unless we can identify a circumstance in which the bargaining system is failing and it is in the public interest to address this failure.

Some have submitted that the bargaining system is failing, as it does not adequately address surface bargaining or protracted negotiations. However, the capacity of the good faith bargaining provisions in this regard has not yet been fully tested. Difficult disputes have been resolved using the FW Act bargaining framework. Further, three ‘intractable’ disputes—namely Cochlear, Endeavour Coal and BMA—are presently or have recently been the subject of bargaining proceedings before FWA. It is not yet clear whether bargaining orders from FWA will improve the prospects of agreement in these disputes.

The role of serious breach declarations and low-paid authorisations in addressing bargaining problems has not yet been fully explored. There have been no serious breach declarations in the first two years of operation of the FW Act. This probably reflects its short period of operation and the still emerging jurisprudence about what matters a bargaining order can address. However, it is also not surprising because—in accordance with the policy intention—the bar for reaching arbitration under these provisions is high.

Some submissions urged the Panel to give employees bargaining for their first collective agreement access to arbitration when an impasse is reached.<sup>562</sup> We were referred to systems of first contract arbitration that operate in most Canadian provinces.<sup>563</sup> A major difference between collective bargaining in Canada and in Australia is that we have a low-paid bargaining stream, which enables employees who have not been able to secure collective agreements to engage in multi-employer bargaining with the availability of arbitration should impasses occur. In the fullness of time, Australia may consider adopting one or more variants from the first contract arbitration models in Canada, but at present we should not take this step unless the low-paid bargaining stream is found wanting. The Panel is also of the view that the time is not opportune to recommend arbitration to secure agreements in all first contract situations above and beyond low-paid workers. In our opinion, the good faith bargaining rules should be given more time to evolve to determine whether first contract situations in Australia are failing to result in collective agreements.

Accordingly, we are not inclined to recommend providing any additional avenues for arbitration, with the exception of greenfields agreements, which we deal with separately in 6.5.

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<sup>558</sup> Ai Group, pp. 18, 42, 68, 80–81; Ai Group supplementary, pp. 30–31.

<sup>559</sup> MCA, p. 22.

<sup>560</sup> DEEWR submission to the FW Bill inquiry, pp. 31–32.

<sup>561</sup> FW Act s. 228(2).

<sup>562</sup> See, for example, ACTU, p. 46, Forsyth and Stewart, pp. 24, 26, 27.

<sup>563</sup> S Slinn and RW Hurd, ‘First contract arbitration and the Employee Free Choice Act: multijurisdictional evidence from Canada’, *Advances in Industrial and Labor Relations*, vol. 18, 2011, pp. 41–86; and Gregor Murray and Joelle Cuillerier, ‘The sky is not falling: unionization, Wal-Mart and first contract arbitration in Canada’, *Just Labour*, vol. 15, 2009, pp. 78–98.

### FWA assistance with bargaining

As noted above, Forward with Fairness envisaged that FWA would play a voluntary conciliation or arbitration role to assist bargaining.<sup>564</sup> The second reading speech indicated that FWA could exercise broad conciliation powers at the request of one of the parties, and where the parties agree, to make a binding determination on matters in dispute.<sup>565</sup>

The Victorian Government submitted that FWA should play a greater role in preventing bargaining disputes.<sup>566</sup> Some submitted that compulsory conciliation could play an important role.<sup>567</sup> On the other hand, the Minerals Council of Australia submitted that the FW Act should not create an environment that relies upon, or presumes, the invocation of compulsory conciliation.<sup>568</sup>

Although we are reluctant to expand compulsory arbitration, we consider that FWA can play a more proactive role in bargaining disputes to the benefit of both employees and employers. The recent disputes involving nurses in Victoria<sup>569</sup> and Asciano and the MUA<sup>570</sup> are two examples where in exercising its dispute resolution powers FWA has helped to resolve seemingly intractable disputes.

Section 240 of the FW Act already provides FWA with considerable latitude to actively assist in a bargaining dispute. Section 595 sets out FWA's general powers to deal with disputes and provides that FWA may mediate, conciliate, make a recommendation or express an opinion. Section 595 also provides that, in dealing with a dispute, FWA may exercise any powers under Subdivision B, Division 3 of Part 5.1. These powers include the capacity for FWA to inform itself about the dispute in a way it considers appropriate, including, for example, by requiring a person to attend the conference; requiring a person to provide copies of documents, records or other information; taking evidence; or holding a hearing.<sup>571</sup> FWA may also direct a person to attend a conference at a specified time and place.<sup>572</sup>

Between 1 July 2010 and 31 March 2012, FWA received 472 applications under s. 240 and decided to deal with the dispute, by conducting some form of dispute resolution, in 371 cases.<sup>573</sup> Accordingly, the s. 240 process is the most widely used of all the measures under the FW Act directed at facilitating bargaining and agreement making. Presently, FWA has the power to deal with a bargaining dispute under s. 240 only if a party applies to FWA.<sup>574</sup> Further, unless the dispute is about a single enterprise agreement or an agreement where a low-paid authorisation is in place, FWA can only deal with it with the agreement of all bargaining representatives. The capacity for FWA to call parties in dispute before it and to exercise its dispute resolution function is a clear omission in the legislative scheme and one that could be easily addressed. FWA's existing powers, as set out above, should apply to this new function.

**Recommendation 22:** The Panel recommends the FW Act be amended to include a new provision after s. 240 which expressly empowers FWA to intervene on its own motion where it considers that conciliation could assist in resolving a bargaining dispute, including in respect of a greenfields agreement.

<sup>564</sup> FWF, p. 16.

<sup>565</sup> SRS.

<sup>566</sup> Victorian Government, p. 38.

<sup>567</sup> Shipping Australia, pp. 2–3; CCIWA, p. 29; Farstad, p. 5; Australian Public Transport Industrial Association, p. 9.

<sup>568</sup> MCA, p. 22.

<sup>569</sup> 'Victorian nurses retain nurse: patient ratios after long bargaining campaign', *Workplace Express*, 16 March 2012.

<sup>570</sup> 'Asciano and MUA announce final agreement on Patrick container terminals EA', joint Asciano and MUA media release, 19 April 2012.

<sup>571</sup> FW Act, s. 590.

<sup>572</sup> FW Act, s. 592(1).

<sup>573</sup> Fair Work Australia, *Quarterly Report*, Report to the Minister, Jul–Sep 2010, Sep–Dec 2010, Jan–Mar 2011, Apr–Jun 2011, Jul–Sep 2011, Oct–Dec 2011, Jan–Mar 2012.

<sup>574</sup> FW Act, s. 240(1).

### 6.3.8 Low-paid and other multi-employer bargaining

A clear policy objective of the FW Act was to promote bargaining at the individual enterprise level. The DEEWR submission confirms the expectation that '[i]n most cases a single-enterprise agreement under the new system will be made between a single employer and some or all of its employees'.<sup>575</sup> Notwithstanding the primacy given to 'enterprise' bargaining, the policy indicated that bargaining involving more than one employer, or 'multi-employer bargaining', was intended to be an element of the system in three circumstances.

The first circumstance is when an 'enterprise' extends beyond an individual employer.<sup>576</sup> The FW Act permits employers who are engaged in a joint venture or common enterprise and employers who are related bodies corporate to bargain as a single enterprise.<sup>577</sup> For example, a number of individual companies in a corporate group could bargain together. Beyond this, a ministerial declaration and order from FWA is required to authorise this practice.<sup>578</sup> Employers in this category are subject to good faith bargaining obligations and industrial action provisions.

The second is in respect of 'low paid employees or employees who have not historically had access to the benefits of collective bargaining'; for example, in the community sector.<sup>579</sup> The objective was to facilitate the productivity and other benefits of bargaining for employers and employees who are unable to bargain unaided.<sup>580</sup> The FW Act gives effect to this policy in Part 2-4, Division 9. FWA may make a low-paid authorisation<sup>581</sup>, which enables access to bargaining orders (unlike ordinary multi-employer bargaining).<sup>582</sup> FWA has additional powers to facilitate low-paid bargaining, including by providing assistance on its own initiative and directing third parties to attend conferences.<sup>583</sup>

The third is via voluntary multi-employer bargaining. Forward with Fairness provided that '[w]here more than one employer and their employees or unions with coverage in the workplaces voluntarily agree to collectively bargain together for a single agreement they will be free to do so'.<sup>584</sup> The FW Act provided for this by removing the Work Choices precondition of obtaining a public interest authorisation before such bargaining could occur.<sup>585</sup> This multi-employer bargaining is available to all employers. However, bargaining orders and protected industrial action are not available.

A number of unions said that the FW Act should facilitate multi-employer bargaining more than it currently does, including through allowing protected industrial action in respect of such agreements<sup>586</sup>, or that the processes for making and approving such agreements should be improved.<sup>587</sup> In contrast, the Ai Group submitted that multi-employer enterprise agreements should be abolished and protected industrial action should not be permitted in the single interest bargaining stream.<sup>588</sup>

Unions also submitted that the low-paid bargaining stream is not effective in facilitating bargaining for low-paid employees.<sup>589</sup> Some parties observed that the provisions to date have not been widely utilised and it is therefore difficult to gauge their effectiveness. They criticised FWA's exclusion, in its first low paid authorisation, of employers

<sup>575</sup> DEEWR submission to the FW Bill inquiry, p. 19.

<sup>576</sup> FWF, p. 13. See also DEEWR submission to the FW Bill inquiry, p. 20.

<sup>577</sup> FW Act s. 172(5).

<sup>578</sup> FW Act, Part 2-4, Division 10.

<sup>579</sup> FWF, p. 14. See also EM, p. 157.

<sup>580</sup> DEEWR submission to the FW Bill inquiry, pp. 29-30. See further Appendix B.

<sup>581</sup> FW Act, ss. 242, 243.

<sup>582</sup> FW Act, s. 230(2)(d).

<sup>583</sup> FW Act, s. 246.

<sup>584</sup> FWF, p. 13.

<sup>585</sup> Work Choices 331-332.

<sup>586</sup> AEU, p. 7; ASU, pp. 21-23; ANF, pp. 5-6; MEAA, pp. 11-12; AMWU, pp. 9-10; NUW, p. 14; ANF, pp. 6-7.

<sup>587</sup> ASU, pp. 22-23.

<sup>588</sup> Ai Group, pp. 18, 75.

<sup>589</sup> AWU, p. 7; United Voice, pp. 23-24.

who already had an agreement in place.<sup>590</sup> United Voice suggested the development and implementation of industry councils in relevant industries as an alternative approach.<sup>591</sup>

The Council of Small Business Australia (COSBOA) expressed the view that the current application of the Australian Nursing Federation (ANF) for a low-paid authorisation is inconsistent with the intent of the legislation, as the relevant employees should not be considered low paid.<sup>592</sup> CCIWA suggested a definition of low-paid be inserted in the FW Act, along with other amendments.<sup>593</sup> The HR Nicholls Society suggests that it is inappropriate to impose bargaining and arbitration in areas that should be the reserve of minimum standards.<sup>594</sup> The Ai Group also opposed arbitration in the low-paid bargaining stream.<sup>595</sup>

The evolution of industrial relations over the last 20 years has involved a shift away from industry-level agreements and determinations through the award system towards agreement making at the enterprise level. The FW Act continues the emphasis on enterprise-level bargaining and agreement making. It actively facilitates multi-employer bargaining only when there is a clear policy basis for doing so. Consistent with this policy, multi-employer agreements make up only 1 per cent of agreements made under the FW Act.

Data in Appendix E demonstrates the incidence of multi-employer agreements under the FW Act. The industry most likely to make a multi-employer agreement is Health care and social assistance, and the next most likely is Education and training. Together they account for 44.8 per cent of multi-employer agreements, covering 76.4 per cent of employees. While multi-employer agreements are relatively rare overall, their concentration in these industries suggests that they are a useful feature of the bargaining system where appropriate.

To date under the FW Act there have been only four applications for a low-paid authorisation and one low-paid authorisation determination relating to two applications.<sup>596</sup> A major concern of United Voice, an applicant in the matter in which a low-paid authorisation has been issued, is that the authorisation excluded employers who had already had an enterprise agreement.<sup>597</sup> While we note these submissions, we consider that the low-paid bargaining provisions are very much in their infancy and it is not yet possible to assess their effectiveness in meeting their objectives. In respect of the issue raised by United Voice, we note that FWA has discretion as to whether to include employers to which agreements have already applied. It has foreshadowed that 'there may be other cases in which a different approach could be followed consistent with the legislative provisions'.<sup>598</sup>

The effect of many of the other proposals relating to multi-employer bargaining generally would be to introduce elements of compulsion beyond that which is mandated in the policy framework for the FW Act. The Panel is not convinced that a case for change has been made out.

### 6.3.9 Impact of good faith bargaining and associated provisions

#### General impact

The good faith bargaining and associated provisions aim to address the absence of a positive obligation to bargain under the previous legislation. The material set out in 6.3 of the Report demonstrates that the provisions have largely been effective in meeting their objective. This has resulted in an increase in collective agreement making. In July 2009,

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<sup>590</sup> ANF, pp. 9–10; Forsyth and Stewart, pp. 18–19; see *United Voice, AWUE Queensland* [2011] FWA FB 2633.

<sup>591</sup> United Voice, p. 24.

<sup>592</sup> COSBOA, Attachment 2, p. 16.

<sup>593</sup> CCIWA, pp. 18, 94.

<sup>594</sup> HR Nicholls Society Part C, p. 6.

<sup>595</sup> Ai Group, pp. 18, 75.

<sup>596</sup> Fair Work Australia, Annual report 2009–10 and Annual report 2010–11; Fair Work Australia, *Quarterly Report*, Report to the Minister, Jul–Sep 2011 and Oct–Dec 2011; *United Voice, AWUE Queensland* [2011] FWA FB 2633.

<sup>597</sup> United Voice, p. 24.

<sup>598</sup> [2011] FWA FB 2633, [38].

at the commencement of the FW Act, there were 22,371 current agreements covering almost 2.05 million employees. As at 30 September 2011 there were 22,769 agreements covering 2.42 million employees.<sup>599</sup>

Interestingly, as we have noted above, orders relating to the good faith bargaining and associated provisions have been used in only a very small proportion of bargaining processes. Table 6.5 demonstrates the extent of FWA intervention in bargaining by making determinations, authorisations or orders under the good faith bargaining and associated provisions.

The number of agreements approved does not reflect all instances of bargaining, assuming that some parties do not reach agreement; however, it is the best available indicator. It is likely that in some cases multiple orders have been made in respect of bargaining for one agreement. Even with these limitations, and taking each determination, authorisation or order reflected in Table 6.5 as applying to a separate agreement, orders relating to the good faith bargaining provisions have had a direct impact on less than 1 per cent of all agreements. While the evidence set out above suggests these provisions have had an indirect positive influence on bargaining, it is not possible to measure its extent.

**Table 6.5—FWA intervention in bargaining**

Process	Number	Percentage of agreements affected
Agreements approved	18,315	-
Majority support determinations made	80	0.44%
Bargaining orders made	35	0.19%
Scope orders made	17	0.09%
Low-paid authorisations made	1	0.01%
Serious breach declarations made	0	0.00%
<b>TOTAL</b>	<b>133</b>	<b>0.73%</b>

Source: Agreements approved – DEEWR Workplace Agreements Database. No. Applications, Orders and Determinations - FWA annual and quarterly reports, and FWA advice, from 1 July 2009 to 31 March 2012.

Note: In addition to these instances of compulsory intervention by FWA, FWA also conducted dispute resolution in 371 matters between 1 July 2010 and 31 March 2012 (see 6.3.7).

On the evidence available, direct compliance costs to employers and employees have arisen from good faith bargaining and associated orders in only a very small number of cases. Where this occurs, however, the costs associated with participating in a proceeding to determination are likely to be significant and will have a greater impact on smaller employers and unions with less access to the resources required to do so. The relative benefit that accrues when orders have enabled disputes to be resolved and agreements made flows beyond the immediate parties to the broader community.

#### **Impact on employers**

For the small proportion of unwilling employers who have been compelled to bargain through these provisions, the FW Act is likely to have imposed costs that previously they would not have incurred, including, as noted above, the costs of

<sup>599</sup> Data derived from DEEWR's Workplace Agreements Database; Fair Work Act Review discussion paper, p. 13; DEEWR, *Trends*, September quarter 2011. See also Chapter 4.3.



defending proceedings and costs associated with bargaining itself. No stakeholder sought to quantify these costs. It is not possible to know to what extent these costs have been offset or negated—for example, as a result of a particular employer no longer administering a large number of individual statutory agreements. While it is likely that entering an enterprise agreement has in some cases increased labour costs for employers, in other cases it is likely to have resulted in efficiency and other benefits for employers.

The impact of the provisions is likely to differ in light of different employer characteristics, such as the size of the relevant business, the different bargaining issues raised, the particular labour requirements of the employer and the availability of that labour.

Good faith bargaining requirements also apply to the conduct of unions and other employee bargaining representatives. This is a benefit for employers, who have recourse to orders to address bargaining behaviour contrary to the good faith bargaining requirements. It is likely that the mere availability of this remedy has had an indirect impact on union bargaining conduct.

The FW Act allows employees to be represented by their union in bargaining if they wish. There is a lower proportion of non-union agreements under the FW Act than under Work Choices. Requiring an employer to bargain with a union representative may have contributed to this, although the Panel notes that the proportion of non-union agreements under the FW Act is significantly higher than under both the WR Act and the IR Act post-1993. A comparison of union and non-union agreements is made at 6.3.6.

### **Impact on employees**

The FW Act has extended the benefits of collective agreements to approximately an additional 440,000 employees.<sup>600</sup> It has provided employees with a greater voice in the bargaining process by facilitating collective bargaining when a majority of employees wish to do so and by allowing employees to be effectively represented by their union.

The promotion of collective bargaining in good faith is a core objective of the FW Act. In essence, it is designed to rectify the imbalance in the previous legislative schemes by empowering employees to bargain collectively. The costs that ensue to a small number of employers who previously refused to collectively bargain with their employees is outweighed by the benefits to employees of a system that actively promotes the uptake of collective agreements.

## **6.4 Agreement type, content and approval**

### **6.4.1 Agreement types**

Under previous schemes, there was a distinction between union and non-union collective agreements, which resulted in disputes over the type of agreement to be negotiated. This inhibited the making of agreements and in some cases led to industrial action. The decision to create a single stream of agreements between employers and employees was intended to remove the capacity for disputes over the type of agreement parties should enter into, and also allow an agreement to be made even if the union did not support or recommend it.<sup>601</sup> The Implementation Plan made it clear that agreements could be made with no union input or involvement if there were no union members at a workplace or if employees did not wish to be represented by a union.<sup>602</sup>

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<sup>600</sup> Data derived from DEEWR's workplace agreements database as at 31 December 2011; see also Fair Work Act Review Discussion Paper, p. 13.

<sup>601</sup> DEEWR submission to the FW Bill inquiry, pp. 19, 37; EM, p. xxxi.

<sup>602</sup> FWFIP, pp. 13–14.

Under the FW Act, enterprise agreements may or may not cover a union. An enterprise agreement can cover a union in circumstances where that union is a bargaining representative for a proposed enterprise agreement and has applied to FWA to be covered by the enterprise agreement.<sup>603</sup>

A number of employer organisations urged a return to the union and non-union agreement streams, thereby allowing an employer to choose to exclude a union from agreement coverage.<sup>604</sup> The Ai Group submitted that a union should only be entitled to be covered by an agreement where the parties have agreed to it, arguing that it is not appropriate that a union with only one relevant member be covered by an agreement.<sup>605</sup>

We have considered the argument that union bargaining representatives for an enterprise agreement should not be entitled to be covered by the agreement. We were not directed to any evidence that allowing a union bargaining representative to be covered by an enterprise agreement has been problematic. The two case studies in the Ai Group's submission did not demonstrate any problem arising from a union being covered by an enterprise agreement. Rather, the case studies related to applications for bargaining orders prior to the relevant agreements being approved.<sup>606</sup> The legal consequences of a union being covered by an agreement are limited to ensuring that agreement content under s. 172(1)(b) is permitted; providing rights to terminate the agreement; and prohibiting organising and engaging in industrial action until 30 days before the nominal expiry date of the agreement. We have identified a very small number of cases where a union's eligibility to be covered by an agreement has been disputed. These disputes have arisen at the approval stage of agreement making and have not prevented the agreements being made or approved.<sup>607</sup>

At 6.3.6 we examined the incidence of union and non-union agreements under each of the four industrial relations regimes examined in this Report. This data demonstrated that the incidence of non-union agreements peaked under Work Choices, which we do not consider surprising given the limits on union representation under that system. However, the data also demonstrates that more non-union agreements have been made under the FW Act, covering more employees, than under either the WR Act or the IR Act post-1993. As noted above, the FW Act was expressly intended to allow employees to be represented by their union in bargaining and agreement making. The change in proportion of union agreements between Work Choices and the FW Act may in part reflect the change to a single stream of agreements, along with changes to the rights of employees to be represented by a union in bargaining. Viewed in the context of the two prior regimes, we concluded above that, in addressing the problems associated with Work Choices, the FW Act has not disproportionately or unduly increased the role of unions in agreement making in comparison with previous regimes.

#### 6.4.2 Breadth of agreement content

To address complex and prescriptive regulation under Work Choices, including about agreement content, which hindered agreement making and increased agreement making outside the statutory scheme, Forward with Fairness foreshadowed that the FW Act would 'remove the ... onerous, complex and legalistic restrictions on agreement content' that had been introduced under Work Choices and allow bargaining participants to 'be free to reach agreement on whatever matters suit them'. The policy objective was that parties who bargained in good faith and could reach agreement would be free to do so 'without the need for government intervention or to comply with complex procedural rules and requirements'. The intention was to remove the need for parties 'to resort to side agreements and other deals to set out their arrangements'.<sup>608</sup> In her speech to the National Press Club, the then Deputy Prime Minister indicated that such matters should properly relate to work, and that matters relating to managerial prerogative such as

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<sup>603</sup> FW Act, s. 183.

<sup>604</sup> See, for example, ACCI submission, [8.87]–[8.89], [8.92], recommendation 8.1.

<sup>605</sup> Ai Group, pp. 66–67. See AMWU supplementary, p. 4 in response.

<sup>606</sup> Ai Group, pp. 66–67.

<sup>607</sup> See, for example, *John Holland Pty Ltd (NSW/ACT)* [2009] FWA 1774; *Conspect Construction Pty Ltd T/A Perth Precast* [2012] FWA 216; *RotoMetrics Australia Pty Ltd T/A RotoMetrics v AMWU and others* [2011] FWAFB 7214.

<sup>608</sup> FWF, pp. 14–15. See also EM, p. xxxv.

‘decisions about closing an unprofitable plant or using a preferred supplier’ would not be included in enterprise agreements, as had always been the case.<sup>609</sup> The DEEWR submission outlined the basis of the ‘matters pertaining’ formula, which was ultimately included in the FW Act.<sup>610</sup>

Section 172(1) of the FW Act provides that enterprise agreements can be made about:

- matters pertaining to the relationship between an employer that will be covered by the agreement and that employer’s employees who will be covered by the agreement
- matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement
- deductions from wages for any purpose authorised by an employee who will be covered by the agreement
- how the agreement will operate.

The FW Act prohibits the inclusion in agreements of ‘unlawful terms’. These are discriminatory terms, objectionable terms, and certain other terms dealing with unfair dismissal, industrial action and right of entry that are inconsistent with the provisions of the FW Act about these matters.<sup>611</sup> Further, a term of an agreement has no effect to the extent that it is not a term about a permitted matter. However, the inclusion of such a term does not prevent the agreement from being an enterprise agreement<sup>612</sup> or from being approved.<sup>613</sup>

Many submissions about agreement content were made, and in the following section we address the significant examples.

Many employers submitted that the scope of agreement content under the FW Act is unduly wide and constitutes an undesirable impost on managerial decision making. Some employers called for a return to the matters pertaining to the employment relationship formula, consistent with the High Court’s *Electrolux* decision, and the removal of the capacity to include matters pertaining to the employer’s relationship with the union.<sup>614</sup> Some also called for the reintroduction of the Work Choices mechanisms for listing exceptions to otherwise permissible content or prescribing ‘unlawful terms’.<sup>615</sup>

Some unions supported the current scope of permissible agreement content.<sup>616</sup> Many other unions submitted that the scope of agreement content is too restrictive and should be broadened.<sup>617</sup> A number of unions submitted that agreements should be able to cover all legitimate employee interests, including social and economic matters with a direct impact on workers generally.<sup>618</sup> Some referred to ILO standards or productivity arguments to support this assertion.<sup>619</sup>

Employers argued that agreement content that restricts the use of contractors or labour hire inhibits flexibility and constitutes an undue restriction on management of the business.<sup>620</sup> Unions argue that such clauses are aimed at creating job security for permanent and casual employees.<sup>621</sup> Employers also variously opposed content relating to a union’s capacity to represent employees (such as additional rights of entry), be involved in workplace decision making or promote union membership.<sup>622</sup> The AMWU suggested this ignores the role that union representatives play—for

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<sup>609</sup> PCS.

<sup>610</sup> DEEWR submission to the FW Bill inquiry, pp. 24, 25.

<sup>611</sup> FW Act, ss. 12, 186(4), 194–195.

<sup>612</sup> FW Act, ss. 253(1)(a), 253(2).

<sup>613</sup> FW Act, Part 2–4, Division 4, Subdivision B.

<sup>614</sup> See, for example, Ai Group, p. 16, 62–3; BHP, pp. 4–5, AMMA, p. 12; CCIWA, pp. 12, 49; ASA, p. 12.

<sup>615</sup> ACCI, pp. 14, 106; POAGS, p. 7; CCIWA, pp. 9, 44; Qantas, pp. 2–4.

<sup>616</sup> ANF, p. 5; MUA, p. 5; PFA, p. 2; SDA, pp. 6–7.

<sup>617</sup> AIMPE, p. 2; CFMEU C&G Supplementary, pp. 2–3; HSU, p. 9.

<sup>618</sup> ACTU, pp. 42–43, 57; AEU, p. 7; ASU, p. 19; TCFUA, pp. 13–14.

<sup>619</sup> ACTU, p. 57; AMWU, pp. 6–7, 9; CFMEU supplementary, p. 4. See also Ai Group supplementary, p. 23. See also CCIQ supplementary, p. 8.

<sup>620</sup> AMMA, pp. 12, 78; ACCI, p. 14; Woodside, pp. 13–14; Business SA, p. 9.

<sup>621</sup> Unions NSW, pp. 11–12.

<sup>622</sup> ACCI, p. 14; Ai Group, pp. 40–42; Ai Group Supp, p. 47; AMMA, pp. 12, 15; Business SA, p. 9; BCA, pp. 41–2, 48; CCIWA, pp. 12, 57; MBA, p. 84; MCA, p. 22.

example, in consultation and dispute resolution procedures.<sup>623</sup> Some unions argued for restrictions on improvements to statutory right of entry in agreements to be lifted.<sup>624</sup>

Provisions about an employer's contracting out of work and an employee's capacity to be represented by a union in the workplace have been a feature of industrial instruments, with the exception of instruments made under Work Choices, since early last century. Arguments about whether these are 'matters pertaining' to the employment relationship or whether they should be the exclusive domain of 'managerial prerogative' have been going on for equally as long.<sup>625</sup> Without revisiting every decided case on these issues, it is worth reviewing some of the key authorities, if only to demonstrate that the issues of agreement content which we are considering today are by no means new.

### Early cases

In the 1919 case of *Archer*, the High Court considered whether claims for union rights of entry and prohibitions or conditions on contracting out work were about matters pertaining. The claims were opposed by employers then, as they are today, because 'the granting of them would bring about an interference with the way in which employers shall carry on their business' and 'none of the claims have anything to do with the conditions of employment'.<sup>626</sup> The High Court found in favour of the union.<sup>627</sup> Justice Higgins characterised the right of entry claim as enabling an employee's union to check compliance with any agreement or award, and observed, regarding the contracting claim, the 'vital importance to the members of the union that an employer shall not have facilities for evading the award rates and conditions'.<sup>628</sup>

Almost 50 years later, in *Ex Parte Cocks*, the High Court came to the opposite conclusion about a prohibition on contracting.<sup>629</sup> Chief Justice Barwick, Justice Taylor and Justice Owen had 'great difficulty with the proposition that an alternative course which is lawfully open to an employer and which the Commission has no independent power to forbid or regulate, may be forbidden or regulated merely because it is in the interests of employees in the industry that this should be done, or merely because it is an undesirable practice'.<sup>630</sup>

In the 1978 case of *Ex Parte Moore* the High Court again considered whether it was possible to include a restriction on contracting out in an award.<sup>631</sup> Justice Gibbs considered that *Ex Parte Cocks* was distinguishable, as the claim in question was not an outright prohibition.<sup>632</sup> Justice Jacobs, with Justice Stephen concurring, observed that if the relevant claim could not be included companies could avoid award conditions for activities that were in substance their own.<sup>633</sup>

In the 1987 case of *Re Cram*, the High Court observed that a dispute about manning levels 'affects the volume of work to be performed by each employee and the conditions in which he performs his work' and, in respect of recruitment modes, 'the competence and reliability of the workforces has a direct impact on the conditions of work'. The court considered that 'employees, as well as management, have a legitimate interest in both these matters' and rejected the suggestion 'that managerial decisions stand wholly outside the area of industrial disputes and industrial matters'.<sup>634</sup>

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<sup>623</sup> AMWU supplementary, p. 5.

<sup>624</sup> ACTU, p. 57; NUW, p. 17; SDA, p. 80.

<sup>625</sup> For most of this period, the prerequisite for inclusion of such matters in awards was whether they could properly found a dispute about 'industrial matters'. Industrial matters were defined to mean 'all matters pertaining to the relations of employers and employees': *Conciliation and Arbitration Act 1904*, s. 4.

<sup>626</sup> *The Federated Clothing Trades of the Commonwealth of Australia v Archer and Ors* (1919) 27 CLR 207, 210–211.

<sup>627</sup> Per Isaacs, Higgins, Powers, and Rich JJ.

<sup>628</sup> (1919) 27 CLR 207, 216–217, per Higgins J.

<sup>629</sup> *R v The Judges of the Commonwealth Industrial Court and Ors; Ex Parte Cocks and Ors* (1968) 121 CLR 313, Per Barwick CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ.

<sup>630</sup> (1968) 121 CLR 313, 319–320, per Barwick CJ, Taylor and Owen JJ.

<sup>631</sup> *R v Moore and Ors; Ex Parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470, Per Gibbs, Jacobs and Stephen JJ.

<sup>632</sup> (1978) 140 CLR 470, 473, per Gibbs, J.

<sup>633</sup> (1978) 140 CLR 470, 47477-478, per Jacobs J.

<sup>634</sup> *Re Cram, Ex Parte NSW Colliery Proprietors Association Ltd*, (1987) 163 CLR 117, 135–136.

In the 1994 case of *Re Alcan*, the High Court considered whether a claim for deduction by an employer of union dues was an industrial matter. Confirming the earlier decision of *R v Portus*, the court held that in order for a matter to pertain to the relations of employers and employees it must affect them in their capacity as such.<sup>635</sup> The court rejected a claim about deduction of union dues, as it pertained to the relationship between the employer and its employees as ‘union members’, not as employees.<sup>636</sup>

### Electrolux and post-Electrolux

Many employers have submitted that agreement content rules should be consistent with the 2004 High Court decision in *Electrolux*.<sup>637</sup> *Electrolux* confirmed that the ‘matters pertaining’ formulation had application to the content of certified agreements under the WR Act. The approach to ‘matters pertaining’ which the court applied in *Electrolux* was that confirmed in *Re Alcan*, namely that the matter must pertain to the relevant employers and employees in their capacity as such.<sup>638</sup> Following *Electrolux* there were many decisions considering the validity of a variety of proposed agreement clauses, including those relating to union rights and contracting.

The AIRC decision in *Schefenacker* was something of a test case in which the Full Bench considered whether a range of clauses in a number of proposed agreements were about matters pertaining to the requisite employment relationship.<sup>639</sup> The *Schefenacker* Full Bench found that a number of union facilitation provisions were matters pertaining, including trade union training leave<sup>640</sup>, union delegates clauses<sup>641</sup> and right of entry for the purpose of ensuring observance of the agreement.<sup>642</sup> However, they found that right of entry for ‘legitimate union business’ could be used for extraneous purposes and was not limited to matters pertaining.<sup>643</sup> They also found provisions regulating labour hire were matters pertaining, notwithstanding that they ‘may be construed as a partial prohibition on the use of labour hire employees’, as they were designed to increase permanent employment and concerned the employment security of the employees covered by the agreement.<sup>644</sup> Less than three months earlier, the Federal Court in *Westfarmers* had found that a clause restricting use of contractors was not a matter pertaining.<sup>645</sup> The difference in the two approaches was reconciled in *TWU v Australian Air Express* on the basis that *Westfarmers* identified a line, which is ‘not always easy to draw’, whereby prohibitions on the right to use contractors were not permissible, but provisions regulating their conditions were permissible.<sup>646</sup>

### Work Choices

Prior to the commencement of Work Choices, *Schefenacker* represented the accepted state of the law on matters pertaining for agreement making. There was significant scope for agreements to include terms dealing with contracting, labour hire, manning levels, union right of entry and other union facilitation clauses. However, the difficulties in applying the ‘matters pertaining’ principle meant that there was often uncertainty about the validity or otherwise of a particular clause and which side of the ‘line’ it fell.<sup>647</sup> Work Choices addressed this uncertainty by introducing strict prohibitions on the inclusion of a range of content in agreements. ‘Prohibited content’ included matters that did not

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<sup>635</sup> *Re Alcan, Australia Ltd and ors; Ex Parte Federation of Industrial, Manufacturing and Engineering Employees*, (1994) 181 CLR 96, p. 106–07, citing *R v Portus, Ex Parte Australia and New Zealand Banking Group Ltd*, (1972) CLR 353.

<sup>636</sup> *ibid.*, p. 107.

<sup>637</sup> *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 133 IR 49; [2004] HCA 40.

<sup>638</sup> See, for example, per J McHugh, [80].

<sup>639</sup> *Re Rural City of Murray Bridge Nursing Employees, ANF (Aged Care)—Enterprise Agreement 2004; Re Schefenacker Vision Systems Australia Pty Ltd, AWU, AMWU Certified Agreement 2004* (2005) 142 IR 289; [2004] AIRC 1064.

<sup>640</sup> (2005) 142 IR 289, [88]–[90], citing *Re K L Ballantyne & National Union of Workers (Laverton Site) Agreement 2004* [PR952656] and *Westfarmers Premier Coal Ltd v AMWU (No 2)* [2004] FCA 1737

<sup>641</sup> (2005) 142 IR 289, [127]–[132]; See also *Westfarmers Premier Coal Ltd v AMWU (No 2)* [2004] FCA 1737; (2004) 138 IR 362.

<sup>642</sup> (2005) 142 IR 289, [93]–[94].

<sup>643</sup> (2005) 142 IR 289, [119]–[124].

<sup>644</sup> (2005) 142 IR 289, [83].

<sup>645</sup> *Westfarmers Premier Coal Ltd v AMWU (No 2)* [2004] FCA 1737; (2004) 138 IR 362, pp. 389–90.

<sup>646</sup> PR959284 [2005] AIRC 566 (24 June 2005), per Harrison SDP and Smith C, SDP Hamberger dissenting [48].

<sup>647</sup> See J Harrison, ‘Federal collective bargaining after *Electrolux*’, *Federal Law Review*, vol. 34, no. 1, 2006, p. 45.

pertain to the relevant employment relationship, as well as a wide range of content that had previously been found to be matters pertaining, such as contracting, labour hire and union representation rights.

A common practice, which began after the *Electrolux* decision due to uncertainty about permissible content and ‘became almost compulsory’ after the enactment of prohibited content rules under Work Choices, was for unions to concurrently negotiate a formal agreement to be certified by the AIRC and a side agreement or deed containing matters that could not be included in registered agreements.<sup>648</sup> Stewart and Riley have described the legal and practical difficulties that arose as a result of this practice. They also observe that the prohibited content restrictions ‘caused significant difficulties for employers due to the uncertainty of what is prohibited’ and due to the difficulties and delays associated with obtaining a pre-lodgment assessment of agreements.<sup>649</sup> Accordingly, the restrictions on permissible agreement content did not necessarily make it clearer to parties what matters fell within or outside the rules and did not prevent parties from reaching agreement about the matters it sought to prohibit.

### Fair Work Act

As described previously, the FW Act reintroduced the ‘matters pertaining’ formulation for agreement content. The EM indicates that the substantial jurisprudence about matters pertaining which preceded Work Choices was intended to apply to s. 172(1)(a) of the FW Act.<sup>650</sup> The EM goes on to provide some examples of agreement terms that would be intended to be matters pertaining, which in the Panel’s view are consistent with the case law.

The FW Act also permits additional terms, pursuant to s. 172(1)(b), that relate to a union’s ‘legitimate role in representing the employees to be covered by the agreement’.<sup>651</sup> The EM observes that a matter may fall within both s. 172(1)(a) and s. 172(1)(b).<sup>652</sup> The intention of this additional category was to reduce some of the uncertainty that arose as to whether terms relating to union facilitation could legitimately be included in agreements under the traditional ‘matters pertaining’ formula.<sup>653</sup> An advantage of this approach is that it removes the incentive for regulation of such matters through ‘side deals’ such as occurred after *Electrolux* and post-Work Choices, as just described.

### Impact of new agreement content rules

Table 6.6—Comparison of contractor and union clauses in agreements

Condition and years recorded	Pre-Work Choices		FW Act	
	Agts	Emps	Agts	Emps
Restriction on contractors (1997–2006, 2009–11)**	23.10%	11.50%	4.80%	8.60%
Union fees deducted (1997–2006, 2009–11)	15.40%	23.07%	10.85%	20.86%
Union right of entry (1997-2006, 2009–11)	46.03%	38.71%	9.99%	21.69%
Delegates—leave for union training (1997–99, 2010–11)	25.96%	33.17%	34.72%	46.26%

Notes: Percentages are calculated based on lodgments/approvals for only the years in which the condition was recorded.

\*\* Coding framework definitions have changed over time. The 2006 definition differs from the 2011 definition.

Table 6.6 compares the incidence of particular contractor and union facilitation clauses in agreements made in the period prior to the enactment of Work Choices as well as under the FW Act. It demonstrates that, with the exception of

<sup>648</sup> A Stewart & J Riley, ‘Working around Work Choices: collective bargaining and the common law’, (2007) 31(3) *Melbourne University Law Review*, vol. 31, no. 3, 2007, pp. 903, 908–909.

<sup>649</sup> *ibid.* pp. 903, 910–911, citing ‘Employer fears on prohibited content slowing down bargaining, unions claim’, *Workplace Express*, 21 September 2006.

<sup>650</sup> EM, p. 107.

<sup>651</sup> EM, p. 109.

<sup>652</sup> EM, p. 109.

<sup>653</sup> DEEWR submission to the FW Bill inquiry, pp. 24–25.

clauses providing for trade union training leave, such clauses are less common under FW Act agreements than in the period prior to Work Choices. Certainly the FW Act agreement content provisions have not led to any significant increase in these provisions than when they were last permitted in agreements, prior to Work Choices.

Employers drew our attention to decisions including *Australian Industry Group v ADJ Contracting Pty Ltd*<sup>654</sup>, *Dunlop Foams*<sup>655</sup> and *Asurco Contracting v CFMEU*.<sup>656</sup> These decisions involve a consideration of clauses relating to union facilitation and engagement of contractors. In our view the clauses considered in these cases would have been likely to fall within the matters pertaining formula prior to 2006. Similarly we were referred to the decision in *Airport Fuel Services Pty Ltd v TWU*<sup>657</sup>, in which the clause in question provided that an employer had to ensure that any contractor had an agreement with the Transport Workers Union (TWU). To this extent, the Full Bench considered it was not permitted content. In reaching this conclusion, it applied the previous 'matters pertaining' jurisprudence and further found it was not a matter pertaining to the relationship between the employer and the union. AMMA's submission suggested that decisions such as those referred to above 'demonstrate how much things have changed'.<sup>658</sup> It is true that inclusion of such matters in agreements represents a change from the Work Choices period. However, it also largely represents a return to agreement-content rules that developed over more than a century.

The capacity to reach agreement over a wider range of matters may lengthen the bargaining process in circumstances where the parties are unable to agree over these additional matters. While the extent to which this has occurred is not clear, the current bargaining between BMA and the CFMEU Mining and Energy Division represents an extreme example. Bargaining for an agreement between those parties has been taking place for approximately 17 months.<sup>659</sup> In its submission to the Review, BHP listed outstanding matters over which agreement had not been reached between its subsidiary BMA and employees at its Bowen Basin mine, including many matters that would have been 'prohibited content' under Work Choices.<sup>660</sup> One union bargaining representative, the CFMEU Mining and Energy Division, recently described the matters outstanding as 'crucial conditions around safety, rosters, housing and equality for contractors'.<sup>661</sup> It appears therefore that the outstanding matters include some that were previously prohibited (such as conditions for contractors) and some that were not (such as rostering). Accordingly, the previously prohibited matters may be contributing to the delay in finalising an agreement at BMA. These previously prohibited matters nonetheless may have been the subject of a dispute over the content of a 'side agreement'<sup>662</sup> had the bargaining occurred under Work Choices.

The matters that may or may not be included in an enterprise agreement have been hotly disputed in submissions to us and in the media. In the view of the Panel, the matters pertaining formulation, which is the centrepiece of s. 172, accords a fair balance between the prerogative of management to manage and the reasonable desires of employees to jointly govern their terms and conditions of employment. Furthermore, the jurisprudence on this phrase is well known to the parties, and any further refinements should be left to FWA and the courts. Similarly, we believe that the permitted matters in s. 172 concerning the relationship between an employer and a union covered by the agreement address some uncertainties that would otherwise exist as to the outer reach of matters pertaining, and are an appropriate balance between the freedom of employers and the legitimate rights of employees to be represented in the workplace. We do not recommend any changes to s. 172 of the FW Act.

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<sup>654</sup> [2011] FWAFB 6684.

<sup>655</sup> *Pacific Brands Limited t/as Dunlop Foams* [2009] FWAA 1118, 16 November 2009.

<sup>656</sup> [2010] FWAFB 6684.

<sup>657</sup> [2010] FWAFB 4457.

<sup>658</sup> AMMA, p. 78.

<sup>659</sup> Bowen Basin ballot delayed as unions object; Norwich Park ceases production', *Workplace Express*, 11 April 2012.

<sup>660</sup> BHP, pp. 3–4.

<sup>661</sup> 'CFMEU calls on BHP listen to Bowen Basin coal workers after another overwhelming ballot defeat', 21 May 2012, <http://cfmeu.com.au>.

<sup>662</sup> See Appendix B.

### 6.4.3 Opt-out clauses

'Opt-out' clauses in agreements allow employees to vote on an agreement and then elect not to be covered by it on an individual basis. The FW Act does not directly provide for, nor directly prohibit, opt-out clauses. Many unions and others called for a prohibition on opt-out clauses in agreements.<sup>663</sup>

This issue first arose upon an application for approval of the Newlands Coal Surface Operations Enterprise Agreement 2010. The agreement contained a coverage clause which provided that employees who would otherwise be covered by the scope of the agreement could elect at any time in writing not to be covered by the agreement, in which case the agreement would not cover that employee.

Commissioner Roe at first instance found that the FW Act did not permit opt-out clauses as:

- Agreements can only be made with employees who *will*, as opposed to *may* be covered.
- The FW Act makes no provision for optional coverage in ss. 52–54.
- Only employees who *will* be covered can vote for and validly approve an agreement.
- There could not be 'genuine' agreement where some may opt out in future.
- The BOOT would not be satisfied, as an employee who opted out would not be better off than the award, with any undertaking to this effect not readily enforceable.
- The group could not be fairly chosen where some may opt out in future.

Further, Commissioner Roe considered an opt-out clause to be inconsistent with the objects of the FW Act and Part 2-4, inconsistent with a long line of Australian authority that parties cannot contract out of awards, and inconsistent with the absence of a statutory individual agreement mechanism in the FW Act.<sup>664</sup>

On appeal, the Full Bench revoked the decision of Commissioner Roe and decided the application. They found that the employees who made the agreement were covered at the relevant time and that whether or not those employees remain covered cannot and need not be known, as the phrase 'will be' was not intended to identify those that would be covered with absolute certainty. They considered that the opt-out provision did not detract from the genuine agreement of the employees. They found that the BOOT test had been satisfied because employees could elect to remain on conditions more beneficial than the award. The agreement was approved, subject to an undertaking that no employee would be required as a condition of employment to opt out of the agreement.<sup>665</sup>

On appeal to the Federal Court, Justice Katzmann found that the agreement had been validly made, notwithstanding that it excluded a class of employees from coverage and the identity of that class could not be known at the relevant time.<sup>666</sup> However, she found that 'a right to choose not to be covered is not a benefit or entitlement conferred by the agreement' but a 'right to forfeit' such benefits and that what the Full Bench described in finding that the agreement passed the BOOT 'was no benefit at all'. Further, she found that the Full Bench had failed to consider whether the group of employees to be covered by the agreement was 'geographically, operationally or organisationally distinct' and therefore had failed to exercise their jurisdiction.

The Full Bench subsequently reconsidered the approval of the agreement and, subject to an undertaking that employees who opted out would be entitled to more than the award, approved the agreement.<sup>667</sup>

*Newlands Coal* was followed in *Re New Acland Coal*<sup>668</sup>, with Vice President Lawler indicating that, while he was bound to follow the Full Bench in *Newlands Coal*, he agreed with the decision of Commissioner Roe at first instance.

<sup>663</sup> ETU, pp. 6–7; ASU, p. 20; APESMA, p. 9; AMWU, pp. 23–26; NSW Society of Labour Lawyers, p. 8.

<sup>664</sup> *Newlands Coal Pty Ltd* [2010] FWA 4811

<sup>665</sup> *Newlands Coal v CFMEU* [2010] FWAFB 7401, per Hamberger SDP and McCarthy DP, Blair C dissenting.

<sup>666</sup> *CFMEU v Deputy President Hamberger and ors* [2011] FCA 719.

<sup>667</sup> *Newlands Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* [2011] FWAFB 7325.



*Newlands Coal* was also considered in *ALDI*. Here, the agreements under consideration permitted ALDI to determine their scope of operation and expressly provided for ALDI to engage employees ‘under different hours of work and pay arrangements’.<sup>669</sup> Commissioner McKenna found that the circumstances of the ALDI agreements were distinguishable from that in *Newlands Coal* because they did not involve employee choice in opting out, but observed that ‘if comparisons can be drawn ... , imperfect though they are, the ALDI agreements allow ALDI unilaterally to opt out of the agreements’.<sup>670</sup>

The ALDI agreements illustrate the difficulty associated with the approach in *Newlands Coal*, which was not decided on the basis that opting out was the employee’s choice. It is not clear how the reasoning of the Full Bench is limited to where an employee decides to opt out, as opposed to the employer deciding who opts out. Further, an opt-out clause could apply to only a subset of employees, who may influence the vote to the detriment of employees bound to remain covered by the terms. Employees who opt out could legitimately institute bargaining for a new agreement, including by taking protected industrial action.<sup>671</sup>

Opt-out clauses are relatively novel, and we are unaware that they have been a feature of more than a small number of agreements. However, we are concerned that as a result of *Newlands Coal* they may become more common. In the view of the Panel these clauses undermine the collective nature of an enterprise agreement. The Panel is concerned by the potential for opt-out clauses to be used to manipulate agreement making by allowing a range of employees to approve an agreement, only to have a number of them opt out at a later stage. Likewise, operational agreements could be displaced by employees opting out, possibly reopening bargaining. Also concerning is the potential for new and existing employees to feel pressured to opt out of such agreements, thereby relinquishing legitimate rights and entitlements.

**Recommendation 23:** The Panel recommends that the FW Act be amended to prohibit enterprise agreement clauses which permit employees to opt out of the agreement.

#### 6.4.4 Dispute resolution clauses

In 5.3.3 we considered the nature of award dispute resolution clauses. Consistent with the position in respect of award dispute resolution, the FW Act does not require dispute resolution provisions in enterprise agreements to provide for arbitration. A number of unions submitted that it should be compulsory to include arbitration in a dispute resolution procedure under the FW Act, with the CFMEU Mining and Energy Division submitting that the absence of arbitration in the coal mining industry has been dramatic and costly in terms of industrial action.<sup>672</sup> Ai Group and a number of other employers opposed this submission.<sup>673</sup>

Agreements under the IR Act post-1993 were required to contain dispute resolution procedures about matters arising under the agreement<sup>674</sup>, which could empower the AIRC to settle disputes over the application of the agreement.<sup>675</sup> The High Court described such a provision as authorising the AIRC to exercise a power of private arbitration.<sup>676</sup> The WR

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<sup>668</sup> *Re New Acland Coal Pty Ltd* [2011] FWA 9075. This decision is under appeal.

<sup>669</sup> *ALDI Foods Pty Ltd as General Partner of ALDI stores (A Limited Partnership)* [2012] FWA 161, [14], [15].

<sup>670</sup> [2012] FWA 161, [36].

<sup>671</sup> See AMWU, p. 26.

<sup>672</sup> ACTU, pp. 45–6, 57; CFMEU M&E pp. 13, 15–16; AMWU, pp. 59–61.

<sup>673</sup> See, for example, Ai Group, pp. 139–41; Ai Group supplementary, p. 25.

<sup>674</sup> IR Act, ss. 170MC(1)(c), 170NC(1)(e).

<sup>675</sup> IR Act, ss. 170MH, 170 NI.

<sup>676</sup> *Construction Forestry Mining and Energy Union v Australian Industrial Relations Commission and Anor* (2001) 203 CLR 645, 658; [2001] HCA 16, [31]–[32].

Act contained similar provisions, as did Work Choices workplace agreements; however, the dispute resolution powers of the AIRC under Work Choices were more limited.<sup>677</sup>

The Full Bench in *Ampol Refineries (NSW) Pty Ltd v Australian Institute of Marine and Power Engineers* considered whether a procedure for preventing and settling disputes which merely provided for the referral of a dispute but did not empower it to resolve the dispute met the relevant statutory test under the IR Act post-1993. The Full Bench found that it did, on the basis that ‘procedures for preventing and settling’ disputes meant procedures with that object or purpose, as opposed to procedures that would ‘guarantee’ the preventing and settling of disputes.<sup>678</sup>

The FW Act requires enterprise agreements to include a term requiring or allowing FWA or another independent person to settle disputes.<sup>679</sup> In *Woolworths Ltd t/as Produce and Recycling Distribution Centre*<sup>680</sup> a Full Bench of FWA reached the same conclusion about the effect of these provisions as the earlier AIRC Full Bench in *Ampol*. The *Woolworths* Full Bench considered whether a dispute resolution term under the FW Act is required to provide access to arbitration. It found that the statutory context of FWA’s dispute resolution powers, coupled with a lack of evidence of any clear intention to alter the effect of *Ampol*, told strongly against a conclusion that access to arbitration is a prerequisite for a dispute settling term.<sup>681</sup>

It has been permissible, but not required, for dispute resolution procedures in agreements to authorise arbitration of disputes by the tribunal throughout the period of regulation which we have examined in this report. If anything, the FW Act facilitates greater access to arbitration about disputes over agreements than previously existed because arbitration is included in its model dispute resolution clause.<sup>682</sup> Seventy-three per cent of FW Act agreements contain either the model clause or a clause that provides access to arbitration at the initiative of one party.<sup>683</sup>

The substantive argument in favour of mandating arbitration in dispute resolution clauses is that it provides a quick and cheap resolution of disputes by persons who understand industrial issues.<sup>684</sup> The opposing position, put by Ai Group, is that providing access to arbitration provides less incentive for the parties to search for an acceptable solution.<sup>685</sup>

We do not consider that dispute resolution clauses in agreements should be required to provide for arbitration. This was not the policy objective of the FW Act and would represent a departure from the nature of agreement dispute resolution provisions over the last 20 years. We therefore decline to recommend any changes to the existing dispute settling requirements for enterprise agreements.

#### 6.4.5 Individual flexibility arrangements

We discussed IFAs made pursuant to an award flexibility term in 5.3.2. Many of the submissions received apply to IFAs made under both an award flexibility term and an enterprise agreement flexibility term, and we have considered these submissions in both contexts in Chapter 5. Our recommendations 9–13 are intended to apply in respect of IFAs made under either awards or enterprise agreements. Those recommendations are that:

- the ‘better off overall’ test in ss. 144(4)(c) and 203(4) be amended to expressly permit an individual flexibility arrangement to confer a non-monetary benefit on an employee in exchange for a monetary benefit. Whilst the employee foregoing a monetary benefit need not be an element of the arrangement, and we would expect in many cases it would not, where present the value of the monetary benefit foregone should be specified in writing, be relatively insignificant and the non-monetary benefit should be proportionate in value.

<sup>677</sup> WR Act ss. 170LT(8), 170LW; Work Choices ss. 711, 701.

<sup>678</sup> N Print P8620 [1998] AIRC 1778.

<sup>679</sup> FW Act s. 186(6).

<sup>680</sup> [2010] FWAFB 1464.

<sup>681</sup> [2010] FWAFB 1464, [17]–[39].

<sup>682</sup> FW Act s. 737, FW Regs, Schedule 6.1.

<sup>683</sup> DEEWR Workplace Agreements Database.

<sup>684</sup> CFMEU M&E, p. 12.

<sup>685</sup> Ai Group, p. 140; Ai Group supplementary, p. 21.

- the FW Act be amended to require an employer, upon making an individual flexibility arrangement, to notify the Fair Work Ombudsman in writing (including by electronic means) of the commencement date of the arrangement, the name of the employee party and the modern award or enterprise agreement the arrangement is made under
- the FW Act be amended to provide a defence to an alleged contravention of a flexibility term under s. 145(3) or s. 204(3) where an employer has complied with the notification requirements proposed in recommendation 20 and believed, on reasonable grounds, that all other statutory requirements (including the better off overall test) had been met
- sections 144(4)(d) and 203(6) be amended to require an employer to ensure that an individual flexibility arrangement agreed to under a flexibility term provides for termination by either the employee or the employer giving written notice of not more than 90 days, thereby increasing the maximum notice period from 28 days to 90 days
- sections 144 and 203 be amended to include the prohibition currently under s. 341(3) preventing a prospective employer making an offer of employment conditional on entering into an individual flexibility arrangement.

Here, we address the additional issue of the nature of flexibility terms in enterprise agreements.

The Implementation Plan provided that enterprise agreements would be required to contain a flexibility clause. It provided that ‘the terms of the clause are best decided at the enterprise level in the bargaining process’, but that FWA would publish a model flexibility clause to assist employers and employees in bargaining. It provided that, upon approval of an enterprise agreement, FWA would ensure ‘the clause provides for genuinely agreed individual flexibilities’.<sup>686</sup>

The FW Act requires enterprise agreements to include a flexibility term that must ‘enable an employee and his or her employer to agree to an arrangement ... varying the effect of the agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer’.<sup>687</sup> Where an enterprise agreement does not contain a valid flexibility term, the model flexibility term prescribed in Schedule 2.2 of the FW Regulations is taken to be a term of the agreement.<sup>688</sup> The model term permits flexibility over the same five matters as the model award flexibility term. Safeguards consistent with those applicable to the award flexibility term are also provided for.<sup>689</sup> As noted earlier, the model award flexibility term may, in the future, be varied by FWA (as to matters to which the term applies) to accommodate prevailing workforce and industrial relations circumstances. If that occurred, it would be open to the Executive Government to consider varying Schedule 2.2 in the same way.

The submissions we received indicate that neither employers nor unions are happy with present arrangements concerning flexibility terms in enterprise agreements. Many employers proposed that the model flexibility term operate as a mandatory minimum in enterprise agreements, with the capacity to bargain for greater flexibility.<sup>690</sup> This submission reflected a view that unions have actively campaigned to frustrate the take-up of IFAs by refusing to agree to flexibility terms that operate in respect of more than a small number of relatively insignificant matters.<sup>691</sup> Unions submitted that flexibility terms should not be mandatory in agreements.<sup>692</sup> At least one union observed that it ‘presumes most unions would prefer not to have flexibility clauses in agreements at all, which is why they endeavour to narrow their scope as much as possible’.<sup>693</sup>

<sup>686</sup> FWFIP, p. 14.

<sup>687</sup> FW Act s. 202(1)(a).

<sup>688</sup> FW Act s. 202(4).

<sup>689</sup> FW Act s. 203.

<sup>690</sup> ACCI, p. 11; AMMA pp. 9, 64; AFEI, p. 34; AMIC, p. 7; BCA, p. 48; BHP, p. 5; CCIWA, pp. 14, 62–63; CIA, p. 8; G Smith, p. 2; MCA, p. 22; RIO, p. 5; SAL, p. 2; VECCI Supp, p. 18; WA Govt p. 7

<sup>691</sup> AMMA, pp. 60–61; AHA, p. 28; CAI, p. 9; G Smith, p. 2; PIAA, p. 4

<sup>692</sup> ACTU, p. 57.

<sup>693</sup> AMIEU, p. 7.

DEEWR's Workplace Agreements Database data demonstrates that the model term, or terms that provide for unrestricted flexibility<sup>694</sup>, are included in 57.4 per cent of FW Act enterprise agreements approved between 1 July 2009 and 30 September 2011, covering 60.8 per cent of employees. It is not possible to identify whether the remainder of flexibility terms provide for flexibility over a greater or lesser number of matters than the model term. However, 92 per cent of a sample of 140 agreements with specific flexibility clauses<sup>695</sup> examined by DEEWR provided for flexibility over four or fewer matters.<sup>696</sup> We note that the sample examined by DEEWR represents less than 1 per cent of the 14,282 agreements that have been made under the FW Act as at 30 September 2011 and cannot be assumed to represent the character of all specific flexibility terms in enterprise agreements. However, these figures are consistent with submissions that in many cases flexibility terms in enterprise agreements are restricting the number of matters over which an IFA may be made to below that provided for in the model term.

The FW Act makes inclusion of a flexibility term mandatory rather than optional. While the policy framework for the FW Act envisaged that flexibility terms would be the subject of bargaining, it also envisaged that flexibility terms would allow for genuine flexibility. We believe that this has not always occurred.

In order to create the opportunity for greater use of IFAs as they might modify the operation of an enterprise agreement, the Panel believes the matters covered by the model flexibility term should be included in all enterprise agreements as the minimum matters over which flexibility is permitted, with bargaining representatives having the capacity to negotiate for additional flexibility if they so wish.

**Recommendation 24:** The Panel recommends that s. 203 be amended to require enterprise agreement flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in paragraph 1(a) of the model flexibility term in Schedule 2.2 of the FW Regulations, along with any additional matters agreed by the parties.

#### 6.4.6 Agreement approval, variation and termination

##### The better off overall test

The BOOT was intended to address problems associated with previous tests for measuring proposed agreement content against the relevant safety net. It is important to emphasise that the BOOT serves a quite different purpose in this context than it does in relation to IFAs, which we have already discussed. Indeed, it is unfortunate that the same language is used to describe the test in what are materially different contexts. The BOOT was intended to operate so that enterprise agreements would 'not need to comply with every condition in the relevant award' but could be approved by FWA 'as long as the agreement means employees are better off overall against the safety net'.<sup>697</sup> It is distinguishable from the fairness test that existed under the latter part of Work Choices, 'which only required that an employee be compensated for the modification or removal of a limited range of protected award conditions'.<sup>698</sup> It was anticipated that the BOOT test would be applied by FWA using 'a broadly similar approach to that taken by the AIRC in their administration of the no-disadvantage test that applied from 1996 to 2006'.<sup>699</sup>

The BOOT is the mechanism for assessing the contents of proposed enterprise agreements against the safety net. An enterprise agreement passes the BOOT if FWA is satisfied at the time the application for approval is made that each

<sup>694</sup> This category includes agreements with the model flexibility clause (including where incorporated or by default) and flexibility clauses that allow any term of the agreement to be varied (unrestricted flexibility clauses).

<sup>695</sup> This category includes agreements with flexibility clauses that specify which terms can be varied.

<sup>696</sup> See further Appendix E.

<sup>697</sup> FWF, 14.

<sup>698</sup> DEEWR submission to the FW Bill inquiry, pp. 25–26.

<sup>699</sup> DEEWR submission to the FW Bill inquiry, pp. 25–26.

award-covered employee or prospective employee would be better off overall under the agreement than they would be under the relevant modern award.<sup>700</sup>

The BOOT is a 'global' test in the sense that it does not require each provision of the agreement to result in employees being better off overall than they would be under the award. Rather, it permits agreements that disadvantage employees in some respects and advantage them in others to be approved, provided that the advantages outweigh the disadvantages.<sup>701</sup> In this respect it is similar to the no-disadvantage test which applied under the WR Act.<sup>702</sup>

However, the BOOT is not a 'collective' test in the sense of permitting the impact on employees to be assessed as a group. Instead, it requires *each* employee or prospective employee to be better off overall. In this regard, the BOOT arguably differs from the tests under previous industrial laws for measuring agreements against the safety net, which were interpreted to allow the assessment of advantage or disadvantage to be made on the group of relevant employees as a whole. However, in making its assessment, FWA is not required to investigate each employee's individual circumstances<sup>703</sup> but can consider a *class* of employees and, in the absence of evidence to the contrary, assume that each employee in that class would be better off overall.<sup>704</sup>

Employers generally viewed the BOOT as less flexible than the previous no-disadvantage test.<sup>705</sup> ACCI submitted that agreement making is a one-way street to deliver benefits to employees, not employers.<sup>706</sup> Employers variously submitted that the BOOT is a barrier to agreement making<sup>707</sup>, is applied inconsistently<sup>708</sup>, is an obstacle to flexibility<sup>709</sup> and is overly onerous.<sup>710</sup> They said it should be applied to the overall group of employees, or at least more clearly to a class of employees.<sup>711</sup> Many employers said that non-financial benefits should be able to be considered, contrary to current application of the BOOT.<sup>712</sup> The Australian Newsagents' Federation submitted that workforce utilisation and workforce participation should be considered by FWA.<sup>713</sup> Other employers said that the agreement of the parties should be given greater primacy, even where the BOOT is not passed (ACCI cited examples).<sup>714</sup> The Ai Group submitted that FWA should be required to make a finding in writing with reasons that an agreement does not pass the BOOT, which is subject to appeal, prior to requesting or requiring undertakings to be provided.<sup>715</sup>

The TCFUA and SDA, in contrast, submit that the BOOT is not a particularly high bar given it only requires comparison with the modern award, the 'overall' effect is considered and the comparison only takes place at the time the application is made rather than on, for example, an annual basis.<sup>716</sup> The AWU submits that the BOOT should also measure entitlements under an existing agreement<sup>717</sup>, a proposal that the Ai Group submits would prevent employers ever negotiating less generous conditions, even when a business was no longer competitive.<sup>718</sup> The National Tertiary Education Union (NTEU) proposes special approval requirements relating to precarious employment.<sup>719</sup>

It was submitted that the change from applying a 'collective' test has made it substantially more difficult to apply the BOOT than it was to apply the no-disadvantage test, which has been a disincentive to agreement making. We are

<sup>700</sup> FW Act, s. 193(1), (6).

<sup>701</sup> *NTEU v University of NSW* [2011] FWA 5163; *Armcell Australia Pty Ltd* [2010] FWA 9985.

<sup>702</sup> WR Act, s. 170XA.

<sup>703</sup> EM, p. 128.

<sup>704</sup> FW Act, s. 193(7).

<sup>705</sup> See, for example, ACCI supplementary, p. 8; MPMSAA, p. 7; QTIC, p. 7.

<sup>706</sup> ACCI supplementary, p. 8.

<sup>707</sup> BMIAA, pp. 2, 4–5; MGA, pp. 11–12; ACCI supplementary, p. 8.

<sup>708</sup> CCF, p. 7; NFF, p. 20; PHIEA supplementary, pp. 5–6.

<sup>709</sup> PIAA, p. 3.

<sup>710</sup> BCA, p. 56; ACCI, p. 13; NRA, p. 8; ANRA, pp. 4, 16–19.

<sup>711</sup> BCA, p. 56; ACCI, p. 13; NRA, p. 8; ANRA, pp. 4, 16–19.

<sup>712</sup> ACCI, p. 13; ANRA, p. 19; ARTIO, p. 5; AMIF, pp. 15, 17; CAI, pp. 8–9; MPAQ, p. 6.

<sup>713</sup> Australian Newsagents' Federation, p. 13.

<sup>714</sup> ACCI, pp. 106–107; ANRA, p. 4.

<sup>715</sup> Ai Group, pp. 17, 78.

<sup>716</sup> TCFUA, p. 21; SDA, pp. 57–60. See ANRA supplementary, p. 4, in reply.

<sup>717</sup> AWU, p. 6; see also AEU, p. 4; NTEU, p. 12–13.

<sup>718</sup> Ai Group supplementary, p. 25.

<sup>719</sup> NTEU, p. 9.

concerned that this may be the case, and note that some individual examples have been provided in submissions to this effect.<sup>720</sup> We are concerned that the change between the BOOT and the no-disadvantage test may mean that employers are now required to meet a more rigid standard, as agreements are no longer permitted to disadvantage certain employees where the group of employees is, as a whole, advantaged. We have considered whether there should be additional flexibility in the BOOT such that not every relevant award-covered employee must be better off in appropriate circumstances. However, we are unaware of the widespread impacts of this issue and accordingly are reluctant to recommend change at this stage.

**Recommendation 25:** The Panel recommends that the Government continue to monitor the application of the BOOT to enterprise agreement approvals, to ensure that it is not being implemented in too rigid a manner or resulting in agreements being inappropriately rejected.

Another issue raised by some submissions is the capacity for the BOOT to take into account non-monetary benefits to employees in assessing whether an employee is better off overall. This issue arose in *Bupa Care Services Pty Ltd*<sup>721</sup> regarding the no-disadvantage test under the Transition Act. That decision concerned a refusal to approve two agreements because they contained provisions precluding employees from an entitlement to penalty rates if they indicated their preference to work at the relevant times. The relevant benefit to employees was characterised as the capacity to work their preferred hours, with the trade-off being that they would not receive the penalty rates that would otherwise apply under the award. At first instance, Commissioner Smith rejected this characterisation, observing that ‘the same could be said of a person who would offer for work at an amount below the minimum wage thereby giving themselves a cost and competitive edge against a person who wishes to rely upon the safety net’.<sup>722</sup>

The Full Bench, in considering the appeal, referred to the *Security Officers* case, relating to the WR Act no-disadvantage test. In *Security Officers* the majority stated: ‘[w]e fail to see how the distinction between hours performed beyond ordinary hours at the employer’s direction and hours performed with the voluntary agreement of the employee is available for the purpose of applying the no-disadvantage test, given the terms of the Award’.<sup>723</sup> The *Bupa* Full Bench affirmed this approach, finding that the no-disadvantage test did not involve an analysis of matters other than the terms and conditions of the enterprise agreement against those in any relevant reference instrument. They held that ‘[t]he effect the terms and conditions may have on the actions of an employer or employee is not relevant to the no-disadvantage test’.<sup>724</sup>

Accordingly, it has not been permissible to have regard to subjective employee preference under either the no-disadvantage test or the BOOT. We regard this as appropriate in respect of the application of the BOOT to enterprise agreements. To do otherwise would effectively permit individual flexibilities that are intended to be addressed through IFAs without any of the safeguards to employees that apply to IFAs. However, we consider that the BOOT should be applied differently in respect of IFAs, which we have detailed at 5.3.2.

The BOOT prevents overall detriment to employees measured against the content of modern awards, in contrast to the fairness test, which was referable to only a selection of award conditions. It therefore benefits those employees whose conditions were reduced in comparison to the award under Work Choices.<sup>725</sup> It results in extra cost only to those employees who utilised the fairness test to reduce employee conditions in this way, and reduces any flexibilities associated with reducing those conditions.

<sup>720</sup> ANRA, pp. 16–19; MGA, pp. 11–12; BCA, pp. 54–56.

<sup>721</sup> [2010] FWAFB 2762.

<sup>722</sup> *Bupa Care Services Pty Ltd* [2010] FWA 16 [11].

<sup>723</sup> *MSA Security Officers Certified Agreement* [2003], PR 937654, [79].

<sup>724</sup> [2010] FWAFB 2762, [25].

<sup>725</sup> See Appendix B.

### Approval, variation and termination

Under Work Choices, agreements commenced on lodgment but could subsequently be found not to pass the fairness test. Parties were not provided with reasons for approval decisions and they were not published. There was no avenue of appeal against a decision to approve or not approve an agreement and there were inordinate delays in the approval of agreements. The FW Act sought to address these issues by providing for agreements to commence seven days from approval<sup>726</sup>; providing for FWA to conduct the approval process in an open and transparent forum, provide reasons for its decisions and provide a right of appeal to parties;<sup>727</sup> and by facilitating speedy approval processes including ‘on the papers’, without the need for a hearing.<sup>728</sup> The FW Act also permits undertakings to be provided by parties, which become terms of the agreement, where FWA has a concern that an agreement does not meet the approval requirements. This is provided the effect of accepting the undertaking is not likely to cause financial detriment to any employee covered by the agreement or result in substantial changes to the agreement.<sup>729</sup>

We received wide-ranging submissions about the process of approval, variation and termination of enterprise agreements. A number of parties expressed concern about, or proposed changes to, the agreement approval requirements or the procedure adopted by FWA.<sup>730</sup> The SDA and MUA both submitted that the approval processes under the FW Act are an improvement.<sup>731</sup> Some parties were concerned about the process by which FWA refuses approval or obtains undertakings.<sup>732</sup> Other parties made submissions about aspects of the scheme for variation and termination of agreements.<sup>733</sup>

**Table 6.7—Enterprise agreement processing times**

Enterprise agreement processing times—lodgment to finalisation			
	Single enterprise agreements	Greenfields agreements	Multi-enterprise agreements
2009–10	35	24	57
2010–11	22	15	27

Source: FWA Annual report 2009–10 and Annual report 2010–11.

Table 6.7 contains data from FWA annual reports indicating the median number of days between the lodgment of an application for approval of an enterprise agreement and its finalisation. The table demonstrates that the time taken to finalise approval applications fell significantly between the first and second year of operation of the FW Act. Further, it appears that agreement approval times are significantly faster than under Work Choices, based on the available data for agreement approval times. This indicates that, almost six months after the introduction of the fairness test, 64 per cent of agreements lodged for approval with the Workplace Authority had not received an outcome as to whether they had passed the test or not.<sup>734</sup>

The provisions in the FW Act about approval, variation and termination of enterprise agreements are very similar in nature to provisions that existed under the WR Act. Many of the submissions related to matters that are already within

<sup>726</sup> FW Act, s. 54(1).

<sup>727</sup> FW Act, Part 2-4, Division 4.

<sup>728</sup> FWF, p. 15. See also EM, p. 121.

<sup>729</sup> FW Act, ss. 190, 191.

<sup>730</sup> See, for example, ACCI, pp. 13, 107–108; AMIF, pp. 16–17; R&CA, pp. 10–11; BCA, p. 55; CAI, p. 24; HIA, pp. 22–23, 33; AMCA, pp. 3–4; ARTIO, p. 6; IPA, p. 6; ETU, p. 10; Forsyth and Stewart, p. 16; TCFUA, p. 18; AMWU, pp. 17–18; APESMA, p. 8; CFMEU C&G, p. 14; CPSU (SPSF), pp. 5, 24–26; PHIEA Supp, pp. 6–7; AHEIA, pp. 5–6.

<sup>731</sup> SDA, p. 6; MUA, p. 6.

<sup>732</sup> See, for example, CCIWA, pp. 10, 46; ACCI, p. 13; SDA, p. 73.

<sup>733</sup> BHP, p. 20; HR Nicholls Part C, p. 10.

<sup>734</sup> Sutherland, C and Riley, J, ‘Industrial Legislation in 2007’, *Journal of Industrial Relations*, vol. 50, no. 3, p. 423; Workplace Authority, *Workplace Agreement Data October 2007*.

FWA's discretion to address. The approval, variation and termination procedures appear to us to generally function adequately, and we are not persuaded to make change, with one exception.

The AMWU submitted that enterprise agreements should not be permitted to be made with only one employee.<sup>735</sup> We agree with that submission.

This issue was considered in *Fourth Furlong Motel*<sup>736</sup>, an application for approval of an agreement that covered only one employee, the manager of the motel. The motel employed cleaners, to which the agreement did not apply. Commissioner Gooley considered that the FW Act does not allow enterprise agreements to be made with one employee, having regard to:

- the use of the term 'collective' bargaining in s. 171(a)
- the use of the term 'group' of employees in ss. 186(3) and (3A)
- statements in the EM referring to enterprise agreements covering 'groups' of employees
- the repeal of legislation permitting statutory individual agreements to be made
- the alternative mechanism available for making individual flexibility arrangements.

A Full Bench in *AMWU v Inghams* came to a different conclusion, expressly rejecting the reasoning in *Fourth Furlong*. The Full Bench held '[t]here is nothing explicitly in the FW Act to suggest an enterprise agreement cannot be made with only one employee and it would not be consistent with the objects of the FW Act or Part 2-4 of the FW Act concerning enterprise agreements to so construe the FW Act'.<sup>737</sup>

FWA is of course constrained in its capacity to determine this question by the meaning of the statutory provisions before it. We, on the other hand, are able to take a far broader view. It is clear from our review of the policy material underlying the development of the FW Act that the scheme introduced by it expressly excluded the capacity to make a statutory individual contract. An enterprise agreement with one employee appears to us to be just that. In addition, the mechanism for individual flexibility associated with enterprise agreements and awards was intended to be individual flexibility arrangements. With the benefit of considering this broader range of policy material, in our view enterprise agreements should not be permitted with only one employee.

**Recommendation 26:** The Panel recommends that the FW Act be amended to prohibit the making of an enterprise agreement with one employee.

## 6.5 Greenfields agreements

### 6.5.1 General

Forward with Fairness provided that '[w]here an employer commences a genuinely new business or undertaking and they have not yet engaged any employees, the employer and a relevant union may bargain for a collective greenfields agreement for the new business'.<sup>738</sup> This policy was developed in the context of a long history of legislative facilitation of the making of greenfields agreements between employers and unions<sup>739</sup>, including under the WR Act, which had been altered significantly by the Work Choices legislation. In particular, Work Choices introduced 'employer greenfields agreements', which allowed an employer who was proposing to establish a new business, project or undertaking to

<sup>735</sup> AMWU, pp. 20–22.

<sup>736</sup> [2011] FWA 3256.

<sup>737</sup> *AMWU v Inghams Enterprises Pty Ltd* [2011] FWA 6106, [30].

<sup>738</sup> FWF, p. 14.

<sup>739</sup> See WR Act, s. 170LL; IR Act 1988, s. 170MA (see 170MC(3)).



unilaterally determine the content of the instrument that would apply to its future employees.<sup>740</sup> In contrast, FW Act greenfields agreements were to be ‘true agreements negotiated between the relevant bargaining representatives and made by more than one party’.<sup>741</sup>

Greenfields agreements currently make up 6.4 per cent of all agreements and are most prevalent in the construction industry (where over 67 per cent of agreements are greenfields agreements), administrative and support services (6.4 per cent), manufacturing (5.3 per cent) and mining (5.2 per cent).

Many employers argued that the provisions enabling greenfields agreements under the FW Act are not working efficiently. The MBA, for example, submits that unions are using their position of power to seek leverage on matters not related to development of the agreement, and that start-up agreements on major projects are non-existent without union consent.<sup>742</sup> VECCI submits that unions ‘hijack’ the agreement making process.<sup>743</sup> The Minerals Council of Australia submits that negotiations with unions are lengthy, tortuous and onerous.<sup>744</sup> Business SA submits that unions make inflated claims in greenfields negotiations.<sup>745</sup> The Institute of Public Affairs submits that requiring negotiations with unions is inconsistent with other agreements under the FW Act, and jeopardises projects.<sup>746</sup>

Employers suggested a variety of responses to these issues. Some employers called for the reintroduction of non-union employer greenfields agreements.<sup>747</sup> Some proposed that the FW Act provide for the making of greenfields agreements with a union eligible to represent a single employee to be employed under the agreement, thereby increasing the employer’s options as to whom it reaches agreement with.<sup>748</sup> This proposal is opposed by unions on the basis that it allows an employer to bypass unions who are the legitimate representatives of people to be employed, thereby not reflecting the varying interests of all employees and effectively pre-selecting their representative.<sup>749</sup>

Some employers propose that good faith bargaining principles should apply to greenfields negotiations.<sup>750</sup> The AWU also supports this proposal.<sup>751</sup> The Ai Group considers this unworkable, as it could lead to bargaining with multiple unions competing for coverage in the workplace.<sup>752</sup>

Some employers propose that FWA should focus greater emphasis on the current approval requirement that greenfields agreements be in the public interest.<sup>753</sup>

Many employers and other parties called for the introduction of some form of determination or arbitration by FWA in respect of greenfields agreements.<sup>754</sup> Employers varied as to what circumstances should predicate such an application and what criteria should be applied by FWA. A common suggestion was where agreement with a relevant union on reasonable terms within a reasonable time frame could not be reached. Some employers suggested that the employer’s template should form the basis for approval by FWA in similar circumstances.<sup>755</sup> Graham Smith proposes a ‘circuit breaker’ process whereby compulsory conciliation, followed by final offer arbitration, is available for greenfields

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<sup>740</sup> Work Choices, s. 330. See further Appendix B.

<sup>741</sup> DEEWR submission to the FW Bill inquiry, p. 21.

<sup>742</sup> MBA supplementary, pp. 5–6.

<sup>743</sup> VECCI supplementary, p. 5.

<sup>744</sup> MCA, p. 22.

<sup>745</sup> Business SA, p. 7.

<sup>746</sup> IPA, p. 14.

<sup>747</sup> NRA, p. 9; CCIWA, pp. 8, 42–43; Ai Group, pp. 16, 65; MBA supplementary, pp. 5–6; POAGS, pp. 3–6; VECCI supplementary, pp. 5, 18–22; Business SA, p. 7; BCA, p. 58; Ai Group/Australian Constructors Association, p. 4; APPEA, p. 4; HIA, p. 34. See, for example, AMWU supplementary, pp. 3–4, in opposition.

<sup>748</sup> MBA supplementary, p. 6; Ai Group pp. 16, 64–65; CCIWA, pp. 9, 42–44; Ai Group/Australian Constructors Association, p. 4.

<sup>749</sup> AMWU supplementary, pp. 3–4; CFMEU supplementary, pp. 5–6.

<sup>750</sup> BCA, pp. 58–59; AMMA, p. 14; ASA, p. 14.

<sup>751</sup> AWU, pp. 5–6.

<sup>752</sup> Ai Group supplementary, pp. 23–24.

<sup>753</sup> BCA, p. 58; MBA, pp. 31–32.

<sup>754</sup> AMMA, p. 14; BHP, pp. 5–6; POAGS, pp. 3–5; ASA, p. 14; G Smith, p. 3.

<sup>755</sup> Woodside, p. 13; CCIWA, pp. 9, 43.

agreements.<sup>756</sup> The ACTU, in response to these submissions, suggest that this approach would not be consistent with international obligations for minimal interference in collective bargaining or the objects of the FW Act.<sup>757</sup>

### 6.5.2 Incidence, content and coverage of greenfields agreements

Data from DEEWR's Workplace Agreements Database indicates that in a two-year period<sup>758</sup> under the WR Act, greenfields made up 5.4 per cent of all agreements, and provided for an average annualised wage increase (AAWI) of 4.5 per cent compared to 4.4% per cent of all agreements. In a two-year period under Work Choices,<sup>759</sup> greenfields made up 9.2 per cent of all agreements. Fifty-seven per cent of greenfields agreements were employer greenfields agreements and 43 per cent were union greenfields agreements. The AAWI for non-union greenfields was 4.1 per cent and for union greenfields was 4.0 per cent, compared with all agreements, which were 3.8 per cent and 4.1 per cent union / non-union respectively. In a two-year period under the FW Act<sup>760</sup>, greenfields made up 6.4 per cent of all agreements and provided an AAWI of 4.7 per cent, compared to 3.9 per cent for all agreements and 4.0 per cent for union agreements. Accordingly, under the FW Act the use of greenfields agreements has contracted to a level slightly higher than that under the WR Act, which preceded Work Choices.

Further, the use of greenfields in Accommodation and Food Services, Retail Trade and Health Care and Social Assistance, which expanded significantly under Work Choices, contracted equally significantly under the FW Act. Under the FW Act, only 0.4 per cent of greenfields agreements are made in Accommodation and Food Services, 0.5 per cent in Retail Trade and 0.9 per cent in Health Care and Social Assistance.

Under the FW Act, over two-thirds of greenfields agreements occur in construction and over 90 per cent occur in only six industries. Table 6.8 contains a comparison of the AAWI for each of these industries:

Table 6.8—AAWI for greenfields agreements

Industry	% of all greenfields	Greenfields AAWI	Average AAWI
Construction	67.3%	4.9%	5.1%
Administrative and Support Services	6.4%	5.0%	4.1%
Manufacturing	5.3%	4.7%	3.8%
Mining	5.2%	4.4%	4.3%
Transport, Postal and Warehousing	3.6%	5.1%	3.9%
Professional, Scientific and Technical Services	3.1%	4.4%	4.2%

Source: DEEWR's Workplace Agreements Database as at 30 September 2011.

As noted in Chapter 4, while the gap between wage outcomes under greenfields agreements and the average wage outcome in all agreements has widened, the average wage increase under greenfields agreements remains under 5 per cent. In Chapter 4 we suggest that this may reflect a recent increase in remote minerals and energy construction projects. The AAWI for greenfields in construction, comprising over two thirds of greenfields agreements is lower than the average AAWI for that industry. However, the AAWI for greenfields in the remainder of the top six industries is higher than the average AAWI. In some cases (such as transport, postal and warehousing, and manufacturing) it is considerably higher.

<sup>756</sup> G Smith, p. 3.

<sup>757</sup> ACTU supplementary, p. 15.

<sup>758</sup> From 1 January 2004 to 31 December 2005.

<sup>759</sup> From 1 April 2006 to 31 March 2008.

<sup>760</sup> From 1 October 2009 to 30 September 2011.

In addition, greenfields agreements under the FW Act are generally less likely to contain ‘flexible’ agreement terms than the average across all agreements, with the exception of loaded hourly rates and the capacity for management to alter hours of work after consultation. When compared to all agreements, they are also slightly more likely to contain certain beneficial terms for employees (such as annual leave loading, overtime at penalty rates and public holidays at penalty rates). This is likely to have resulted in increased costs to employers.

### 6.5.3 Measures to address deficiencies with greenfields agreements

We were provided with a number of case studies in submissions and in consultations that suggested the current system of greenfields agreements is not operating efficiently. Employers and their representatives claimed that, in light of the requirement to bargain with a union in order to secure certainty about terms and conditions to apply on a project, they are required to agree to terms that are economically unsustainable. They also claimed that unions withhold agreement to address issues unrelated to the project, which puts projects in jeopardy. Employers say the requirement to negotiate with the union or unions that have majority coverage is partially to blame because it has reduced competition between unions and therefore reduced the likelihood of reaching agreement on satisfactory terms.

BCA provided evidence of the critical importance of the major projects pipeline for the Australian economy. They submit that economic growth in Australia is driven by major investment projects funded by strong multinational corporations with funding access. They submit that the pipeline of capital projects either underway, under consideration or in planning is worth \$912.8 billion.<sup>761</sup> This is concentrated in the infrastructure and resources sectors. These projects are not assured, and potential investors continually review risks associated with them. BCA submits that Australia’s capacity to deliver these projects is critical to economic growth.<sup>762</sup> The evidence provided by BCA demonstrates the value to the Australian economy of the investment pipeline and, importantly, the risks to that pipeline associated with industrial relations uncertainty or instability.

In April 2012, the value of major project investment in Australia in minerals and energy was estimated to be as follows:

- Ninety-eight projects at an advanced stage of development involved record capital expenditure of \$260.8 billion, a 34 per cent increase from April 2011.
- Exploration expenditure in Australia’s minerals and energy sector for 2010–11 totalled \$6.4 billion and was 6 per cent higher than for 2010–11.
- New capital expenditure in the mining industry for 2010–11 totalled \$52 billion, 29 per cent higher than for 2009–10, and may be greater than \$80 billion in 2011–12.<sup>763</sup>

The FW Act addressed a key problem identified by the Government with Work Choices, namely the capacity for an employer proposing to establish a new business, project or undertaking to unilaterally determine the content of the instrument that would apply to its future employees.<sup>764</sup> We accept that the Work Choices framework conferred greater freedom on employers to unilaterally determine wages and conditions. As we note in Chapter 4, we are not convinced that, currently, the economically relevant outcomes are significantly different.

However, based on the evidence we have received in submissions and consultations, and a review of the data associated with greenfields agreements above, we consider that there is a significant risk that some bargaining practices and outcomes associated with greenfields agreements potentially threaten future investment in major projects in Australia. This is because the existing provisions effectively confer on a union (or unions) with coverage of a majority of prospective workers a significant capacity to frustrate the making of an appropriate greenfields agreement

<sup>761</sup> Deloitte Access Economics, *Investment Monitor*, December 2011, p. 1.

<sup>762</sup> BCA, p. 19.

<sup>763</sup> Australian Government, Bureau of Resources and Energy Economics, *Mining industry major projects* (Commonwealth of Australia, May 2012), p. 1.

<sup>764</sup> Work Choices, s. 330.

at all or at least in a timely way. Unions in this position are able to withhold agreement and effectively prevent the determination of terms and conditions in advance of a project commencing. In light of the evidence we were presented about the need for certainty over the labour costs associated with major projects, we are concerned at the risk of delays in greenfields agreement making that this entails. We have considered a range of mechanisms to address these concerns. We do not consider that a return to employer greenfields agreements is appropriate. A central object of the FW Act in addressing the problem with Work Choices was to ensure greenfields agreements were 'true agreements negotiated between the relevant bargaining representatives and made by more than one party'.<sup>765</sup> Further, we consider that changes to greenfields agreements can be made within the scope of this objective.

It appears to us that a very straightforward way of addressing the claims made about the capricious bargaining conduct of unions during greenfields negotiations is to extend the application of the good faith bargaining provisions to negotiations for greenfields agreements. We are unable to discern a cogent policy basis for the creation of an exception for greenfields agreements in this respect. We note that the Fair Work Bill originally made provision to this effect, and in doing so provides a potential model for doing so.

**Recommendation 27:** The Panel recommends that the FW Act be amended to apply the good faith bargaining obligations in s. 228 to the negotiation of an s. 172(2)(b) greenfields agreement, with any necessary modifications.

Consistent with enlivening the obligations to bargain in good faith, it will be necessary to provide a mechanism for taking all reasonable steps to notify relevant unions—namely those with eligibility to represent the future employees to be covered by the proposed agreement—of an employer's intention to bargain. Again, the Fair Work Bill provides a model for such an obligation. The rationale for this notification obligation, as it was in the Bill, is to 'make sure that unions with relevant coverage are aware that bargaining is going on' and to require the employer to bargain in good faith with 'all relevant unions who seek to bargain'.<sup>766</sup>

**Recommendation 28:** The Panel recommends that the FW Act be amended to require employers intending to negotiate a s. 172(2)(b) greenfields agreement to take all reasonable steps to notify all unions with eligibility to represent relevant employees.

In conjunction with the extension of good faith bargaining provisions, we consider that the powers of FWA under s. 240 of the FW Act, along with our proposed 'own motion' dispute resolution power, should extend to disputes over greenfields agreement negotiations. This presently does not occur in light of the requirement that an applicant under s. 240 be a bargaining representative for an agreement, a term that does not apply to greenfields negotiations.

**Recommendation 29:** The Panel recommends that the FW Act be amended so that s. 240 (as with our Recommendation 22) applies to the negotiation of a s. 172(2)(b) greenfields agreement.

As summarised above, there are a range of views on the appropriateness of arbitration for resolving impasses in greenfields bargaining. After much thought and deliberation, the Panel is of the view that, where an impasse in negotiations is not resolved within a specified time and where conciliation by FWA has failed, FWA should have the power, either on its own motion or via a request from one of the parties, to resolve the impasse by a limited form of

<sup>765</sup> DEEWR submission to the FW Bill inquiry, p. 21.

<sup>766</sup> DEEWR submission to the FW Bill inquiry, p. 22.

arbitration. While the Panel does not possess hard and fast views, FWA could be empowered to resolve the remaining outstanding issues between the parties by a process of arbitration, which is colloquially known as 'last offer' arbitration. In other words, FWA would examine the positions taken by the parties on the remaining outstanding issues and would be empowered to choose the position either of the employer or of the trade union or trade unions. It is the Panel's expectation that the ultimate availability of this type of final offer arbitration will ensure that the parties adopt realistic approaches to issues in their negotiations with one another.

**Recommendation 30:** The Panel recommends that the FW Act be amended to provide that, when negotiations for a s. 172(2)(b) greenfields agreement have reached an impasse, a specified time period has expired and FWA conciliation has failed, FWA may, on its own motion or on application by a party, conduct a limited form of arbitration, including 'last offer' arbitration, to determine the content of the agreement.

## 7 Industrial action

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### 7.1 Introduction

Throughout most of the history of Australia's federal industrial relations system there was no legal right to take industrial action. The form and extent of legal prohibition on industrial action varied, and included mechanisms such as outright statutory prohibition, common law remedies, deregistration of unions and the insertion of bans clauses in awards. However, despite the availability of conciliation and arbitration and the various legal prohibitions, strike action was common and enforcement of legal remedies against it irregular. Creighton has described the 'paradox' of a system which was 'in practice reasonably tolerant of industrial disputation but which in principle purport[ed] entirely to proscribe it'.<sup>767</sup>

As noted in 3.2.2, the IR Act post-1993 introduced the concept of 'protected industrial action' during bargaining for an agreement, to provide 'a fairer and more effective regime to regulate industrial action and sanctions'.<sup>768</sup> The object of these provisions was 'to give effect, in particular situations, to Australia's international obligation to provide for a right to strike'.<sup>769</sup> Protected industrial action has been a feature of each legislative regime since 1993. Work Choices increased the regulation of protected industrial action, including by requiring a secret ballot prior to action being taken. The FW Act has largely continued the Work Choices model, with some modifications. These are explored below.

Again somewhat paradoxically, the introduction of a right to strike coincided with a pronounced decline in the rate of employee industrial action in Australia. The incidence of industrial action under the FW Act in the relevant historical context is examined in 4.6. Charts 4.16 and 4.17 demonstrates that, even though there has been a small increase recently, the average level of days lost to industrial disputation during the 1980s was around six times higher than it was in 2011. The 2011 figure was in line with the band of historically low levels that have prevailed over the last decade.<sup>770</sup>

It has been suggested that introducing protected industrial action had a particular 'psychological effect' on parties so that 'the legitimisation of industrial action in certain circumstances has also legitimised the imposition of sanctions in situations where the action is unprotected'.<sup>771</sup> Conversely the introduction of a legislative right for employers to lock out employees led to an increase in lockouts.<sup>772</sup>

Unsurprisingly, most employers and employer representatives proposed greater restrictions on the ability of employees to take protected industrial action.<sup>773</sup> Conversely, unions submitted that the FW Act unduly restricts the right of employees to take industrial action in support of bargaining claims, in contravention of international law and ILO rules.<sup>774</sup>

The EM encapsulated the two competing considerations that operate in assessing the industrial action provisions. It noted that while, generally, industrial action has a negative impact on productivity, the FW Bill recognised 'the right of bargaining participants to take protected industrial action and provide the employer with a proportionate response'.<sup>775</sup>

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<sup>767</sup> B Creighton, 'Enforcement in the federal industrial relations system: an Australian paradox', (1991) 4 *Australian Journal of Labour Law*, vol. 4, no. 197, p. 225.

<sup>768</sup> Industrial Relations Reform Bill 1993, second reading speech.

<sup>769</sup> IR Act post-1993, s. 170PA(1). See Richard Naughton, 'The Industrial Relations Reform Act 1993', *Centre for Employment and Labour Relations Law Working Paper No 2* (May 1994), p. 6.

<sup>770</sup> See 4.6.

<sup>771</sup> B Creighton & A Stewart, *Labour law*, 5th edn, Federation Press, 2012, p. 764.

<sup>772</sup> C Briggs, 'The return of lockouts down under in comparative perspective: globalisation, the state and employer militancy', *Comparative Political Studies*, vol. 39, no. 855, pp. 855–6; S McCrystal, *The Right to Strike in Australia*, Federation Press, 2010, pp. 182–3.

<sup>773</sup> See, for example, submissions referred to at 7.3.

<sup>774</sup> ACTU, p. 43.

<sup>775</sup> EM, p. lxiii.

We have considered submissions about industrial action using this framework, bearing in mind the historical context described above.

## 7.2 Industrial action and good faith bargaining

The industrial action provisions of the FW Act have not significantly changed from Work Choices. However, the addition of the good faith bargaining provisions represents a significant change to the overall bargaining framework. The Panel received submissions from a number of employer groups suggesting that the industrial action provisions sit uncomfortably with the new bargaining rules and for that reason the Panel has given this matter considerable attention. A key question for the Panel was whether the good faith bargaining provisions resulted in, or should result in, changes to the way that the industrial action provisions operate. Under each previous legislative regime we have examined, it has been possible for employees to take protected industrial action to persuade an unwilling employer to commence bargaining. Submissions have questioned whether industrial action should continue to be available as a legitimate means of *persuading* an unwilling employer to bargain, in light of the new capacity to *require* an employer to bargain through the use of a majority support determination. This has most clearly been ventilated in the *JJ Richards*<sup>776</sup> litigation.

The policy underpinning the FW Act about whether industrial action was intended to be available to persuade an unwilling employer to bargain is not clear. There are no express statements to this effect. Nor are there any express policy statements that this mechanism, previously available under Work Choices, was intended to be removed.

Forward with Fairness stated that protected industrial action would be ‘available during good faith collective bargaining’ and that ‘industrial action outside good faith bargaining processes’ would not be protected.<sup>777</sup> The Press Club Speech of the then Deputy Prime Minister foreshadowed that protected industrial action would be allowed ‘in the course of bargaining’.<sup>778</sup> The EM contained similar statements<sup>779</sup> suggesting industrial action was to be limited to circumstances when bargaining had commenced.

However, the DEEWR submission states that employees would ‘continue to have the long-recognised right to take protected industrial action to support or advance claims during collective bargaining’<sup>780</sup>, and described bargaining orders as a new ‘option’ to address an employer’s failure to respond to a bargaining proposal, rather than taking industrial action.<sup>781</sup> In the context of addressing joint applications for a protected action ballot order, the EM provides that ‘a finding by FWA that there is no majority support for collective bargaining is not of itself intended to be determinative of the question of whether the applicant is genuinely trying to reach agreement with the employer’.<sup>782</sup> These statements suggest that industrial action was to remain available as a means of persuading an unwilling employer to bargain, as does the absence of any express statement that industrial action would no longer be available in this manner.

Regardless of which view is taken about the policy intention, we consider that this aspect of the interrelationship between good faith bargaining and industrial action warrants further examination.

Under the FW Act, the issue was first considered by a Full Bench of FWA in *Ford Motor Company of Australia Pty Ltd v CEPU and Ors*.<sup>783</sup> In that case, even though bargaining had been ongoing for some months, there was a dispute about the scope of the proposed agreements. The unions applied for a protected action ballot order in respect of its proposed

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<sup>776</sup> *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53.

<sup>777</sup> FWF, p. 16.

<sup>778</sup> PCS.

<sup>779</sup> EM, pp. lix.

<sup>780</sup> DEEWR submission to the FW Bill inquiry, p. 34.

<sup>781</sup> *ibid.* p. 14.

<sup>782</sup> EM, p. 276.

<sup>783</sup> [2009] FWAFC 1240.

scope. Ford opposed the order, arguing that the unions were not genuinely trying to reach an agreement, as there had been no bargaining about an agreement with the unions' scope. The Full Bench found that the protected industrial action provisions were 'premised on the basis that negotiations, or bargaining, for an enterprise agreement to be made under the Act must be in train before protected industrial action may be organised or engaged in'.<sup>784</sup> As Ford had not agreed to the unions' proposed scope, a ballot order could not be issued.

The outcome in *Ford* meant that not only was protected industrial action unavailable when an employer had not agreed to bargain, it was not possible to take industrial action to support or advance a party's preferred scope for an agreement. However, two subsequent Full Benches rejected this approach.<sup>785</sup>

In *JJ Richards*, which followed, the employer simply refused to bargain.<sup>786</sup> Faced with this, the TWU applied for a protected action ballot order on behalf of its members, rather than obtaining a majority support determination. Accordingly, the key legal issue in *JJ Richards* was whether a protected action ballot order can be made before bargaining has commenced, or whether the TWU was first required to obtain a majority support determination to force the employer to do so.<sup>787</sup> At first instance, Commissioner Harrison granted the ballot order,<sup>788</sup> finding that 'the Act does not require a bargaining agent to seek a majority support determination, good faith bargaining orders, or scope orders as a prerequisite to seeking a protected action ballot order where an employer refuses to commence bargaining'.<sup>789</sup> This decision was upheld on appeal by a Full Bench, and confirmed by the Full Federal Court of Australia while the Review was underway.<sup>790</sup>

Numerous employers and some other parties expressed serious concern with the policy implications of the Full Bench decision in *JJ Richards* (now confirmed by the Full Federal Court)<sup>791</sup> and proposed that the FW Act should be amended to provide that bargaining must be occurring, either through the agreement of the employer or via a majority support determination, before a protected action ballot can be sought and granted.<sup>792</sup>

In response to employer suggestions that the FW Act be amended to prevent further decisions along the lines of the Full Bench decision in *JJ Richards*, the ACTU submitted that such a move would be inconsistent with the objects of the FW Act recognising freedom of association and providing laws that take into account Australia's international obligations.<sup>793</sup> The TWU submitted that this 'would constitute a seismic shift in Australian industrial relations' and greatly undermine the system of enterprise bargaining 'in a manner not endorsed by the Fair Work Act nor argued for by any employer, employee, or union prior to the Act's introduction'.<sup>794</sup> Forsyth and Stewart submitted that the decision of the Full Bench in *JJ Richards* was the correct statutory interpretation. However, they consider that good faith bargaining and industrial action are 'fundamentally at odds with each other: co-operative negotiation, and industrial conflict'.<sup>795</sup>

While this issue was raised by a significant number of employers, its impact to date appears to have been minimal. There is no available data on how frequently industrial action has been used to persuade an unwilling employer to commence bargaining. The FW Act decisions we have referred to above are the only instances we are aware of in which this issue has been considered. However, we recognise that there may be other instances, and we also consider that the imprimatur of the Full Federal Court in *JJ Richards* may lead to an increase in this practice.

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<sup>784</sup> [2009] FWA FB 1240, [32].

<sup>785</sup> *Stuartholme School and Ors v Independent Education Union of Australia* [2010] FWA FB 1714; *MSS Security Pty Ltd v LHMU* [2010] FWA FB 6519.

<sup>786</sup> See [2011] FWA FB 3377, [5].

<sup>787</sup> *JJ Richards and Sons Pty Ltd v TWU* [2011] FWA FB 3377, [7].

<sup>788</sup> *Transport Workers' Union of Australia v JJ Richards and Sons Pty Ltd* [2011] FWA 973.

<sup>789</sup> *ibid.* [24].

<sup>790</sup> *JJ Richards and Sons Pty Ltd v TWU* [2012] FCAFC 53.

<sup>791</sup> [2010] FWA FB 9963, [2011] FWA FB 3377.

<sup>792</sup> ACCI, pp. 14 112–113; Ai Group, p. 128; Allens Arthur Robinson, p. 5; AMMA, pp. 14, 106; AMIF, pp. 15–16; BHP, p. 11; BCA, pp. 50–51; Business SA, p. 8; HIA, pp. 45–46; HR Nicholls, p. 8; MBA, pp. 63–64; NECA, p. 5; Rio Tinto, pp. 5, 14; WA Government, pp. 3–4; Woodside, p. 15.

<sup>793</sup> ACTU supplementary, p. 18.

<sup>794</sup> TWU, p. 5–6.

<sup>795</sup> Forsyth and Stewart, p. 17.



The majority of the Full Court in *JJ Richards* made some observations about the role of industrial action within the new bargaining scheme of the FW Act. Their view, expressed in the judgment of Justice Jessup (with Justice Tracey agreeing), was that:

... although limited to an extent, the legislature has, both specifically and in some detail, turned its mind to the means by which an unwilling employer might, to use the Full Bench's metaphor, be persuaded to come to the bargaining table. Although not so stated in terms, it would be at least consistent with [the good faith bargaining provisions] to perceive a legislative assumption that recourse to industrial action would not be an available means to oblige an employer, or any other party, to commence bargaining.

Additionally to the matters to which I have just referred, I consider there is much to be said for the applicant's case, as a matter of broad statutory purpose. The Act provides a detailed, carefully-structured regulatory environment for the making of enterprise agreements, and for the maintenance of the integrity of the system of collective bargaining which conventionally leads to such agreements. In the sense that protected industrial action must necessarily relate to a proposed enterprise agreement ..., it is legitimate to point out, as the applicants did in their submissions, that the ability to take protected industrial action is to be seen as part and parcel of the statutory regime for bargaining in pursuit of, or in resistance to, the making of such agreements.<sup>796</sup>

We share the views of the Full Court. While the law is now settled, we do not think this is the appropriate outcome from a policy perspective. Given the legislature has sought to codify the circumstances in which an employer can be positively required to bargain, we consider it incongruous for industrial action to be available to bring pressure to bear on an employer to bargain outside of those circumstances.

The mechanism to compel bargaining under the good faith bargaining provisions, a majority support determination, requires the support of a majority of the employees to be covered by a proposed agreement.<sup>797</sup> In contrast, industrial action can be taken by a minority of employees to be covered by a proposed enterprise agreement.<sup>798</sup> Viewed this way, the capacity for protected industrial action to be taken to persuade an unwilling employer to bargain tends to undermine the majority support determination provisions, and represents a clear 'disconnect' with the new bargaining regime in the FW Act.

However, to allay any doubt, we consider the scope of a proposed enterprise agreement to be a legitimate matter for bargaining. In our view, bargaining for a proposed enterprise agreement can commence whether the scope of the proposed agreement has been agreed or not. Our view is consistent with that of the Full Bench in both *Stuartholme* and *MSS Security* and contrary to the view of the Full Bench in *Ford*. The absence of agreement about scope should not preclude the taking of protected industrial action.

**Recommendation 31:** The Panel recommends that Division 8 of Part 3-3 be amended to provide that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained. The Panel further recommends that the FW Act expressly provide that bargaining has commenced for this purpose despite any disagreement over the scope of the agreement.

A further issue raised in some submissions was the interaction between the requirement to be 'genuinely trying to reach an agreement' in order to take protected industrial action and obtain a protected action ballot order, and the requirement to bargain in good faith. Some parties suggested replacing the 'genuinely trying to reach an agreement'

<sup>796</sup> [2012] FCAFC 53, [28]–[29].

<sup>797</sup> FW Act, s. 237(2).

<sup>798</sup> FW Act, ss. 437(5), s. 459.

test with a requirement to be bargaining in good faith.<sup>799</sup> Others suggested that applicants for a protected action ballot order should be required to demonstrate that they are meeting all the good faith bargaining requirements,<sup>800</sup> or a set of prescribed conditions related to good faith bargaining.<sup>801</sup> The ACTU opposed these submissions.<sup>802</sup> The NUW submitted that the requirement delays the making of a ballot order.<sup>803</sup>

The ‘genuinely trying to reach an agreement’ requirement has been present in one form or another in all iterations of the protected industrial action provisions since 1993. While compulsory secret ballots were not required under the IR Act post-1993 or the WR Act, ‘trying’ or ‘genuinely trying’ to reach agreement was a precondition for industrial action to be protected,<sup>804</sup> and a bargaining period (and therefore industrial action) could be suspended or terminated if the party had not met the requirement.<sup>805</sup> When the secret ballot provisions were introduced in Work Choices, satisfaction of this requirement also became a precondition for the granting of a ballot order.<sup>806</sup> Under the FW Act, for industrial action to be protected, the relevant party must be ‘genuinely trying to reach an agreement’.<sup>807</sup> In addition, for FWA to issue a protected action ballot order, it must be satisfied that the ballot order applicant ‘has been, and is, genuinely trying to reach an agreement’ with the relevant employer.<sup>808</sup>

The similarity between the ‘genuinely trying to reach agreement’ requirement and the requirement to bargain in good faith has been identified.<sup>809</sup> Lee observed in 2005 that the two concepts had been ‘treated as virtually interchangeable’.<sup>810</sup> Since the commencement of the FW Act, some FWA decisions have examined the interrelationship between the two concepts, as they appear in the FW Act. The general effect of these decisions is that while a party’s compliance or otherwise with the good faith bargaining requirements may be a relevant consideration as to whether a party is genuinely trying to reach an agreement, it is not determinative, and the two concepts should not be equated.<sup>811</sup> Despite the differences, Creighton has observed that ‘the fact a party is bargaining in good faith must be compelling evidence that that party is trying to reach agreement, whilst the fact that a party is not bargaining in good faith strongly suggests that they are not genuinely trying to reach agreement’.<sup>812</sup> The similarities between the two concepts may now be more closely aligned, in light of the view expressed by the Full Bench in *Endeavour Coal* that the good faith bargaining provisions required a ‘real or serious endeavour’ to negotiate an agreement.<sup>813</sup>

We note the express intention to retain this requirement in the FW Act to ‘ensure that parties focus on agreement making and the Government does not fully fund ballots authorising industrial action which would be unprotected at the time of the application’.<sup>814</sup> Further, we were not presented with any evidence that the FW Act is not working as intended in this respect. Therefore, we are not persuaded to make any change to this requirement.

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<sup>799</sup> Forsyth and Stewart, p. 18.

<sup>800</sup> ACCI, p. 15; BHP, p. 11; Farstad, p. 3; NECA, p. 5.

<sup>801</sup> Ai Group, pp. 127–128.

<sup>802</sup> ACTU supplementary, pp. 12–13, 19.

<sup>803</sup> NUW, p. 19.

<sup>804</sup> IR Act post-1993, s. 170PI; WR Act, s. 170MP.

<sup>805</sup> IR Act post-1993, s. 170PO(1)(a)(i); WR Act, s. 170MW(2).

<sup>806</sup> Work Choices s. 444 provided that employer industrial action was not protected unless the employer had and was genuinely trying to reach agreement. Section 461 provided that an application for a ballot order must not be granted unless the applicant had and was genuinely trying to reach agreement.

<sup>807</sup> FW Act, s. 413(3).

<sup>808</sup> FW Act, s. 443(1)(b).

<sup>809</sup> A Rathmell, ‘Collective bargaining after Work Choices: will “good faith” take us Forward with Fairness?’, *Australian Journal of Labour Law*, vol. 21, 2008, p. 184; S McCrystal, *The right to strike in Australia*, Federation Press, 2010, p. 165.

<sup>810</sup> M Lee, ‘Crafting remedies for bad faith bargaining, coercion and duress: “relative ethical flexibility” in the twenty-first century’, *Australian Journal of Labour Law*, vol. 18, 2005, p. 40.

<sup>811</sup> *MUA v Total Marine Services Pty Ltd* [2009] FWA 187; *Total Marine Services v MUA* [2009] FWA 368; *NUW v SKF Australia Pty Ltd* [2010] FWA 6557; *TWU v CRT Group Pty Ltd* [2009] FWA 425; *AMWU v Rocla Pty Ltd t/as Rocla Pipeline Products* [2009] FWA 508.

<sup>812</sup> B Creighton, *Embedding workplace collaboration—good faith bargaining*, Business Council of Australia discussion paper, January 2010, p. 21.

<sup>813</sup> *Endeavour Coal v APESMA* [2012] FWA 1891 [30]. Judicial review of this decision is pending.

<sup>814</sup> EM, p. lxiv.

## 7.3 Protected action ballots

The Government observed that under Work Choices the process for obtaining a secret ballot prior to taking industrial action was unnecessarily complex, prescriptive and time consuming, which unduly constrained the capacity of employees to exercise their right to take protected industrial action. Forward with Fairness provided that protected action ballots under the FW Act were to be a 'means of determining the views of employees about taking protected industrial action, not to frustrate or delay the action' through a 'fair and simple' process.<sup>815</sup> The DEEWR submission described the secret ballot provisions under Work Choices as 'unnecessarily prescriptive', with the equivalent provisions in the Bill establishing 'a simpler and more streamlined democratic process'.<sup>816</sup> The EM confirmed that secret ballot provisions would be 'streamlined and simplified' to reduce the red tape burden on ballot applicants.<sup>817</sup> Preventing FWA from ordering a stay of the operation of a protected action ballot order on appeal was intended to address a concern highlighted by Senior Deputy President Watson that '... the bringing of an appeal and the obtaining of a stay order based only on the establishment of an arguable case would provide a ready, and it would appear unintended, means of frustrating the substantive legislative right to engage in protected industrial action'.<sup>818</sup>

### 7.3.1 Incidence of ballot applications and orders

Despite the measures taken under the FW Act to improve secret ballot processes compared to Work Choices, several unions expressed opposition to protected action ballots, and frustration at what they consider to be complicated and excessively bureaucratic mechanisms to access protected industrial action and exercise the right to strike.<sup>819</sup> Supplementary submissions from both the Ai Group and CCIQ contained strong opposition to the idea of removing the requirement for a compulsory secret ballot.<sup>820</sup> Generally, submissions on this issue were wide ranging, traversing, for example, removal of the requirement for a ballot to be authorised by FWA,<sup>821</sup> employer standing in proceedings,<sup>822</sup> determination of applications ex-parte<sup>823</sup> or 'on the papers', constructing the role of voters,<sup>824</sup> and the 30-day rule.<sup>825</sup> While we have considered all of these submissions, we do not specifically address each of them below.

Since the commencement of the FW Act, many more protected action ballot orders have been made than under Work Choices. FWA data, presented in Chart 7.1, shows that the number of protected action ballot order applications spiked at the start of the FW Act, and have continued to remain higher on average than under Work Choices. While this can partly be explained by the increase coverage of the FW Act over Work Choices,<sup>826</sup> as well as the increase in enterprise agreement making under the FW Act over Work Choices,<sup>827</sup> it may demonstrate that some impediments to obtaining a protected action ballot order have been removed, in line with the policy objectives of the FW Act.

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<sup>815</sup> FWF, p. 16; FWFIP, p. 21.

<sup>816</sup> DEEWR submission to the FW Bill inquiry, pp. 58–59, referring to *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Biffinger Berger (Australia) Pty Ltd* AIRC BP2008/3448 (22 October 2008).

<sup>817</sup> EM, p. lix–lx.

<sup>818</sup> DEEWR submission to the FW Bill inquiry, pp. 58–59, referring to *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Biffinger Berger (Australia) Pty Ltd* AIRC BP2008/3448 (22 October 2008).

<sup>819</sup> AMWU, p. 39; ANF, p. 18; CFMEU M&E, p. 8; NUW, p. 19.

<sup>820</sup> Ai Group supplementary, p. 45; CCIQ supplementary, p. 9.

<sup>821</sup> CFMEU M&E, p. 8; NUW, p.19; TCFUA, p. 19.

<sup>822</sup> ACTU, p. 57; CFMEU M&E, p. 9; Ai Group, p. 131.

<sup>823</sup> ACTU, p. 57.

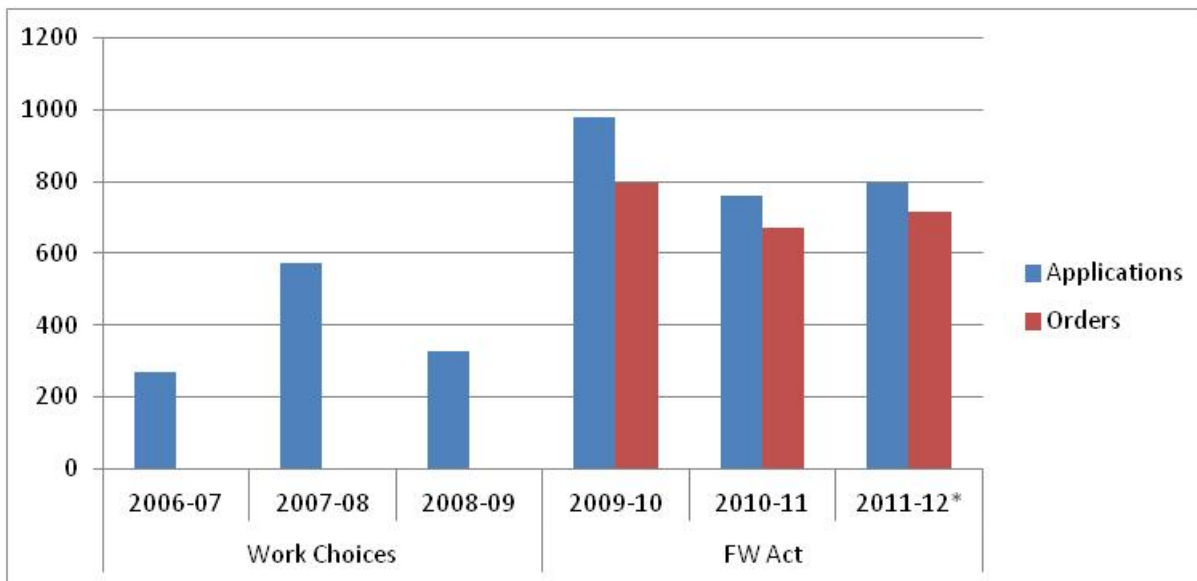
<sup>824</sup> See, for example, TWU, p. 8.

<sup>825</sup> See, for example, ACTU, p. 63; Ai Group supplementary, p. 45; MUA supplementary, p. 14; POAGS, p. 9; TCFUA, p. 19–20.

<sup>826</sup> In May 2010 there were 18 per cent more employees whose pay setting arrangements were governed by the federal jurisdiction than in May 2006: ABS Cat. No. 6105.0, *Australia labour market statistics, July 2011*.

<sup>827</sup> Data derived from DEEWR's Workplace Agreements Database and DEEWR, *Trends*, September quarter 2011 indicates that In July 2009, at the commencement of the FW Act, there were 22,371 current agreements covering almost 2.05 million employees. There were 22,769 agreements covering 2.42 million employees current as at 30 September 2011.

Chart 7.1—Protected action ballot applications and orders



Source: AIRC and FWA Annual reports.

\*2011–12 only contains data for the first three quarters. Source: FWA Quarterly Reports.

### 7.3.2 Results of ballots

We are not aware of any collated data about the incidence, timing and nature of ballot orders, and ballots, under the FW Act. Accordingly, DEEWR examined a sample of 50 ballot declarations from FWA’s website, consisting of 20 from 2012 and 10 from each of 2009, 2010 and 2011 (see Appendix F). Of the sample selected:

- 90 per cent of ballots were successful, in that industrial action was authorised in accordance with s. 459 of the FW Act
- of those ballots which were not successful, 100 per cent failed because less than 50 per cent of employees on the roll of voters voted
- the AEC was the ballot agent in 98 per cent of cases
- the average number of days between the ballot order and the declaration of the ballot was 21.62.

Table 7.1 shows the time taken between the ballot order and the declaration of the ballot across the 50 matters.

Table 7.1—Time taken between ballot order and declaration

Time taken between ballot order and declaration					
	10 days or less	11–12 days	21–30 days	31–40 days	41 days or more
% of matters	8%	40%	44%	4%	4%

Source: www.fwa.gov.au

### 7.3.3 Impact of FW Act secret ballot provisions

Stakeholder evidence suggests that the secret ballot provisions have a significant impact on employees and their union representatives. There is cost and inconvenience associated with making the ballot order application and conducting the voting process. These costs were not quantified by stakeholders, though submissions expressed concern about the costs of administration and lost time associated with this process. However, these costs give employees the

opportunity to take protected industrial action when a ballot is successful, thereby potentially enhancing the bargaining position of employees and the outcomes of bargaining. Full government funding of AEC ballots has reduced the cost of conducting the ballots for unions (and therefore their members) compared to Work Choices. The increase in the number of secret ballots is likely to have resulted in a proportionate increase in the costs to employees and unions.

The increased number of secret ballot applications is likely to also have increased costs for some employers. Some employers oppose the granting of a ballot order by FWA, which involves costs. There are administrative costs associated with identifying the employees to include on the roll of voters. There may also be indirect administration costs associated with running a ballot at a workplace, though none of the submissions quantified these costs. However, evidence from stakeholders suggests that the majority of ballots are conducted by post<sup>828</sup> and therefore this latter impact is likely to be insignificant.

While there are costs to both employers and employees from the taking of industrial action, the number of secret ballot applications and orders does not directly correlate with the extent of industrial action. The ballot order may be refused, the ballot may be unsuccessful, the number of ballots does not indicate the nature and duration of industrial action to be authorised, and when authorised, industrial action may nonetheless not take place.

The more significant cost that stems from the conduct of a protected action ballot is the cost to the Australian Government of funding the ballot. Under Work Choices the Government's liability was for 80 per cent of the cost; however, that figure has increased to 100 per cent under the FW Act. In 2009–10, the first year of operation of the FW Act, the Government paid just over \$1.13 million for protected action ballots conducted by the Australian Electoral Commission.<sup>829</sup> This corresponds to the spike in ballots at the commencement of the FW Act. In 2010–11 the cost had reduced to just over \$0.92 million.<sup>830</sup> In the last two years of Work Choices (when the Government was liable for only 80 per cent of the cost of a ballot) the Government's contribution was approximately \$438,000<sup>831</sup> and \$448,922.<sup>832</sup> This cost delivers a corresponding benefit to employees, namely the capacity to have their views about whether or not to take industrial action determined without requiring the employees or their union to fund the ballot.

#### 7.3.4 Conclusions

Based on the above material, we consider that the operation of the protected action ballot provisions could be further improved. In particular, we are concerned that in the context where 90 per cent of ballots were successful, all unsuccessful ballots were due to a failure to obtain the requisite voter turnout. Secondly, the above material demonstrates that the time taken between the granting of the ballot order and the declaration of the results is greater than 21 days in more than half the matters. In one case it was 60 days.<sup>833</sup> This time does not include the additional period between making an application for a protected action ballot order and the granting of that order, which is not apparent from the public records. The NUW submitted that in its experience, the timeframe between applying for a protected action ballot and declaration of the results is about one month.<sup>834</sup> In our opinion this timeframe impinges upon employees' right to take industrial action against an employer at a time of their choosing.

#### 7.3.5 Method of voting

We received a number of submissions from unions to the effect that the method of voting employed was inappropriate. We are concerned, as submitted by some,<sup>835</sup> that this may contribute to low voter turnout in some

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<sup>828</sup> NUW, p. 22.

<sup>829</sup> DEEWR Annual report 2009–10, p. 146.

<sup>830</sup> DEEWR Annual report 2010–11, p. 123.

<sup>831</sup> DEEWR Annual report 2008–09, p. 224.

<sup>832</sup> DEEWR Annual report 2007–08, p. 232.

<sup>833</sup> Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Energex Ltd, declaration dated 10 February 2012.

<sup>834</sup> NUW, p. 19.

<sup>835</sup> See, for example, NUW, p. 22.

cases. The reliance on paper, as opposed to electronic, ballots was a significant frustration for unions. Evidence provided suggested that this creates particular inconvenience, difficulty and delay for workers in remote localities and for employees of large, national employers.<sup>836</sup> The NUW submitted that the AEC tends to prefer postal over attendance ballots which has at times resulted in less appropriate voting methods being employed for the relevant employees.<sup>837</sup> The ACTU proposed that the FW Act could require the AEC to give greater weight to the applicant's preference or require FWA's order to specify the method of voting.<sup>838</sup>

We are persuaded that greater flexibility should be afforded in the method of voting in protected action ballots. In particular, we consider that allowing electronic voting in appropriate circumstances has the potential to increase voter turnout and potentially reduce delays. We note the ACTU submitted that FWA adopts a 'one size fits all' approach in relation to when a ballot must close, routinely issuing orders that specify 20 days.<sup>839</sup> In light of our concerns about the delay associated with the ballot process, we are also persuaded that FWA should be required to ensure a ballot is conducted expeditiously.

### 7.3.6 Protected action ballot order coverage

Further technical problems were raised about the eligibility of employees to be covered by a protected action ballot order or to take industrial action. The ACTU submitted that the inclusion of one or more employees who are covered by an unexpired collective agreement in the scope for a proposed enterprise agreement should not result in the remainder of the group being ineligible to take protected action.<sup>840</sup> This was opposed by Ai Group.<sup>841</sup> Similarly, the TCFUA submitted that an employee who commences employment or joins the union after a ballot order has been made should be permitted to participate in protected action.<sup>842</sup> The TCFUA also criticised the current requirement for an employee bargaining representative, also a union member, to resign as a bargaining representative in order to be covered by the union's ballot application.<sup>843</sup> While each of these matters is somewhat technical in nature, their impact is not insignificant to the employees involved. We consider that, consistent with the original policy objective of the FW Act to improve the ballot process for users, they should be rectified.

We received two further submissions for improving the ballot process, which we wish to address briefly. Firstly, the ANF (Vic Branch) submitted that the FW Act is unclear as to whether a 'collective' ballot order can be made where a single interest employer authorisation has been made.<sup>844</sup> We note that a ballot order has been made in this circumstance, and on this basis conclude that the FW Act appears to already facilitate this practice,<sup>845</sup> which in our view is consistent with the general approach of the FW Act in treating the parties to a single interest employer authorisation as one. Second, the ACTU raised a difficulty with varying the timetable for a ballot.<sup>846</sup> We suggest that the Government monitor this issue to ensure that the provisions facilitating variation of a protected action ballot order are not operating in an inflexible manner.

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<sup>836</sup> CPSU-PSU, pp. 5–6.

<sup>837</sup> NUW, pp. 21–22.

<sup>838</sup> ACTU, p. 63.

<sup>839</sup> *ibid.*

<sup>840</sup> *ibid.* pp. 62–63.

<sup>841</sup> See *Power Projects International Pty Ltd v AMWU* [2011] FWA 1327.

<sup>842</sup> TCFUA, p. 20.

<sup>843</sup> *ibid.* p. 19.

<sup>844</sup> ANF (Vic Branch), p. 21.

<sup>845</sup> See, for example, *Australian Nursing Federation v Victorian Hospitals' Industrial Association* [2011] FWA 7198.

<sup>846</sup> ACTU, p. 63.

**Recommendation 32:** The Panel recommends that Division 8 of Part 3-3 be amended to:

- (a) allow protected action ballots to be conducted by electronic voting
- (b) allow an employee who becomes a union member after a protected action ballot order is obtained by that union to be included on the roll of voters for the ballot, and to vote on and take protected industrial action
- (c) allow an employee bargaining representative who is a union member to be included in the group of employees to be balloted pursuant to a ballot order obtained by the employee's union, and to vote on and take protected industrial action
- (d) require FWA to ensure that ballot agents conduct ballots expeditiously
- (e) if the group of employees to be covered by a proposed agreement includes employees covered by an agreement that has not passed its nominal expiry date, allow the remaining employees to be the subject of a ballot order, and to vote on and take protected industrial action.

## 7.4 Withdrawal of notice of industrial action

A number of employers submitted that the requirement to provide three days' notice of protected employee industrial action is being misused. The same requirement existed under previous legislative regimes and submissions did not suggest that this practice was uniquely a feature of the FW Act. BHP submitted that 'the tactic of giving notice, and then unilaterally withdrawing it at the eleventh hour, has become a weapon in enterprise bargaining', citing recent experience at its current BMA coal mining negotiations as evidence.<sup>847</sup> Qantas submitted that this tactic was used by both the ALAEA and TWU during its agreement negotiations in 2011.<sup>848</sup> AMMA also highlighted member concerns about this practice in its submission and noted its occurrence in Qantas bargaining in late 2011 by the TWU and the ALAEA.<sup>849</sup> AMMA, the Institute of Public Affairs and the NSW Business Chamber & Australian Business Industrial all emphasised the disruption and cost this practice causes to business, who often put in place mitigation measures and/or inform their customers of the upcoming disruption, yet are still required to pay employees who turn up for work.<sup>850</sup> The Institute of Public Affairs and POAGs called for the introduction of penalties where bargaining representatives notify of action they do not intend to take.<sup>851</sup> BHP, the BCA and AMMA suggested that a union that engages in the tactic should be disqualified from further protected action for a set period of time.<sup>852</sup> AMMA suggested that employers should have the right to refuse to accept employees making themselves available for work after a notice of protected action is withdrawn.<sup>853</sup> BHP and the NSW Business Chamber & Australian Business Industrial submitted that notices should only be able to be withdrawn by the consent of the employer.<sup>854</sup>

In its supplementary submission, the MUA noted that there are many circumstances in which a bargaining representative notifies action then for good reason does not take it.<sup>855</sup> It noted that a consequence of limiting or removing the right to withdraw a notice of protected industrial action would be to force the relevant action to be taken when it need not otherwise have been, in order to avoid a penalty.

<sup>847</sup> BHP, p. 12.

<sup>848</sup> Qantas, pp. 6–7.

<sup>849</sup> AMMA, p. 68.

<sup>850</sup> AMMA, p. 69; NSWBC & ABI, p. 41; IPA, p. 5.

<sup>851</sup> IPA, p. 5. POAGs, p. 7.

<sup>852</sup> AMMA, p. 11; BCA, p. 51; BHP, p. 12.

<sup>853</sup> AMMA, pp. 11, 68.

<sup>854</sup> BHP, p. 12; NSWBC & ABI, p. 55.

<sup>855</sup> MUA supplementary, p. 4.

The Full Bench in *Boral Resources*<sup>856</sup> dismissed an appeal from FWA's refusal to issue a stop order in circumstances where industrial action had been notified, but did not take place, on a number of occasions over a period of approximately 2-3 weeks. The employer had initially sought bargaining orders under s. 229 in respect of the conduct, however did not pursue the application as certain prerequisites had not been met. *Boral* argued that a delay, restriction or limitation of work brought about by a misleading industrial action notice was itself industrial action. The Full Bench found that there was no evidence that the unions did not intend to take the action at the time the notices were issued. They doubted whether the conduct would constitute industrial action for the purposes of the FW Act even if there were such evidence.

The Full Bench observed that 'the notice requirements ... provide the employer with an opportunity to take defensive action as may be appropriate to protect its business and custom. Part of the consideration of what defensive action to take will include an assessment of the likelihood of the industrial action being taken. This might cover the possibility of early agreement being reached either as to issues in dispute or the process of addressing those issues as well as the possibility of some or all employees deciding for whatever reasons not to take part in the action'.<sup>857</sup> They described the practice of issuing a misleading notice as 'an industrial tactic employed in the course of bargaining and negotiations' which 'should not be encouraged', and which 'might also provide a basis for making application for good faith bargaining orders (s. 230) or lead to responsive action by the employer including lock outs and the standing down of employees (s. 524)'.<sup>858</sup>

The Panel is persuaded by submissions that the 'aborted strike technique' has been inappropriately employed in some cases. Based on the evidence of stakeholders, it appears to have been a bargaining practice in some instances in the maritime, aviation and resources industries—industries characterised by a significant proportion of large businesses and traditionally unionised workforces. However, the FW Act already contains a mechanism for addressing this conduct under its good faith bargaining provisions. It is almost certainly open to an employer who is subjected to 'aborted strikes' to apply to the tribunal for an order under s. 230 restraining conduct involving the giving of notice by a bargaining party who does not pursue the industrial action that has been notified. Whether an order should be made will obviously depend on the facts and the reason why the industrial action wasn't taken. We acknowledge that to date no bargaining order has been issued to stop or limit the taking of industrial action. However, the Full Bench in *Boral* has provided a clear indication that this remedy is available. McCrystal has also observed that during protected industrial action, bargaining representatives remain subject to good faith bargaining requirements and, accordingly, it is possible that they may impinge upon or affect the manner in which protected industrial action is undertaken, both for employees and employers.<sup>859</sup> The reach of the good faith bargaining provisions in this regard has not yet been fully explored. Accordingly, the Panel does not consider amendments are, at this point, necessary.

## 7.5 Provision of accommodation and payment for industrial action

The FW Act continues the prohibition on payment for periods of industrial action contained in Work Choices, but no longer requires a mandatory minimum four-hour deduction for protected industrial action, and facilitates partial deductions for partial work bans. Few submissions were received about these changes. However, a number of submissions raised the prohibition on payment for industrial action where 'payment' includes provision of accommodation or living away from home allowances.<sup>860</sup> In each instance the discussion was based on the events that transpired between Mammoet Australia Pty Ltd and some of its employees at the Pluto LNG Project in north-west Western Australia. The employees in question were 'fly-in fly-out' workers. On 21 April 2010 Mammoet was notified

<sup>856</sup> [2010] FWAFB 1771.

<sup>857</sup> *ibid.* [14].

<sup>858</sup> *ibid.* [15].

<sup>859</sup> S McCrystal, 'The relationship between protected industrial action, recognition and bargaining in good faith under the *Fair Work Act 2009*', in B Creighton & A Forsyth, *Rediscovering collective bargaining: Australia's Fair Work Act in international perspective* (forthcoming, 2012), pp. 208–9.

<sup>860</sup> ACTU, p. 62; AMWU, p. 40; CFMEU C&G, p. 21; ETU, p.5.



that some of its crane and forklift employees intended to take protected industrial action from 28 April. On 27 April, the day before the action was due to commence, Mammoet advised that it would no longer provide accommodation for the employees at the camp annexed to the Pluto Project.<sup>861</sup> The CFMEU alleged that this constituted adverse action and a breach of the relevant enterprise agreement. Federal Magistrate Lucev found that the prohibition on strike pay contained in s. 470(1) of the FW Act required Mammoet to withdraw the accommodation, on the basis that provision of the accommodation constituted a ‘payment’ within the meaning of the provisions.

This decision is currently under appeal. In preliminary proceedings, the CFMEU submitted that the lower court’s construction of the word ‘payment’ in s. 470 ‘has the potential to affect the ability of thousands of employees engaged in remote areas to take protected industrial action’. It contended that “Fly in, Fly out’ employees engaged in remote areas are regularly provided accommodation through their employer and that a withdrawal of that accommodation ... [would] render a vast majority of those employees unable to take part in any protected industrial action’.<sup>862</sup> They also submitted to the court that this approach would affect employers who provide accommodation by requiring them to withdraw it because of short periods of protected industrial action or be liable for penalties under the FW Act.<sup>863</sup>

We note that this issue has not arisen from any substantive change to the relevant provisions between Work Choices and the FW Act. A prohibition on ‘payment’ also existed under Work Choices. Rather, this issue arises from the court’s recent interpretation of the meaning of the term in relation to fly-in fly-out workers in the mining industry. However, its ramifications are likely to have much further reach. The interpretation of the court potentially presents a problem for any employee engaging in protected industrial action where provision of accommodation forms part of their overall remuneration. It also presents a problem for all employers of those employees, as making payment for periods of industrial action in contravention of this requirement is a civil remedy provision.<sup>864</sup> Accordingly, the interpretation of the court is likely to result in substantial disruptions to employees and employers, as the practical effect is to require an employer to cease providing accommodation to employees for the duration of protected industrial action.

While the Panel’s general approach has been against recommending statutory prescription over matters that are still evolving through decisions of FWA and the court, we consider that this issue ought to be clarified directly in the legislation. We consider that the provision of accommodation should be expressly excluded from the definition of ‘payment’ for the purposes of Division 9 of Part 3-3 of the FW Act. The requirement to remove an employee from their accommodation as a consequence of that employee taking industrial action has had a demonstrably harsh impact on employees in the case of *Mammoet*. We agree that it undermines the capacity for employees who live away from home for work in accommodation provided by their employer to take protected industrial action. We also agree that it has significant potential to create practical problems for employers when employees take short periods of industrial action.

**Recommendation 33:** The Panel recommends that Division 9 of Part 3-3 be amended to provide that provision of accommodation does not constitute ‘payment’. Employers should continue to be required to provide accommodation even if employees are taking industrial action.

## 7.6 Stopping, suspending and terminating industrial action

The grounds upon which industrial action can be stopped, suspended or terminated under the FW Act are similar to those under Work Choices. For instance, the FW Act retains the longstanding capacity for the tribunal to suspend or terminate industrial action that is (or is threatening to) endanger the life, personal safety or health or welfare of the

<sup>861</sup> *CFMEU v Mammoet Australia Pty Ltd* [2011] FMCA 802.

<sup>862</sup> *CFMEU v Mammoet Australia Pty Ltd* [2012] FCA 141, [6].

<sup>863</sup> *ibid.* [7].

<sup>864</sup> FW Act, s. 470(1).

population or part of it or cause significant damage to the economy. The FW Act also retains the power of the tribunal to suspend protected industrial action for a cooling-off period and where it is causing or threatening to cause significant harm to a third party. In contrast to Work Choices, the FW Act includes a new basis for suspending or terminating industrial action, which is based on significant economic harm to the bargaining parties themselves. Based on the small number of applications made to FWA under this new provision (see below), the impact seems to have been minimal. Section 418 of the FW Act requires FWA to stop any industrial action that is unprotected, as was the case under Work Choices.

Both unions and employers proposed changes to the provisions outlined above.

Unions submitted that FWA currently has significant and wide-ranging powers to suspend and terminate industrial action, which should be reduced, or do not need to be further enhanced.<sup>865</sup> They submitted that FWA should have more discretion in responding to applications for orders in respect of unprotected industrial action<sup>866</sup>, and that more notice of s. 418 application hearings should be provided.<sup>867</sup>

Employers and their representatives have called for FWA to have wider discretion to suspend or terminate protected industrial action<sup>868</sup> and a lower threshold for making out the requisite economic harm or damage under s. 423<sup>869</sup>, s. 424<sup>870</sup> and s. 426.<sup>871</sup> Others proposed that cooling-off periods be available in a wider range of circumstances.<sup>872</sup> Some submitted that unions should be liable for the conduct of officials and members where the union has recommended unlawful industrial action.<sup>873</sup>

The WA Government also called for a lower threshold to suspend or terminate industrial action under s. 426, and submitted that its relevant minister should have standing to apply to suspend or terminate protected industrial action under ss. 423, 424 and 426.<sup>874</sup> The South Australian Government raised the issue of 'self inflicted' economic harm under s. 424.<sup>875</sup> NSW Labour Lawyers suggested that FWA be empowered to only terminate the action that is causing the 'significant damage to the Australian economy' not all industrial action for the proposed agreement.<sup>876</sup>

The Panel is not persuaded that any case for change has been made out in any of these various submissions. We consider that the provisions strike the appropriate balance between facilitating a lawful right to strike for employees, and protecting the economic interests of employers, third parties and the public. Many of the relevant provisions have existed in the same or similar form across previous industrial relations regimes for many years, such as termination on the safety and economy ground. The only new ground for suspending or terminating industrial action was the subject of nine applications in 2009–10 and eight applications in 2010–11, which is not vastly different to the number of applications made under the other provisions to suspend or terminate industrial action.<sup>877</sup> It also represents only 1 per cent of the number of negotiations in which protected industrial action is authorised, based on the number of protected action ballot orders for the same period. In respect of the procedural matters referred to in relation to s. 418, we note that there are already remedies available for a failure to afford procedural fairness.

Forsyth and Stewart recommend that s. 431 be repealed as it has never been used, and allows inappropriate political intervention in disputes.<sup>878</sup> This view was also expressed by a number of stakeholders during private consultations with

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<sup>865</sup> ACTU, pp. 46, 62; ANF, pp. 14–16; ANF Vic Branch, pp. 15–16; MUA supplementary, p. 5; NTEU, p. 10–11.

<sup>866</sup> ACTU, p. 62; AWU, p. 10.

<sup>867</sup> AWU, p. 10; CFMEU C&G, p. 17; MUA, p. 6.

<sup>868</sup> APTIA, p. 9; ASA, p. 13; POAGS, p. 8.

<sup>869</sup> G Smith, p. 16; Farstad, p. 5; AMIC, p. 11.

<sup>870</sup> APTIA, p. 9.

<sup>871</sup> AMMA, p. 12; ASA, p. 13; Woodside, p. 14. See also Eraring Energy, p. 4.

<sup>872</sup> ACCI, p. 15; AMMA, p. 12; BCA, p. 51.

<sup>873</sup> AMMA, p. 11; Woodside, p. 15.

<sup>874</sup> WA Government, pp. 4–5.

<sup>875</sup> SA Government, p. 17.

<sup>876</sup> NSW Labour Lawyers, p. 8.

<sup>877</sup> FWA Annual report 2009–2010, p.76; FWA Annual report 2010–2011, p. 81.

<sup>878</sup> Forsyth and Stewart, p. 24.

the Panel. It has also been suggested that exercise of the power could be open to legal challenge.<sup>879</sup> We agree with these views. In circumstances where the Minister is permitted to make application to FWA to obtain the same outcome, with the benefit of an independent decision maker hearing evidence and submissions from the parties, we consider that the exercise of this power would lack legitimacy.

**Recommendation 34:** The Panel recommends that the FW Act no longer confer power on the Minister to terminate protected industrial action, as s. 431 presently does.

## 7.7 Other submissions

A number of employers proposed additional restrictions on the capacity for employees to take protected industrial action, such as requiring a bargaining impasse<sup>880</sup>, a public interest test or productivity offset requirement<sup>881</sup> or compulsory conciliation.<sup>882</sup>

We have already foreshadowed in Chapter 6 our recommendation that FWA be empowered to deal with disputes on its own motion. In our view this would encompass the capacity for FWA to facilitate conciliation in the circumstances referred to above, without requiring it to do so in every case. We are otherwise not persuaded that the measures proposed are necessary or appropriate.

We also received submissions addressing employer industrial action, calling on the one hand for a reintroduction of pre-emptive employer lockouts<sup>883</sup> or a greater range of employer industrial action,<sup>884</sup> and on the other for further restrictions on employer response action relating to notice<sup>885</sup> and proportionality.<sup>886</sup>

We note the clear policy intention that lockouts would only be possible ‘as the ultimate response to industrial action’ and ‘offensive, pre-emptive lockouts—taken by the employer when employees haven’t taken any industrial action’ would no longer be permitted.<sup>887</sup> We consider that the FW Act is operating as intended in this regard, and we are not persuaded that the balance is wrong in respect of employer industrial action.

We also received several submissions proposing changes to the pattern bargaining prohibition in the FW Act. Employers proposed that the limits on the definition of pattern bargaining in s. 412(2) be reduced or removed<sup>888</sup> and that pattern bargaining be an express ground upon which to refuse a protected action ballot order.<sup>889</sup> Unions proposed that the prohibition on pattern bargaining be removed, either in whole or in part.<sup>890</sup>

Both Forward with Fairness and the Implementation Plan provided that industrial action in support of pattern bargaining would not be protected.<sup>891</sup> The FW Act implements this policy by providing that, for action to be protected industrial action, a bargaining representative must not be engaging in pattern bargaining.<sup>892</sup> The FW Act allows an injunction to be granted by the Federal Court or Federal Magistrates’ Court to stop employee claim action on the basis that a bargaining representative is engaging in pattern bargaining,<sup>893</sup> in addition to the requirement that FWA issue

<sup>879</sup> Julia Gillard did the right thing in Qantas dispute, say legal experts’, *The Australian*, 1 November 2011.

<sup>880</sup> AMMA, p. 11; BHP, p. 11; MCA, p. 22.

<sup>881</sup> ACCI, p. 15; AMMA, p. 10–11; SAL, p. 2; ASA, p. 12; Business SA, p. 7.

<sup>882</sup> APTIA, p. 9; NSWBC & ABI, p. 54; ARTIO, p. 6; ASA, p. 13;

<sup>883</sup> BCA, p. 51; Qantas, p. 7.

<sup>884</sup> Bartier Perry, p. 3; Institute of Public Affairs, p. 15; POAGS, p. 8.

<sup>885</sup> ACTU, p. 57; AIER, p. 34; AIMPE, p. 2; AIPA, p. 13; ASU, p. 25; CPSU-SPSF, p. 22; ETU, p. 5; HSU, p. 8; NUW, pp. 20–21; TWU, pp. 6–7; United Voice, p. 26.

<sup>886</sup> AIPA, p. 13; CFMEU M&E, pp. 10–11.

<sup>887</sup> PCS.

<sup>888</sup> AMMA, p. 13; ASA, p. 13; BHP, pp. 13–14; Farstad, p. 5; HIA, p. 49; MBA, p. 62.

<sup>889</sup> Ai Group, p. 25.

<sup>890</sup> ACTU, p. 43; ASU, pp. 21–23; CFMEU M&E Div, p. 10.

<sup>891</sup> FWF, 16; FWFIP, p. 21.

<sup>892</sup> FW Act, s. 409(4).

<sup>893</sup> FW Act, s. 422.

orders to stop unprotected industrial action occurring which can also be enforced by injunction.<sup>894</sup> The definition of pattern bargaining in the FW Act is in substance the same as under Work Choices.<sup>895</sup> Accordingly, we consider the provisions are appropriate and do not recommend any change.

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<sup>894</sup> FW Act, ss. 418–421.

<sup>895</sup> FW Act, s. 412; Work Choices s. 421; DEEWR submission to the FW Bill inquiry, p. 36.

## 8 Right of entry

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### 8.1 Introduction

A key policy objective of the FW Act expressed in Forward with Fairness was to ‘give effect to important workplace rights that are essential to a functioning democracy’ including ‘the right to representation, information and consultation in the workplace’.<sup>896</sup> Unions were regarded as playing ‘an important part in ensuring workplaces are fair’ by working to protect ‘the health and safety, living standards and job security of employees’ and advocating for working families in the wider community. On this basis, employees would ‘have the right to seek advice, assistance and representation from their union in the workplace and workplace delegates will be able to represent their colleagues in the workplace’. This is reflected in the FW Act insofar as the objects in s. 3(e) refer to ‘enabling fairness and representation at work ... by recognising ... the right to be represented’.

Representation at work can assist with communication and consultation between employers and employees, give employees a ‘voice’ in the workplace, help resolve grievances and make negotiations more effective.<sup>897</sup> While the procedures and rules for exercising right of entry under Work Choices were generally considered by the Government to be appropriate, Work Choices significantly restricted the rights of employees to be represented in the workplace by limiting the circumstances in which right of entry could be exercised. There were two problems identified by the Government that the FW Act sought to address. First was the requirement that to exercise a right of entry for discussion purposes, a union was required to be bound by an applicable industrial instrument. This had the effect of preventing union members and eligible employees in a workplace from being represented by their union. The measures to address this are described in 8.2. Second, allowing an employer to determine the location at the workplace where union members and employees eligible to be a member of a union could meet their union representatives, unless the location was unreasonable, lead to employees being required to meet their representatives in inappropriate locations, such as a toilet block.<sup>898</sup> The measures to address this are described in 8.4.

Part 3-4 of the FW Act grants right of entry to permit holders to investigate suspected contraventions of the FW Act or a fair work instrument, as well as to hold discussions with employees, which is consistent with previous arrangements. A permit holder can enter a workplace to hold discussions with employees who work at the premises, whom the union is entitled to represent, and who want to participate in those discussions, at mealtimes or other break periods. Entry to investigate a suspected contravention can only occur if the permit holder reasonably suspects a contravention of the FW Act or of a fair work instrument relating to or affecting an eligible member working on the premises. The FW Act also modifies the capacity to enter premises under state and territory occupational health and safety laws by imposing conditions on OHS entry.

### 8.2 Right of entry based on eligibility to represent employees

Forward with Fairness provided that employees would have ‘the right to seek advice, assistance and representation from their union in the workplace’.<sup>899</sup> The Implementation Plan stated that the FW Act would ‘maintain the existing right of entry rules’.<sup>900</sup> While the FW Act largely replicates Work Choices right of entry rules in respect of the processes, rights and obligations in the system, it also departs from Work Choices in one important way. The FW Act removed the

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<sup>896</sup> FWF, p. 12.

<sup>897</sup> ACAS, *Representation at Work*, November 2010, [www.acas.org.uk](http://www.acas.org.uk).

<sup>898</sup> See the report of the inquiry of the Senate Standing Committee on Education, Employment and Workplace Relations into the provisions of the Fair Work Bill 2008, February 2009, [7.2].

<sup>899</sup> FWF, p. 12.

<sup>900</sup> FWFIP, p. 23.

requirement that in order for an officer or employee of a union to enter a workplace under the right of entry provisions, the union had to be bound by the award or agreement that applied at the workplace.

There were two policy objectives for this approach. The first was the objective of allowing a union member access to their union representative to resolve problems in the workplace.<sup>901</sup> To allow employees the rights foreshadowed in *Forward with Fairness*, it was necessary to decouple union representation and instrument coverage.<sup>902</sup> The second related to the difficulties associated with specifying multiple unions who were previously bound by pre-modernised awards in modern awards.<sup>903</sup> Based on this approach, the Full Bench of the AIRC determined during award modernisation that unions would not be named as being covered by modern awards.<sup>904</sup>

In practice, this means that employees can access union representation in the workplace, as long as the union is eligible to represent the employee under the union's eligibility rules, when previously many employees did not have such access. This change benefits those employees.

The change requires employers who were previously able to exclude many, or all, unions from their workplace due to the nature of the industrial instrument that applied, to facilitate a relevant union representing their employees. Such employers may need to set aside time and resources to attend to entry requests and may also choose to escort permit holders who are on the premises. While this is likely to result in some additional cost based on lost time, because of the strict requirements regarding the conduct of permit holders<sup>905</sup> and the requirement to meet employees during non-work time, this is likely to be a minor imposition for most workplaces. In addition, a union's permit holders are still subject to certain standards of behaviour and conduct while on the premises to minimise the inconvenience to the employer's operations.

Although there is no data on the frequency of visits by union permit holders to a workplace, we have considered anecdotal evidence provided in submissions further in 8.3.

Employers and employer groups submitted that rights of entry under the FW Act are too broad, and proposed a number of limitations—a key one being the reinstatement of the 'coverage' restriction from *Work Choices*.<sup>906</sup> The Institute of Public Affairs observed that rights of entry for discussion purposes had been relaxed, with awards no longer operating to 'partition' union representation.<sup>907</sup> The Australian Meat Industry Council observed that many employers in the meat industry received right of entry notices from a diverse range of unions covering a broad spectrum of occupations, describing a 'free for all' approach.<sup>908</sup> A number of employer groups have asserted that as a result of the new eligibility rules, union demarcation disputes have increased.<sup>909</sup>

Other proposed limits included:

- a requirement that a union have members at the workplace and be invited to enter by those members<sup>910</sup>
- a requirement for a permit holder to swear a statutory declaration that the union is entitled to represent the group of employees, referencing the relevant coverage rules<sup>911</sup>
- a requirement that the union receive acknowledgment of the visit from the employer before entry.<sup>912</sup>

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<sup>901</sup> DEEWR submission to the FW Bill inquiry, p. 40.

<sup>902</sup> See report of the inquiry of the Senate Standing Committee on Education, Employment and Workplace Relations into the provisions of the Fair Work Bill 2008, p. 12 and Chapter 7.

<sup>903</sup> See Award Modernisation Decision [2008] AIRCFB 1000; DEEWR submission to the FW Bill inquiry, p. 40; Senate Standing Committee on Education, Employment and Workplace Relations Committee *Hansard*, 19 February 2009, EEW 62.

<sup>904</sup> Award Modernisation Decision [2008] AIRCFB 1000, [22].

<sup>905</sup> Such as ensuring that they do not hinder or obstruct any person, or act in an inappropriate manner, or misrepresent their entry rights as per s. 500 and s. 503 of the FW Act respectively.

<sup>906</sup> Ai Group, p. 134; AMMA, pp. 14–15, p. 113; APPEA, p. 5; BHP, p.15; HIA, p. 44; CCIWA, pp. 11, 52–53.

<sup>907</sup> IPA, p. 9. See also BHP, p. 14.

<sup>908</sup> AMIC, p. 14.

<sup>909</sup> Ai Group, p. 28; AMMA, pp. 112–113; IPA, p. 9; MBA, pp. 79–80.

<sup>910</sup> CCIQ supplementary, p. 10; AMMA, pp. 14–15; 113–114; APPEA, p. 5; AFEI, p. 32; HIA, p. 44; R&CA, p. 14.

<sup>911</sup> CCIWA, pp. 11, 56.

Woodside submitted that entry rights for discussion purposes should be confined to where a union has members at a workplace and is either covered by an applicable industrial agreement or is representing members following the commencement of bargaining or a majority support determination.<sup>913</sup> MBA proposed eliminating union entry for discussion purposes other than for TCF workers, or when a demarcation agreement is in place.<sup>914</sup>

The ACTU and the Australian Institute for Employment Rights argued that the purpose of right of entry laws is to enable proper representation at work.<sup>915</sup> The TCFUA observed that some employer groups were concerned that unions have any rights of entry at all.<sup>916</sup> The NUW noted that while the FW Act provisions were an improvement on the previous regime which 'effectively barred unions from non-union workplaces' the FW Act still contains significant impediments to unions gaining access to workers in a meaningful way.<sup>917</sup> Particular areas of inadequacy were considered to be in respect of labour hire workers<sup>918</sup> and because of the interaction with state laws.<sup>919</sup>

Unions also submitted that some employers attempt to restrict access to employees at the workplace.<sup>920</sup> The Health Services Union proposed a requirement for employers to notify their employees of the right to attend and participate in meetings, and the Electrical Trades Union sought an express provision allowing a permit holder to visit the employees of more than one employer at a specific workplace.<sup>921</sup> In contrast, the Ai Group considers the FW Act already addresses such issues by requiring employers not to refuse or delay or hinder or obstruct a permit holder.<sup>922</sup> The Institute of Public Affairs (IPA) suggests that the FW Act should clearly spell out and protect the right of an employee to decline to meet with a union.<sup>923</sup>

As discussed earlier, under Work Choices, entry for discussion purposes was confined to circumstances where a union was itself bound by an award or collective agreement.<sup>924</sup> The impact of this was as follows:

- Where only an award or awards applied to a workplace, only the union party to that award or awards could enter the workplace (noting that awards were displaced by all other instruments in the system).
- Where a union collective agreement applied to a workplace, only the union party to that agreement could enter the workplace (noting that all other unions were excluded).
- Where a non-union collective agreement or employer greenfields agreement applied to a workplace, no union could enter the workplace.
- Where all employees at a workplace were covered by AWAs, no union could enter the premises.

It is apparent from the above that there were many circumstances in which unions were excluded from workplaces, despite a member or person eligible to be a member of the union working on the premises. Also, in the absence of any positive statutory obligation to bargain with a union, it was within the employer's discretion to select the relevant

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<sup>912</sup> CCIQ supplementary, p. 10; NECA, p. 10.

<sup>913</sup> Woodside, p. 15.

<sup>914</sup> MBA, [15.1]–[15.5].

<sup>915</sup> ACTU supplementary, p. 15; AIER, pp. 35–36.

<sup>916</sup> TCFUA supplementary, p. 9.

<sup>917</sup> NUW, pp. 17–18.

<sup>918</sup> NUW, pp. 9–10.

<sup>919</sup> Unions WA, p. 6.

<sup>920</sup> AMIEU, p. 6; TCFUA, pp. 21–23; Unions NSW, pp. 6–7.

<sup>921</sup> ETU, p. 9; HSU, p. 15.

<sup>922</sup> Ai Group supplementary, p. 47.

<sup>923</sup> IPA, p. 6.

<sup>924</sup> Work Choices, s. 760.

statutory agreement to achieve that result. Even union collective agreements operated to exclude many unions, as they could be made between an employer and a union with only one member.<sup>925</sup>

If a similar approach were applied under the FW Act, it would be necessary to provide for all relevant unions to be covered by existing modern awards. Modern awards are largely constructed on an industry basis, and cover a diverse range of occupations within that industry. Accordingly, potentially many unions would be eligible to represent employees covered by a given modern award and would therefore be entitled to be covered by it. This exercise would be time consuming and resource intensive for no clear benefit, as it appears that the consequences would be no different than the current situation for award-covered workplaces. The consequences of reinstating this approach for agreement-covered workplaces would be, as under Work Choices, to exclude unions who are not covered by the relevant enterprise agreement access to members or potential members. The FW Act was designed to overcome this very issue, and we therefore consider that it would be inconsistent with the objects of the FW Act to amend it. We are not inclined to recommend any change to the eligibility criteria for right of entry.

Further, we do not consider that a case has been made out for any other broad restrictions on entry rights. We tend to agree with the NSW Business Chamber & Australian Business Industrial submission that right of entry under the FW Act draws heavily from existing practices settled in previous workplace relations legislation, and that any issues in this area are largely due to individual union officials or specific unions' exercising their entry rights.<sup>926</sup> Evidence from submissions suggests that the only significant impact of the broader entry rights under the FW Act has been more frequent visits to the workplace from unions than under the previous regime. This has clearly had an impact for some employees and employers. We examine that impact below at 8.3.

### 8.3 Frequency of visits

Many employers submitted that the FW Act right of entry provisions had led to more frequent visits from unions. They proposed that there should be a limit on the number of visits a permit holder can make to a workplace, particularly for discussion purposes.<sup>927</sup> The basis for this submission was variously that:

- The frequent exercising of such entry rights places constraints on the business' resources to attend to such requests, and results in instances of employers being unaware that permit holders are in a workplace.
- Frequent visits cause disruption to the business' operations.
- Some permit holders are on recruitment exercises rather than representing members at the workplace, if there are members on site.
- Frequent visits increase the risk of demarcation disputes between rival unions.

As there is no overall statistical data on the frequency of visits to workplaces by permit holders, we have relied on anecdotal evidence provided by stakeholders in their submissions. BHP submitted that it has experienced extraordinary numbers of visits in some workplaces since the FW Act commenced.<sup>928</sup> It provided the data in Table 8.1, which indicates the number of statutory right of entry visits in some of its workplaces since the introduction of the FW Act:

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<sup>925</sup> Work Choices, s. 328.

<sup>926</sup> NSWBC & ABI, p. 85.

<sup>927</sup> AMMA, pp. 15, 114; CCIWA, pp. 11, 53–54; CCIQ supplementary, p. 10.

<sup>928</sup> BHP, p. 15.



Table 8.1—Right of entry visits by union officials at BHP Billiton’s Worsley Alumina plant, 2007–11

	Worsley Alumina operations		Worsley Alumina construction			
	AWU	AMWU	AWU	AMWU	CFMEU	CEPU
2007	0	0	0	0	0	0
2008	0	0	19	1	54	8
2009	12	11	28	67	233	27
2010	68	48	43	103	427	103
2011	162	13	4	130	234	183

Source: BHP submission.

In a survey of 245 employers conducted by Ai Group in August 2011 across many industries, 37 per cent of employers reported that union officials had visited their workplace more often since the commencement of the FW Act, and 15 per cent reported fewer visits.<sup>929</sup> AMMA noted a case study of an unnamed employer who had experienced more than 400 visits to one site between 1 July 2009 and October 2011.<sup>930</sup> An affidavit attached to the submission of CCIWA described the impact of visits on onshore resource construction projects in Western Australia. It indicated that at the ‘high end’ visits averaged 56 per month, or nearly 700 visits over the year, and that on one particular day there were 17 visits. It said the average time taken by projects to deal with each visit was between 60 and 90 minutes, and up to 3.5 hours on remote projects. It also identified the costs of having two personnel available to deal with each visit, along with additional personnel to address site security and other issues; of providing vehicles in some cases; and of training staff to assess eligibility for entry. Other costs are described as resulting from unauthorised or improper conduct of union officials associated with visits.<sup>931</sup> In *CFMEU v Foster Wheeler Worley Parsons (Pluto) Joint Venture*, the employer gave evidence of 217 entry requests having been made between 1 July 2009 and 27 October 2009 on a site where approximately 3,300 workers were engaged by 12 to 14 main contractors, and where up to 703 subcontractors worked.<sup>932</sup>

Based on submissions, we consider that there is evidence of frequent use of entry rights by some unions in some workplaces since the commencement of the FW Act. It is not possible to identify the extent of this practice. Right of entry is only permitted where the union is investigating a suspected contravention of the legislation or an industrial instrument, or to hold discussions with employees. In the former case the union must be investigating a suspected contravention that has impact on a member, while in the latter case discussions must be held with members and employees eligible to be represented by the union.

Consistent with the evidence presented in submissions, it appears that more frequent visits to workplaces are occurring to hold discussions with members or employees that a union is eligible to represent. Given the broad range of matters that could be discussed, this type of visit need not be for specific purposes. While employers need to allocate time and resources to facilitate a union’s permit holder on the premises and to provide a reasonable location for discussions held during meal and rest breaks, in most cases this is not likely to be to the degree required if a union is investigating a suspected contravention.<sup>933</sup> Submissions tend to suggest that this issue is a more significant problem for large worksites where several unions are eligible to represent the employees, such as those in the mining or construction industries.

<sup>929</sup> Ai Group, p. 133.

<sup>930</sup> AMMA, p. 108.

<sup>931</sup> CCIWA, Attachment D.

<sup>932</sup> [2010] FWA 2341, [12], [18].

<sup>933</sup> For an example of the impact of a union seeking entry on a larger scale, see *Construction, Forestry, Mining and Energy Union v Foster Wheeler*

Such employers may need to set aside time and resources to attend to more frequent entry requests and may also choose to escort permit holders who are on the premises. Whilst this is likely to result in some additional cost based on lost time, in light of the strict requirements regarding the conduct of permit holders, and the requirement to meet employees during non-work time, this is likely to be a minor imposition for most workplaces. In addition, a union's permit holders are still subject to certain standards of behaviour and conduct whilst on the premises to minimise the inconvenience to the employer's operations at the workplace.

It seems unlikely that the incidence of visits to a workplace to investigate a suspected contravention would be high, as the FW Act requires the suspected contravention to be specified in the relevant entry notice served by the union on the employer. It also provides for penalties associated with misrepresenting rights of entry. An entry for a suspected contravention requires the employer to allocate time and resources to it. To this extent it would impact on the workplace. The union's permit holder inspects the work, process, objects and documents relevant to the suspected contravention and conducts interviews with the relevant employees who are willing to be interviewed. This requires the employer's staff to liaise with the permit holder about the suspected contravention as well as to meet them and escort them around the premises. While this would impose on the business operations, the overall impact would depend on the scale of the suspected contravention and whether the employer objects to the union's permit holder investigating material that is believed to be irrelevant to the suspected contravention.

It is difficult, on the available evidence, to identify whether the instances of frequent visits are excessive such as to demonstrate that the motivations for entry are not consistent with those authorised by the FW Act. We are, however, concerned that this may be the case in some instances and we wish to ensure that the FW Act has mechanisms in place to address this issue.

There are already some such mechanisms. The FW Act does not permit entry to premises under Division 2 of Part 3-4 unless the permit holder holds the requisite purpose for the entry, namely to hold discussions with employees or investigate a suspected contravention of a relevant instrument. Excessive entry to premises may indicate, in some circumstances, that the visits are occurring for an ulterior purpose, in which case the entry is not authorised. Further, permit holders are prohibited from intentionally hindering or obstructing any person, or otherwise acting in an improper manner.<sup>934</sup> We can see no reason why unjustified excessive visits would not fall within the range of conduct that is the subject of this prohibition. Further, FWA is empowered to impose conditions on an entry permit, suspend an entry permit and revoke an entry permit.<sup>935</sup> It has broad powers to make orders restricting entry rights of an organisation, or officials of an organisation, where entry rights have been misused.<sup>936</sup> We consider that these existing measures provide some scope for unjustified excessive visits to be addressed.

We note that FWA is permitted to deal with a dispute about right of entry under s. 505 of the FW Act. However, we are concerned that FWA does not have the necessary discretion to deal with a dispute relating to excessive workplace visits under s. 505, as doing so may involve circumscribing the statutory rights of entry provided for under Part 3-4. We think that the FW Act should permit FWA greater discretion to deal with these disputes, including by making orders that restrict excessive workplace visits.

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*Worley Parsons (Pluto) Joint Venture*, [2010] FWA 2341.

<sup>934</sup> FW Act, s. 500.

<sup>935</sup> FW Act, s. 507.

<sup>936</sup> FW Act, s. 508.

**Recommendation 35:** The Panel recommends that s. 505 be amended to provide FWA with greater power to resolve disputes about the frequency of visits to a workplace by a permit holder in a manner that balances the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without undue inconvenience.

## 8.4 Location of discussions

The Government considered that the right of employers to determine where a union could meet its members or other eligible employees in the workplace led to instances where employees could be required to meet their representatives in inappropriate locations. The FW Act was intended to address this.

Specifically, s. 492(1) of the FW Act provides that a permit holder must comply with any reasonable request by the occupier of a premises to conduct interviews or hold discussions in a particular room or area of the premises. Section 492(2) sets out the circumstances where a request will be unreasonable, including:

- where the room or area is not fit for the purpose of conducting the interviews or holding the discussions
- where the request is intended to intimidate persons who might participate in discussions
- where the request is intended to discourage persons from participating in discussions or
- where the request is intended to make it difficult for employees to participate in discussions because the room or area is not easily accessible, or for some other reason.

FWA is empowered to deal with a dispute about whether a room or area is reasonable.<sup>937</sup>

Section 492(1) is in substance the same as the requirement introduced under Work Choices<sup>938</sup> that had not existed in any previous regime. There was no equivalent to s. 492(2) under Work Choices. The inclusion of non-exhaustive guidance about whether a location for discussions is 'reasonable' was intended to address situations where 'the location of meetings has been clearly inappropriate, such as outside a toilet, in an unsafe area or in full view of a senior manager's office'.<sup>939</sup> The EM contains the example of an employer providing access to an unsafe location that takes 20 minutes for employees to walk to during a 30-minute lunch break as being unreasonable.<sup>940</sup>

If a permit holder is conducting interviews with members, it must occur during work hours. A union's permit holder can hold discussions with employees only during the employees' rest or meal breaks. This ensures that these interviews and meetings do not unduly disrupt business operations.

There is no data on the impact of these provisions of the FW Act, and instead we have relied on as evidence the experiences and views outlined in submissions.

A number of union submissions claimed that s. 492 of the FW Act undermines the ability of permit holders to access union members and eligible employees by denying employees the ability to meet union officials in the most convenient locations. Several case studies were included in submissions and are available through decided cases.<sup>941</sup> Some argued that the FW Act should explicitly require meetings between permit holders and employees to be held in a specific area<sup>942</sup>, such as meal rooms or common areas close to where the employees work.<sup>943</sup> For example, the AMWU

<sup>937</sup> FW Act, s. 505.

<sup>938</sup> Work Choices, s. 765(3).

<sup>939</sup> DEEWR submission to the FW Bill inquiry, pp. 41–42.

<sup>940</sup> EM, p. 302.

<sup>941</sup> See, for example, AMWU, pp. 43–49; *Australasian Meat Industry Employees Union v Somerville Retail Services* [2010] FWA 6737 and *Somerville Retail Services P/L v Australasian Meat Industry Employees Union 2011* [FWAFB] 120; *Australasian Meat Industry Employees Union v Dardanup Butchering Trust* [2010] FWA 9197 and [2011] FWAFB 3847; *Australian Workers Union v Rio Tinto Aluminium (Bell Bay) Limited* [2011] FWA 3878; *Construction, Forestry, Mining and Energy Union v Foster Wheeler Worley Parsons (Pluto) Joint Venture* [2010] FWA 2341.

<sup>942</sup> See, for example, ACTU, pp. 44, 58; AMWU, p. 43; CFMEU C&G, p. 23.

<sup>943</sup> ACTU, p. 58; AMIEU, pp. 6, 13; AMWU, pp. 43–49; ANF, pp. 19–21; AWU, pp. 11–13; CFMEU C&G, pp. 23–24; ETU, p. 9; NUW, pp. 15–16;

submitted that because permit holders can only hold discussions with employees during their meal or other breaks, the main meal or break room would be the most accessible for permit holders to meet with employees.<sup>944</sup> The ACTU and AIER submitted that employers should take positive steps to provide an appropriate meeting place for employees and permit holders.<sup>945</sup>

The TCFUA raised problems with the ‘intention’ test for prohibited behaviour that may hinder, obstruct, refuse or delay entry to a workplace, proposing it be replaced with a reverse onus of proof test as presently exists under the general protections provisions.<sup>946</sup>

Some employer groups submitted that s. 492 should not be altered in the interests of employees not wishing or entitled to participate in discussions.<sup>947</sup> Rio Tinto proposed that s. 492 should be strengthened to make explicit that the permit holder bears the onus of establishing that the employer’s chosen location is not reasonable.<sup>948</sup>

In *Somerville Retail Services P/L v Australasian Meat Industry Employees Union*<sup>949</sup> the Full Bench considered the impact of s. 492 in a dispute over whether a meeting room was adequate. The majority found that ‘occupiers of premises have the right to request permit holders to conduct interviews or hold discussions with employees in a particular room or area of the premises provided the request is reasonable ... An applicant can only succeed [in a dispute] if it establishes that the employer request is objectively unreasonable. The mere preference of permit holders for a different room is insufficient’. The majority considered the employer’s requirement that meetings take place in the training room in the administration area, rather than the lunch room in the production area where its members were present, was reasonable. They noted that ‘the AMIEU prefers to utilise the canteen. It appears that its reasons for doing so relate to enhancing its ability to approach employees to request them to participate in discussions and to hold meetings with a greater number of employees than can be accommodated within the training room. We can understand why the AMIEU would have such a preference’. However, the majority did not consider that this, or any other matter raised, was sufficient to make the request unreasonable. This decision was confirmed on appeal shortly before this Report was concluded.<sup>950</sup>

Another Full Bench in *AMIEU v Dardanup Butchering Pty Ltd*<sup>951</sup> approved the ‘statements of principle’ in *Somerville* extracted above. However, they considered that the context of Part 3-4 of the FW Act meant that the interests of employers and employees must be balanced in determining whether a request was reasonable, observing that it ‘is not part of the purpose of Part 3-4 to allow the employer or occupier to act as some sort of “gatekeeper” to prevent or limit a permit holder from holding discussions with employees’. They confirmed, however, that consideration of s. 492 must have ‘the employer’s reasons for, or purpose in, making the request as its primary focus’ and refused to overturn a decision that the employer’s selection of the training room rather than the lunch room was not unreasonable.

In *AWU v Rio Tinto Aluminium (Bell Bay) Ltd*<sup>952</sup> Commissioner Lewin considered the requirement to establish intention in order to make out the requirements for unreasonableness in s. 492(2)(b). He observed that if an employer’s subjective intention forms a critical nexus for a legal consequence, reverse onus of proof provisions usually apply, but that no reverse onus was present in the FW Act. He went ‘so far as to say that without presumptive provisions or an appropriate modulation of procedural onus in relation to the operation of the provisions of s. 492(2)(b) it would be difficult to judge the practical vitality of the statutory provisions highly’. He found that the requirement imposed by the

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TCFUA, pp. 22–23; Unions NSW, p. 5; Unions WA, p. 8.

<sup>944</sup> AMWU, p. 43.

<sup>945</sup> ACTU, pp. 44, 65; AIER, p. 36.

<sup>946</sup> TCFUA, pp. 22–23.

<sup>947</sup> Ai Group supplementary, p. 46; AMIC, pp. 14–15; BHP supplementary, p. 1; CCIWA supplementary, p. 28; MBA supplementary, p. 5; Rio Tinto, pp. 16–17.

<sup>948</sup> Rio Tinto, pp. 16–17.

<sup>949</sup> [2011] FWAFB 120.

<sup>950</sup> *AMIEU v FWA & Ors* [2012] [FCAFC 85](#)

<sup>951</sup> [2011] FWAFB 3847.

<sup>952</sup> [2011] FWA 3878.

employer to meet in particular training and visitors' rooms was objectively unreasonable under s. 492(1) in respect of some remotely located employees, and ordered that access to crib rooms would be granted in those cases.

The AMWU provided a number of additional case studies of alleged unreasonableness, including:

- an employer providing access to only one room across a site 3 km long, where employees have a 20-minute break
- an employer providing access to half of a manager's office, divided by a petition, where the manager sits on the other side
- an employer providing access to a meeting room in an administration area that accommodates six employees where two lunchrooms are available, accommodating around 100 and around 30 employees respectively
- an employer providing access to a training room seating only 30 people for a workplace of 250 employees with six work areas and various shift and break arrangements
- an employer requiring three unions entering to address common issues to be located in separate rooms, despite many of the employees being jointly covered by the unions.<sup>953</sup>

The TCFUA provided a further case study where a senior member of management stood and ate his lunch in the corridor between the meals area and the room allocated for right of entry, thereby dissuading the bulk of employees from participating in the discussions with the union.<sup>954</sup>

The evidence from submissions and decided cases does not demonstrate the extent to which this is an issue in all workplaces. However, the case studies were from the meat, mining, textile and manufacturing industries, which suggests that the issue is not confined to a particular industry or type of workplace.

As noted above, FWA is permitted to deal with a dispute about right of entry under s. 505 of the FW Act. This includes disputes about the reasonableness of a meeting location. Based on the above material, the Panel is concerned that the capacity for FWA to deal with the 'merits' of a dispute over the reasonableness of a meeting location determined by an employer is constrained by the statutory presumption in s. 492(1), enunciated in *Somerville*, which gives primacy to the right of the occupier to select the location of a meeting, subject only to it being unreasonable, and despite the preference of the union. As noted earlier, the FW Act's provisions on the location of discussions were created in response to a problem that previously permitted such discussions to be held in inappropriate locations. In the Panel's view, the FW Act right of entry provisions support allowing union representatives to meet employees in the place where they gather, subject to ensuring that undue inconvenience is not caused to an employer. We consider that the FW Act could better meet its objective by providing greater discretion to FWA to determine a reasonable location for interviews and discussions.

**Recommendation 36:** The Panel recommends that s. 492 and s. 505 be amended to provide FWA with greater power to resolve disputes about the location for interviews and discussions in a way that balances the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without undue inconvenience.

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<sup>953</sup> AMWU, pp. 47–48.

<sup>954</sup> TCFUA, p. 23.

## 8.5 Investigating contraventions relating to former employees

The ACTU noted that a permit holder's right to enter premises to investigate a suspected contravention relating to a member is extinguished if the employer terminates that member's employment. It submitted that unions should be able to enter the premises if their members have been employed to exercise investigative rights and to access their records.<sup>955</sup> The Ai Group said that former employees can pursue such suspected contraventions directly with the employer, through the FWO, or through the relevant court jurisdiction, and can have their union represent them in such circumstances.<sup>956</sup>

The FW Act confines entry to investigate a suspected contravention only for a member who 'performs work on the premises'.<sup>957</sup> We consider that there is some justification in the ACTU's submission. We agree that other remedies are available to a former employee who alleges a contravention of a relevant instrument, although we are unaware of any obligation upon an employer to provide access to records of a former employee. We also understand that the other measures identified by the Ai Group involve engaging the assistance of a public enforcement body, either the FWO or the courts, which necessarily involves delay and extra costs.

There may be some value in making limited provision for a union to investigate a suspected contravention relating to a member who has stopped being an employee (and thereby has stopped working on the premises). In our view, such provision should be limited in time, to maintain the proximity of the investigation with the previous employment relationship. Other limits may be necessary to ensure that the capacity to investigate a suspected contravention concerning a former employee does not intrude upon or undermine any processes of a court or investigative body relating to the contravention. However, we consider that there are sound reasons for providing that the right to enter premises to investigate a suspected contravention concerning a member is not extinguished as soon as that member's employment is terminated.

**Recommendation 37:** The Panel recommends that the capacity for a permit holder to enter premises under s. 481 to investigate a suspected contravention relating to a member of the permit holder's organisation should continue to apply, with appropriate limits, following the end of the member's employment.

## 8.6 Other submissions

We wish briefly to indicate our views about the following additional submissions.

Two submissions proposed that limits on access to non-member records should be strengthened.<sup>958</sup> The Office of the Australian Information Commissioner called for enhancement of provisions about the handling of personal information.<sup>959</sup> Under the FW Act, a permit holder investigating a suspected contravention can view and copy any directly relevant record or document, other than a non-member record or document. Access to non-member records can be granted by FWA. The capacity for unions to access non-member records when they are relevant to an investigation is substantially similar to the long-standing position under Work Choices.<sup>960</sup> We are unaware of any proceedings related to alleged abuse of those provisions. Further, the FW Act contains stronger privacy protections

<sup>955</sup> ACTU, p. 65.

<sup>956</sup> Ai Group supplementary, p. 47.

<sup>957</sup> FW Act, s. 481(1)(b).

<sup>958</sup> Allens Arthur Robinson, pp. 3–4; MBA, p. 83. Also refers to *Purvis v State of New South Wales (Department of Education and Training)* [2003] HCA 62 and *Fair Work Australia 2011* [FWA] 4096.

<sup>959</sup> OAI, p. 2.

<sup>960</sup> Work Choices, s. 748(9)

than under previous laws, due to the introduction of a new civil remedy provision that prohibits the unauthorised use or disclosure of information obtained by a person investigating a suspected breach.<sup>961</sup>

The ACTU argued that notice requirements for OHS entry should be removed, whereas some employer groups argued they should be tightened.<sup>962</sup> Again, these provisions are substantially similar to those under the previous legislation. The Panel considers that the current provisions strike an appropriate balance.

Several submissions about entry notice were received, relating to the level of information they are required to contain<sup>963</sup>, the period for which they authorise entry<sup>964</sup> and their provision to employers.<sup>965</sup> Provisions about entry notices in the FW Act are similar to those that applied under Work Choices and the WR Act. They provide for the right of employers to be notified of the date and nature of entry while avoiding overly onerous procedural requirements or inappropriate disclosure of information about members. They have operated effectively in similar form over many years, and we are not persuaded that any change is required.

Some unions submitted that restrictions on entry to residential premises should be removed.<sup>966</sup> Employer groups submitted that the present provision should be retained<sup>967</sup> or strengthened.<sup>968</sup> The Panel notes that restrictions on entry to residential premises have been a feature of the right of entry provisions in previous legislation and considers the current provisions are appropriate.

Some employer groups raised concerns about the conduct of permit holders once they have entered a workplace and proposed allowing permits to be revoked in additional circumstances to those currently provided for under the FW Act.<sup>969</sup> The Panel considers that the FW Act already contains a number of mechanisms for addressing such conduct, consistent with the position under the previous legislation. These include:

- limiting entry powers where permit holders breach entry notice requirements or entry permit conditions, fail to produce authority documents, fail to comply with reasonable OHS requirements and fail to comply with reasonable meeting room requests<sup>970</sup>
- prohibiting a permit holder exercising powers from intentionally hindering or obstructing any person, or otherwise acting in an improper manner<sup>971</sup>
- prohibiting misrepresentations about the conduct authorised by Part 3-4 of the FW Act<sup>972</sup>
- prohibiting unauthorised use or disclosure of information obtained while exercising rights of entry<sup>973</sup>
- allowing disputes about right of entry to be resolved, including by imposing conditions on an entry permit, suspending an entry permit, revoking an entry permit and restricting further entry permits being issued<sup>974</sup>
- allowing FWA to impose conditions on an entry permit, suspend an entry permit, revoke an entry permit and make any other order it considers appropriate<sup>975</sup>
- allowing FWA to make orders restricting entry rights of an organisation, or officials of an organisation, where entry rights have been misused<sup>976</sup>

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<sup>961</sup> FW Act, s. 504. See also DEEWR submission to the FW Bill inquiry, pp. 40–42.

<sup>962</sup> ACTU, p. 65; Ai Group supplementary, p. 48; MBA, pp. 85–86.

<sup>963</sup> ACMCA, p. 4; AMIF, pp. 27–28, NECA, p. 10; CELRL, p. 18.

<sup>964</sup> CCIWA, p. 11; ACTU, p. 65; Ai Group supplementary, pp. 47–48.

<sup>965</sup> CCIWA, pp. 11, 56; NECA, p. 10.

<sup>966</sup> ACTU, p. 65; AWU, pp. 12–13; CFMEU C&G, pp. 23–24; ETU, p. 9.

<sup>967</sup> Ai Group supplementary, p. 47; CCIWA supplementary, pp. 16–19.

<sup>968</sup> MBA, pp. 83–84.

<sup>969</sup> ACCI, p. 20; IPA, p. 6; MBA, pp. 87–88; POAGS, pp. 10–11.

<sup>970</sup> FW Act, s. 486.

<sup>971</sup> FW Act, s. 500.

<sup>972</sup> FW Act, s. 503.

<sup>973</sup> FW Act, s. 504.

<sup>974</sup> FW Act, s. 505.

<sup>975</sup> FW Act, s. 507.

<sup>976</sup> FW Act, s. 508.

- requiring entry permits to be revoked or suspended, unless doing so would be harsh or unreasonable, where a permit holder contravenes obligations under Part 3-4, was ordered to pay a penalty for contravention of an obligation under Part 3-4, or breaches obligations under state or territory OHS laws relating to right of entry<sup>977</sup>
- prohibiting the issue of entry permits in certain circumstances, and allowing entry permits to be denied or made subject to conditions in a range of other circumstances.<sup>978</sup>

We are not persuaded that any further remedies are necessary.

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<sup>977</sup> FW Act, s. 510.

<sup>978</sup> FW Act, Part 3-4 Division 6.



## 9 Transfer of business

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### 9.1 Introduction

The transfer of business provisions in Part 2-8 of the FW Act and their predecessors in previous legislative regimes recognise that when a business purchases or otherwise takes on another business it assumes certain responsibilities, including workplace relations arrangements. In certain circumstances, the provisions require that instruments like enterprise agreements transfer with employees when work transfers from one business to another. The evolution of these provisions is outlined in Chapter 3.

The FW Act's transfer of business provisions were designed to broaden the circumstances in which a transfer occurs and make it easier to determine where this has happened.<sup>979</sup> They were also intended to remove the automatic cessation of transferred industrial instruments after 12 months, a provision introduced by Work Choices. The changes were not expected to have a significant impact compared to the previous arrangements, which also protected employee entitlements in a transmission of business situation. However, there were cases under the previous legislation where employees were ostensibly doing the same work for a new employer but had lost the protection of their industrial instrument.

One problem with the previous provisions, which the Government identified, was that 'transmission of business' was not defined. This resulted in the courts developing a number of tests. In particular, the High Court had developed the 'business characterisation' test, which had the effect of excluding many outsourcing arrangements.<sup>980</sup> As noted by commentators, the common law tests developed were not clear-cut and added complexity rather than reducing it.<sup>981</sup> The difficulty involved in determining the threshold question of whether a transmission of business has actually occurred was demonstrated in a number of cases considering the entitlements of meter readers arising from the privatisation of Victorian power utilities.<sup>982</sup> These cases demonstrated the complexity and uncertainty involved in potential transmission of business situations.

The absence of a definition lead to employees and employers being required in some instances to resort to costly court proceedings to resolve disputes about applicable conditions. While the AIRC had powers to make orders, it was restricted to deciding that a collective agreement would not bind a new employer, or would bind it to a specified extent or for a specified period.<sup>983</sup> We discuss the broader FWA powers to make orders later in this chapter.

This uncertainty had an impact on employers considering whether to purchase a business or restructure their own business, although it is not possible to quantify how often it may have affected these decisions. The incidence of transfer cases where employees lost conditions has not been measured. However, based on the decided cases, it is likely that the incidence was not insignificant and would have had in some cases serious consequences for the individual employees concerned.

The new provisions were intended to introduce a simpler and more predictable legislative test that removed the uncertainty associated with the previous provisions. In addition, the Bill was intended to protect employee entitlements in a wider range of business transfer situations. The mechanism for achieving these goals was a definition that focused on the activities of the employees and the work being performed rather than the character of the business, as well as specifying the relevant connections between the employers involved in the transfer.

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<sup>979</sup> DEEWR submission to the FW Bill inquiry, p. 55.

<sup>980</sup> DEEWR submission to the FW Bill inquiry, p. 55; citing *PP Consultants Pty Ltd v Finance Sector Union of Australia* [2000] HCA 59.

<sup>981</sup> Andrew Stewart, quoted in 'Transmission still up in the air after High Court ruling', *Workplace Express*, 9 March 2005.

<sup>982</sup> *Automated Meter Reading Services and ASU* (PR922053); *Australian Services Union v Electrix Pty Ltd* [1999] FCA 211; and, *Urquhart v Automated Meter Reading Services (Aust) Pty Ltd* [2008] FCA 1447.

<sup>983</sup> WR Act, s. 590.

The provisions were also designed to ensure that safety net entitlements would be protected on a transfer of business, by providing that when a business changes hands, a new employer is bound to recognise employees' prior service with the old employer in most cases. In the case of annual leave and redundancy pay for non-associated entities, if a new employer does not recognise service, the old employer must pay out these entitlements.<sup>984</sup>

Under the new test established in the FW Act there are three basic elements that have to be satisfied for a transfer of business to occur. The first is that the employment of an employee at the old employer has terminated and that employee becomes employed within three months by the new employer. The second is that the work performed for the new employer is the same, or substantially the same, as the work performed for the old employer. The third is that there is a connection between the old employer and the new employer.<sup>985</sup>

The situations where there is a connection between the new and old employer are set out at ss. 311(3)-(6), and include if:

- there has been a transfer of assets
- the old employer (or an associated entity) has outsourced the transferring work to the new employer (or an associated entity)
- the new employer (or an associated entity) ceases to outsource work to the old employer (or an associated entity) and instead employs an employee or employees to undertake the work who had performed the work for the old employer (insourcing) or
- the new employer is an associated entity of the old employer when the transferring employee begins employment.

The effect of a transfer of business is that certain industrial instruments that covered the old employer and employee transfer to the new employer and continue to cover the employee in the performance of transferring work. The instruments include an enterprise agreement, a workplace determination and a named employer award (which is essentially an enterprise specific award). Under the previous legislation, transmitting instruments applied for a maximum of 12 months, whereas transferring instruments under the FW Act continue to apply indefinitely until terminated or replaced under the FW Act.

Transferring instruments also cover new non-transferring employees who perform the transferring work, unless there is another enterprise agreement or modern award that covers the employer and new employee for that work.

FWA can order that a transferable instrument does, or does not, cover the new employer and its employees (both transferring and non-transferring). It can also order that an enterprise agreement, named employer award or modern award covering the new employer will or will not cover transferring and non-transferring employees who perform or are likely to perform the transferring work.

One difference between the previous provisions and the new provisions under the FW Act is FWA's power to vary transferring instruments. Under s. 320 a variation may be made to remove terms that are incapable of meaningful operation post-transfer, or to remove an ambiguity or uncertainty arising from the transfer that will ensure the instrument is better aligned to the working arrangements of the new employer. For example, where an old employer's enterprise agreement may refer to particular company policy, it may not be relevant to the new employer.<sup>986</sup>

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<sup>984</sup> DEEWR submission to the FW Bill inquiry, p. 18.

<sup>985</sup> FW Act, s. 311(1).

<sup>986</sup> EM, p. 205.

FWA must take certain criteria into account when making an order under the transfer of business provisions and cannot make a retrospective variation. Of the criteria that must be taken into account, FWA has emphasised the relevance of the views of the employees and whether the employees would be disadvantaged.<sup>987</sup>

Stakeholder views on the transfer of business provisions varied.

While not always providing evidence to support their assertions, some employers and employer groups suggested that the new provisions were:

- incomprehensible and ambiguous, encouraging retrenchment rather than transfer of employees<sup>988</sup>
- 'imposing excessive and unworkable restrictions on employers'<sup>989</sup>
- inherently uncertain and risky, affecting the employment prospects of workers as risk averse businesses shy away from complex laws<sup>990</sup>
- possibly acting as a deterrent to business transfers<sup>991</sup>
- having adverse consequences, as they constrain business restructuring options.<sup>992</sup>

COSBOA suggested that the provisions were cumbersome and costly, with unnecessary financial and regulatory risk to mergers and acquisitions<sup>993</sup>, while two other employer associations suggested that they present a compliance risk for small business.<sup>994</sup>

Employers called for changes ranging from the reinstatement of the transmission of business provisions under the WR Act including the 'character of the business test' consistent with the High Court's decision in *PP Consultants*<sup>995</sup>; greater flexibility in the extent to which employers are required to transfer employee entitlements<sup>996</sup>; imposing limitations on the application of a transferring instrument when a new employer has an existing enterprise agreement<sup>997</sup>; restrictions on the situations when there is considered to be a connection between a new and old employer (ss. 311(3)–(6))<sup>998</sup>; and sun-setting transferring agreements after either 12 months<sup>999</sup>, six months<sup>1000</sup> or the introduction of a new enterprise agreement.<sup>1001</sup>

Suggestions seeking greater clarity included consolidating all provisions relevant to transfer of business into one chapter of the FW Act<sup>1002</sup>, changing the definition of transfer<sup>1003</sup> and providing for the specific contemplation of certain scenarios.<sup>1004</sup> Greater clarity was also proposed for: the recognition of service and service based entitlements;<sup>1005</sup> the carry-over of employee entitlements, liability for redundancy payments, service, termination of employment and applicable terms and conditions<sup>1006</sup>, including when there are no existing employees<sup>1007</sup>; the triggers for insourcing and outsourcing<sup>1008</sup>; and business transfers relating to franchises.<sup>1009</sup>

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<sup>987</sup> *CEPU v CSIRO* [2010] FWA 1171.

<sup>988</sup> CAI p. 28; BIG p. 6.

<sup>989</sup> Ai Group, p. 88.

<sup>990</sup> AHA, p. 13.

<sup>991</sup> ANRA, p. 21; R&CA p. 11.

<sup>992</sup> BCA, p. 60.

<sup>993</sup> COSBOA, Attachment 2, pp. 13–15.

<sup>994</sup> MPMSAA, p. 6; MPAQ, p. 4.

<sup>995</sup> ACCI, pp. 5 & 16; Ai Group, pp. 19 & 100; Business SA, p. 10; LIV, pp. 4–5; IPA, p. 7; COSBOA, Attachment 2, p. 15.

<sup>996</sup> AHRI, p. 5.

<sup>997</sup> Allens Arthur Robinson, pp. 4–5; BCA, p. 62.

<sup>998</sup> Ai Group, pp. 93–98.

<sup>999</sup> Recruitment and Consulting Services Australia, p. 13; CCIWA, pp. 18 & 90; ANRA, p. 22.

<sup>1000</sup> AMMA, p. 17.

<sup>1001</sup> ANRA, p. 22; CCIWA, p. 17.

<sup>1002</sup> CAI, p. 32.

<sup>1003</sup> *ibid.*, p. 32.

<sup>1004</sup> MGA, p. 16.

<sup>1005</sup> NSWBC & ABI, p. 69; G Smith, pp. 4–5.

<sup>1006</sup> ARA, p. 7.

<sup>1007</sup> Civil Contractors Federation, p. 9.

<sup>1008</sup> BCA, p. 62.

Unions and employee groups broadly supported the provisions, with at least one submission suggesting that the new provisions were clearer and more logical.<sup>1010</sup> Others argued for their strengthening by including outsourcing work to overseas subsidiaries<sup>1011</sup> or broadening the categories in s. 311 to include situations where no employees have transferred to the new employer.<sup>1012</sup>

We are not convinced, on the evidence before us, that the provisions have generally had the deleterious impact referred to in some of the employer submissions summarised above. The provisions, on their face, introduce clarity to an area that remained uncertain despite a number of High Court and Federal Court decisions. While it is early days, we were not presented with examples of the provisions being applied in an unintended way.

Two issues of particular note arising from submissions were the process of applying to FWA for an order relating to a transfer of business and voluntary transfers between associated entities. The evidence available around these issues is examined in 9.2.

## 9.2 FWA application process

The ASU contended that employer concerns about the cost of the transfer of business arrangements are unfounded, suggesting that transfer of business applications to FWA were generally resolved quickly, easily and in the employer's favour.<sup>1013</sup> However, COSBOA suggested that the fact that all applications are granted means that there should be no need to make an application. COSBOA argued that while it is difficult to quantify, there is still a cost to business in preparing applications to FWA.<sup>1014</sup> COSBOA also suggested that successful applications are generally made by big businesses with enterprise agreements in place with the support of a union.

The cases decided so far reflect some support for both the ASU's and COSBOA's contentions. For example, in *Whitehaven Coal Mining Ltd*<sup>1015</sup>, a coal mine successfully applied to have its enterprise agreement apply to a group of 'insourced' employees, rather than the agreement under their former employment. In this instance, the former employer was a labour hire company that contracted with the mine. The decision involved a larger company, was relatively simple, had the support of the union and resulted in better conditions for the employees.

In an early transfer of business ruling made under the FW Act<sup>1016</sup>, AHW Pty Ltd applied for orders so that transferring employees from Australian Wool Network Pty Ltd would be covered by its union-approved agreement and not the relevant transferring instrument. FWA approved the application without a hearing. The application had the support of the employees and the unions involved. Former AMMA chief operations officer, Chris Platt, who represented the new employer, was reported as being pleased with the way the matter was conducted.<sup>1017</sup>

DEEWR has analysed applications<sup>1018</sup> under the transfer of business provisions—either for a transferrable instrument to apply or not apply to the new employer and its employees (both transferring and non-transferring), or for an enterprise agreement or modern award to cover or not cover the new employer and its employees (transferring and non-transferring). There were 142 cases in total, with 93 heard under s. 318, 40 under s. 319 and nine under s. 320. The cases with published transcripts show that applications are generally settled quickly, with hearings generally less than

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<sup>1009</sup> BIG, p. 5.

<sup>1010</sup> ANF, p. 10.

<sup>1011</sup> AIPA, pp. 7–11.

<sup>1012</sup> ASU supplementary, pp. 6–8.

<sup>1013</sup> ASU supplementary, pp. 10–11.

<sup>1014</sup> COSBOA, Attachment 2, p. 14.

<sup>1015</sup> [2010] FWA 1142.

<sup>1016</sup> *AWH Pty Ltd* [2009] FWA 62.

<sup>1017</sup> 'FWA makes first transfer of business ruling', *Workplace Express*, 10 August 2009.

<sup>1018</sup> Analysis includes published decisions up to 26 March 2012.

an hour long, and regularly less than half an hour. Almost all applications were granted, with a small proportion adjourned for various reasons and a smaller proportion dismissed on their merits.

There were far fewer applications to FWA to vary a transferrable instrument. While most of these appear to have been simple applications that were granted after short hearings, at least one decision was more complicated. In *BC Meale's Pty Ltd v Construction, Forestry, Mining and Energy Union*<sup>1019</sup> several employees transferred between two entities in the Brisbane Concrete Pumping Group. The new employer applied to vary the transferring agreement under s. 320 of the FW Act, arguing that the pay rates and allowances were uncompetitive. The CFMEU opposed the application.

The employer relied on s. 320(2)(c), which requires FWA to take into account 'whether the new employer would incur significant economic disadvantage as a result of the transferable instrument, without the variation'. FWA found that while s. 320 gave it power to vary a transferring instrument to better suit the new employer's working arrangements, it was not empowered to reduce the terms and conditions of transferring employees to make the instrument more competitive.

The decision in *Meale* reflects that FWA's power to vary a transferring instrument is new<sup>1020</sup> and that parties are adjusting to it. It is not generally indicative of applications made under this section, most of which are granted.

Based on the analysis of cases and stakeholder comment, it appears to the Panel that the application process is working efficiently. We are not persuaded by calls for the application process to be removed or overhauled. The very fact that successful applications may require the support of the employees or the relevant union does not indicate that there is a problem with the provisions. It could be argued that engagement between employers and employees and their unions about such issues could promote industrial harmony in some instances. At any rate, we do not recommend change to these provisions.

### 9.3 Voluntary transfers between associated entities

Qantas submitted that there should be no transfer of business if an employee voluntarily moves between two associated entities.<sup>1021</sup> Under s. 311(6) of the FW Act, there is a connection between the old employer and the new employer if they are associated entities, resulting in a transfer of business if the other requirements in s. 311(1) are fulfilled. To avoid a transfer of the employee's existing instrument, the transferring employee or new employer must apply to FWA under s. 318. These provisions ensure that 'employers cannot intentionally avoid obligations under instruments by 'transferring' employees between associated entities'.<sup>1022</sup> In our consultations we discussed the issue with the academics in some detail.<sup>1023</sup>

Qantas suggested s. 311(6) had led to perverse outcomes for employees that voluntarily apply for a position in a related entity in the Qantas Group (for example, from Jetstar to Qantas) with different and potentially superior terms and conditions. These employees cannot take up the new position with the new terms and conditions without an order from FWA that the old conditions will not apply. While Qantas noted that all applications it has made for employees transferring voluntarily between related entities have been successful, preparing those applications and seeking union support has taken time and resources. Qantas submitted that the requirement for an order has reduced opportunities for employees of related entities in the Qantas Group.

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<sup>1019</sup> [2010] FWA 8584.

<sup>1020</sup> While s. 590 may have allowed the AIRC to restrict the application of part of a transferring collective agreement, FWA's power to vary is arguably wider.

<sup>1021</sup> Qantas, p. 5.

<sup>1022</sup> EM, p. 195.

<sup>1023</sup> In particular, the Panel would like to thank Professor Andrew Stewart and Professor Joellen Riley, who provided follow-up information on this matter. Further detail regarding consultations conducted by the Panel can be found at Appendix A.

There is some additional case law to support Qantas's contentions. For example, in *Sunstate Airlines (Qld) Pty Ltd*<sup>1024</sup>, Vice President Watson gave weight to the fact that the transferring employee 'applied for the new position at [the related entity] on his own initiative and on the basis that the advertised terms and conditions of employment were acceptable to him'<sup>1025</sup> in deciding that the transferrable instrument should not apply.<sup>1026</sup>

There may be scope to reduce the cost on employers in some situations. For example, s. 311(6) is clearly designed to protect employees when they are moved between associated entities at the employer's initiative. If employees initiate the movement, particularly when they will receive superior terms and conditions in the new position, the provisions can actually reduce their opportunities and impose costs on employers. In the cases brought to the Panel's attention, it seems that FWA has generally accepted that in most instances when the transfer is voluntary, the transferrable instrument should not apply.

The problem that s. 311(6) is designed to meet is ensuring that labour standards are not diminished when employees are transferred from one related corporation to another in a corporate group structure. Without this provision, it would be open to employers in a corporate group structure to transfer employees to associated entities where their terms and conditions of employment would be less favourable. Section 311(6) closes this loophole by ensuring that transferring employees who will be performing the same work carry their terms and conditions of employment with them.

Yet it does appear to the Panel that when employees voluntarily seek to transfer from one associated entity to another, they should be employed under the terms and conditions to which they would be subject as an employee of the 'new employer'. Of course, as has been shown above, in these instances the parties can apply to FWA under s. 318 for an order that the existing terms and conditions of employment of the transferring employee will not govern her or his employment with the new employer.

The question for the Panel is whether it is necessary to require the parties to apply to FWA on every occasion an employee voluntarily seeks to transfer to a similar position in a related entity. We believe it would be preferable to spare both parties the time and expense of making such an application. This could be achieved by amending s. 311(6). Such an amendment is unlikely to increase the risks of employees having their terms and conditions of employment diminished through transfers to associated entities.

**Recommendation 38:** The Panel recommends that s. 311 be amended to make it clear that when employees, on their own initiative, seek to transfer to a related entity of their current employer they will be subject to the terms and conditions of employment provided by the new employer.

## 9.4 Impact on employers

It is not possible to accurately estimate the number of businesses that have been affected by the changes to the transfer of business provisions. On our analysis, the new provisions are likely to have resulted in transitional costs to some employers as they adjust to the new regulatory framework, although exactly how much is difficult to estimate. The new provisions also place some additional burden on some employers in that they expand the circumstances in which a transfer of business will be considered to have occurred. Again, the magnitude of this cost is difficult to estimate, and must be weighed against the clear benefit to employees, along with the employer's capacity to neutralise

<sup>1024</sup> [2011] FWA 4905.

<sup>1025</sup> *ibid.* at [15].

<sup>1026</sup> See also *QCatering Riverside Pty Limited* [2011] FWA 445 and *Re Qantas Airways Ltd* [2012] FWA 933.

any additional costs by applying to FWA. No stakeholder attempted to quantify this cost either in submissions or in consultations.

For large employers transferring employees within the same corporate group, it is also possible that the provisions have led to changes in employer behaviour. For example, as noted above, these employers may be less willing to provide opportunities for employees within the group structure due to the cost of seeking an order that the transferrable instrument not apply to the new employer. We heard convincing evidence on this issue and have made a recommendation to address it.

The new provisions may make outsourcing and insourcing more complicated or expensive for businesses, which may have an impact on decisions to go down this path. However, the evidence is inconclusive. For example, there is little information available about the incidence of outsourcing in Australia either under Work Choices or under the FW Act. What research could be found indicates that outsourcing was becoming more popular in the late 1990s and early 2000s and that employers outsource work for a variety of reasons, with cost reduction a significant consideration.<sup>1027</sup>

If the additional complexity outweighs what are considered to be substantial cost benefits available through outsourcing, there may be a reduction in the practice. However, it is not clear from the evidence, and probably too early to tell, if this has occurred.

While there is little hard evidence to date, the provisions will theoretically have a greater impact on larger businesses, which are more likely to engage in restructuring activities. Larger businesses are also more likely to have in place transferable instruments such as enterprise agreements, whereas smaller employers are more likely to rely on awards or common law contracts. There is some limited evidence to support this in submissions. For example, while representatives of both small and large businesses expressed concerns with the provisions, larger employers such as Qantas were able to cite specific examples where they were required to deal with the provisions.

## 9.5 Impact on employees

As noted above, under the test that applied previously, employee entitlements were protected in a narrower range of business transfer situations. The FW Act protects employees against a reduction in their entitlements in a wider range of situations. Although this benefit is not measurable in any specific way, it may lead to greater job security.

Employees also benefit from greater certainty in their employment relationship through a clearer legislated test. If an employer or union seeks to vary the application of a transferring instrument, FWA must have regard to the employee's views among other matters. In early decisions, FWA has tended to emphasise the importance of this factor over others, which is likely to strengthen protections for employees in transfer situations.

Employees are also more likely to have their service with the old employer recognised with the new employer, with implications for unfair dismissal protections and some entitlements.

While some employers<sup>1028</sup> suggested that, overall, the provisions would discourage an employer taking on potentially transferring employees of an old employer, there was little, if any, evidence presented that this has been occurring other than in relation to employers transferring employees within a corporate group. In our view it is likely that the benefit to the new employer of experienced staff transferring to undertake the relevant work, balances out the potential concerns about transferring pay and conditions arrangements. It is not possible on the available evidence to draw a strong conclusion either way.

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<sup>1027</sup> N Beaumont & A Sohal, 'Outsourcing in Australia', *International Journal of Operations & Production Management*, vol. 24, issue 7, 2004, pp. 688–700; M Wooden, 'Outsourcing and the use of contractors: evidence from the AWIRS', *Economic and Labour Relations Review*, vol. 10, issue 1, 1999.

<sup>1028</sup> ANRA, p21; R&CA, pp. 56–48.

## 9.6 Conclusion

The transfer of business provisions under the FW Act are a departure from the previous arrangements and are novel in many ways. The purpose of the provisions is to protect employees' wages and conditions in certain circumstances, such as a business changing hands or a business restructuring to avoid their obligations to employees. The provisions were designed to address uncertainty around the previous common law test, which did not adequately protect employees. They were also intended to maintain flexibility for employers by giving them the ability to alter the application of transferrable instruments. There was also a deliberate decision by government to allow businesses to apply to FWA to vary the content of transferring instruments in addition to the pre-existing ability to apply for changes in application.

Calls from some employer stakeholders for what amounts to a return to the previous system are clearly not consistent with the intent of the FW Act. Comments made by stakeholders calling for greater clarity appear to overlook the lack of certainty under previous regimes resulting from successive and different interpretations by courts about when a transmission of business had occurred. Stakeholder calls for transferrable instruments to cease operation after a certain period are also inconsistent with the expressed intent of the provisions.

The Panel considers there is a clear need to protect employees in a transfer of business situations. The alternative is to allow employees to be exploited by the structuring of businesses and contracting arrangements. On the basis of stakeholder submissions, academic advice at face-to-face consultations, analysis of cases under the provisions and an examination of the provisions themselves, the broader legislative definition succeeds in providing better protections for employees than the previous arrangements did. It is too early to tell whether the provisions will reduce the number of protracted legal cases that arose under the previous provisions. We are not aware of any such cases in the pipeline to date.

In addition the scope for employers to determine the appropriate outcome for their business on application to FWA provides significant flexibility. Indeed, this process allows for complete departure from the instrument transfer rule, while still providing the safeguard of oversight by FWA. While the AIRC may have had powers under the previous system to restrict the application of transferring instruments, the current system provides parties with greater clarity around what FWA must consider before it makes such an order.



# 10 Unfair dismissal

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## 10.1 Introduction

Forward with Fairness announced an intention to ‘guarantee the right of Australian employees to be protected from unfair dismissal’ in a system that would be based on ‘a fair go all round for employees and employers’ and that would ‘deliver a simpler, faster and less costly unfair dismissal process’, including special arrangements to assist small business.<sup>1029</sup>

The policy was a response to the Work Choices system, which excluded many employees from access to unfair dismissal with the intention of delivering an economic benefit to employers. As discussed in further detail in Chapter 4 and below, these benefits were not readily apparent<sup>1030</sup> but resulted in what was said to be ‘clear injustices and real feelings of insecurity for workers who realised they could be dismissed at any time for no reason’.<sup>1031</sup> The number of employees and employers directly affected by the changes is discussed in more detail below. As the analysis indicates, the loss of protections for these employees may also have limited employees’ ability to voice concerns in the workplace or negotiate flexible working arrangements. The unfair dismissal provisions of the Bill were intended to ‘ensure good employees are protected from being dismissed unfairly, while enabling employers to manage underperforming employees with fairness and with confidence’.<sup>1032</sup>

The policy was not expected to have a negative impact on employment. The DEEWR submission to the FW Bill Inquiry noted that there is ‘no direct or conclusive evidence to support’ a claim that extending unfair dismissal protections would have a negative impact on employers’ decisions to hire more people. The submission went on to state that in any event the new system would have ‘special measures to ensure that it is less complex and easier to comply with than the previous system’.<sup>1033</sup>

The objects of the unfair dismissal provisions are set out in s. 381. They include establishing a framework that balances the needs of businesses and employees, establishing quick, flexible and informal procedures that address the needs of employers and employees and providing remedies for unfair dismissals with an emphasis on reinstatement. The overall intention, as stated in s. 381(2), is to ensure that ‘a fair go all round’ is accorded to both the employer and employee concerned.

### 10.1.1 Coverage

Forward with Fairness foreshadowed the reintroduction of unfair dismissal rights for many employees who had been excluded from the system under Work Choices. It promised a ‘simple system for determining who can bring an unfair dismissal claim’, with minimum qualifying periods of employment of 12 months for small business employees and six months for other employees. The qualifying periods were intended to balance ‘the right of employees to protection from unfair dismissal with the need for employers to have an adequate opportunity to determine whether or not an employee is suited to their job and the employer’s business’.<sup>1034</sup>

The DEEWR submission indicated that minimum employment periods include the previous service of a transferring employee unless the new employer informs transferring employees of a new minimum employment period in writing. This would address ‘the situation under the Work Choices amendments where service with the old employer was often

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<sup>1029</sup> FWF, p. 3.

<sup>1030</sup> Forsyth and Stewart, p. 30.

<sup>1031</sup> SRS.

<sup>1032</sup> *ibid.*

<sup>1033</sup> DEEWR submission to the FW Bill inquiry, p. 45.

<sup>1034</sup> FWF, p. 19.

not recognised in relation to the minimum employment period for unfair dismissal protection on a transfer of business and long-term employees discovered they had no remedy for an unfair dismissal following a transfer of business'.<sup>1035</sup>

Forward with Fairness indicated that access to unfair dismissal would be limited to employees not covered by an award and earning less than \$98,200 per year.<sup>1036</sup> This was later modified to \$100,000, as indexed from August 2007, for employees not covered by an award or enterprise agreement, to ensure that 'highly paid employees in award industries that are currently protected from unfair dismissal remain so'.<sup>1037</sup>

The 'operational reasons' exemption under Work Choices would no longer be a defence; however, a dismissal for reasons of genuine redundancy would not be unfair.<sup>1038</sup> It was estimated that around '6.7 million employees will be protected from unfair dismissal, compared to 3.7 million' under Work Choices.<sup>1039</sup>

The FW Act extends coverage of unfair dismissal laws in line with the policy announcements. The exemption for employers with 100 employees or fewer has been removed, and s. 23 now defines a 'small business employer' as one with fewer than 15 employees. Employees of small businesses can bring unfair dismissal claims, but need to have been employed for a minimum of 12 months (compared with six months for employees of other employers).<sup>1040</sup> Small business employers are also covered by the Small Business Fair Dismissal Code, which allows FWA to dismiss an unfair dismissal claim if the employer can demonstrate that it complied with it.<sup>1041</sup>

The FW Act has introduced a new, narrower 'genuine redundancy' exclusion to replace the 'operational reasons' exclusion that existed under Work Choices.<sup>1042</sup> The exclusion only applies if:

- the employer no longer requires the employee's job to be performed by anyone because of changes in operational requirements
- the employer complies with any award or agreement requirement to consult about the redundancy
- it would not have been reasonable for the employee to be redeployed within the employer's enterprise or associated entity.

Casuals employed on a regular and systematic basis who had a reasonable expectation of continuing employment on that basis are covered by the unfair dismissal provisions as long as they complete the relevant minimum period of employment.<sup>1043</sup>

Section 386 includes a definition of 'dismissed' and excludes categories of employees from unfair dismissal protections in certain circumstances. These include:

- employees engaged for a specified period or task where that period or task ceases
- employees under training arrangements
- employees who are demoted when there is not a significant reduction in their remuneration or duties.

The exclusion of employees engaged for a specified period or task is not intended to apply if a substantial purpose of that employment arrangement was to avoid unfair dismissal protections.<sup>1044</sup> For reasons that we will discuss, we do not consider that this objective has been met by the drafting of the provision.

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<sup>1035</sup> DEEWR submission to the FW Bill inquiry, p. 43.

<sup>1036</sup> FWF, p. 19.

<sup>1037</sup> DEEWR submission to the FW Bill inquiry, p. 43, referring to *Stanfield v Childcare Services Pty Ltd* [2008] AIRC 127; *Ziday, Clarke, Tan, Paskins, Walker v Aged Care Services Australia Group Pty Ltd* [2008] AIRCFB 367.

<sup>1038</sup> SRS.

<sup>1039</sup> DEEWR submission to the FW Bill inquiry, p. 43; EM, p. xlvii.

<sup>1040</sup> FW Act, s. 383.

<sup>1041</sup> FW Act, s. 388.

<sup>1042</sup> FW Act, s. 389.

<sup>1043</sup> FW Act, s. 384.

<sup>1044</sup> FW Act, s. 386(3).

### 10.1.2 Process

Forward with Fairness envisaged a process whereby FWA would determine the merits of an application swiftly, requiring applications to be made within seven days of dismissal ‘to ensure that, where reinstatement is appropriate, it remains a viable option’.<sup>1045</sup> The Implementation Plan flagged a system that ‘left lawyers out of the picture and encouraged an end to the matter after a conference, not endless days of hearings before the Industrial Relations Commission’ and in which there would be no ‘go away money’.<sup>1046</sup>

FWA would determine the case in a conference, with local offices and the capacity to go to a workplace. FWA would ask the parties their views about how and where the conference would take place.<sup>1047</sup> At the conference FWA would ‘be required to reach a conclusion about whether the dismissal was unfair’ with ‘no formal written submissions, no cross examination and no hearing’. While parties could have a representative or support person present, the employer and employee would be required to respond directly to questions from FWA.

The DEEWR submission indicated that FWA would be able to make ‘binding decisions following a conference, without the need for a formal, public hearing’, unless FWA decided that a hearing would be the most efficient and effective way to resolve the matter.<sup>1048</sup>

The FW Act ultimately included a 14-day period in which to make an unfair dismissal application, with an ability for FWA to extend that period in exceptional circumstances.<sup>1049</sup> It permits an unfair dismissal claim to be dealt with in conference, and requires parties’ views to be considered about how FWA considers and informs itself about the application.<sup>1050</sup> It provides that FWA must not hold a hearing unless considered appropriate, having regard to the views of the parties and whether this would be the most efficient and effective way of resolving the matter.<sup>1051</sup>

### 10.1.3 Small business

A key aspect of the regime foreshadowed by Forward with Fairness was a Fair Dismissal Code (the Code) for small business employers that would be a ‘clear and concise reference’ to help them meet their obligations. Genuine compliance with the Code would result in a dismissal being considered fair.<sup>1052</sup> The Implementation Plan stated that the Code could allow, for example, that ‘where an employer has reported an employee to the police for suspected theft, fraud or for violence in the workplace the dismissal will be a fair dismissal’.<sup>1053</sup> In September 2008 during her Press Club Speech the then Deputy Prime Minister explained that when dismissal is justified the Code would simply require the employer to give the employee a warning, based on a reason that validly relates to the employee’s conduct or capacity to do the job, and provide a reasonable opportunity for the employee to improve their performance, with no requirement for ‘three strikes and you’re out’.<sup>1054</sup>

In addition the intention was that FWA would be able to provide information and assist small business employers before a dismissal,<sup>1055</sup> and ‘where specific advice has been provided to a small business by FWA about a dismissal and the employer complies with that advice, the dismissal will be considered a fair dismissal’.<sup>1056</sup> This initiative was not ultimately included in the FW Act. The Fair Work Ombudsman gives telephone advice and template material on its website to help employers manage issues that may lead to termination of employment.

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<sup>1045</sup> FWF, p. 19.

<sup>1046</sup> FWFIP, p. 18.

<sup>1047</sup> FWF, p. 19; FWFIP, p. 18.

<sup>1048</sup> DEEWR submission to the FW Bill inquiry, p. 44.

<sup>1049</sup> FW Act, s. 394.

<sup>1050</sup> FW Act, s. 398.

<sup>1051</sup> FW Act, s. 399.

<sup>1052</sup> FWF, p. 20.

<sup>1053</sup> FWFIP, p. 19.

<sup>1054</sup> PCS.

<sup>1055</sup> FWF, p. 20.

<sup>1056</sup> FWFIP, p. 20.

## 10.2 General

As noted above, the changes to the unfair dismissal provisions were intended to strike a balance between the needs of employees and employers. In line with the clearly stated policy position, the provisions facilitated access to unfair dismissal protections for more employees and aimed to make the process of defending a claim less burdensome on employers. Perhaps not surprisingly, debate continues on whether that balance has been achieved. Employer groups continue to assert that the provisions allow employees to bring frivolous or unmeritorious claims, while employees and unions argue that there are too many restrictions on bringing an application and for those that do get through, the remedies are insufficient.

Several parties expressed the view that there were positive aspects to the new provisions, with many pointing to advantages over the previous system.<sup>1057</sup> For example, the National Farmers Federation suggested that ‘the current procedures are effective, assisting with quick, flexible and informal resolution of disputes’.<sup>1058</sup> This sentiment was also repeated in several face-to-face consultations with us. A number of submissions, however, outlined concerns about the coverage of the provisions, the number of applications made, the process to resolve claims, the burden of defending a claim, ‘go away money’, vexatious or unmeritorious claims, the time limit for lodgment and the criteria for determining whether a dismissal was fair or not. These matters are discussed below.

## 10.3 Coverage and number of claims

### 10.3.1 Coverage

Views about the reach of the system tended to be polarised. Many suggested that the coverage should be reduced in some way due to the impost on employers. Many others advocated for broader coverage to improve employee access to justice and fairness in the workplace.

Suggestions to reduce the coverage of the provisions came mostly from employer groups and included:

- an increase in the small business 15-employee threshold<sup>1059</sup>
- basing the small business threshold on full-time equivalent (FTE) employees rather than a headcount<sup>1060</sup>
- exempting small businesses entirely from the provisions<sup>1061</sup>
- removing protections for high earning employees who are covered by awards<sup>1062</sup>
- removing protections for labour hire and daily hire employees.<sup>1063</sup>

The arguments to reduce coverage were based partly on the cost of defending an unfair dismissal claim that was said to be a greater impost on small businesses.<sup>1064</sup> Some employers argued that the increased coverage of the provisions would inhibit job growth, especially in small businesses or in regional areas.<sup>1065</sup> Despite these assertions, as discussed at 4.6.5, the new provisions have not had a discernible impact on major economic indicators.

Several submissions advocated increasing the small business threshold to 20 employees. Both the MBA and the AHA<sup>1066</sup> based their recommendation on the ABS definition, which identifies a small business as one employing 1–19 employees

<sup>1057</sup> ACTU, p. 48; AEU, p. 10; AIER, p. 30; Ai Group, p. 123; AWMU, p. 61; ANF, p. 12; ASU, p. 12; CPSU-PSU, p. 2; COSBOA, Attachment 2, p. 6; Forsyth and Stewart, p. 32; Joanna Howe, p. 1; JobWatch, p. 36; Kingsford Legal Centre, pp. 2, 24; Law Society of NSW, p. 6; Marilyn Pittard, p. 1; MUA, p. 3; NFF, pp. 26–27; RTBU, p. 6; VECCI, pp. 76–78.

<sup>1058</sup> NFF, p. 26.

<sup>1059</sup> AAA, p. 5; ACCI, p. 17; AHA, pp. 19–20; ATEC, p. 2; COSBOA, Attachment 2, p. 10; HIA, p. 43; MBA, p. 47; MGA, pp. 12–13; NSW Small Business Commissioner, p. 2; QTIC, p. 7; RCA, p. 15; TTIA, p. 7.

<sup>1060</sup> AAA, p. 5; ATEC, p. 2; NSWBC & ABI, p. 82; BIG, pp. 6, 23; COSBOA, Attachment 2, p. 10; NSW Small Business Commissioner, p. 2; RCA, p. 15.

<sup>1061</sup> Ai Group, p. 24; CCIQ, p. 15; CCIQ supplementary, pp. 4, 12; COSBOA, Attachment 2, p. 9.

<sup>1062</sup> ACCI, p. 17.

<sup>1063</sup> AMMA, p. 132.

<sup>1064</sup> AFEI, p. 44.

<sup>1065</sup> ACCI, p. 134; COSBOA, Attachment 2, p. 9; Eltham Valley Pantry, p. 4.

<sup>1066</sup> MBA, p. 47; AHA, p. 19.

on a headcount basis.<sup>1067</sup> We are advised that the ABS was not able to explain the reason that this definition was first used. The ABS does, however, review classifications from time to time and last considered the definition of small business in 2006, concluding that it was an appropriate classification.

The threshold in the FW Act directly reflects the commitment made in Forward with Fairness. The definition reflects the long-standing small business exemptions established in the Australian Conciliation and Arbitration Commission's Termination, Change and Redundancy decision of 1984, that set generally accepted standards for redundancy arrangements in federal awards for more than 20 years. This standard is reflected in the NES that exempt businesses with fewer than 15 employees from having to pay redundancy payments.

Recommendations for an increase in coverage of unfair dismissal protections came mostly from unions and community groups. While these groups acknowledged the increase in coverage under the FW Act was an improvement over the previous arrangements, they said more should be done to facilitate access. For example, the Employment Law Centre of WA submitted that while the FW Act generally provides a balanced framework, exclusions that prevented vulnerable workers from making an unfair dismissal claim do not promote social inclusion.<sup>1068</sup> In this category, they referred to casuals, labour hire workers, employees who failed to meet the minimum qualifying periods of employment, and employees who failed to obtain advice before the expiry of the 14-day lodgment period.

Recommendations to increase the coverage of the unfair dismissal provisions included:

- reducing the qualifying period for all employees to three months or abolishing it completely<sup>1069</sup>
- allowing employers and employees to agree to a shorter qualifying period<sup>1070</sup>
- abolishing the high income threshold<sup>1071</sup>
- removing small business exemptions<sup>1072</sup>
- extending protections to all casual employees<sup>1073</sup>
- allowing labour hire employees to make unfair dismissal claims against their host employer.<sup>1074</sup>

It was a clear purpose of the changes to restore unfair dismissal protections to many employees who lost protection under the previous legislative regime. As noted above, DEEWR's analysis in the EM suggested that the coverage of employees under the system would increase from 3.7 million to 6.7 million. Using the same methodology with more recent ABS data<sup>1075</sup>, DEEWR now estimates that approximately 7 million employees currently have access to unfair dismissal protections, compared to 4.2 million if the coverage provisions had remained unchanged from Work Choices. This is an increase in coverage of 2.8 million employees, or 66 per cent.<sup>1076</sup>

The ACTU estimates that the number of employees with access to unfair dismissal protections if Work Choices had remained in place would be about two million, with approximately 6.5 million employees protected under the FW Act.<sup>1077</sup> Given that the ACTU has not provided the basis for its calculations, it is difficult to assess which estimate is more accurate. However, it is clear from both estimates that there has been a significant increase in the coverage of the provisions.

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<sup>1067</sup> For example, *Counts of Australian Businesses, including Entries and Exits, Jun 2007 to Jun 2011*, Cat. No. 8165.0, 2012, and *Small Business in Australia, 2001*, Cat. No. 1321, 2002, ABS, Canberra.

<sup>1068</sup> ELCWA, p. 20.

<sup>1069</sup> APESMA, Attachment A, p. 16; AHRC supplementary, p. 12; AWU, p. 9; Beasley Legal, p. 7; ELCWA, pp. 11–12; JobWatch, p. 41; Kingsford Legal Centre, p. 25; TCFUA, p. 25; SDA, p. 63 United Voice, p. 12.

<sup>1070</sup> CPSU-SPSF, p. 28.

<sup>1071</sup> APESMA supplementary, p. 2; HSU, p. 13.

<sup>1072</sup> AEU, p. 10; HSU, p. 13.

<sup>1073</sup> ELCWA, pp. 12–13; HSU, pp. 11, 13.

<sup>1074</sup> ELCWA, p. 31; Kingsford Legal Centre, p. 26.

<sup>1075</sup> Current calculations use *Employee Earnings and Hours, August 2008*, Cat. No. 6306.0, 2009, ABS, Canberra. Previous calculations used *Earnings and Hours, May 2006*, Cat. No. 6306.0, 2007, ABS, Canberra.

<sup>1076</sup> See Appendix G for further detail of this calculation.

<sup>1077</sup> ACTU, p. 48.

### 10.3.2 Number of claims

Several stakeholders pointed to an increase in unfair dismissal claims under the new system.<sup>1078</sup>

An increase in applications is to be expected given the greatly expanded coverage of the provisions arising from the inclusion of smaller businesses, employees of unincorporated bodies in referring states and the removal and refinement of exclusions.

Table 10.1 shows the number of unfair dismissal applications lodged in state and Commonwealth jurisdictions under Work Choices and the FW Act. The table shows that, while there was an increase in applications in the Commonwealth jurisdiction between the final year of Work Choices and the commencement of the FW Act, there has been a decrease in applications in state jurisdictions as a result of the referrals of workplace relations powers. The table also shows a slight decrease in general protections matters involving dismissal compared to unlawful termination applications in the final year of Work Choices, which is consistent with the suggestion that dismissed employees pursued unlawful termination as an avenue of redress when access to unfair dismissal was restricted.

It was generally acknowledged in submissions to us that the expansion in coverage was responsible for the increase in applications. ACCI, for example, said the increase was partly due to the removal of the 100 employee exclusion with the 'other reason' attributable to the inclusion of employees formerly covered by state jurisdictions.<sup>1079</sup>

Table 10.1—Unfair dismissal applications under Work Choices and the FW Act

	WR Act			Work Choices			Fair Work Act	
	2003–04	2004–05	2005–06	2006–07	2007–08	2008–09	2009–10	2010–11
<b>Total Commonwealth applications involving unfair dismissal * **</b>				4,123	4,729	6,307	11,421	12,848
<b>Unlawful termination only/general protections involving dismissal # **</b>				1,050	1,338	1,687	1,633	2,049
<b>All termination of employment applications ^</b>	7,044	6,707	5,758	5,173	6,067	7,994	13,054	14,897
<b>State unfair dismissal applications ^^</b>	8,263	7,758	5,389	1,558	988	1,254	929	278
<b>Combined unfair dismissal applications</b>				5,681	5,717	7,561	12,350	13,126
<b>Combined termination of employment with state UFD</b>	15,307	14,465	11,147	6,731	7,055	9,248	13,983	15,175

Source: AIRC, FWA and state tribunal Annual reports.

\* For Work Choices, this includes applications under s. 643(1)(a) and s. 643(1)(c), and for the FW Act includes applications made under s. 394 and residual WR Act matters.

\*\* Figures not available for pre-Work Choices WR Act.

# For Work Choices, figures include s. 643(1)(b), and for the FW Act include applications made under s. 565, s. 773 and residual WR Act matters.

^ As defined by AIRC and FWA Annual reports.

^^ State figures include averaged NSW calendar year date to provide approximate financial year figures. The numbers of applications in NSW for the 2011 calendar year are not yet available, which means the total for state unfair dismissals in 2010–11 does not include NSW. Based on the 2010 calendar year and trends observed in other states, DEEWR estimates that there were fewer than 200 applications in the NSW system in 2011.

<sup>1078</sup> For example, ACCI, p. 135; ACTU, p. 48; Ai Group supplementary, pp. 38; AMMA, p. 130; ASU, p. 12; Forsyth and Stewart, p. 28; MGA, p. 12; MUA, p. 3.

<sup>1079</sup> ACCI, p. 135.

Table 10.1 also shows that there was a 33 per cent increase in federal unfair dismissal applications between 2007–08 and 2008–09, the final two years of Work Choices, a period in which there were no material changes to the coverage of the system. Commenting on the jump, the AIRC Annual report 2008–09 noted:

Although there is no clear indication of the reason for the increase, it is reasonable to assume that the significant downturn in global financial markets has had an effect and employers are responding to market conditions by reducing labour costs where it is practical to do so. It is also likely that the rising unemployment rate is providing an additional incentive to challenge a termination of employment which is perceived to be unfair.<sup>1080</sup>

Before the introduction of Work Choices the number of applications under the termination of employment provisions of the WR Act were not disaggregated between unfair dismissal and unlawful termination. As a result, to make comparisons over a longer period of time, unfair dismissal applications and general protections applications under the FW Act have been combined in Chart 10.1 to create an approximation of the previous termination of employment provisions. However, this comparison is limited in that the general protections incorporate additional protections beyond the previous unlawful termination provisions. Chart 10.1 also includes state unfair dismissal matters to allow for the changes in jurisdiction between the pre-Work Choices WR Act, Work Choices and the FW Act.

Employer concerns about the increase in claims should also be viewed in the context of the likelihood of an employer being subject to a claim. Two submissions<sup>1081</sup> examined ABS statistics<sup>1082</sup> on the number of people who ceased employment involuntarily in the 12 months before February 2010 (917,300 people) and compared them to the number of unfair dismissal applications in 2010–11, arriving at a figure between 1 and 1.5 per cent. Using 12,840 as the number of unfair dismissal applications (and assuming the overall separation rate remains stable), our calculation is that approximately 1.4 per cent of involuntary separations resulted in an unfair dismissal application under the FW Act in 2010–11.<sup>1083</sup>

While this figure may be a slight underestimation due to the ABS definitions<sup>1084</sup>, a survey of small regional businesses in 2004 found that only 3 per cent of respondents had any direct experience with unfair dismissal claims.<sup>1085</sup> The overall data continues to point to a low likelihood of employers facing an unfair dismissal claim when dismissing an employee.

While the expanded coverage has obviously led to more employers being exposed to the risk of unfair dismissal proceedings, this must be balanced against restoring a level of employment security to employees who had been excluded by the imposition of the 100-employee cap under Work Choices. While some unions and community groups argued for the system's coverage to be wider, we are satisfied that the current provisions strike the balance that the objects are seeking to achieve. It is also clear that despite the increased number of applications, it is still rare for a dismissal to result in a claim. For these reasons, we do not recommend change to the coverage provisions.

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<sup>1080</sup> AIRC Annual report 2008–09, p. 7.

<sup>1081</sup> ACTU, p. 48; Forsyth and Stewart, p. 29.

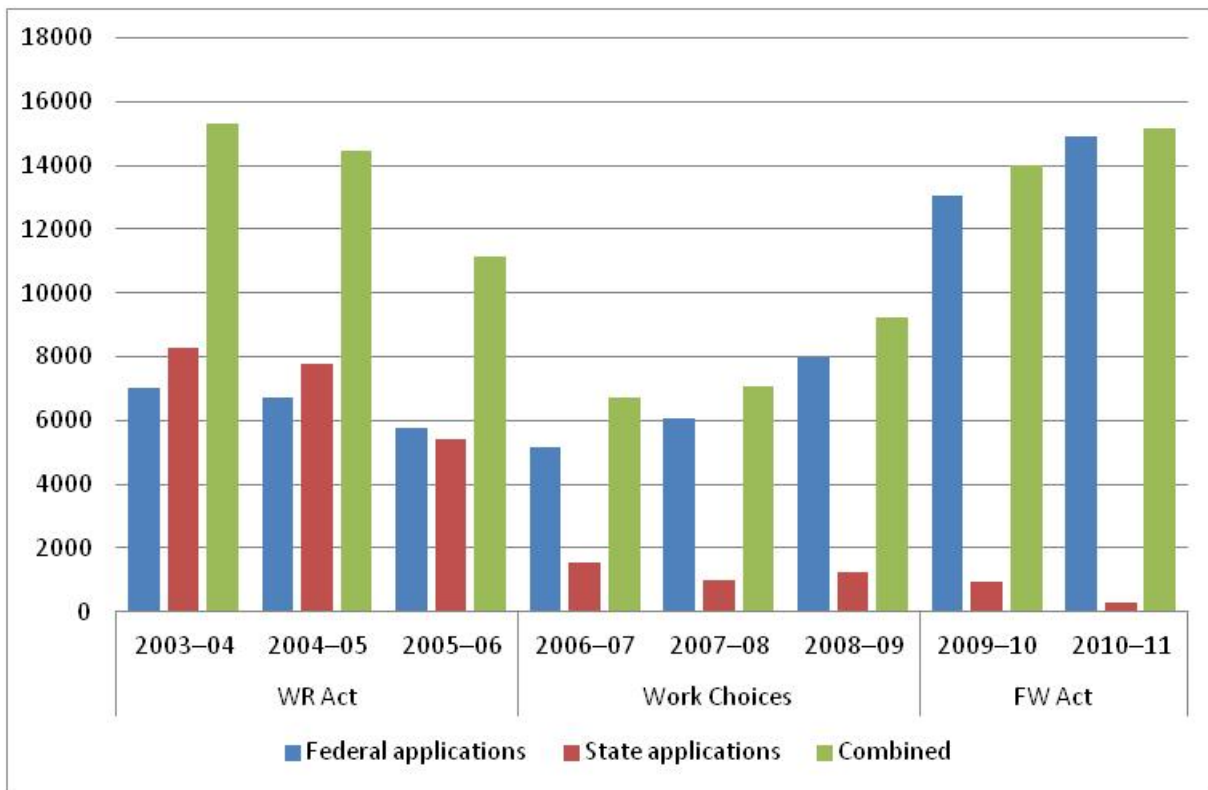
<sup>1082</sup> *Labour Mobility, Australia, Feb 2010*, Cat. No. 6209.0, 2010, ABS, Canberra.

<sup>1083</sup> Note that the ACTU round this figure down to 1 per cent whereas Forsyth and Stewart round it up to 1.5 per cent.

<sup>1084</sup> The ABS definition of 'ceased employment involuntarily' includes people who may not have been dismissed, such as business owners whose businesses shut down.

<sup>1085</sup> W Robbins & G Voll, 'Who's being unfair? A survey of the impact of unfair dismissal laws on small regional businesses', 2004, as cited in W Robbins & G Voll, 'The case of unfair dismissal reform: a review of the evidence', *Australian Bulletin of Labour*, vol. 31, no. 3, 2005, p. 237.

Chart 10.1—Termination of employment applications over time



Source: AIRC, FWA and state tribunal Annual reports. Note: Work Choices came into effect in March 2006, meaning that the last quarter of 2005–06 reflects Work Choices rather than the pre–Work Choices WR Act. State figures include averaged NSW calendar year date to provide approximate financial year figures. The numbers of applications in NSW for the 2011 calendar year are not yet available, which means the total for state unfair dismissals in 2010–11 does not include NSW. Based on the 2010 calendar year and trends observed in other states, DEEWR estimates that there were fewer than 200 applications in the NSW system in 2011.

## 10.4 Criteria for considering dismissal

Section 387 of the FW Act sets out the criteria that FWA must take into account in assessing whether a dismissal is harsh, unjust or unreasonable. They include whether there was a valid reason for the dismissal related to the person’s capacity or conduct, and also a number of criteria relating to procedural grounds. The only significant difference to the criteria under s. 652(3) of the WR Act is the addition of paragraph (d): ‘any unreasonable refusal by the employer to allow the person to have a support person present at any discussions relating to the dismissal’. Both sets of criteria include the broad formulation of ‘any other matters’ that the tribunal considers relevant. In neither case is there a stipulation about what weight should be applied to each criterion.

Several employer bodies suggested that the validity of an employer’s reason for dismissing an employee should be given primacy when considering whether a dismissal is fair or not.<sup>1086</sup> ACCI argued that procedural elements should not be considered if it can be established that there was a valid reason for dismissal. A table in ACCI’s submission listed several cases where a valid reason was established, but the dismissal was found unfair due to procedural defects or other considerations.

COSBOA went further in recommending that the validity of the reason should be the only factor in deciding a case and that factor should be determined ‘by reference to whether the reasons for dismissal were based on facts that were reasonably apparent or open to the employer at the time of dismissal’.<sup>1087</sup>

<sup>1086</sup> ACCI, pp. 5, 142–147; AMMA, pp. 16, 132–134; COSBOA, Attachment 2, p. 6, 8, 10; HIA, p. 42; MPAQ, p. 5.

<sup>1087</sup> COSBOA, Attachment 2, p. 10.



The Australian Motor Industry Federation proposed limiting the factors that should be considered when deciding an unfair dismissal claim, but did not confine consideration to the validity of the reason for dismissal. The Federation also suggested that whether the employee was given a chance to respond and the impact on the business of the employee's misconduct or performance should also be considered.<sup>1088</sup>

Rio Tinto referred us to *Lawrence v Coal & Allied Mining Services*<sup>1089</sup>, an FWA case in which an employee working for one of its subsidiaries was dismissed for a safety violation. A Full Bench (in a majority decision) reinstated the dismissed employee despite finding that the safety breach reasonably called for disciplinary action. The Full Bench majority found that the employee's age (he was 55), family circumstances, prospects of future employment and long service with the employer with an 'impeccable' disciplinary and safety record made the dismissal 'manifestly harsh'.<sup>1090</sup>

Rio Tinto argued that the decision reduced its ability to manage occupational health and safety risks on sites. It asserted that the decision demonstrated that matters other than whether there was a valid reason for dismissal are given 'equal weight' in determining whether a dismissal was unfair.<sup>1091</sup>

It has long been a feature of unfair dismissal jurisdictions in Australia that they are designed to ensure a 'fair go all round', and as noted earlier this aim has been retained as an express object of the FW Act.

The 'harsh, unjust or unreasonable' formulation also has a long history in Australian unfair dismissal regulation. As the FWA Full Bench in the *Lawrence* case cited by Rio Tinto noted, the leading pronouncement on the meaning of the expression is contained in the judgment of Justices McHugh and Gummow in *Byrne v Australian Airlines Ltd* (1995):

It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.<sup>1092</sup>

Our brief assessment of the 52 cases set out in ACCI's table reveals that in eight of them the remedy included reinstatement. In one of those cases, the decision was overturned on appeal: *Parmalat Food Products v Wililo*.<sup>1093</sup> The Full Bench overturned a finding by Commissioner Cargill that a dismissal was unfair despite there being a valid reason for termination and despite proper processes being followed. The Bench said that 'having found a valid reason for termination amounting to serious misconduct and compliance with the statutory requirements for procedural fairness it would only be if significant mitigating factors are present that a conclusion of harshness is open'.<sup>1094</sup> In three of the cases that resulted in reinstatement, the decision and remedy were upheld on appeal.<sup>1095</sup>

We consider that the cases demonstrate that FWA is able to accord a 'fair go all round' if it is given discretion to determine the weight to be apportioned to the criteria in s. 387. In some cases this will mean that a dismissal is unfair even when a valid reason for termination of employment is found to exist. This was the situation that prevailed under the WR Act<sup>1096</sup>, and we see no reason to alter that state of affairs.

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<sup>1088</sup> AMIF, p. 25.

<sup>1089</sup> [2010] FWAFB 10089.

<sup>1090</sup> *ibid.* at [38].

<sup>1091</sup> Rio Tinto, p. 22.

<sup>1092</sup> 185 CLR 410 at [465]–[466].

<sup>1093</sup> [2011] FWAFB 1166.

<sup>1094</sup> *ibid.* at [24].

<sup>1095</sup> See *GlaxoSmithKline Australia v Makin* [2010] FWAFB 5343; *Commonwealth of Australia v Black* [2011] FWAFB 3038; *Regional Express Holdings v Richards Limited* [2010] FWAFB 8753.

<sup>1096</sup> For an example of a case under the WR Act resulting in reinstatement where an AIRC Full Bench found there was a valid reason for dismissal and where procedural requirements had been met, see *Woodman and the Hoyts Corporation*, PR906309, 11 July 2001.

We accept that in the face of a conclusion that the employer had a valid reason for dismissing an employee, FWA should be slow to conclude that an employee was nonetheless entitled to a remedy. But FWA does not appear to have an inappropriate predisposition to grant a remedy in those circumstances. Ultimately the result in any particular case is likely to depend on the unique mix of facts the case presents. In some cases it may not be unreasonable for FWA to grant a remedy even though there was a valid reason for the dismissal, bearing in mind that the discretionary power to grant a remedy in these circumstances is subject to internal review by way of appeal. The inappropriate granting of a remedy can be corrected by an FWA Full Bench.

In the unlikely event that, in the future, there were a significant number of cases in which a remedy was granted despite a finding that there was a valid reason for dismissal, it may be desirable to reconsider how the criteria in s. 387 are identified and whether they should be expressly weighted in some way. But this is not the position at present.

## 10.5 Contracts for a specified period or task

As noted earlier, s. 386(2) provides that an employee has not been dismissed (and is therefore unable to bring an unfair dismissal claim) if they were terminated after being employed for a specified period or for a specified task, and the employment has terminated at the end of the period or on completion of the task. Under s. 386(3), the exclusion of those employees is not intended to apply if a substantial purpose of that employment arrangement was to avoid unfair dismissal protections. The clear intention is that when such an arrangement exists, an employee should have unfair dismissal protection if an employer seeks to rely on the expiry of the time or the completion of the task to end the employment.

As the NTEU points out in its submission, there is real doubt that this objective has been achieved in the drafting of s. 386.<sup>1097</sup> This is because subsection 386(1) still only applies to an employee whose employment is ‘terminated on the employer’s initiative’, and subsection (3) on its terms does not appear to bring the relevant employees within that definition. We think this is a case where the legislation does not meet its objectives, or at least where there is real doubt that it does. We therefore recommend that s. 386 be redrafted to remedy this deficiency.

**Recommendation 39:** The Panel recommends that s. 386 be amended to bring employees who are subject to the circumstances set out in subsection (3) within the definition of ‘dismissed’ when the employment has terminated at the end of the specified period, on completion of the task or at the end of the season.

## 10.6 ‘Go away money’

Several employer submissions raised the issue of ‘go away money’<sup>1098</sup>, contending that the FW Act has led to an increase in the incidence of employers paying compensation to settle unmeritorious claims. They argued that this is often a more economical option than contesting the claim to finality. There was no statistical analysis to support the contention, and it is difficult to see how one could be compiled. Assessment of the merits of particular claims will necessarily involve subjective judgments that are impossible to quantify. The contention was based in the main on feedback from employers to their associations.

If the cost of settling a claim is less than fully arguing its merits, there can be an economic incentive to settle at an earlier stage. When the compensation that can be awarded is relatively low, as is the case with the FW Act<sup>1099</sup>, there is also an incentive for employees to accept these payments. This is supported in part by FWA research on conciliations

<sup>1097</sup> NTEU, pp. 13–15.

<sup>1098</sup> For example, ACCI, pp. 135–136; AHRI, p. 8; AMIF, pp. 21–22; ARTIO, p. 7; Forsyth and Stewart, pp. 32–33; NECA, p. 2.

<sup>1099</sup> See ACTU p. 49 for analysis of compensation across international jurisdictions.

from the first half of 2010.<sup>1100</sup> Survey results for those who settled at conciliation showed that for 79 per cent of applicants, 76 per cent of respondents and 85 per cent of their representatives, their decision to settle was influenced to a medium or large degree by a desire to avoid the cost, time, inconvenience or stress of further legal proceedings.

While it is difficult to assess the incidence of unmeritorious claims being settled with ‘go away money’, there is information available about how often money is paid as compensation and approximately how much. Table 10.2 shows the outcomes of unfair dismissal matters for 2010–11 and the first three quarters of 2011–12. The table shows that only 4 per cent (517) of matters were finalised by decision in 2010–11. According to an analysis undertaken by the ACTU<sup>1101</sup>, of the matters settled by decision in 2010–11, 193 (1.6 per cent of matters settled) were dismissed on jurisdictional grounds, eight (less than 1 per cent) were dismissed on the grounds that they were frivolous or vexatious and 324 (2.6 per cent) were substantively arbitrated.

**Table 10.2—Outcomes of unfair dismissal matters**

Period	Stage finalised	Number	% of matters finalised
2010–11	Finalised before conciliation	2,131	17
	Finalised at conciliation	7,738	63
	Finalised after conciliation	1,915	16
	Finalised by a decision	517	4
	Total finalised	<b>12,301</b>	n/a
2011–12 (first three quarters)	Finalised before conciliation	1,760	17
	Finalised at conciliation	6,759	65
	Finalised after conciliation	1,463	14
	Finalised by a decision	387	4
	Total finalised	<b>10,369</b>	n/a

Source: Statistics provided by Fair Work Australia.

Two submissions<sup>1102</sup> and an unpublished academic paper from Benoit Freyens of the University of Canberra and Paul Oslington of the Australian Catholic University<sup>1103</sup> examine the outcomes of claims that proceeded all the way to arbitration. Forsyth and Stewart concluded that the success rate for employees in arbitration under the FW Act was broadly similar to that under the WR Act (January 1997 to June 2009). The Freyens and Oslington analysis drew on a database compiled by them of arbitrated cases between 1 January 2001 and 1 November 2010, as well as on AIRC/FWA annual reports. Relying on the database, they reported that employees were successful in approximately 51 per cent of substantively arbitrated cases under the FW Act, compared to 33 per cent under Work Choices and 48 per cent under the WR Act. On the AIRC/FWA figures, they calculated employee success rates at around 50 per cent under the WR Act, falling to a low of 38 per cent under Work Choices in 2008–09, with a high of 60 per cent under the first year of the FW Act, declining to 41 per cent in 2010–11. For reasons they set out, they felt that the 2010–11 figure was artificially low.

<sup>1100</sup> FWA *Unfair Dismissal Conciliation Research*, TNS Social Research, 2010, p. 51.

<sup>1101</sup> ACTU, p. 48.

<sup>1102</sup> ACTU, p. 48; Forsyth and Stewart, p. 29.

<sup>1103</sup> B Freyens & P Oslington, 2012, ‘A first look at incidence and outcomes of unfair dismissal claims under Fair Work, Work Choices and the Workplace Relations Act’, presented at the 2011 Economic Society of Australia conference and the Australian Labour Market Research Workshops in 2012.

Freyens and Oslington noted that, whatever figures were relied upon, there was a significantly lower success rate for employees under Work Choices. They suggested that one important reason for this difference was the exclusion under Work Choices of smaller businesses, which effectively removed cases that employees were more likely to win. This was because small businesses, in their words, were usually less careful in their HR practices than large businesses and didn't have the resources to maintain knowledgeable HR departments.<sup>1104</sup>

Table 10.3 shows the outcomes of unfair dismissal matters finalised at conciliation for 2010–11 and the first three quarters of 2011–12—that is, 2071 matters (26.7 per cent) of the 7738 finalised at conciliation were settled without any monetary payment in 2010–11, with a similar trend developing in 2011–12.

**Table 10.3—Recorded outcomes of matters settled at conciliation**

Period	2010–11		2011–12 (first three quarters)	
	Number*	% of settled matters	Number*	% of settled matters
<b>Total settled</b>	<b>7,738</b>	<b>n/a</b>	6,759	<b>n/a</b>
Settled: Monetary	1,717	22	1,372	20
Settled: Non-monetary	1,978	26	1,767	26
Settled: Monetary + non-monetary	3,912	51	3,484	52
Settled: Reinstatement	75	1	56	1
Settled: Reinstatement + monetary	29	<1	30	<1
Settled: Reinstatement + non-monetary	18	<1	19	<1
Settled: Reinstatement, monetary + non-monetary	9	<1	1	<1

Source: Statistics provided by Fair Work Australia. Notes: 'monetary' indicates money was paid, 'non-monetary' indicates some sort of non-monetary compensation (for example, an apology or letter of recommendation).

\*Due to data variations, mode of conciliation figures may not equal the number of conciliations held during the reporting period.

Table 10.4 shows the distribution of payments when compensation was paid either at conciliation or at arbitration for the first three quarters of 2011–12.

Table 10.4 shows that when payments are made as a result of conciliation the amounts are generally modest, with half of payments under \$4000. As noted by the ACTU, these payments may also include the payment of employee entitlements initially withheld by the employer.<sup>1105</sup> Figures contained in evidence presented by FWA to the Senate Standing Committee on Education, Employment and Workplace Relations at Additional Budget Estimates hearings in 2010–11 show a similar distribution of payments for matters settled at conciliation from 1 July 2010 to 31 January 2011.<sup>1106</sup> The distribution of compensation payments shows pay outs are generally higher as a result of arbitration.

Forsyth and Stewart noted that the practice of 'go away money' had been a feature of the system under the WR Act and Work Choices. They concluded 'without hesitation' that it remains a feature under the FW Act. In their view, this is

<sup>1104</sup> Freyens & Oslington, p. 8.

<sup>1105</sup> ACTU, p. 48.

<sup>1106</sup> DEEWR Question on Notice No. EW0749\_11, available at [www.apf.gov.au](http://www.apf.gov.au).

a function of two elements of the system. The first is the rule that the losing party will not generally be ordered to pay the winner’s costs. The second is the 26-week cap on compensation that can be awarded to a successful applicant.<sup>1107</sup>

Forsyth and Stewart argued that there are ‘three obvious reforms’ that could be adopted to tackle the practice of ‘go away money’, while noting the shortcomings of each. The first is to make the system a ‘costs’ jurisdiction, whereby the successful party is entitled to have their costs paid by the unsuccessful one. The second would be to ‘substantially increase’ compensation payments for successful applicants, which they say would give employers more incentive to fight groundless claims. The third would be a heightened effort by FWA to weed out unmeritorious claims.<sup>1108</sup>

**Table 10.4—Amounts of compensation paid when conciliation or arbitration results in monetary compensation**

Period	2011–12 (first three quarters)			
	Conciliation - % inc. \$		Arbitration - % inc. \$	
0 – 999	9	53%	5	28%
1,000 – 1,999	17		11	
2,000 – 3,999	27		11	
4,000 – 5,999	18	28%	14	24%
6,000 – 7,999	10		10	
8,000 – 9,999	5	13%	5	9%
10,000 – 14,999	8		4	
15,000 – 19,999	3	6%	9	23%
20,000 – 29,999	2		6	
30,000 – 39,999	1		4	
40,000 – maximum amount	<1		4	
> maximum amount	<1		–	

Source: Statistic provided by Fair Work Australia

These recommended reforms received support from some quarters, although not necessarily as a package. For example, several employer groups supported the ability for the successful party to seek costs after a decision.<sup>1109</sup> Other employer groups recommended that FWA be required to be more proactive in removing unmeritorious or vexatious claims.<sup>1110</sup> Recommendations for increasing the compensation payable came from unions<sup>1111</sup>, a community group<sup>1112</sup> and a legal practice.<sup>1113</sup> The Ai Group opposed an increase in the compensation cap.<sup>1114</sup>

<sup>1107</sup> Forsyth and Stewart, pp. 32–33.

<sup>1108</sup> Forsyth and Stewart, p. 33.

<sup>1109</sup> ACCI, p. 18; AHA, pp. 32–33; AHEIA, p. 3 (where an application is vexatious); AMIF, p. 27; CCIQ supplementary, pp. 4, 12; NFF, p. 6; Ai Group supplementary p. 42.

<sup>1110</sup> Ai Group supplementary, p. 42; AMIC, p. 16; ARTIO, p. 8; ABI and NSW Business Chamber, p. 81; CCIWA, pp. 22, 114–115.

<sup>1111</sup> AMWU, p. 62; AWU, p. 9; SDA, p. 64.

<sup>1112</sup> JobWatch, p. 47.

<sup>1113</sup> Beasley Legal, p. 6.

<sup>1114</sup> Ai Group supplementary, p. 42.

Some employer organisations recommended the reinstatement of the ability to make costs orders when parties act unreasonably in failing to discontinue or settle a claim, or cause costs to be incurred by the other party through an unreasonable act or omission.<sup>1115</sup> These provisions were introduced to the WR Act in 2001 (s. 170CJ) and continued under Work Choices (s. 658).

Forsyth and Stewart noted that moving to a costs jurisdiction would ‘erect a barrier to industrial justice for most workers’, and went on to suggest that lowering the current threshold in s. 611 for a costs order may be an option. They concluded that increasing the compensation cap would be resisted by business groups. In relation to a process for filtering out groundless claims, they noted that the requirements for procedural fairness would mean an increase in the time taken to finalise applications. Nevertheless, they suggested that conciliators could be asked to give an assessment of the prospects of success of a particular claim, which could later have a bearing on any costs order.<sup>1116</sup>

A further option proposed by some employer groups was to increase the filing fee, which is currently \$62.40 and can be waived in cases of financial hardship.<sup>1117</sup>

We do not doubt that employers continue to make a commercial decision to pay an amount to an applicant to settle an unfair dismissal claim, and that the factors identified by Forsyth and Stewart and others contribute to this approach. In some cases, the employer may genuinely consider that the application has no merit, but is convinced that settling the claim for a small or nominal amount is preferable to incurring significantly higher costs in defending it. In other cases, an employer may be advised (or form the view) that the applicant has some prospects of success, and will weigh this up in determining whether to settle and for how much. As has been noted, these are practices that existed under the legislation before the FW Act, and almost certainly exist under other small claim jurisdictions where costs do not necessarily follow the outcome.

We accept comments made by unions in face-to-face consultations that they do not tend to pursue cases where they assess that there is little or no merit. This is likely to be partly based on an efficient use of union resources, as well as an appreciation of the limits to compensation available (particularly where the individual member is not seeking reinstatement). In our consultations with the legal profession, one law firm said that many features of the system influenced them to caution individuals against pursuing claims.

As we have already noted, it is difficult to assess the extent to which employers are settling claims in conciliation by paying money when they believe the claim is without substance (and perhaps, additionally, it is without substance as a matter of objective assessment). It is not surprising that this might become a feature (though to what extent is another question) of a legal process in which one party can seek a remedy against another party using processes that are comparatively informal, inexpensive and where the grant of the remedy is likely to depend upon a subjective evaluation of criteria which are fairly broadly expressed. We accept that it is undesirable that payments of this character are made.

Ultimately, however, the various proposals by mainly employer interests to avoid this appear to be either a solution with potentially unacceptable indirect consequences (for example, increasing filing fees) or unlikely to be effective in addressing the issue. An example of the latter was a suggestion there might be some preliminary assessment on the papers. We were anxious, in our consultations, to explore options for reducing or avoiding the phenomenon of ‘go away money’. However, as some employer groups conceded in discussion, earlier attempts in other jurisdictions (Victoria was given as an example) to filter out unmeritorious claims by a preliminary assessment on the papers had not proved particularly successful.

We think that to the extent there is a solution, it lies in the FWA processes and procedures. An employer would be more likely to settle an unmeritorious claim by agreeing to pay compensation during conciliation if the employer

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<sup>1115</sup> AHA, pp. 32–33; ARTIO, p. 8.

<sup>1116</sup> Forsyth and Stewart, p. 33.

<sup>1117</sup> ACCI, pp. 19, 150; APTIA, p. 8; ARTIO, p. 8; PHIEA supplementary, pp. 3–4.

believed that to contest the claim would be a drawn out, time consuming and potentially expensive process. An employer would be less likely to do so if the contest was dealt with quickly, efficiently and as cheaply as possible. We discuss existing procedures later in this chapter and make some recommendations to improve them, including some that we think will help to address the 'go away money' issue.

## 10.7 Time limits for lodgment

Employers and peak bodies generally argue that the 14-day time limit for lodgment should be maintained<sup>1118</sup> or reduced to seven days.<sup>1119</sup> Overwhelmingly, unions, community legal centres and other legal professionals argued that the time limit should be extended, either to 21 days<sup>1120</sup>, 60 days<sup>1121</sup> or 90 days.<sup>1122</sup>

Interestingly, ACCI advocated increasing the time limit for lodgment to 21 days as well as a restriction on extensions of time. This is in line with ACCI's recommendation for the time limit to lodge a general protections claim involving a dismissal<sup>1123</sup>, which ACCI contended is being abused by speculative litigators as 'de facto unfair dismissal'.<sup>1124</sup> There is some evidence to support this contention from the Working Women's Centres' submission, which said that the general protections provide 'an avenue of redress for workers who have not qualified for unfair dismissal or who are out of time for lodging their complaints'.<sup>1125</sup> VECCI suggested that aligning the unfair dismissal and general protections claims will reduce the number of speculative general protections claims lodged by 'no-win no-fee' legal representatives.<sup>1126</sup> These assertions are supported by reports of employees pursuing unlawful termination claims under Work Choices when their access to unfair dismissal protections had been removed.<sup>1127</sup>

While the ACTU disagreed with ACCI about the actual length of the lodgment period, it also argued that the time limit for lodging unfair dismissal applications should be harmonised with the general protections.<sup>1128</sup>

As noted above, the objective of reducing the time limit to lodge an application was to preserve the viability of reinstatement if a dismissal was found to be unfair; however, there is mixed evidence presented in submissions and elsewhere about the success of these provisions. For example, the analysis in the unpublished paper by Freyens and Oslington<sup>1129</sup> referred to previously suggests that the proportion of arbitrated cases that result in reinstatement is volatile, but broadly similar under the current and the previous regulatory regimes. However, evidence referred to in Forsyth and Stewart's submission<sup>1130</sup> suggested that the proportion of claims that result in reinstatement has increased slightly, although compensation is still far more common.

Limitations in the data prevent the number of cases resulting in reinstatement being thoroughly assessed.<sup>1131</sup> However, the findings above, anecdotal evidence provided by stakeholders<sup>1132</sup> and the statistics contained in table 10.3 indicate that reinstatement is relatively rare.

The Panel believes there is merit in increasing the time limit to lodge an unfair dismissal claim to 21 days and harmonising it with the time limit to lodge a general protections claim. This should result in fewer general protections

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<sup>1118</sup> Ai Group supplementary, p. 39; CCIQ supplementary, p. 4.

<sup>1119</sup> AFEI, p. 4; AHA, pp. 16–17; BIG, pp. 6, 19, 25; MBA, p. 44; TTIA, pp. 7–8.

<sup>1120</sup> AFAP, p. 4; AHRC, p. 12; AWU, p. 10; HSU, pp. 11–13; SDA, p. 63; Unions WA, p. 8; United Voice, p. 13.

<sup>1121</sup> ACTU, p. 64; Kingsford Legal Centre, p. 27; Law Institute of Victoria, p. 6.

<sup>1122</sup> Beasley Legal, pp. 3–4; ELCWA, p. 25.

<sup>1123</sup> ACCI, pp. 18–19.

<sup>1124</sup> ACCI, p. 6.

<sup>1125</sup> National Working Womens Centres, pp. 11–12.

<sup>1126</sup> VECCI, p. 64.

<sup>1127</sup> Every second dismissal claim cites unlawful grounds: Guidice, *Workplace Express*, 1 September 2006.

<sup>1128</sup> ACTU, p. 49.

<sup>1129</sup> Freyens & Oslington, 2012. *A first look at incidence and outcomes of unfair dismissal claims under Fair Work, Work Choices and the Workplace Relations Act*, presented at the 2011 Economic Society of Australia conference and the Australian Labour Market Research Workshops in 2012.

<sup>1130</sup> Forsyth and Stewart, p. 29.

<sup>1131</sup> For example, less than 5 per cent of matters were resolved by a published decision under Work Choices and the Fair Work Act and no statistical data is available on the results of settlement under Work Choices.

<sup>1132</sup> AHA, pp. 16–17; MUA, p. 3.

claims that would be better dealt with as unfair dismissal applications. It would also remove the situation outlined in a submission from VECCI<sup>1133</sup>, where applicants who do not believe they have been offered enough money at conciliation can discontinue their case and make a general protections application instead.

Another possible practical benefit of extending the time limit would be to afford parties (especially unions) more time to discuss particular grievances with the employer before proceedings were commenced. Both union and employer representatives told us that some grievances that had led to unfair dismissal proceedings were basically a belief by the dismissed employee that they had not been paid all their entitlements on termination. We were also told that such disputes could frequently be resolved by discussion.

**Recommendation 40:** The Panel recommends that the time limit for lodging unfair dismissal applications should be extended to 21 days (to align with the recommended amended time limit for general protections claims involving a dismissal).

## 10.8 Small Business Fair Dismissal Code

The Code was developed in consultation with the Small Business Working Group during the development of the Fair Work Bill 2008, and is made as a legislative instrument by the Minister.<sup>1134</sup> The working group was formed specifically to develop the Code, with membership drawn from peak bodies representing small businesses and one employer. There was also a Union Working Group on Unfair Dismissal formed to consult on the Code<sup>1135</sup>. Both groups were chaired by the then Minister for Small Business, Independent Contractors and the Service Economy, the Hon. Craig Emerson MP.

The Code sets out the circumstances in which a summary dismissal (a dismissal without notice or warning) is warranted, including cases of theft, fraud and violence. For under-performing employees, the Code requires the employer to give the employee a valid reason, based on the employee's conduct or capacity to do the job, why the employee is at risk of being dismissed and a reasonable chance to rectify the problem. The Code also requires the employer to allow the dismissed employee to have a support person present. For a claim involving a small business employer, FWA is required to decide whether a dismissal was consistent with the Code before considering the merits of the application.<sup>1136</sup> If FWA finds that the small business employer complied with the Code, the dismissal cannot be held to be unfair.<sup>1137</sup> The Code is accompanied by a checklist developed by the Government to help small businesses assess and record their reasons for dismissing an employee. Filling out the checklist is not a requirement for compliance with the Code, nor does completing it result in compliance.

While some employer and industry bodies called for a return of a blanket exemption from unfair dismissal laws for small business, there was some support for the continuation of the Code.<sup>1138</sup> A number of employer groups called for changes to how the Code was applied, including by allowing for the disposal of claims on the papers<sup>1139</sup>, and by tightening the circumstances in which compliance with it constitutes a complete defence to a claim.<sup>1140</sup>

Unions with an opinion about the Code were largely opposed to its continuation. The TCFUA noted that it had a disproportionate impact on employees in industries dominated by small to medium businesses, such as textile, clothing and footwear. The ACTU and the AWU argued that unfair dismissal protections should be uniform and that there

<sup>1133</sup> VECCI, p. 64.

<sup>1134</sup> FW Act, s. 388.

<sup>1135</sup> See EM, pp. lxxix–lxxx for a full membership list of these working groups.

<sup>1136</sup> FW Act, s. 396.

<sup>1137</sup> FW Act, s. 385.

<sup>1138</sup> Ai Group, p. 122; Ai Group supplementary, p. 40; COSBOA, Attachment 2, p. 10; Australian Newsagents Federation, pp. 18–21; NFF, p. 27.

<sup>1139</sup> CCIWA, p. 22, 113; MBA, pp. 47–48; BIG, p. 24.

<sup>1140</sup> COSBOA, Attachment 2, p. 10.



should not be any special rules for small business. The SDA on the other hand said that the Code should be enshrined in the legislation, rather than continue as a disallowable instrument.<sup>1141</sup>

Professor Marilyn Pittard from Monash University noted the history of attempts to accommodate the interests of small business in unfair dismissal regulation since 1993, and concluded that the Code was a 'more sophisticated and nuanced approach' and, although not perfect, was the most workable approach to date. She supported its simplicity, comparing it favourably with similar UK regulation that she said had become 'unwieldy and unworkable'.<sup>1142</sup>

Professor Pittard pointed to a number of FWA cases as evidence of a 'reasonable degree of compliance with the Code by small business employers'. She was also in favour of genuine access to a review of the merits of a dismissal when the Code had not been complied with. She concluded that overall there was a 'reasonable balance between employer interests and employee interests'.<sup>1143</sup>

Available data from FWA indicates that of applications finalised by decision between 1 July 2009 and 31 March 2012, 20 have been dismissed on the basis of compliance with the Code.<sup>1144</sup> In that time, 691 applications have been finalised by a decision on the merits or on the basis of compliance with the Code. We do not have data about how many of those 691 applications involved a small business employer, but we do know that based on information provided by employers 16.5 per cent of applications lodged in 2011–12 have involved a small business employer. Applying that percentage to the 691 applications results in a figure of 113, which we can take as an estimate of how many small business unfair dismissal claims have proceeded to a final decision on the merits.<sup>1145</sup> We do not know if the Code was at issue in each of those cases, but we can conclude from the available data that a small, but not insignificant, percentage of unfair dismissal claims that proceed past the conciliation stage are found to comply with the Code. Of course, this does not tell us what influence the Code has had in the high percentage of claims that are settled at or before the conciliation stage.

Our analysis of the cases referred to by Professor Pittard and of the more recent FWA Full Bench decision of *Pinawin v Domingo*<sup>1146</sup> leads us to a similar conclusion as Professor Pittard's about the balance achieved by the Code, although we think that its operation should be monitored as more cases are decided under it. We note that COSBOA supported the approach to applying the Code in one of those cases, *Khammaneechan v Nanakhon P/L* (the Banana Tree Cafe case)<sup>1147</sup>, to the point where they recommended that it be reflected in an amendment to the FW Act.<sup>1148</sup> The Full Bench in *Pinawin* endorsed the approach of Deputy President Bartel in the Banana Tree Cafe case (and that of Deputy President McCarthy in *Harley v Rosecrest Asset P/L*<sup>1149</sup>), in identifying the lower burden of proof a small business employer is required to meet under the Code in cases of summary dismissal. The Full Bench said there were two steps in the process:

First, there needs to be a consideration whether, at the time of dismissal, the employer held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal. Secondly it is necessary to consider whether that belief was based on reasonable grounds. The second element incorporates the concept that the employer has carried out a reasonable investigation into the matter. It is not necessary to determine whether the employer was correct in the belief that it held.<sup>1150</sup>

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<sup>1141</sup> ACTU, p. 58; AWU, p. 10; SDA, pp. 82–83; TCFUA, p.26.

<sup>1142</sup> Pittard, p. 1.

<sup>1143</sup> *ibid.*, p. 2.

<sup>1144</sup> FWA, Annual report 2009–10, Annual report 2010–11 and first three *Quarterly reports* for 2011–12.

<sup>1145</sup> We note the AFEI estimates at p. 43 that since the introduction of the FW Act there have been 89 arbitrated cases involving small businesses, of which 69 concerned unfair dismissal. The basis of this calculation is not included in the submission, but it may suggest that our estimate of 113 is on the high side.

<sup>1146</sup> [2012] FWA FB 1359, 21 March 2012.

<sup>1147</sup> [2010] FWA 7891.

<sup>1148</sup> COSBOA, Attachment 2, p. 10.

<sup>1149</sup> [2011] FWA 3922.

<sup>1150</sup> [2012] FWA FB, at [59].

This decision was handed down after the closing date for submissions to this Review. It provides relatively clear Full Bench guidance about a significant element of the Code, and is likely to lead to greater consistency in the way the Code is applied in single member decisions. It illustrates in our view the need for the case law to evolve before the need for legislative change in this area can be properly assessed. We also consider that there is emerging evidence in the FWA decisions to support Professor Pittard's assessment of the 'more sophisticated and nuanced approach' that the Code represents.

## 10.9 Process and procedures

The processes and procedures in the FW Act and adopted by FWA to resolve unfair dismissal claims were raised in several submissions. In line with the Government's policy commitments, the FW Act gives FWA significant scope to decide how to inform itself, with the aim of developing procedures that are quick, flexible and informal and meet the needs of employers and employees.

### 10.9.1 Conciliation

FWA has introduced telephone conciliation as the default method for dealing with claims in the first instance, employing specialist conciliators rather than using FWA members.<sup>1151</sup>

As noted in several submissions<sup>1152</sup> this has allowed conciliations to happen much more quickly (in most cases in four weeks compared to eight to nine weeks since July 2005 under the WR Act and Work Choices).<sup>1153</sup> This conclusion is supported by caseflow measures in the FWA Annual report 2010–11, which show a reduction in both the time taken from lodgment to first conciliation and from lodgment to finalisation of applications.<sup>1154</sup> COSBOA noted that telephone conciliation had resulted in cost savings for small business and JobWatch concluded that they had proved to be successful and often preferable to face-to-face conferences.<sup>1155</sup>

The annual report also shows a slight increase in the percentage of claims settled at conciliation, from 75 per cent in the final year of Work Choices to 81 per cent in 2009–10 and 76 per cent in 2010–11<sup>1156</sup>. Preliminary data from the first three quarters of the current financial year indicates that the settlement rate is tracking at 80–81 per cent.<sup>1157</sup>

Research commissioned by FWA in 2010 into the views of applicants, respondents and their representatives demonstrated strong support for telephone conciliation and for the attributes of the conciliators. The research found that '78% of applicants [and] 81% of respondents ... agreed or strongly agreed the conciliation of an unfair dismissal application by telephone conference works well'.<sup>1158</sup> Telephone conciliation was slightly less well received by representatives, with only 58 per cent agreeing or strongly agreeing that conciliation by telephone conference works well. However, the overwhelming majority of representatives felt the conciliations were well managed (91 per cent), fair (86 per cent) and that it was a valuable and worthwhile process (82 per cent).<sup>1159</sup> The vast majority of applicants and respondents felt that telephone conciliation was efficient and cost effective (86 and 88 per cent respectively). Seventy-two per cent of applicants and 59 per cent of respondents reported that telephone conciliation was more comfortable than face-to-face conciliation. The research also found that all participants were happy with the conduct and performance of the conciliators.<sup>1160</sup>

<sup>1151</sup> FWA, 'Unfair dismissal conciliation research', press release, 19 November 2010.

<sup>1152</sup> For example, Forsyth and Stewart, p. 32; ASU C&SQ, p. 4; AIER, p. 30; Law Society of NSW, p. 6; AFEI, p. 39.

<sup>1153</sup> Forsyth and Stewart, p. 32.

<sup>1154</sup> FWA Annual report 2010–11, p. 84. The measures are based on the time taken for a first conciliation or finalisation for 85 per cent of the applications.

<sup>1155</sup> COSBOA, Attachment 2, p. 6; JobWatch, p. 36.

<sup>1156</sup> AIRC Annual report 2008–09, p. 10; FWA Annual report 2009–10, p. 13, and Annual report 2010–11, p. 13.

<sup>1157</sup> FWA, *Quarterly Reports, 2011–12*.

<sup>1158</sup> *Fair Work Australia Unfair Dismissal Conciliation Research*, November 2010, TNS Social Research, p. 5.

<sup>1159</sup> *ibid.*, p. 32.

<sup>1160</sup> *ibid.*, pp. 37–44.

Support for telephone conciliation also came from Ai Group, who referred to an internal survey of its members, which found most considered it an appropriate way of conciliating unfair dismissal claims.<sup>1161</sup> The Master Grocers Association said that telephone conciliation was preferable to face-to-face hearings, as it was less expensive and had had a high success rate in resolving claim.<sup>1162</sup> Forsyth and Stewart felt that the FWA research ‘perhaps overstates’ the degree of representatives’ satisfaction with telephone conciliation, but nevertheless concluded that ‘in terms of dealing quickly with claims and minimising costs, the present system must be considered a success’.<sup>1163</sup>

While telephone conciliation was generally supported, a number of stakeholders felt that it was not appropriate in all circumstances.<sup>1164</sup> Some employers stated that the ability for parties to see each other face to face results in better outcomes<sup>1165</sup>, while at least one community group submitted that telephone conciliation is more difficult for unrepresented litigants.<sup>1166</sup> The Australian Nursing Federation asserted that the lack of visual cues made misunderstandings more common during telephone conciliation.<sup>1167</sup> There was a degree of support for parties being able to choose face-to-face conciliation.<sup>1168</sup>

Some submissions suggested that conciliations should be undertaken by FWA members rather than trained conciliators.<sup>1169</sup> The Australian National Retailers Association reported concern from members that some conciliators were more focused on ‘ticking boxes’ than on achieving a fair outcome.<sup>1170</sup>

### 10.9.2 Unmeritorious claims

Some stakeholders suggested a certificate or statement on the merits of a claim should be issued if conciliation is unsuccessful to reduce the number of unmeritorious or vexatious claims.<sup>1171</sup> For example, Clubs Australia Industrial proposed that a written opinion be issued on conclusion of an unsuccessful conciliation, and the applicant then has seven days to pursue the claim further. If the opinion is unfavourable to a party, and that party loses in a subsequent hearing, the other party would be entitled to lodge a claim for costs.<sup>1172</sup>

Several submissions proposed changes to how claims are initially dealt with before conciliation.<sup>1173</sup> Two themes were that some matters should be settled ‘on the papers’ before conciliation is scheduled and that applicants should be required to provide more information in the application form to substantiate the claim. COSBOA suggests that the factors set out at s. 396 of the FW Act (initial matters to be considered before the merits) could be considered earlier in the process of dealing with a claim, possibly before conciliation. The MBA and the AHA contend that it would reduce the number of speculative or vexatious claims if applicants were required to outline more of their cases in their applications.

### 10.9.3 Reneging on settlements

Both employer organisations and community legal representatives raised the possibility of a party reneging on a settlement agreement. ACCI suggests that FWA should have a power to dismiss an application if settlement is reached

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<sup>1161</sup> Ai Group, p. 123.

<sup>1162</sup> MGA, p. 14.

<sup>1163</sup> Forsyth and Stewart, p. 32.

<sup>1164</sup> See, for example: ACTU, p. 64; AIER, p. 30; ANF, p. 14; ANRA, pp. 26–27; ASU, p. 13; Bartier Perry, pp. 3–4; BMIAA, p. 8; Kingsford Legal Centre, pp. 28–29; MPAQ, p. 5; NUW, p. 26; Redfern Legal Centre, pp. 6–7; TCFUA, p. 25.

<sup>1165</sup> For example, MPAQ, p. 5.

<sup>1166</sup> Redfern Legal Centre, p. 4.

<sup>1167</sup> ANF, p. 14.

<sup>1168</sup> AFEI, p. 48; AHA, p. 20; CCIWA, p. 22; COSBOA, Attachment 2, pp. 10–18; MBA, pp. 48–49.

<sup>1169</sup> For example: ACCI, p. 18; Australian Motor Industry Association, p. 26.

<sup>1170</sup> ANRA, p. 32.

<sup>1171</sup> ACCI p. 18; ACMCA p. 3; JobWatch p. 38. Also recommended by a confidential submission.

<sup>1172</sup> CAI, pp. 12–23.

<sup>1173</sup> COSBOA, Attachment 2, p. 18; AHA, p. 20; CCIWA, p. 22; MBA, p. 49; AFEI p. 48.

but the employee reneges.<sup>1174</sup> The Kingsford Legal Centre supports registering settlement agreements with FWA, which would be given power to enforce them.<sup>1175</sup>

#### 10.9.4 Conferences and hearings

As outlined earlier, the policy objective was that the processes for determining claims would be more informal, with FWA required to reach a conclusion in a conference with ‘no formal written submissions, no cross examination and no hearing’ and with limits on legal representation. While Forsyth and Stewart note that the FW Act does not mention ‘claims being resolved at a single, lawyer-less conference’, the FW Act clearly does allow the option of a conference to deal with claims involving disputed facts. It also provides that FWA should not hold a hearing to deal with a matter unless it considers it appropriate to do so taking account of listed factors (s. 399).

FWA has provided to us figures demonstrating that, despite the policy intention, the vast majority of matters that proceed beyond conciliation are being dealt with in hearings rather than conferences. The usual practice appears to involve filing witness statements and outlines of argument. The reluctance of FWA members to use the conference option appears to stem partly from a factor identified by Forsyth and Stewart, namely the risk of ‘inevitable challenges for denial of procedural fairness’.<sup>1176</sup> Faced with this risk, FWA members appear to be choosing the safer—and more familiar—option of a formal hearing.

CCIWA also queried whether the policy intention of a less formal approach had been achieved. It proposed ‘an inquisitorial approach to replace the current adversarial system’.<sup>1177</sup> Clubs Australia Industrial supported s. 399 and its presumption against FWA holding a hearing, but felt that this was not occurring in practice.<sup>1178</sup> The NUW supported ‘the use of inquisitorial powers to investigate unfair dismissal applications and making binding decisions at an earlier stage of proceedings’.<sup>1179</sup>

The FW Act on its face provides FWA with considerable flexibility to handle unfair dismissal applications, and it seems that the tribunal has adopted practices to deal with claims more efficiently and usually at reduced cost. Using conciliators and telephone conciliation has undoubtedly generally increased the speed of resolution of claims, and reduced costs for the parties. However, it does seem that there may be room to improve how flexibly claims are dealt with to better meet the objects of the provisions.

The legislation has significant scope already for FWA to consider administrative changes that would take into account the views of most stakeholders. We also note the recommendation in ACCI’s supplementary submission<sup>1180</sup> that ACCI and the ACTU engage in tripartite discussion with FWA on ways to improve flexibility in dealing with the manner and scheduling of conciliation. Similarly, the ASU has suggested that issues regarding conciliation should be brought to FWA’s attention through the appropriate consultative forums and user groups.<sup>1181</sup>

Some parties are concerned that some conciliators appear overly focused on disposing of applications, and that this can lead to encouraging compensation payouts in applications lacking any real merit. Some unions commented that one disadvantage of telephone conciliation is that the applicant can feel that they have been denied their ‘day in court’. To the extent that these concerns have substance, we think they can and should be taken up in the type of consultative processes advocated by ACCI.

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<sup>1174</sup> ACCI, p. 16.

<sup>1175</sup> Kingsford Legal Centre, pp. 29–30.

<sup>1176</sup> Forsyth and Stewart, p. 31.

<sup>1177</sup> CCIWA, p. 116.

<sup>1178</sup> CAI, p. 13.

<sup>1179</sup> NUW, p. 25.

<sup>1180</sup> ACCI supplementary, p. 11.

<sup>1181</sup> ASU, p. 15.

We are not convinced, however, that a case has been made out for all conciliations to be carried out by FWA members, nor that there should be a guaranteed right for a face-to-face conciliation. It does not appear that providing FWA with flexibility to determine these matters has led to any obvious injustices or unintended results. Requiring FWA members to conduct conciliations would inevitably create undesirable delays in disposing of cases.

Regarding the determination of claims where conciliation is unsuccessful, we conclude that through a combination of the FW Act provisions and FWA practice, the objective to dispose of claims flexibly and informally is not being fully met. This is partly due to the absence of clear direction to FWA about its powers under s. 398 dealing with conferences. This can be remedied by removing the distinction between hearings and conferences, and providing that claims be dealt with in a proceeding that is informal, inquisitorial and determinative. This may require some consequential amendments to expressly provide for a conciliation process—a matter we leave for the Government.

**Recommendation 41:** The Panel recommends that Division 5 of Part 3-2 be amended to provide that FWA can deal with applications by way of a hearing process that is informal, inquisitorial and determinative.

We also consider there is merit in expanding the capacity of FWA to dismiss applications that are totally lacking in merit, or when an applicant has failed to attend a proceeding, adhere to a settlement or comply with FWA directions. We note that s. 397 requires FWA to conduct a conference or hold a hearing if a matter involves disputed facts. This limits FWA's power to dismiss unmeritorious, vexatious or frivolous applications under s. 587 on the papers. We are advised that FWA will sometimes dismiss a matter without a conference (or 'on the papers') if there is no dispute that an employee's service was less than a relevant qualifying period. FWA is reluctant to exercise this option in other circumstances, and s. 397 would appear to be a significant factor in this.

Under Work Choices, the tribunal was given express power to decide not to hold a hearing when determining whether a claim should be dismissed for want of jurisdiction or because it was frivolous, vexatious or lacking in substance (see ss. 645 and 646). Presumably to deal with natural justice concerns, if the tribunal decided not to hold a hearing, it was required under s. 648 to invite the employee and employer to provide further information before making a decision. We consider that the FW Act should be amended to include similar provisions. We also believe that FWA's powers to dismiss applications should be extended to cases where a settlement agreement has been concluded, where an applicant fails to attend a proceeding (see s. 657 of Work Choices) or where an applicant fails to comply with any FWA directions. In relation to settlement agreements, we note the Federal Court's view in *Australian Postal Corporation v Gorman* [2011] FCA 975 that FWA is able to consider these in deciding whether to dismiss claims under s. 587, but consider that the FW Act should be amended to make this clear.

**Recommendation 42:** The Panel recommends that the FW Act be amended to give FWA the discretionary power to dismiss applications under s. 394 in circumstances where the parties have concluded a settlement agreement, or where an applicant fails to attend a proceeding relating to the application, or where the applicant fails to comply with FWA directions or orders relating to the application.

**Recommendation 43:** The Panel recommends that the FW Act be amended to provide that FWA is not required to hold a hearing when exercising powers to dismiss an application under s. 587, nor when exercising the recommended powers to dismiss an application involving a settlement agreement or a failure by an applicant to attend a proceeding or comply with an FWA direction or order. In each of those circumstances, FWA must be required to invite the applicant and the employer to provide further information before making a decision to dismiss the application or not.

It would be desirable if applicants were required to include more detail on the unfair dismissal application form. The content of the form is a matter for FWA rules made by the President under s. 609, and we do not intend to alter this state of affairs. Additional information would enable employers to gain a better appreciation of the grounds on which an application is based, and may in some circumstances allow for the dismissal of claims ‘on the papers’. This may require additional material about how to fill in the relevant forms to be given to the parties. In this context, we note our recommendation that the timeframe for lodging an unfair dismissal application be increased to 21 days.

**Recommendation 44:** The Panel recommends that the FWA President give consideration to requiring applicants to provide more information about the circumstances of the dismissal in the initial documentation lodged with FWA.

We also recommend extending the circumstances in which costs can be ordered against parties and their representatives. We see merit in reintroducing the provisions referred to above, which enable costs to be awarded against either side when there is an unreasonable failure to discontinue or settle proceedings, or where unreasonable acts of omissions result in costs being incurred. Further, we note that the power in s. 401 to award costs against a lawyer or paid agent is only enlivened once FWA has granted permission for the lawyer or agent to represent a party. However, many cases do not reach the formal stage where permission is sought and given. Circumstances may arise before that point when it would be appropriate to exercise the power conferred by s. 401. The power to award costs should not depend on the formal grant of representational rights.

**Recommendation 45:** The Panel recommends that the FW Act be amended to allow FWA to make costs orders against a party that has unreasonably failed to discontinue a proceeding, or that has unreasonably failed to agree to terms of settlement that could have led to discontinuing the application, or that has through an unreasonable act or omission caused the other party to incur costs.

**Recommendation 46:** The Panel recommends that s. 401 be amended to allow FWA to make an order for costs against a lawyer or paid agent whether or not FWA has granted permission for the lawyer or agent to represent a party in the relevant application.

We consider sensible ACCI’s previously noted suggestion that there be tri-partite discussions with the FWA unfair dismissals panel head and the President about administrative arrangements for processing unfair dismissal applications. We are confident FWA would share our view that the reputation of the entire system of workplace regulation embodied in the FW Act could be tarnished in the eyes of the community, if large numbers of employers were subjected to a legal process which led to an outcome that they believed was completely unfair and unfounded. But as we discussed earlier, the FW Act should provide a remedy to employees with a genuine grievance. Subject to the recommendations we have made, creating the appropriate procedural balance is best left to FWA drawing on its experience and expertise.

## 10.10 Distributional impacts on employers

As noted above, many more employers may now be at risk of having to defend an unfair dismissal claim. The new arrangements include measures to reduce the burden of dealing with a claim, which a number of stakeholders submitted have been effective.<sup>1182</sup> This means that for employers with more than 100 employees the burden for defending an unfair dismissal claim is less compared to the previous system. For employers with 100 or fewer

<sup>1182</sup> AFEI, p. 39; AIER, p. 30; ASU—C&SQ, p. 4; Forsyth and Stewart, p. 32; JobWatch, p. 36; Law Society of NSW, p. 6.

employees, there is an increased regulatory impact as they may now be subject to an unfair dismissal claim, although the impact will likely be less than under previous systems.

It is not possible to estimate precisely the number of employers affected by this change as the relevant ABS data release, *Counts of Australian businesses, including entries and exits, Jun 2007 to Jun 2011* (ABS Cat. No. 8165.0) does not provide a breakdown to the relevant employment size categories. A rough estimate<sup>1183</sup> of the proportion of businesses employing 1–100 employees is 37–39 per cent of all businesses (or roughly 94 per cent of employing businesses).

ABS data<sup>1184</sup> based on a different definition of small business (that is, businesses with 1–19 employees) indicates that the concentration of small businesses is greatest in the construction, retail trade and professional, scientific and technical services industries. Together, these three sectors account for 41 per cent of employing small businesses. Therefore, the changes to unfair dismissal coverage may have a greater impact on these industries. The same publication shows, however, that small businesses account for 80 per cent or more of the total number of employing businesses in every industry measured. This means that a large proportion of businesses in every industry will be affected by the changes in coverage.

## 10.11 Benefits to employees

The unfair dismissal provisions clearly benefit employees of businesses with 100 or less employees whose access to unfair dismissal protections had been removed by the previous regulatory framework. These employees can now access a remedy if they are dismissed in a manner that is harsh, unjust or unreasonable. The remedy may be reinstatement or compensation, with a six-month cap on compensation. In addition to these direct impacts, there are several possible flow-on effects, such as increased job security, the ability to voice an issue in the workplace and to influence factors such as working hours.

These are particularly important for vulnerable employees. For example, Pocock et al<sup>1185</sup> undertook a qualitative study of the impacts of Work Choices on women in low paid employment. The study suggested a link between protection from unfair dismissal and ability to influence working hours or request flexibility. While a comparable study has not been undertaken under the FW Act, the findings suggest that improved access to unfair dismissal protections is likely to have a positive effect on vulnerable employees in particular.

The act of challenging an unfair dismissal can also give a sense of justice to dismissed employees, although this is difficult to quantify.

Aside from the increased ability to challenge a claim, employees have also benefited from the more streamlined procedures for resolving claims. As discussed above, the changes have led to the speedier resolution of claims at reduced costs.

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<sup>1183</sup> Assuming a linear progression from the 1–19 employee category to the 20–199 employee category.

<sup>1184</sup> *Counts of Australian Businesses, including Entries and Exits, Jun 2007 to Jun 2011*, Cat. No. 8165.0. 2012, ABS, Canberra.

<sup>1185</sup> B Pocock, J Elton, A Preston, S Charlesworth, F MacDonald, M Baird, R Cooper and B Ellem, 'The impact of "Work Choices" on women in low paid employment in Australia: a qualitative analysis', *Journal of Industrial Relations*, vol. 50, 2008, p. 475.

# 11 General protections

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## 11.1 Introduction

Work Choices contained a number of protections against discrimination and unfair treatment. However, the Government considered that the scheme lacked regulatory coherence, involved duplication and contained inconsistencies. The Work Choices protections were scattered throughout the Act, and were not always easy to understand or enforce.<sup>1186</sup> There were gaps in the range of conduct proscribed, and inconsistency in the processes and remedies available in some instances. Issues with the discrimination protections, which the Government specifically sought to address in the FW Act, are discussed at 11.4.

Forward with Fairness foreshadowed that the FW Act would give effect to ‘important workplace rights that are essential to a functioning democracy’, and as part of this would ‘recognise that freedom of association is vital for the proper functioning of a fair industrial relations system built on the concept of democracy in the workplace’. It would be unlawful to prevent exercise of this free choice ‘by threats, pressure, discrimination or victimisation’. Discrimination because of the nature of industrial instrument that covers employees would also be prohibited. It also separately foreshadowed ongoing protections from unlawful dismissal.<sup>1187</sup>

In her 2008 Press Club Speech the then Deputy Prime Minister indicated that protections would extend to union membership, participation in bargaining or industrial action, representing other workers or making enquiries about pay or entitlements, observing that ‘many of these rights already exist but our new legislation will make them easier to follow and simpler to enforce’.<sup>1188</sup>

In the FW Bill all these protections were grouped together as the general protections. The EM provides that the consolidated protections ‘are intended to rationalise, but not diminish, existing protections’ and ‘[i]n some cases, providing general, more rationalised protections has expanded their scope’.<sup>1189</sup> The provisions from Work Choices incorporated into the general protections include unlawful termination, freedom of association, sham arrangements regarding independent contractors and various other specific protections such as a right to reasonably refuse to work on a public holiday and protection from coercion in relation to an enterprise agreement.

The FW Act was also intended to provide for a ‘single enforcement process’ and ‘combined set of remedies’ including ‘monetary penalties, injunctions, compensation and reinstatement in the case of dismissal’. FWA was intended to hold conferences in an attempt to resolve matters in most cases involving dismissal.<sup>1190</sup>

### 11.1.1 Incidence

Significant numbers of employers submitted concerns with the general protections, especially the level of uncertainty that remains over the operation of the provisions and the relative ease with which unmeritorious claims proceed through to conciliation and hearing.<sup>1191</sup>

Employers also sought to draw the Panel’s attention to the allegedly common practice of dismissed employees seeking redress for their dismissal through the general protections jurisdiction rather than the unfair dismissal jurisdiction. This problem was variously attributed to the availability of uncapped compensation for victims of adverse action, the

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<sup>1186</sup> DEEWR submission to the FW Bill inquiry, p.38.

<sup>1187</sup> FWF, pp. 12, 20.

<sup>1188</sup> PCS.

<sup>1189</sup> EM, p. 212.

<sup>1190</sup> DEEWR submission to the FW Bill inquiry, pp. 38–40.

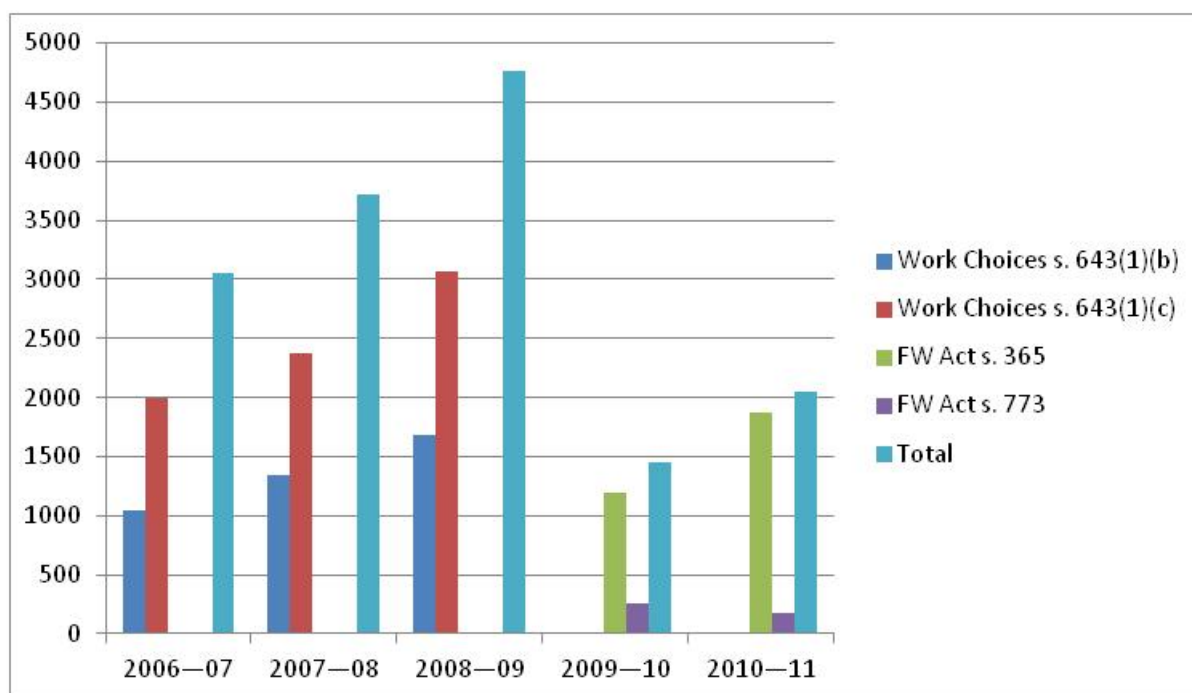
<sup>1191</sup> ACCI, p. 162; Ai Group, p. 21; AMIF, p. 18; ARA, p. 6; CELRL, p. 8; CAI, p. 16; Employment Law Centre of WA, p. 25; BMIAA, p. 7; Victorian Government, p. 44; also referred to in a confidential submission.



breadth of the protections, and the time limit after a dismissal within which a person can make an application for a remedy, which is longer than the time limit for making an application alleging unfair dismissal.

The level of concern expressed by some stakeholders about the operation of the general protections provisions does not appear to reflect the incidence of general protections disputes. FWA data shows that there were 1871 general protections dismissal applications under s. 365 and 175 unlawful termination applications under s. 773 (by non-national system employees) in 2010–11 (a total of 2046 applications).<sup>1192</sup> This was 41 per cent higher than the 1450 applications received in 2009–10.<sup>1193</sup> However, the 2010–11 figures remain much lower than the comparable number of applications under the final year of the Work Choices laws.

**Chart 11.1—Unlawful termination and general protections (involving dismissal) applications under Work Choices and the FW Act**



Source: AIRC, FWA.

Unlawful termination figures under Work Choices include unlawful termination applications (s. 643(1)(b)) and applications that alleged an unfair and unlawful termination (s. 643(1)(c)).

General protections figures under the FW Act include general protections (involving dismissal) applications (s. 365) and unlawful termination applications by non-national system employees (s. 773).

When comparing the number of unlawful termination applications and general protections (involving dismissal) applications over time, it is important to note that under Work Choices employees could make an application for relief alleging their dismissal was both unfair and unlawful. There were 4760 applications involving unlawful termination in 2008–09, the last year of the previous legislation.<sup>1194</sup> We note that those applications included 1687 applications claiming unlawful termination only and 3073 applications claiming both unfair dismissal and unlawful termination. Even taking account of the dual-application process under Work Choices, the current level of applications is hardly alarming. In light of the more significant exclusions from the unfair dismissal laws under Work Choices, it is possible that many employees turned to unlawful termination claims as an alternative. Some submissions assert that the same has occurred under the FW Act. However, given that eligibility to bring an unfair dismissal claim is much greater under the

<sup>1192</sup> FWA Annual report 2010–11, pp. 80–81.

<sup>1193</sup> FWA Annual report 2009–10, pp. 76–77.

<sup>1194</sup> AIRC Annual report 2008–09, pp. 8–9.

FW Act when compared to Work Choices, it seems to us that the FW Act is likely to have stemmed, rather than increased, this practice.

If an application is made under s. 365, FWA is required to conduct a conference to deal with the dispute.<sup>1195</sup> When FWA is satisfied that all reasonable attempts to resolve the dispute at conference have been, or are likely to be, unsuccessful, it must issue a certificate to that effect.<sup>1196</sup> FWA has only published the number of certificates issued under s. 369 from the first quarter 2010 onwards. Generally there has been a minor increase in quarter from the 125 certificates issued in the first quarter of 2010 to the 202 certificates issued in the third quarter of 2011–12 (latest available data).<sup>1197</sup> As mentioned previously, the number of applications under s. 365 in 2010–11 was 1871. The number of certificates issued under s. 369 for the corresponding period was 608, indicating that approximately two-thirds of s. 365 applications are resolved or withdrawn during the conciliation stage.<sup>1198</sup>

The number of applications under s. 372 (contravention of the general protections not involving dismissal) also increased between 2009–10 (254) and 2010–11 (504).<sup>1199</sup>

### 11.1.2 Impact on employers' ability to manage their business

A number of employers submitted that the risks associated with the general protections are a major barrier to effectively managing their business.<sup>1200</sup> The Australian Retailers Association said the concerns faced by employers include:

[A] fear of initiating performance management processes for fear of being seen to infringe these provisions, and a lack of understanding about how to manage employee absenteeism in a manner that is fair to both the employee and employer without leading to a claim in this area.<sup>1201</sup>

The Panel is aware of at least two cases in which the Federal Court or the Federal Magistrates Court have considered whether behaviour characterised as 'performance management' has breached the general protections. In both *Ramos v Good Samaritan Industries (No. 2)*<sup>1202</sup> and *Bayford v Maxxia Pty Ltd*<sup>1203</sup> the Federal Magistrates Court held that the general protections provisions do not prevent employers from taking reasonable disciplinary action against employees.

The Panel has not seen any evidence of a judicial interpretation of the general protections which infringes unjustly on an employer's right to initiate performance management processes against an underperforming employee. With time, the Panel believes a body of jurisprudence regarding the general protections will develop, which should provide employers and employees with greater certainty about the range of behaviour prohibited by the general protections.

### 11.1.3 Scope

Employers attributed much of their uncertainty to the breadth of the term 'workplace right'. Some employers recommended the meaning be narrowed to improve understanding and reduce their potential liability.<sup>1204</sup> One such example was in relation to s. 341(1)(c), which provides that an employee's ability to make a complaint or inquiry about their employment is a workplace right. The meaning of 'complaint or inquiry', various stakeholders suggested, needs to be clarified<sup>1205</sup> or removed.<sup>1206</sup>

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<sup>1195</sup> FW Act, s. 368.

<sup>1196</sup> FW Act, s. 369.

<sup>1197</sup> FWA *Quarterly reports*.

<sup>1198</sup> Noting that s. 369 certificates issued each quarter don't necessarily correspond with the s. 365 applications brought in the same period.

<sup>1199</sup> FWA Annual report 2009–10, p. 76; FWA Annual report 2010–11, p. 80.

<sup>1200</sup> Ai Group, p. 21; ARA, p. 6; BMIAA, p. 7; BCA, p. 64; MPMSAA, p. 6.

<sup>1201</sup> ARA, p. 6.

<sup>1202</sup> [2011] FMCA 341 (24 August 2011).

<sup>1203</sup> [2011] FMCA 202 (12 April 2011).

<sup>1204</sup> HIA, p. 50; BHP, p. 16; COSBOA, p. 11.

<sup>1205</sup> ANF, p. 11; ANRA, p.28; NSWBC & ABI, p. 74; BHP, p. 16; Forsyth and Stewart, pp.34–35.

In response to these and other concerns (see below), a number of employers and employer representatives have called for the general protections to be removed completely from the FW Act.<sup>1207</sup>

The National Farmers' Federation (NFF) speculated that while there is still a level of uncertainty about the scope of the general protections, which is leading to some novel claims being brought by applicants, this may be part of the testing of the terms that is common when any new legislation is introduced.<sup>1208</sup> The NFF, along with a number of unions, praised the clarity resulting from grouping multiple protections together in one Part of the FW Act.<sup>1209</sup>

In contrast to the employer representatives, unions tended to recommend the general protections be expanded to cover a broader range of conduct. In particular, the ACTU requested the FW Act be amended to include a positive statement of the reasonable activities that union delegates are empowered to undertake at the workplace. The ACTU detailed the experiences of union delegates whose attempts to do their job as a delegate in the workplace are often frustrated by the employer:

They are told they cannot put up union notices on the noticeboard, send union emails on the company system, or talk about union business with colleagues during work time. They are told that these activities breach company policy, or their contracts of employment, or other employees' 'right not to join a union'.<sup>1210</sup>

The ACTU argued that while the Full Court of the Federal Court decision in *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education*<sup>1211</sup> has gone some way to protect union delegates in the workplace, the lack of a clear positive statement of the duties and rights of a delegate has meant that union members are less willing to take on the role of a workplace delegate.<sup>1212</sup> Union NSW echoed the call for the general protections provisions of the FW Act to include specific protections for employees undertaking or participating in union activities.<sup>1213</sup>

Various issues relating to coverage by the general protections arose in submissions, including:

- The Employment Law Centre of WA recommended that s. 342 be amended so that labour hire workers can make general protections claims against host businesses<sup>1214</sup>
- Ai Group contended that high-income earners should be excluded from the general protections provisions<sup>1215</sup> The Association of Professional Engineers, Scientists and Managers Australia opposed this<sup>1216</sup>
- The Australian Mines and Metals Association (AMMA) submitted that the application of the general protections to prospective employees and independent contractors is unwarranted and should be removed<sup>1217</sup> The ACTU opposed this proposal in its supplementary submission<sup>1218</sup>
- The Australian Workers Union noted that the table in s. 342 does not refer to adverse action by a 'person' against another 'person' or 'employee' to enable people or employees to bring a claim against another individual such as a manager if the individual is in breach<sup>1219</sup>
- A number of employee advocates submitted that the definition of 'workplace instrument' in s. 12 should be amended to include common law contracts.<sup>1220</sup>

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<sup>1206</sup> ANRA, p. 28.

<sup>1207</sup> AMMA, p. 15; AMIF, p. 21; Business SA, p. 9; CCIQ, p. 15; CCIWA, p. 19; IPA, p. 8; MBA, p.51.

<sup>1208</sup> NFF, p. 24.

<sup>1209</sup> ANF, p. 10; NFF, p. 24; TWU, p. 3.

<sup>1210</sup> ACTU, p. 44.

<sup>1211</sup> [2011] FCAFC 14 (9 February 2011).

<sup>1212</sup> ACTU, p. 44.

<sup>1213</sup> Unions NSW, p. 6.

<sup>1214</sup> Employment Law Centre of WA, p. 32.

<sup>1215</sup> Ai Group, p. 114.

<sup>1216</sup> APESMA supplementary, p. 3.

<sup>1217</sup> AMMA, p. 16.

<sup>1218</sup> ACTU supplementary, p. 17.

<sup>1219</sup> AWU, p. 8.

Given the limited evidence available about the impact of the term ‘workplace right’ encompassing an employee’s ability to make a complaint or inquiry the Panel is not inclined to make any recommendation. Similarly, the Panel believes there are sufficient protections in the FW Act to ensure employees are adequately represented in the workplace, and have decided against recommending a positive statement of delegates’ rights.

## 11.2 The Barclay decision

Nearly every party who made a submission about the operation of the general protections referred to the Full Court of the Federal Court of Australia decision in the Barclay case, a matter currently on appeal to the High Court of Australia. In this case, the majority (Justices Gray and Bromberg) overturned the first instance decision of Justice Tracey, finding that the employer had contravened the ‘industrial activities’ protection in the general protections when it took action against the employee, Mr Barclay, (including suspending him from employment and denying him internet access at the workplace) after he emailed union members in his capacity as a union delegate.

The employer argued that action was taken against Mr Barclay because he had breached the Bendigo Regional Institute of Technical and Further Education’s (BRIT) code of conduct. Mr Barclay alleged that BRIT’s conduct constituted adverse action because:

- he was an officer of an industrial association (s. 346(a))
- he engaged in an industrial activity by representing or advancing the views, claims or interests of his union, the Australian Education Union (AEU) (ss. 346(b) and 347(b)(v))
- he engaged in industrial activity by encouraging or participating in a lawful activity organised or promoted by the AEU (ss. 346(b) and 347(b)(iii))
- he exercised a workplace right as a representative of the AEU in the resolution of a dispute or grievance under the BRIT collective agreement
- he exercised a workplace right by participating in a dispute resolution process under the BRIT collective agreement.

In determining what motivated the dismissal, the majority stated that while the state of mind or subjective intention of the employer is centrally relevant, it does not determine whether the employer acted for a prohibited reason. What does is the ‘real reason’ behind the employer’s conduct, not what the employer thinks was the reason. ‘The real reason’, they found, ‘may be conscious or unconscious, and where unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator held a benevolent intent’.

The majority found that the employee was engaged in industrial activity when he sent the email and engaged in the other conduct complained of. Justices Gray and Bromberg found that the relevant causal connection between the adverse action and the industrial activity existed because one of the significant reasons for the action that the employer gave was founded on the sending of the email, done by the employee in his capacity as a union officer (and not in his capacity as an employee). The majority allowed the appeal and set aside the first instance decision. They found that the employer had contravened s. 346(a) and (b) of the FW Act.

BRIT appealed this decision. The High Court heard the appeal on 29 March and a decision is pending. The then Minister for Tertiary Education, Skills Jobs and Workplace Relations intervened in the appeal, under s. 569 of the FW Act.

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<sup>1220</sup> Jobwatch, p. 33; Kingsford Legal Centre, pp. 14–15; Australian Federation of Air Pilots, p. 1. In *Barnett v Territory Insurance Office* [2011] FCA 968 (24 August 2011), the Federal Court ruled that a common law contract is not a ‘workplace instrument’ for the purposes of s. 341(1), meaning that agreed rights and obligations in a common law contract are not able to be enforced under the FW Act. The Australian Federation of Air Pilots, at page 3 of its submission, commented that by not including common law contracts of employment in the definition of a workplace instrument parties are left to enforce these contracts through the courts. The Federation submitted that this often costly process may deter employees from attempting to enforce their rights.

A number of employer representatives submitted that if the decision is not overturned on appeal, the relevant provisions of the FW Act should be amended to ensure a lower threshold is applied in determining the reason for the relevant conduct.<sup>1221</sup> Employer representatives expressed concern that the Federal Court's decision suggests:

- that union membership may invoke certain privileges over and above the general protections granted to all employees by the FW Act<sup>1222</sup>
- that future general protections claims (brought by union delegates) will be almost impossible to defend given that the innocent state of mind of the employer is not determinative (coupled with the burden of the reverse onus of proof requirements).<sup>1223</sup>

This second concern may be largely unfounded according to Forsyth and Stewart. They note that in several recent cases, employers have been able to show that disciplinary action was motivated by performance or conduct.<sup>1224</sup>

The Centre for Employment and Labour Relations Law (CELRL) and Ryan Carlisle Thomas Lawyers agreed with the approach taken by the Full Court. CELRL argued in favour of maintaining the precedent established by the Federal Court as:

literature on the role of unconscious motivation in anti-discrimination law suggests that people may act for reasons that they are unaware of or refuse to admit to themselves, such as unconscious prejudice. It is possible that unconscious or unadmitted motivations could also influence management in relation to 'industrial activities and 'workplace rights'.<sup>1225</sup>

The majority in *Barclay* (Justices Gray and Bromberg) said that while the employers' subjective intention will be relevant to determining whether adverse action occurred, it will not be decisive. A person who allegedly takes adverse action must establish that the 'real reason' for taking the action was not motivated at all by the employee's participation in lawful industrial activity. Justice Lander disagreed, finding that the central consideration is the subjective intention of the person taking the alleged adverse action.

The Panel prefers the approach taken by Justice Lander. If the High Court adopted his view, employers would have access to the defence that their belief about the lawfulness of their action was honestly held and reasonable considering all of the circumstances. If the employer gives testimony of such a belief about the lawfulness of the action, the employer no doubt would be cross-examined. To succeed, the employer would have to convince the judge, on a balance of probabilities, that in all of the circumstances the belief was honestly and sincerely held.

Despite being aware that this interpretation in theory and perhaps in practice may reduce employee protections, the Panel doubts that this would be significant.

If the High Court adopts the majority view of Justices Gray and Bromberg in the *Barclay* Case, the Panel recommends the Government give employers a broader defence, especially considering employers bear the onus of proof, by legislating the approach taken by Justice Lander.

**Recommendation 47:** The Panel recommends that Division 7 of Part 3-1 be amended so that the central consideration about the reason for adverse action is the subjective intention of the person taking the alleged adverse action.

<sup>1221</sup> ACCI, pp. 165–166; ANRA, p. 29; CCIWA, p. 99.

<sup>1222</sup> ANRA, p. 29; CCIWA, p. 99.

<sup>1223</sup> ANRA, p. 28, Ai Group, p. 104.

<sup>1224</sup> Forsyth and Stewart, p. 36.

<sup>1225</sup> CELRL, p. 8.

## 11.3 Evidentiary burdens for employers

### 11.3.1 Multiple reasons for action

The 'sole or dominant reason' test was introduced in the Freedom of Association provisions of the Work Choices legislation, and applied to one of the 16 'prohibited reasons' for action, namely that the person was entitled to the benefit of an industrial instrument, an order of an industrial body or the Australian Fair Pay and Conditions Standard (AFPCS).<sup>1226</sup> For all other prohibited reasons, the test was whether the conduct was done 'for a prohibited reason, or for reasons that include a prohibited reason'.<sup>1227</sup>

Section 360 of the FW Act deals with the extent to which a person's action must be motivated by a particular reason to establish a contravention of the general protections. In contrast to the 'sole or dominant reason' test, it provides that a person takes action for a particular reason if the reasons for the action include that reason.

Numerous employers called for the reintroduction of the 'sole or dominant reason' test for assessing whether the action taken was in breach of the general protections.<sup>1228</sup> Employers submitted that claims should not be able to proceed if other, more valid, more significant reasons exist for the adverse action. AMMA suggested that poor performance or gross misconduct may be other more valid, more significant reasons.<sup>1229</sup>

In the Panel's view, the 'sole or dominant reason' test was a short-term and limited departure from the traditional evidentiary burden placed on employers to disprove allegations of breaches of workplace protections. We do not believe reinstating this test would better serve the objects of the FW Act.

### 11.3.2 Onus of proof

Numerous employer representatives requested that the reverse onus of proof requirement be removed from the general protections provisions.<sup>1230</sup> The Australian Hotels Association, Master Builders Australia (MBA) and the Baking Industry Group adopted a halfway position, recommending it not apply to small business.<sup>1231</sup>

The Panel has not seen any evidence that the reverse onus of proof requirement for general protections claims is generating unanticipated results. Therefore, the Panel has decided against recommending changes to the evidentiary burden placed on employers in general protections disputes.

## 11.4 Discrimination

### 11.4.1 General

Under the previous legislation, it was unlawful to terminate employment on a range of discriminatory grounds. For discrimination in employment that did not fall within any of the other freedom of association protections, employees had to pursue remedies under other Commonwealth or state anti-discrimination laws. However, under other Commonwealth legislation discriminatory grounds are quite narrow and do not cover sexual preferences, religion, political opinion and social origin. Other grounds, such as family responsibilities, were only unlawful in the context of dismissal. The content of state discrimination laws varies.

<sup>1226</sup> Work Choices, ss. 792(8), 793(1)(i). See also Work Choices, s. 902(1)(b).

<sup>1227</sup> *ibid.*, ss. 792(1).

<sup>1228</sup> Ai Group, p. 21; AHA, p. 23; AMMA, pp. 15–16; NSWBC & ABI, p. 74; BCA, p. 67; BHP, p. 18; CCIWA, p. 19; Civil Contractors Federation, p. 8; HIA, p. 38; IPA, p. 8; MBA, p. 56; Recruitment and Consulting Services Australia, p. 14; also referred to in a confidential submission.

<sup>1229</sup> AMMA, pp. 15–16.

<sup>1230</sup> ACCI, p. 19; AAA, p. 4; ACCI, p. 19; Ai Group, p. 21; AMMA, p. 16; ANRA, pp. 6, 28–29; CCIWA, p. 19; Civil Contractors Federation, p. 8; COSBOA, Attachment A, p. 11; HIA, p. 38; IPA, p. 8; MGA, p. 15; Recruitment and Consulting Services Association, p. 14; Rio Tinto, p. 5.

<sup>1231</sup> AHA, p. 24; MBA, p. 56; BIG, p. 31.

The FW Act anti-discrimination protections apply to a broader range of conduct than existed under the previous legislation, because they include remedies for discrimination in employment generally, not just in relation to dismissal. They do not extend beyond the employment relationship, covering only action taken by an employer against an employee or prospective employee.

The reason for including general anti-discrimination provisions in the general protections was to make the protections 'simpler for employers and employees to both understand and apply', to 'more effectively protect employees from workplace discrimination', to 'provide consistency with state and territory laws' and to take into account Australia's international labour obligations.

Further, including these provisions was intended to address a situation where a particular case gave rise to breaches of both workplace relations laws and anti-discrimination obligations under separate laws. This allowed most employment-related matters to be dealt with simultaneously, rather than the affected parties having to participate in multiple claims in often separate jurisdictions. Anti-double-dipping provisions would be included.<sup>1232</sup>

Employees seeking to apply under the FW Act alleging discrimination must do so under either s. 365 (application for FWA to deal with a dispute involving dismissal) or s. 372 (application for FWA to deal with a dispute not involving dismissal). Consequently, the number of applications to FWA to deal with a dispute about potentially discriminatory conduct (as defined by s. 351) is not disaggregated from the number of general protections disputes.

Extending anti-discrimination protections in workplace relations law to a broader range of grounds and to instances not involving dismissal, coupled with the reverse onus of proof requirement for all general protections matters, will have resulted in increased costs to the small number of businesses faced with defending a claim. While the exact number of businesses is not known, it is a relatively minor subset of the applications made under ss. 365 and 372. The benefits to employees, however, are stronger protections from discrimination in the workplace and easier access to a remedy if they are discriminated against. This situation accords precisely with the Government's intention of the anti-discrimination provisions in the FW Act.

#### 11.4.2 Scope

In submissions to the Review, several employer groups expressed frustration at the level of duplication between state, federal and workplace relations anti-discrimination legislation as a result of the enhanced protections in the FW Act relative to Work Choices. A significant number of employers and employer representatives called for s. 351 to be removed from the FW Act.<sup>1233</sup> The Ai Group suggested that the only discrimination protection that should remain is the requirement that employees not be terminated for discriminatory reasons, considering this protection has been in federal workplace relations legislation for many years.<sup>1234</sup> In response, the ACTU pointed out that '[t]he Workplace rights, undue influence, coercion, inducement, instrument coverage, allocation of duties and sham contracting provisions are not duplicated in other anti-discrimination laws'.<sup>1235</sup>

A number of organisations that made a submission to the Review noted the consolidation of Commonwealth anti-discrimination laws project, which is currently underway. Many parties have made submissions to both the Review and the consolidation project on the need to rationalise anti-discrimination legislation across Australian jurisdictions.

The Panel acknowledges that there is substantial overlap between the anti-discrimination provisions in the FW Act and other Commonwealth anti-discrimination laws.<sup>1236</sup> Among other things, the consolidation of Commonwealth anti-

<sup>1232</sup> DEEWR submission to the FW Bill inquiry, p. 48.

<sup>1233</sup> AMIF, p. 21; ACCI, p. 52; Ai Group, p. 22; BIG, p. 29; NSWBC & ABI, p. 74; WA Government, p. 6.

<sup>1234</sup> Ai Group, p. 22; Ai Group supplementary, p. 33.

<sup>1235</sup> ACTU supplementary, p. 17.

<sup>1236</sup> *Racial Discrimination Act 1975, Sex Discrimination Act 1984, Disability Discrimination Act 1992, Age Discrimination Act 2004.*

discrimination laws project is considering how other anti-discrimination laws and the FW Act interact. One question posed in the discussion paper prepared by the Commonwealth Attorney-General's Department was:

Should the consolidation bill make any improvements to the existing mechanisms in Commonwealth anti-discrimination laws for managing the interactions with the Fair Work Act?

Particularly, the FW Act discrimination provisions differ from other federal anti-discrimination laws by allocating the burden of proof to the respondent. The consolidation project discussion paper notes that if the burden of proof were allocated to the respondent in a new federal anti-discrimination Act, this would enable case law about both provisions to develop together.<sup>1237</sup>

While employer groups called for s. 351 to be removed from the FW Act, many employee advocates recommended s. 351(1) be expanded to encompass a greater range of discriminatory factors, such as physical features<sup>1238</sup>, victim of violent crime<sup>1239</sup> and victim of domestic violence<sup>1240</sup>.

The Panel is not inclined to recommend any restriction or extension of the discriminatory grounds listed in s. 351(1).

#### 11.4.3 Interaction with state and territory laws

The protections against adverse action for a discriminatory reason in the general protections do not override state or territory anti-discrimination laws, as set out in s. 351(2)(a).

The operation of s. 351(2)(a) attracted particular attention from the ACTU. The ACTU suggested that this subsection is ambiguous and does not clearly confine the defence to discriminatory conduct that is expressly authorised under an exception to state or federal laws. The ACTU proposed that the defence should be confined to cases where there is a specific exemption for the discriminatory conduct.<sup>1241</sup> ACCI and the Ai Group opposed this suggestion.<sup>1242</sup>

The Panel believes that the current wording of s. 351(2)(a) reflects the Government's intended effect. The original FW Bill as introduced to the Parliament contained a version of s. 351(2)(a) closer to the ACTU's preference. This section in the FW Bill was:

351(2) However, subsection (1) does not apply to action that is  
(a) authorised by, or under, a State or Territory anti-discrimination law; ...

In the Supplementary Explanatory Memorandum to the FW Bill the Government explained that this exception was 'intended to ensure that where action is not unlawful under a relevant anti-discrimination law (e.g., because of the application of a relevant statutory exemption) then it is not adverse action under subclause 351(1)'.<sup>1243</sup> The Government decided to amend s. 351(2)(a) of the FW Bill by removing the word 'authorised' so that the exemption more fully captured all action that is not unlawful under anti-discrimination legislation, 'especially if the legislation does not specifically authorise the conduct but has the effect that the conduct is not unlawful'.<sup>1244</sup>

It is clear from this explanation that the Government did not intend for s. 351(1) to override any state and territory exemptions. Rather s. 351 is configured as an alternative jurisdiction to state and territory anti-discrimination processes for people discriminated against in the workplace.

<sup>1237</sup> Consolidation of Commonwealth Anti-Discrimination Laws discussion paper, Australian Government, 2011, p. 16.

<sup>1238</sup> JobWatch, p. 32.

<sup>1239</sup> Victims of Crime Assistance League, p. 6.

<sup>1240</sup> Australian Domestic and Family Violence Clearing House, pp. 7–8; AHRC supplementary, p. 16; Australian Law Reform Commission, p. 6; National Working Women's Centres, p. 30.

<sup>1241</sup> ACTU, p. 64.

<sup>1242</sup> ACCI supplementary, p. 11; Ai Group supplementary, p. 33.

<sup>1243</sup> FW Bill Supplementary Explanatory Memorandum, p. 40.

<sup>1244</sup> *ibid.*



There are yet to be any significant decisions under s. 351, and the Panel is not aware of any perverse outcomes or practical problems with the provisions. Accordingly, we consider that it is too early to assess the effectiveness of s. 351 and there is no present case for change.

## 11.5 Sham arrangements

Penalty provisions for sham arrangement have been a feature of Commonwealth workplace relations legislation since 2006 when the Government introduced the *Workplace Relations Amendment (Independent Contractors) Act 2006*. The FW Act maintains these penalties in substantially the same form.

According to the EM, clause 357 of the FW Bill was intended to broadly cover the effect of ss. 900 and 901 of Work Choices, and clause 359 to broadly cover s. 903. Clause 358 was intended to largely replicate the effect of s. 902 except that clause 358 did not include a ‘sole or dominant purpose’ test. Instead the formulation in clause 360 was to apply, which provides that a person takes action for a particular reason if the reasons for the action include that reason.

Thus, the sham arrangement protections in the FW Act preclude an employer, on pain of a civil penalty, from representing to a worker that the worker is an independent contractor, when as a matter of law the worker is being employed under a contract of employment. An employer who has made such a representation may escape liability if they can prove under s. 357(2) that they did not know the contract was a contract of employment, and were not reckless in their lack of knowledge.

### 11.5.1 Prevalence of sham arrangements

In its submission, the ACTU advocated strongly for strengthening the sham contracting provisions. It asserted that as a result of the FW Act retaining the ‘weak’ sham contracting provisions from Work Choices, sham contracting in this country ‘is getting out of control’.<sup>1245</sup> Several other unions joined the ACTU in calling for stronger protections against these arrangements.<sup>1246</sup> One employer, Spotless Group, expressed similar concern, submitting that it and other legitimate employers in the cleaning industry had lost contracts to employers who could undercut responsible businesses by using sham contracted labour.<sup>1247</sup> The ACTU and a small number of other unions requested that the legislation be amended to clarify what constitutes an employment relationship and what constitutes a sham contract.<sup>1248</sup>

Echoing a recommendation from the ABCC’s *Sham Contracting Inquiry Report 2011*<sup>1249</sup>, which was released in November 2011, the CCIWA called for a comprehensive education and awareness campaign rather than increased complexity and regulation.<sup>1250</sup> The South Australian Government agreed, suggesting that information about the consequences of engagement as a contractor rather than an employee could be incorporated into the Fair Work Information Statement.<sup>1251</sup>

One of the problems with attempting to evaluate the impact of sham contracting protections is the lack of data about its prevalence in Australia. The CFMEU’s estimate of the number of sham contracting arrangements in the construction industry is between 92,000 and 168,000, representing 26–46 per cent of all independent contractors in the industry.

The ABCC concluded in its *Sham Contracting Inquiry Report 2011*:

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<sup>1245</sup> ACTU, p. 50.

<sup>1246</sup> ASU, p. 33; CFMEU C&G, p. 14; TCFUA, p. 26; United Voice, p. 17.

<sup>1247</sup> Spotless Group Limited supplementary, p. 4.

<sup>1248</sup> ACTU, p. 50; ASU, p. 33; United Voice, p. 17.

<sup>1249</sup> <http://www.shamcontractinginquiry.gov.au/>

<sup>1250</sup> CCIWA supplementary, p. 26.

<sup>1251</sup> SA Government, p. 7.

Given the comments of both submitters and Roundtable participants, as well as the experience of the ABCC as a regulatory agency, sham contracting is a real problem affecting workers in the building and construction industry. However, there is a knowledge gap on the part of all parties to the extent and incidence of the problem.<sup>1252</sup>

At the conclusion of its inquiry, the ABCC commissioned independent research into the incidence and impact of sham contracting in the building and construction industry. In April 2012 the tender was awarded to TNS Social Research, which is required to produce a research report by late August 2012. This research should produce a robust estimate of the incidence of sham contracting in the building industry. Submissions to the Review also suggested that sham contracting was occurring in the cleaning and call centre industries. Given the lack of data available the Panel cannot reach a conclusion about sham contracting in Australia across all industries. However, from an analysis of the relevant provisions under Work Choices and the FW Act and feedback from stakeholders, there is no evidence to indicate that the FW Act has in any way exacerbated the problem.

### 11.5.2 The reckless defence

The issue most commonly raised by stakeholders about sham contracting was the ‘reckless’ defence at s. 357(2)(b). This subsection provides that an employer has not misrepresented employment as an independent contracting arrangement if they did not know and were not reckless as to whether the contract was a contract of employment rather than a contract for services. The same defence existed under Work Choices.<sup>1253</sup>

In their submission to the ABCC inquiry, Andrew Stewart and Cameron Roles said that s. 357 provides inadequate protection against sham arrangements as the recklessness defence is ‘both ambiguous and inappropriately generous’.<sup>1254</sup> They suggested that while ss. 357(2)(a) should be retained as it is, s. 357(2)(b) should incorporate a requirement of ‘reasonableness’ in place of the present ‘recklessness’ defence.

The CFMEU Construction and General Division argued instead that s. 357(2) should be deleted and sham contracting become a strict liability offence.<sup>1255</sup> The MBA opposed this, noting that in many circumstances, an arrangement that looks like a sham contract is actually a case of misclassifying the worker rather than a deliberate action.<sup>1256</sup>

Only one case in the Federal Magistrate’s Court has squarely confronted the reckless defence. It is *Construction, Forestry, Mining and Energy Union v Nubrick Pty Ltd*<sup>1257</sup>, and it is ably summarised in paragraphs 3.54–3.63 of the ABCC Sham Contracting Report. In no other provision of the FW Act is the term ‘reckless’ given such a breadth of meaning in that it is not connected to more specific criteria.

Interestingly, as is pointed out in the ABCC report (see paragraph 3.40), in the Workplace Relations Amendment (Independent Contractors) Bill 2006 (IC Bill) as it was originally introduced into Parliament, the subsection (2) defence was much tighter. It provided:

(2) A person does not contravene subsection (1) if the person proves that, at the time the person made the representation concerned, the person:

(a) **believed** that the contract was a contract for services rather than a contract of employment; and

(b) **could not reasonably have been expected to know** that the contract was a contract of employment rather than a contract for services.

<sup>1252</sup> ABCC Sham Contracting Inquiry Report 2011, p. 91.

<sup>1253</sup> Work Choices, s. 900(2).

<sup>1254</sup> Stewart and Roles, ABCC inquiry submission, p. 9.

<sup>1255</sup> CFMEU C&G, p. 15.

<sup>1256</sup> MBA supplementary, p. 3.

<sup>1257</sup> [2009] FMCA 981.

In paragraph 3.42 of the ABCC report, Mr Johns almost invites this Review to consider whether s. 357(2) of the FW Act should be repealed and replaced by the defence as originally set out in the IC Bill.

In our opinion the current defence does not fit within a legislative scheme designed to be fair for working Australians. Therefore, we propose a return to the defence that was prescribed in the original draft of the IC Bill.

**Recommendation 48:** The Panel recommends that s. 357(2) be amended to provide a defence to the prohibition on misrepresenting a contract of employment as a contract for services only when the employer proves that at the time the representation was made, the employer believed that the contract was a contract for services rather than a contract of employment, and could not reasonably have been expected to know otherwise.

## 11.6 General protections claims process

It was intended that the FW Act would require FWA to conduct a conference for alleged contraventions of the general protections involving dismissal, to attempt to resolve the matter before the institution of formal proceedings in the Federal Magistrates Court or the Federal Court.<sup>1258</sup> The FW Act stipulates that an application to FWA alleging this behaviour must be made within 60 days after the dismissal took effect. In cases not involving dismissal, parties can elect to pursue voluntary conciliation before starting formal court proceedings.

### 11.6.1 Time limits

Under Work Choices an application alleging unlawful termination had to be made within 21 days of the dismissal taking effect and applications under the freedom of association provisions had to be made within six years. The change in time limits under the FW Act consolidates the unlawful termination and freedom of association protections under Work Choices into a single provision under the general protections. In consolidating the time limits, primacy was given to the time limit for dismissal to ensure certainty of employment arrangements for all parties.

The effect of the change is that employees now have 60 rather than 21 days within which to consider making an application alleging their dismissal was unfair. This gives greater time and procedural fairness to employees, but leaves employers with an extra 39 days of uncertainty about whether an ex-employee will apply to FWA alleging their dismissal was unlawful.

Stakeholders submitted a variety of suggestions about the appropriate time limits within which employees should be required to apply to FWA to deal with a general protections dispute.

Generally, employers submitted that the timeframes should be reduced. A number of employer representatives suggested that both s. 365 (application for FWA to deal with a dispute involving dismissal) and s. 372 (application for FWA to deal with a dispute not involving dismissal) be amended to prescribe a time limit of 14 days.<sup>1259</sup> ACCI recommended a time limit for both of 21 days.<sup>1260</sup> Yet more employers argued for both or either of the time limits to be reduced significantly.<sup>1261</sup>

Submissions from employee representatives and advocates tended to call for the timeframes to be increased or abandoned.<sup>1262</sup>

<sup>1258</sup> DEEWR submission to the FW Bill inquiry, p. 40.

<sup>1259</sup> Ai Group, p. 23; CCIWA, p. 20; MBA, p. 57; R&CA, p. 14.

<sup>1260</sup> ACCI, p. 19.

<sup>1261</sup> AMMA, p. 16; WA Government, p. 6; ANRA, p. 6; CAI, p. 21; NFF, p. 6; NSWBC & ABI, p. 77; HIA, p. 38; IPA, p. 8; Bartier Perry, p. 2; also referred to in a confidential submission.

<sup>1262</sup> Employment Law Centre of WA, p. 32; Kingsford legal Centre, p. 22; Ryan Carlisle Thomas Lawyers, p. 15; United Voice, p. 17.

A third position advanced was that the time limits for applying under s. 365 and s. 394 be aligned. The Australian Federation of Employers and Industries and Recruitment and Consulting Services Australia suggested 14 days<sup>1263</sup>, and Forsyth and Stewart and ACCI suggested 21.<sup>1264</sup> Others again said merely that the time limits should be aligned.<sup>1265</sup>

Many of the arguments for harmonising the time limits for s. 365 and s. 394 applications centred on eliminating the possibility of unsuccessful or out-of-time unfair dismissal cases being run as general protections claims.<sup>1266</sup> In its supplementary submission the Victorian Employers Chamber of Commerce and Industry (VECCI) detailed the anecdotal evidence from its members about this practice:

Our members advise (and VECCI Workplace Relations Consultants can attest) in unfair dismissal conciliations the common tactic from 'no-win, no-fee' solicitors is to threaten the employer if 'go-away money' is not paid they will lodge a general protections claim instead, causing additional time and expense from the company managers to defend an additional claim and attend additional compulsory conciliations. As the unfair dismissal conciliations are usually held within the 60 day time limit, the applicant can lawfully discontinue the unfair dismissal claim and make an application under general protections. These solicitors know that the general protections provisions of the FW Act are difficult for small employers to understand and as a result the employer is often conversed into settling at the unfair dismissal conciliation. If the application cut-off date was the same for both types of claims, this would support the intention of the FW Act of s. 725 in which a complaint must only be made under one type of application.<sup>1267</sup>

The National Working Women's Centres acknowledged that 'General Protections claims for unfair dismissal do provide a possible avenue of redress for workers who have not qualified for unfair dismissal or who are out of time for lodging their complaints and seek to settle their matters via this process; however, many complaints that are addressed this way would be more suited to the unfair dismissal provisions'.<sup>1268</sup>

Despite the anecdotal evidence, there is no quantitative data available to indicate the incidence and impact of employees seeking to have unfair dismissal complaints settled in the general protections stream. FWA does not collate and publish the time taken from when a dismissal took effect to when an employee makes an application for an unfair dismissal remedy or an application for FWA to deal with a general protections dispute. Neither does it collate and publish the employment period served by the employee before applying for either of these remedies. These data fields could have indicated whether significant numbers of dismissed employees are pursuing a remedy under s. 365 because their matter does not meet the jurisdictional requirements for an unfair dismissal remedy. Also, there is no quantitative evidence to show whether dismissed employees are applying for FWA to deal with a general protections dispute after unsuccessfully applying for an unfair dismissal remedy.

Despite this lack of evidence about the extent of the problem, the Panel suspects that the considerable difference in time limits for making applications under s. 365 (60 days) and s. 394 (14 days) is undermining the purpose of both the unfair dismissal protections and the general protections.

To prevent employees from applying for FWA to deal with a general protections dispute for out of time or unsuccessful unfair dismissal matters, the Panel recommends the Government align the time limits for making applications under s. 365 and s. 394.

In considering aligning the time limits the Panel weighed up requests from employers to reduce the time limit for making an application to FWA alleging a breach of s. 365, with the evidence presented by unions in consultations that

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<sup>1263</sup> AFEI, p. 51; Recruitment and Consulting Services Australia, p. 14.

<sup>1264</sup> Forsyth and Stewart, p. 37; ACCI, p. 19.

<sup>1265</sup> AHA, p. 25; ARTIO, p. 9.

<sup>1266</sup> VECCI, p. 57; CAI, p. 20; Forsyth and Stewart, p. 37.

<sup>1267</sup> VECCI supplementary, p. 32.

<sup>1268</sup> NWWC, pp. 11–12.

14 days would not be enough time in which to assess and advise members on the merits of a general protections dispute. Based on a range of competing factors the Panel recommends the time limits be harmonised at 21 days.

**Recommendation 49:** The Panel recommends that s. 366 be amended to reduce the time limit for lodging a general protections claim relating to a termination of employment to 21 days (to align with the recommended amended time limit for unfair dismissal applications).

Employers have also called for a reduction in the time limit for making an application alleging a contravention of the general protections not involving dismissal. The six-year time period currently legislated for has long been required for non-dismissal related contraventions of workplace rights. The FW Act did not introduce any changes to this time limit and the Panel have not seen sufficient evidence to warrant overturning an established principle.

#### 11.6.2 Role of FWA, the Federal Court and the Federal Magistrates Court

Currently, FWA must hold a compulsory conference for all applications involving a dismissal; however, for contraventions of the general protections not involving a dismissal FWA can only hold a conference if both parties agree. Unions and employee legal representatives suggested that the compulsory conference requirement be extended to matters not involving dismissal.<sup>1269</sup> This suggestion was echoed by at least two employer representatives—the Australian National Retailers Association (ANRA) and the Business Council of Australia.<sup>1270</sup>

A considerable number of submissions expressed frustration with the ‘FWA followed by the court’ claims process required in applications alleging a contravention of the general protections. Currently if FWA is satisfied that all reasonable attempts to resolve a s. 365 dispute at conference have been, or are likely to be unsuccessful, it must issue a certificate to that effect. In both dismissal and non-dismissal disputes, FWA is required to advise the parties if a general protections court application regarding the disputes would not have a reasonable prospect of success.

Multiple employer representatives recommended FWA only be empowered to issue a certificate in instances where the applicant has demonstrated that they have reasonable grounds for making a claim.<sup>1271</sup> Most submissions on this topic suggested applicants be required to demonstrate to FWA that they have reasonable grounds for a court application. Forsyth and Stewart echoed the calls from business suggesting that FWA could be required, before proceeding with a conference (and/or before issuing a certificate under s. 369), to be satisfied that the applicant has a tenable claim.<sup>1272</sup>

FWA’s conciliation process (including issuing a certificate) reflects the compliance framework that applied under the unlawful termination provisions in the WR Act and Work Choices. Under the freedom of association provisions of these previous legislative frameworks, though, matters were heard and determined by the Federal Court. To rationalise the freedom of association and unlawful termination provisions, a policy decision was made to extend the availability of FWA conciliation to all general protections claims.

The practical difference between the enforcement of equivalent provisions under previous legislation and under the FW Act is that all general protections matters *can* go to FWA for conference now if the parties agree to it but there was no similar capacity to go to AIRC conciliation for matters other than unlawful terminations under previous legislation.

While the Panel strongly supports compulsory FWA conferences for general protections disputes involving dismissal we do not believe it would be sound policy to recommend all general protections disputes be subject to a compulsory

<sup>1269</sup> ACTU, p. 64; Employment Law Centre of WA, p. 32; JobWatch, p. 34; Media, Entertainment and Arts Alliance, p. 4; North West Community Legal Centre, pp. 3–4; NSW Labor Lawyers, p. 10; Ryan Carlisle Thomas Lawyers, p. 16; SDA, p. 16.

<sup>1270</sup> ANRA, p. 6; BCA, p. 67.

<sup>1271</sup> CCIWA, p. 20; MBA, p. 57; AHA, pp. 25–26; BIG, p. 31.

<sup>1272</sup> Forsyth and Stewart, p. 37.

conference. To do so could increase the incidence of minor workplace disputes that should be resolved at the workplace being elevated to FWA for a conference. The temptation would then be for an aggrieved person to use compulsory conciliation by FWA to pressure employers over issues which may only superficially relate to a general protections matter. The current arrangement whereby employees are required to assess whether their matter is sufficiently serious to warrant legal intervention is, in the Panel's estimation, preferable.

After careful consideration the Panel has also decided against recommending that FWA be given additional powers to assess the merits of a general protections claim and strike out unmeritorious claims. To do so may have the effect of requiring FWA to exercise judicial power, which would be contrary to Chapter III of the Australian Constitution.

### 11.6.3 Costs and compensation

Forsyth and Stewart suggested that the threshold for awarding costs in a dismissal-related general protections claim could be lowered, which may discourage spurious claims.<sup>1273</sup> ACCI and NSW Business Chamber & Australian Business Industrial submitted that spurious claims could also be deterred if successful parties could generally receive a costs order.<sup>1274</sup>

Various employer representatives called for compensation in general protections claims to be capped.<sup>1275</sup> They argued that the lack of a cap is inconsistent with the role and purpose of the unfair dismissal cap. In its submission, the Ai Group included a quote from the Policy Implementation Plan in relation to unfair dismissal: 'there will be a cap on compensation to increase certainty and to discourage speculative claims'.<sup>1276</sup> ANRA expressed concern that the availability of uncapped compensation in the general protections jurisdiction 'potentially encourages applicants to "dress-up" an unfair dismissal claim as a general protections application in the hope of achieving a greater financial outcome'.<sup>1277</sup> The suggested cap from stakeholders was 26 weeks' pay, which would bring the maximum amount of compensation available as a result of a breach of the general protections in line with the level of compensation available for an unfair dismissal.<sup>1278</sup>

The Panel notes the suggestions of stakeholders about the way in which costs and compensation are awarded in general protections matters heard in the Federal Court or Federal Magistrates Court. Our remit, however, does not extend to court processes and we do not intend to make any recommendations that seek to limit the powers of the courts.

## 11.7 Conclusion

The scope of the general protections is purposefully broad and the requirements for seeking a remedy or defending a claim are appropriately strict in view of the seriousness of the offence. The general protections impose an obligation on people not to take adverse action against another person because the other person has a workplace right.<sup>1279</sup> This is in contrast to the unfair dismissal protections in the FW Act, which offer a remedy to employees dismissed unfairly rather than prohibiting the unfair behaviour by the employers. The Panel considers that Part 3-1 of the FW Act effectively delivers on the Government's intention to expand the protections available under Work Choices.

While one would imagine that the consolidation of previously scattered protections into a single Part of the FW Act would make the protections easier for employers and employees to understand and apply, the Panel is aware that this

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<sup>1273</sup> Forsyth and Stewart, p. 37.

<sup>1274</sup> ACCI, p. 19; NSWBC & ABI, p. 76.

<sup>1275</sup> Ai Group, p. 24; HIA, p. 38; ANRA, p. 29; ACCI, p. 19.

<sup>1276</sup> FWFIP, p. 18.

<sup>1277</sup> ANRA, p. 27.

<sup>1278</sup> Ai Group, p. 24; HIA, p. 38; ACCI, p. 19.

<sup>1279</sup> Or, the other person has, or has not exercised a workplace right; or proposes or proposes not to, or at any time proposed or proposed not to, exercise a workplace right; or to prevent the exercise of a workplace right by the other person. As per s. 340 of the FW Act.

has not been the immediate result. Moreover, there is uncertainty and confusion (primarily among employers and their representatives) about the implications of the provisions. The Panel consider that much of this is due to the lack of judicial consideration of matters that test the limits of the new protections. As more legal precedent develops, the Panel hopes employer uncertainty will subside.

The *Barclay* case, however, is one instance where the Panel considers that the application of the general protections provisions has proved to be broader than was intended during drafting, with a Full Bench of FWA finding that an employer's subjective intention about why they took action against an employee was not decisive. The Panel has recommended the Government consider making changes to the general protections giving employers a broader defence if the High Court adopts the view of the Federal Court majority in *Barclay*.

We have recommended two further changes to the general protections provisions: reducing the timeframe in which to make an application under s. 365 to address the practice of employees using the general protections provisions to seek a remedy for an out-of-time or otherwise excluded unfair dismissal claim; and removing the reckless defence from the offence of sham contracting to provide stronger protections for employees.

## 12 Fair Work Australia and Fair Work Ombudsman

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### 12.1 Introduction

Under Work Choices, many separate statutory agencies shared responsibility for the various aspects of the workplace relations system. These included the AIRC, Australian Industrial Registry, Australian Fair Pay Commission (AFPC), Workplace Authority, Workplace Ombudsman, Australian Building and Construction Commission, as well as the Federal Court, Federal Magistrates Court and, in some cases, state and territory courts. This array of institutions resulted in overlap and confusion. Studies of ACAS in the United Kingdom have demonstrated the economic benefits which arise from an appropriate institutional framework.<sup>1280</sup>

Also, the processes adopted by some agencies, such as the AFPC<sup>1281</sup> and the Workplace Authority<sup>1282</sup>, were perceived by the Government as lacking in transparency. In addition, the administrative delays experienced in dealing with the Workplace Authority<sup>1283</sup> led to a lack of confidence in the capacity of the system.

The cumulative impact of these issues was no doubt to increase uncertainty as well as compliance costs.

### 12.2 Fair Work Australia

Forward with Fairness initially conceived of Fair Work Australia (FWA) as a 'one-stop shop' which would help parties resolve workplace grievances; resolve unfair and unlawful dismissal claims; facilitate collective bargaining and enforcing good faith bargaining; review and approve collective agreements; adjust minimum wages and award conditions; monitor compliance with and ensuring the application of workplace laws, awards and agreements; and regulate registered industrial organisations.<sup>1284</sup> FWA would also provide information and advice to parties, and would include an independent judicial division. FWA offices were to be located in suburbs and regional centres, and workplace visits would be available to provide further convenience.

In her Press Club Speech, the then Deputy Prime Minister said that the 'one-stop shop' would comprise both FWA as the arbitral and inspectorate, and specialist Fair Work Divisions in the Federal Court and the Federal Magistrates Court.<sup>1285</sup>

While the provisions of the FW Act ultimately established the FWA, the Fair Work Ombudsman (FWO) and Fair Work Divisions of the federal and federal magistrates' courts, the EM continued to express a policy intention to 'efficiently integrate the services that currently span seven agencies, to ensure the public is provided with a streamlined, accessible, one-stop shop on workplace relations issues'.<sup>1286</sup>

FWA commenced operation on 1 July 2009, and essentially took over the functions of the AIRC, the Australian Industrial Registry, the AFPC and the Workplace Authority. Each of those bodies continued to operate for short periods, with the Workplace Authority the last to cease operating on 31 January 2010.

As per the terms of reference, this Review is limited to an examination of the processes and requirements of FWA provided for in the FW Act. These include its adjudicative functions in matters set out in s. 576, the administrative

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<sup>1280</sup> A Forsyth, 'Cooperation key to reform of the workplace', *The Age*, Business Day, 31 October 2008; P Meadows, *A review of the economic impact of employment relations services delivered by ACAS*, National Institute of Economic and Social Research, November 2007.

<sup>1281</sup> B Schneiders, 'Union push for big pay rises', *The Age*, 8 February 2010.

<sup>1282</sup> C Sutherland & J Riley, 'Industrial legislation in 2007', *Journal of Industrial Relations*, vol. 50, no. 3; Workplace Authority, *Workplace Agreement Data October 2007*.

<sup>1283</sup> *ibid.*

<sup>1284</sup> FWF, p. 17.

<sup>1285</sup> PCS. See also ALLA Speech.

<sup>1286</sup> EM, p. lxvi.



activities that support those functions and any other functions of the General Manager derived from the FW Act. They do not include FWA's various powers and functions under the *Fair Work (Registered Organisations) Act 2009* ('the Registered Organisations Act') relating to rules and amalgamations of organisations, the conduct of elections for office, record keeping obligations and powers to make inquiries and conduct investigations. In this context, we note the recent introduction of a bill to amend the Registered Organisations Act.

Under s. 577, FWA is required to perform its functions and exercise its powers in a manner that: (a) is fair and just, (b) is quick, informal and avoids unnecessary technicalities, (c) is open and transparent, and (d) promotes harmonious and cooperative workplace relations. Section 576 lists the functions of FWA, which include functions in relation to minimum wages. A seven-member Minimum Wages Panel is established under s. 620, and includes the FWA President and at least three Minimum Wage Panel members.

FWA can generally inform itself about matters before it in such manner as it considers appropriate, including by conducting inquiries, undertaking or commissioning research, conducting a conference or holding a hearing.<sup>1287</sup> It is not bound by the rules of evidence and procedure,<sup>1288</sup> and is not generally required to hold a hearing in performing its functions or exercising powers. Any hearings that it does hold should be in public, unless there is a need to deal with confidential evidence.<sup>1289</sup> Conferences are generally to be conducted in private, and FWA may direct persons to attend.<sup>1290</sup>

Stakeholder views about FWA were generally positive. Ai Group noted that the independent industrial umpire had a 'proud history' extending over 100 years and that its latest incarnation generally 'conducts matters in an efficient and practical manner'. It also commented favourably on changes to filing and hearing procedures introduced 'in recent years' and indicated that FWA's expanded use of the web, email and video conferencing had made life much easier for parties.<sup>1291</sup> The National Farmers' Federation felt that the tribunal had performed adequately since its inception.<sup>1292</sup> Strong union support was evident, with the ACTU confirming that unions had a high degree of confidence in FWA. It noted that cases were dealt with 'impartially, professionally and expeditiously' and that FWA was doing an 'excellent job in administering the Act'.<sup>1293</sup> Some quarters criticised it for inconsistency in decision-making, although there was some acknowledgment that this was to be expected in the early days of the new legislation.<sup>1294</sup>

### 12.2.1 Name of tribunal

The Australian Road Transport Industrial Organisation submitted that the tribunal should be renamed to reduce confusion and uncertainty among employees and employers about whether they were dealing with FWA or the FWO. It suggested that any new name should include the word 'Commission' or 'Tribunal' to clearly delineate it from the FWO.<sup>1295</sup> ACCI Chief Executive Peter Anderson made a similar submission in the Panel's consultation session and followed this up in a well-reported address in Canberra in which he called for a return to the old Australian Industrial Relations Commission title, or to the 'Australian Workplace Relations Commission'.<sup>1296</sup>

The Panel consulted directly with new FWA President, Justice Iain Ross. He is also a strong advocate for changing the name of the tribunal, arguing that the current title undermines its independence and creates confusion. He proposed that as a minimum the tribunal be changed to 'Fair Work Commission', but said it would be preferable to separate it

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<sup>1287</sup> FW Act, s. 590.

<sup>1288</sup> FW Act, s. 591.

<sup>1289</sup> FW Act, s. 593.

<sup>1290</sup> FW Act, s. 592.

<sup>1291</sup> Ai Group, p. 136.

<sup>1292</sup> NFF, p. 16.

<sup>1293</sup> ACTU, p. 52.

<sup>1294</sup> For example. AMMA, pp. 146–147; Ai Group, p. 18; BCA, p. 55.

<sup>1295</sup> ARTIO, pp. 9–10.

<sup>1296</sup> Address to the Australian Labour and Employment Relations Association, 18 April 2012.

from the 'Fair Work' brand altogether, and rename it the 'Australian Employment Commission' or the 'Australian Workplace Commission'.

After consideration, the Panel believes that the tribunal's name should be changed for two reasons. The first is to clearly separate the tribunal and its functions from the administrative arm of FWA. The second is to eliminate unnecessary confusion by lessening the plethora of bodies that have the words 'Fair Work' in their titles.

First, FWA is an amalgam of the former Australian Industrial Relations Commission, the former Australian Fair Pay Commission and the former Australian Industrial Registry. Indeed, and somewhat confusingly, s. 575 declares that FWA consists of the President, the Deputy Presidents and the Commissioners, who collectively constitute the adjudicative tribunal. For completeness, we add that the FWO is an amalgam of the former Workplace Authority and the former Workplace Ombudsman. In our view, having the adjudicative functions and the administrative functions in a single body without any differentiation does create unnecessary confusion.

For example, there has been much discussion in the media and the community about the 2012 investigation by FWA into the Health Services Union of Australia. The relevant legislative framework provides for such investigations to be carried out by the General Manager and relevant staff of FWA, with no statutory role for Deputy Presidents or Commissioners. The investigatory powers are derived from the administrative functions that were undertaken by the former Australian Industrial Registry.

At the very least, the Panel believes that the name of the tribunal should be altered to ensure that the public are not confused about the difference between its adjudicative functions, and the separate administrative functions of FWA. Since amending legislation that came into force in 1956, the name of the tribunal has always contained the word 'Commission'. For example, the body was initially styled the Commonwealth Conciliation and Arbitration Commission, with its most recent name being the Australian Industrial Relations Commission. In our view, it would lessen confusion if the tribunal were given a name containing the word 'Commission' to denote that its adjudicative functions are recognised as separate and distinct from the administrative functions of FWA. This separation already occurs between FWA on the one hand, and the FWO on the other. We note a recent report that Justice Ross has called for legal changes to give a 'clear separation' between FWA's functions as a tribunal and as an administrator overseeing registered organisations.<sup>1297</sup> While we did not examine this issue in detail in the Review, we consider it to be an appropriate objective and encourage its further consideration.

Second, there are too many bodies with Fair Work in their titles and this often creates unnecessary confusion. There is the FW Act and other related statutes, FWA, the FWO and the Fair Work Division of the Federal Court of Australia.

A recent example of the confusion which does occur, especially in the minds of working women and men, can be illustrated by *Warrell v Fair Work Australia*<sup>1298</sup>, decided by Justice Perram on 22 March 2012. Mr Warrell sought to challenge his termination of employment by seeking a remedy for unfair dismissal before FWA. However, he mistakenly applied to the FWO. By the time this mistake was brought to his attention, Mr Warrell's claim was out of time. In commenting on Mr Warrell's mistake in applying to the wrong body, Perram J stated: 'Since Mr Warrell is functionally illiterate and brain damaged, this is not surprising. *The fact that the present legislation insists on prefixing every federal industrial institution with the words 'fair work' is unlikely to have assisted either*' (emphasis added). In the view of the Panel, this type of confusion will be lessened if the tribunal is given a name that better describes its adjudicative and related functions.

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<sup>1297</sup> M Skulley, 'Review to take into account judge's call on FWA', the *Australian Financial Review*, 29 May 2012.

<sup>1298</sup> [2012] FCA 267.

**Recommendation 50:** The Panel recommends that the FW Act be amended to change the name of Fair Work Australia to a title which more aptly denotes its functions. It is recommended that the new title contain the word 'Commission' and that it no longer contain the words 'Fair Work'.

### 12.2.2 New approach to industry engagement

In his response to welcoming addresses on 23 March 2012, Justice Ross flagged a more 'prominent and proactive role' for FWA in tackling productivity and other issues at the workplace or industry level.<sup>1299</sup> He noted that the objects of the FW Act provided a mandate to 'facilitate discussions at an industry and enterprise level to highlight the challenges and opportunities facing each sector of our economy'. Such discussions, he said, 'should lead to a deeper understanding of our current poor productivity performance and the drivers for future growth'.<sup>1300</sup> He went on to note that:

Many factors impact on productivity and competitiveness, including the skills of our workforce, the general regulatory framework, workforce participation, and the capacity for enterprises to successfully innovate. I am confident that the industrial parties will be able to find common ground in at least some of these areas. The extent of consensus is likely to be greater if these discussions are kept quite separate from any collective bargaining negotiations, and nor should the Fair Work Act itself form part of such facilitated discussions.<sup>1301</sup>

Justice Ross acknowledged that the pace and extent of this industry engagement would vary from sector to sector and would depend on the level of interest and support of the industrial parties. He concluded by noting that while this approach would not be a panacea for the challenges facing us, 'each national institution must play its part, and it is vital that we meet these challenges if future generations are to enjoy higher living standards'.<sup>1302</sup>

Justice Ross took up this theme with us in direct consultations, describing it as part of an increased emphasis on 'dispute prevention' as distinct from the traditional and more reactive role of dispute settlement. He has more recently announced the establishment of a new major resources/infrastructure projects panel, which he will lead and which includes 15 other FWA members. The FWA website notes that the panel 'will facilitate engagement between the tribunal and the industrial parties involved in major projects'.<sup>1303</sup>

We have elsewhere recommended the FW Act be amended to allow FWA to intervene on its own motion in bargaining disputes. We recognise that Justice Ross is developing a broader agenda to more actively engage with industry sectors, and that it draws in part on the activities of the United Kingdom's Advisory Conciliation and Arbitration Service. We support this agenda, noting that there is considerable scope within the existing framework of the FW Act for it to be implemented. This aspect of FWA's operations should be clearly distinguishable from its other functions so as to avoid unnecessary confusion.

### 12.2.3 Appointment of General Manager

The General Manager of FWA is currently appointed by the Governor-General under s. 660. Unlike the situation in the Federal Court of Australia, the appointment does not have to be nominated by the FWA President. Under s. 18C of the *Federal Court of Australia Act 1976*, the Registrar of the Court is appointed by the Governor-General on the nomination of the Chief Justice.

There are good reasons why the equivalent arrangement should exist under the FW Act. Currently the FW Act requires there to be a strong and effective working relationship between the President and the General Manager. Under s. 657

<sup>1299</sup> Transcript of Ceremonial Sitting to Welcome Justice Ross, 23 March 2012, PN77.

<sup>1300</sup> Transcript, PN78.

<sup>1301</sup> Transcript, PN79.

<sup>1302</sup> Transcript, PN80.

<sup>1303</sup> <http://www.fwa.gov.au/index.cfm?pagename=aboutpanels#projects>.

the primary function of the General Manager is to assist the President in ensuring that FWA performs its functions and exercises its powers. The President has power under s. 582 to give directions to the General Manager about how FWA is to perform its functions, exercise its powers or deal with matters, albeit that this power is qualified in certain respects under s. 658.

Further, under s. 625 the President may delegate significant functions and powers to the General Manager. The President has exercised this option to delegate a number of functions to the General Manager, including the power to issue entry permits, waive application fees in cases of serious hardship and publish enterprise agreements and other significant documents.

We consider that the relationship is analogous to that between the Chief Justice of the Federal Court and the Registrar.<sup>1304</sup> While the General Manager of FWA has functions additional to assisting the President, this does not detract from the reality that a strong, professional relationship between the two offices must exist for FWA to function efficiently.

**Recommendation 51:** The Panel recommends that s. 660 of the FW Act be amended to require that the appointment of the General Manager by the Governor-General be on the nomination of the President.

#### 12.2.4 Technical issues

Justice Ross raised with us two issues that he said impeded the efficiency of FWA's operations.

The first was the limitation in s. 606(2) about which FWA members are empowered to grant a stay of a decision under review or appeal. Currently, only the Full Bench hearing the appeal, or the senior member of that Full Bench, has the power to grant a stay order. Justice Ross advised us that this created difficulties if the relevant senior member was unavailable to hear an application for a stay order. His proposal was that the President or any Deputy President be able to exercise this power, which makes eminent sense.

**Recommendation 52:** The Panel recommends that the FW Act be amended to allow the President or any Deputy President to stay the operation of a decision under appeal or review, whether or not the President or Deputy President is a member of the Full Bench hearing the appeal or conducting the review.

The second issue raised by Justice Ross was the inability for Acting Commissioners to be appointed to FWA. Section 648 allows for Acting Deputy Presidents to be appointed for a specified period, so long as the Minister is satisfied that the appointments are necessary to enable FWA to perform its functions effectively. Justice Ross noted that the effective operation of FWA would be significantly enhanced if the power extended to the appointment of Commissioners. We consider there is merit in this proposal, and recommend accordingly.

**Recommendation 53:** The Panel recommends that the power to appoint Acting Deputy Presidents for specified periods in s. 648 be extended to the appointment of Acting Commissioners.

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<sup>1304</sup> See, for example, s. 18D of the *Federal Court of Australia Act 1976* in relation to the Registrar's powers.

### 12.2.5 Conclusion

Overall, we believe FWA is taking a practical approach to administering the FW Act and in most instances is doing so expeditiously. While some submissions alleged inconsistency in decision making, we do not consider that the number and outcomes of Full Bench or court appeals reveal anything other than the usual activity associated with the introduction of new legislation. We would expect this to settle down as time passes. We have commented favourably in various sections of the report on the more efficient FWA processes for approving agreements, conciliating unfair dismissal applications and disposing of various other matters. FWA statistics in annual reports and provided to us demonstrate improvement in a range of areas. This is not to say, of course, that there is no room for improvement. Our recommendations in this chapter and elsewhere aim to further the desirable trend in the tribunal becoming more user friendly and resolving disputes more efficiently.

## 12.3 Fair Work Ombudsman

The functions of the FWO are set out in s. 682 of the FW Act. They include the general goal of promoting harmonious, productive and cooperative workplace relations and compliance with the FW Act and instruments, including by 'providing education, assistance and advice' to employees and employers'. Other functions include investigating any potentially unlawful acts or practices under the FW Act, commencing court or FWA proceedings, referring matters to relevant authorities and representing employees or outworkers in court or FWA proceedings.

The EM suggests that the FWO's educative functions may include providing general information, targeted education campaigns, assisting parties with self-help remedies and responding to requests for advice or information.<sup>1305</sup>

The FWO exercises similar enforcement functions to those of the Workplace Ombudsman under Work Choices. The FWO can appoint inspectors to carry out compliance activities (s. 700). Those inspectors are given specific powers to enter premises, inspect records and interview persons for compliance purposes (s. 708).

One significant difference between the enforcement regimes under the FW Act and Work Choices is the introduction of enforceable undertakings and compliance notices as an alternative to prosecution. Under s. 715, if the FWO reasonably believes that a person has contravened a civil remedy provision in the FW Act, the FWO may accept a written undertaking given by the person. The EM notes that this provision 'provides the FWO with another option to deal with non-compliance (by encouraging co-operative compliance) instead of pursuing court proceedings'.<sup>1306</sup>

Section 716 gives an inspector the option of issuing a compliance notice, if the inspector reasonably believes that a person has contravened a term of the NES, a modern award, an enterprise agreement, a workplace determination, a national minimum wage order or an equal remuneration order. If the person does not comply with the notice, an inspector can bring an action under s. 539 for the failure. A compliance order cannot be issued if an enforceable undertaking exists in relation to the same contravention (s. 716(4)).

Perhaps not surprisingly for an organisation of 952 employees spread over 26 locations in Australia,<sup>1307</sup> we received a wide range of views about the operations of the FWO. Strong support came from Ai Group, who indicated that FWO 'carries out its functions in an effective manner and works hard to consult and maintain good working relations with employer groups and unions'.<sup>1308</sup> They also complimented the activities of fair work inspectors, noting that in nearly all

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<sup>1305</sup> EM, p. 385.

<sup>1306</sup> EM, p. 400.

<sup>1307</sup> At 30 June 2011. In addition to 26 FWO offices, there were 27 state partner offices in Qld, NSW and SA delivering FWO services. (FWO Annual report 2010–11).

<sup>1308</sup> Ai Group, p. 138.

instances in which Ai Group had been involved, the inspectors had used their powers appropriately. In the small number of cases where they took concerns to a more senior level, the matters were resolved satisfactorily.<sup>1309</sup>

The SDA was also a clear supporter of the FWO, commenting favourably on its information services including the website and pay calculator. The union noted that the 'increased educative role for the FWO, combined with random auditing following training, most certainly helps employers and employees to better understand their rights and obligations under the Act'.<sup>1310</sup>

The Centre for Employment and Labour Relations Law (CELRL) at the University of Melbourne provided in-depth comments on the compliance and enforcement activities of the FWO. The comments are derived from a broader research project funded by the Australian Research Council. As noted in its submission, this research draws on internal FWO documents such as the operations manual for inspectors, as well as publicly available documents including annual reports, guidance notes, media releases and court cases. Significantly, the researchers also undertook approximately 40 detailed interviews with fair work inspectors, managers and lawyers.<sup>1311</sup>

The CELRL concludes that the FWO has been active and innovative in performing its function of promoting compliance with the FW Act. It points to the development of 'a number of tools and programs to further its responsibility for providing education, advice and assistance to employees, employers and others'. Examples cited are the establishment of a national employer branch and targeted compliance and audit campaigns. The CELRL attributes these positive outcomes partly to the variety of enforcement approaches under the FW Act compared to the approaches available to the Workplace Ombudsman under the previous legislative regime.

The ACTU, on the other hand, expressed 'a number of reservations about the role of the FWO'.<sup>1312</sup> These included its view that the FWO's advice was sometimes based on a black-letter reading of the law, a claimed undue focus on workers and unions taking unlawful industrial action at the expense of assisting un-unionised employees enforce their rights, and its disinclination to enforce superannuation rights.

ACCI felt the FWO had a conflict in providing non-binding advice about laws that it was also seeking to enforce. It urged giving the FWO power to issue binding advice to ensure certainty.<sup>1313</sup> AMMA made a similar recommendation, proposing immunity from prosecution for parties who rely on the advice.<sup>1314</sup>

The CFMEU (Construction and General Division) argued that the FWO should only provide advice when it was consistent with settled interpretations from the courts or FWA.<sup>1315</sup> Master Builders Australia agreed in principle with this recommendation, but also proposed that FWO be able to issue binding interpretative decisions similar to ATO rulings (with a right of review in FWA).<sup>1316</sup>

Contrasting views were expressed about the FWO's propensity to involve itself in cases of alleged unprotected industrial action. The ANF Victorian Branch was highly critical of the FWO's intervention in the recent bargaining dispute in Victoria, suggesting that it should be restricted from appearing in proceedings that it had not initiated or where it was not representing a party.<sup>1317</sup> On the other hand, while the Australian Shipowners Association felt the FWO had generally been doing a good job, it advocated devoting more resources to prosecuting unprotected industrial action. The ASA argued that it was not reasonable to rely on employers becoming prosecutors of their employees and unions.<sup>1318</sup>

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<sup>1309</sup> Ai Group, p. 139.

<sup>1310</sup> SDA, p. 7.

<sup>1311</sup> CELRL, pp. 9–10.

<sup>1312</sup> ACTU, p. 52.

<sup>1313</sup> ACCI, p. 180.

<sup>1314</sup> AMMA, pp. 17, 145.

<sup>1315</sup> CFMEU C&G, p. 24.

<sup>1316</sup> MBA supplementary, p. 5.

<sup>1317</sup> ANF (Vic Branch), pp. 19–20.

<sup>1318</sup> ASA, p. 14.

### 12.3.1 Enforceable undertakings

The FWO's exercise of its new power to accept written undertakings as an alternative to prosecution was favourably received. Ai Group said that the undertakings were often 'fairer, less costly and more effective in securing compliance than prosecution, particularly where a party has not deliberately broken the law'.<sup>1319</sup> The Baking Manufacturers Industry Association of Australia agreed, describing it as a positive step, as 'keeping matters out of court is beneficial for all'.<sup>1320</sup>

While the MUA felt that the mechanism was a flexible and less costly option than prosecution, it suggested that undertakings sought by the FWO were 'too onerous or harsh or politically and industrially too sensitive for adoption or acceptance'. It argued that it defeated the purpose of the reform if the undertakings were less acceptable than the likely court outcome, and suggested this was a matter for the FWO to adjust its policy settings.<sup>1321</sup>

We referred earlier to the CELRL's submission and related research. The CELRL submission contains analysis of the enforceable undertakings made since the system began. It noted that the FWO have accepted 22 such undertakings, and point to the innovative content of some of them. Employers have agreed to develop 'management and human resources systems and processes to ensure ongoing compliance with workplace laws; to organize and ensure that firm managers attend training on rights and responsibilities of employers; and to pay sums of money to external organizations, such as not-for-profit community legal centres as a way of promoting future compliance with workplace laws'.<sup>1322</sup>

The CELRL was in no doubt that the FWO had a mix of regulatory approaches that was consistent with the 'enforcement pyramid' of responsive regulation.<sup>1323</sup> It concluded that the evidence suggested that the FWO was endeavouring to be strategic and innovative in its use of enforceable undertakings to achieve compliance. The Centre suggested that the FWO should have the power to withdraw from an undertaking in appropriate circumstances, although it did note that there was no evidence of parties failing to comply with undertakings at this stage.<sup>1324</sup>

### 12.3.2 Conclusion

Our overall impression is that the FWO has been successful in carrying out its education and enforcement activities, and has the right tools at its disposal to further enhance those activities. We are particularly impressed with its informative and functional website,<sup>1325</sup> which we consider could serve as an example for other similar institutions.

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<sup>1319</sup> Ai Group, pp. 29, 139.

<sup>1320</sup> BMIAA, p. 11.

<sup>1321</sup> MUA, p. 7.

<sup>1322</sup> CELRL, pp. 10–11.

<sup>1323</sup> CELRL, p. 11, citing Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

<sup>1324</sup> CELRL, pp 11–12.

<sup>1325</sup> www.fwo.gov.au.

## Appendix A: List of submissions and consultations

Table A.1—List of meetings and roundtables

Date	Persons and/or organisations
2 March	High Level Officials' Group (HLOG)—state and territory workplace relations officials
13 March	Australian Mines and Metals Association including: <ul style="list-style-type: none"> <li>- Woodside Energy Ltd</li> <li>- Chevron Australia Pty Ltd</li> <li>- Farstad Shipping</li> </ul>
13 March	Business Council of Australia including: <ul style="list-style-type: none"> <li>- Qantas</li> <li>- BHP</li> <li>- Cochlear</li> </ul>
14 March	Australian Industry Group
14 March	Australian Federation of Employers and Industries
14 March	Working women: <ul style="list-style-type: none"> <li>- University of Western Sydney</li> <li>- Security4Women Incorporated</li> <li>- Women and Work Research Group (University of Sydney)</li> <li>- Working Women's Centres</li> </ul>
15 March	Australian Council of Trade Unions
15 March	Unions (bargaining issues): <ul style="list-style-type: none"> <li>- Australian Council of Trade Unions</li> <li>- Construction, Forestry, Mining and Energy Union</li> <li>- Australian Manufacturing Workers Union</li> <li>- National Union of Workers</li> <li>- Transport Workers Union</li> <li>- Maritime Union of Australia</li> </ul>
19 March	Recruitment and Consulting Services Association
19 March	Employment and workplace relations lawyers: <ul style="list-style-type: none"> <li>- Freehills</li> <li>- Ashurst</li> <li>- Corrs Chambers Westgarth</li> <li>- Slater and Gordon</li> <li>- Ryan Carlisle Thomas</li> </ul>
19 March	Fair Work Ombudsman
20 March	Unions (safety net issues): <ul style="list-style-type: none"> <li>- Australian Council of Trade Unions</li> <li>- Australian Services Union</li> <li>- Shop, Distributive and Allied Employees Association</li> <li>- Textile, Clothing and Footwear Union of Australia</li> </ul>
20 March	Unions (public sector representatives): <ul style="list-style-type: none"> <li>- Australian Council of Trade Unions</li> <li>- Community and Public Sector Union—Public Sector Union</li> <li>- Community and Public Sector Union—State Public Services Federation</li> <li>- Australian Education Union</li> <li>- Australian Nursing Federation</li> <li>- Health Services Union</li> <li>- National Tertiary Education Union</li> </ul>



Date	Persons and/or organisations
20 March	Unions (professional representatives): <ul style="list-style-type: none"> <li>- Australian and International Pilots Association</li> <li>- Association of Professional Engineers, Scientists and Managers Australia</li> </ul>
21 March	Master Builders Australia
21 March	Australian Hotels Association
21 March	Rio Tinto
21 March	Australian National Retail Association
22 March	Academics: <ul style="list-style-type: none"> <li>- Andrew Stewart (University of Adelaide)</li> <li>- Anthony Forsyth (Monash University)</li> <li>- Joellen Riley (University of Sydney)</li> <li>- John Howe (University of Melbourne)</li> <li>- Paul Gollan (Macquarie University)</li> <li>- Marilyn Pittard (Monash Law School)</li> <li>- John Buchanan (University of Sydney)</li> </ul>
22 March	Small Business Advisory Committee: <ul style="list-style-type: none"> <li>- Australian Chamber of Commerce and Industry</li> <li>- National Retail Association</li> <li>- Starfish Business Solutions</li> <li>- JTA Australia</li> <li>- Kings Australia</li> <li>- BDO Australia</li> <li>- Council of Rural Research and Development Corporations</li> <li>- Fisher Advisory Services</li> </ul>
27 March	Small business: <ul style="list-style-type: none"> <li>- Accommodation Association of Australia</li> <li>- Institute of Chartered Accountants</li> <li>- Pharmacy Guild</li> <li>- Real Estate Institute of Australia</li> <li>- Restaurant and Catering Australia</li> <li>- Victorian Automobile Chamber of Commerce</li> </ul>
28 March	Chamber of Commerce and Industry Western Australia
28 March	Fair Work Australia—Bernadette O’Neill, General Manager
29 March	Australian Chamber of Commerce and Industry
29 March	Fair Work Australia—The Hon Iain Ross, President
29 March	Australian Public Service Commission

Table A.2—List of initial submissions received (207)

Person/organisation	Person/organisation
Accommodation Association of Australia	ACT Government
Aerosail Engineered Fabric Structures	Australian Industry Group
Australian Industry Group and Australian Constructors Association	Air Conditioning and Mechanical Contractors’ Association
Allens Arthur Robinson	Anderson, Mary
aplFinancial	Association for Payroll Specialists
Association of Professional Engineers, Scientists and	Association of Professional Engineers, Scientists and

Person/organisation	Person/organisation
Managers Australia	Managers Australia—Collieries' Staff Division
Australian and International Pilots Association	NSW Business Chamber and Australian Business Industrial
Australian Catholic Council for Employment Relations	Australian Chamber of Commerce and Industry
Australian Council of Trade Unions	Australian Domestic and Family Violence Clearinghouse
Australian Education Union	Australian Federation of Air Pilots
Australian Federation of Employers and Industries	Australian Glass and Glazing Association
Australian Higher Education Industrial Association	Australian Hotels Association
Australian Human Resources Institute	Australian Institute of Employment Rights
Australian Institute of Marine and Power Engineers	Australian Law Reform Commission
Australian Manufacturing Workers Union	Australian Meat Industry Council
Australian Mines and Metals Association	Australian Motor Industry Federation
Australian National Retailers Association	Australian Newsagents Federation
Australian Nursing Federation	Australian Nursing Federation (Victorian Branch)
Australian Petroleum Production and Exploration Association	Australian Public Transport Industrial Association
Australian Retailers Association	Australian Road Transport Industrial Organisation
Australian Services Union	Australian Services Union Central and Southern Queensland Clerical and Administrative Branch
Australian Shipowners Association	Australian Sugar Milling Council
Australian Tourism Export Council	Australian Workers Union
Baking Industry Group Ltd	Baking Manufacturers Industry Association of Australia
Bannon, Matthew	Bartier Perry
Beasley Legal	Bennett, Alistair
BHP Billiton	Broadhurst, Nick
Brosnan, Terry	Brown, Douglas
Buchanan, John	Business Council of Australia
Business Enterprise Centres Australia	Business SA
Caspersz, Donella and Gillan, Michael	Carers Australia
Carers NSW	Cat Alliance of Australia Inc
Centre for Employment and Labour Relations Law	Chamber of Commerce and Industry Queensland
Chamber of Commerce and Industry WA	Chamber of Commerce NT
Chamberlin, Meriel	Civil Contractors Federation
Clubs Australia Industrial	Collier Clothing
Community and Public Sector Union (PSU Group)	Community and Public Sector Union State Public Services Federation Group
Confederation of ACT Industry	Construction, Forestry, Mining and Energy Union (Construction and General Division)
Construction, Forestry, Mining and Energy Union (Mining and Energy Division)	Council of Small Business Australia
Crawshaw, Jason	Council of Textile and Fashion Industries of Australia

Person/organisation	Person/organisation
	Limited
Dewan, Clare	Dias-Abey, Manoj and Bansgrove, John
DND May Services	Draggin Jeans
Drew, Phil	Drummond, Mark
Economic Security4Women	Electrical Trades Union
Eltham Valley Pantry Pty Ltd	Employment Law Centre of WA
Eraring Energy	Farstad Shipping (Indian Pacific) Pty Ltd
Financial Services Council	Fire Brigade Employees' Union
Fitzpatrick, Nadine	Forsyth, Anthony and Stewart, Andrew
Gollan, Peter and Patmore, Glenn	Government of Tasmania
Gregory, Jan	Hair and Beauty Australia
Health Services Union	Hobart Community Legal
Housing Industry Association	Howe, Joanna
HR Nicholls Society	Human Rights and Responsibilities Australia
Industrial Staff Union	Information Technology Contract and Recruitment Association
Institute for Private Enterprise	Institute of Public Affairs
Jamieson, Kathryn	JobWatch Inc
Kertes, Rachael	Kingsford Legal Centre
Law Council of Australia	Law Institute of Victoria
Law Society of New South Wales	Law Society of South Australia
Lawyers for Companion Animals	LCN Fashion
Lisa Barron Pty Ltd	Local Government Workplace Solutions
Lyons, Michael	Maritime Union of Australia
Master Builders Australia	Master Grocers Australia
Master Plumbers' and Mechanical Contractors Association of NSW	Master Plumbers' and Mechanical Services Association of Australia
Master Plumbers' Association of Queensland	McCartin, Julie
McCullough Robertson	Media, Entertainment and Arts Alliance
Melbourne Made Clothing	Mercer (Australia) Pty Ltd
Migration Alliance	Minerals Council of Australia
Motor Trade Association WA	National Bulk Commodities Group
National Electrical and Communications Association	National Farmers' Federation
National Retail Association	National Tertiary Education Industry Union
National Tourism Alliance	National Union of Workers
National Working Women's Centres	North West Community Legal Centre
Norton Rose Australia	NSW Government
NSW Institute of Senior Educational Administrators	NSW Labor Lawyers
NSW Young Labor	O'Donoghue, Peter
Office of the Australian Information Commissioner	O'Grady, Lois
O'Leary, Sean	Pearce, Noel
Peetz, David	Perin, Richard

Person/organisation	Person/organisation
Pesenti, Ester	Pharmacy Guild of Australia
Pittard, Marilyn	POAGS
Police Federation of Australia	Ports Australia
Printing Industries Association of Australia	Qantas
Queensland Tourism Industry Council	Queensland Workplace Rights Ombudsman
Rail, Tram and Bus Union	Recruitment and Consulting Services Association
Redfern Legal Centre	Restaurant and Catering Australia
Rio Tinto	Ryan Carlisle Thomas Lawyers
Scarlet Alliance	Seager, Emily
Shipping Australia Limited	Shop, Distributive and Allied Employees' Association
Smith, Graham	South Australian Government
South Australian Wine Industry Association Incorporated	Stanley, William
Stewart, Andrew and Roles, Cameron - Submission to the ABCC Inquiry into Sham Contracting	Textile, Clothing and Footwear Union of Australia
The Ark Clothing Co	Timber Trade Industrial Association
Thompson, Clive	Todd, Patricia
Transport Workers Union	Unions NSW
Unions WA	United Voice
Victims of Crime League	Victorian Equal Opportunity and Human Rights Commission
Victorian Employers Chamber of Commerce and Industry	Victorian Government
Vincent, Joanna	Western Australian Government
White, Chris	Woodside Energy Limited
Work and Family Policy Roundtable	6 x confidential initial submissions

Table A.3—List of supplementary submissions received (47)

Person / Organisation	Person / Organisation
Aesthetics Practitioners Advisory Network	Australian Industry Group
Association of Professional Engineers Scientists and Managers Australia	Australasian Meat Industry Employees' Union
Australian Business Industrial and NSW Business Chamber	Australian Chamber of Commerce and Industry
Australian Council of Trade Unions	Australian Federation of Air Pilots
Australian Forest Products Association	Australian Hotels Association
Australian Human Rights Commission	Australian Institute of Marine Power Engineers
Australian Manufacturing Workers' Union	Australian National Retailers Association
Australian Services Union	BHP Billiton
Business Council of Australia	Chamber of Commerce and Industry Queensland
Chamber of Commerce and Industry WA	Construction, Forestry, Mining and Energy Union (Construction and General Division)

Person / Organisation	Person / Organisation
Council of Textile and Fashion Industries of Australia	Drummond, Mark
Finance Sector Union	HR Nicholls Society
JobWatch Inc	Maritime Union of Australia
Master Builders Australia	National Disability Services
NSW Small Business Commissioner	Office of the Australian Information Commissioner
Peetz, David	Private Hospital Industry Employer Association
Qantas	Scarlett Alliance
Shop, Distributive & Allied Employees' Association	Spotless Group Limited
Textile Clothing and Footwear Union of Australia	The Ark Clothing Co
Thompson, Clive	Together Queensland, Industrial Union of Employees
Transport Workers' Union of Australia	Unions ACT
United Voice	Victorian Employers' Chamber of Commerce and Industry
Victorian Trades Hall Council	2 x confidential supplementary submission

## Appendix B: The regulatory problem

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### The rationale for government intervention in workplace relationships

It has long been accepted in Australia that government plays a legitimate role in regulating workplace relationships. Despite different views about the nature and degree of government regulation in the workplace relations arena, all submissions to the Review proceeded from this common basic assumption. Regulation can mitigate imbalances of bargaining power that would otherwise have adverse economic and social consequences both for the vulnerable party and for the wider community. It can address barriers to self-regulation. It can also positively promote desirable outcomes, such as fairness and equity, decent work, personal dignity, productivity, flexibility, workforce participation, macroeconomic stability and general economic prosperity.

The challenge for government is to ensure that the workplace relations framework is flexible and adaptable in light of changing global and local economic and social circumstances, while also ensuring that its costs and benefits are distributed fairly to achieve widespread economic prosperity and desirable social outcomes. Further, regulation should be effective at meeting its purpose and should not create barriers to compliance.<sup>1326</sup>

As described in 2.3 and 3.5 of the Report, the Government identified a range of problems with Work Choices which meant it did not meet, or appropriately balance, these objectives. OBPR requirements for a PIR require us to identify the problems that the FW Act was intended to address and describe how the relevant previous regulatory arrangements were not adequately addressing those problems. In this case, the previous regulation was Work Choices. Drawing on relevant policy documentation, the Fair Work legislation's explanatory memoranda and advice from DEEWR, we outline below the problems with that legislation that the Government intended to remedy through the introduction of the FW Act.

### The problems that the Fair Work legislation sought to address

#### Failure to adequately establish a national system

##### *Lack of coverage and lack of clarity about coverage*

Work Choices departed from the previous federal/state framework of industrial relations in Australia. Instead, its stated aim was to create a unitary industrial relations system.<sup>1327</sup> Developing a national approach to industrial relations was considered desirable in light of our integrated national economy.<sup>1328</sup>

To further this aim, Work Choices relied on the Commonwealth's constitutional power to regulate corporations, along with a combination of other powers. This suite of powers was used both to underpin the substantive provisions of Work Choices, and to expressly exclude the operation of state and territory industrial relations laws.

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<sup>1326</sup> For a range of perspectives on regulation, including of industrial relations, see, for example, R Johnston & R Mitchell, 'Regulating work', in C Parker et al. (eds), *Regulating law*, Oxford University Press, 2004, pp. 101, 109; H Collins, 'Justifications and techniques of legal regulation of the employment relation', in H Collins, P Davies & R Rideout, *Legal regulation of the employment relation*, Kluwer Law, 2000; B Morgan & K Yeung, *An introduction to law and regulation*, Cambridge University Press, 2007, p. 18; R Baldwin & M Cave, *Understanding regulation: theory, strategy and practice*, 2nd edn, Oxford University Press, 2002, p. 9; J Howe, "'Deregulation' of labour relations in Australia: towards a more "centred command and control model'", in C Arup et al. (eds), *Labour Law and Labour Market Regulation*, Federation Press, 2006, pp. 147, 154; S Cooney, J Murray & J Howe, 'Time and money under Work Choices: understanding the new Workplace Relations Act as a scheme of regulation', *University of New South Wales Law Review*, vol. 29, 2006, pp. 215–241.

<sup>1327</sup> Parliament of Australia, Department of Parliamentary Services, Parliamentary Library, Bills Digest—Workplace Relations Amendment (Work Choices) Bill 2005, 2 December 2005, no. 66, 2005–06, ISSN 1328-8091.

<sup>1328</sup> Workplace Relations Amendment (Work Choices) Bill 2005, second reading speech.

The absence of a national workplace relations system imposed a significant and unnecessary cost on the economy. A 2009 analysis conducted by Access Economics estimated the total net benefit to business and government of moving to a single national industrial relations system for the private sector to be \$4.83 billion over the decade to 2018–19, resulting from higher productivity and greater ease of compliance, particularly for firms operating across multiple jurisdictions.<sup>1329</sup> Accordingly, the shift towards a unitary national system was positive. However, there were two key problems with the Work Choices model for achieving it.

First, because of limits on the Commonwealth’s constitutional power, Work Choices did not, and could not, cover all employers and employees. Work Choices could not regulate employers who were not constitutional corporations, or their employees. Work Choices therefore clearly excluded non-corporate employers such as partnerships, unincorporated associations and sole traders, and their employees. Work Choices was intended to cover ‘up to 85 per cent of employees across Australia’.<sup>1330</sup> As a result of Victoria’s pre-existing referral of industrial relations powers, and the Commonwealth’s powers over the territories, Commonwealth workplace relations laws already applied in a uniform way in these jurisdictions.<sup>1331</sup> Therefore, Work Choices was directed at expanding Commonwealth coverage outside these jurisdictions. Estimates about the actual coverage of Work Choices nationally, and in non-referring states, indicate that Work Choices fell short of its 85 per cent target, and did not deliver a uniform system, particularly in non-referring states. The ABS considered that Work Choices covered at least 79 per cent of employees nationally.<sup>1332</sup> Others estimated coverage at 76 per cent nationally, but as low as 60 per cent in Queensland, South Australia, Western Australia and Tasmania.<sup>1333</sup> A further estimate put Work Choices coverage in those four states to be at least 70 per cent.<sup>1334</sup>

The second key problem with the Work Choices model was that a significant number of employees and their employers could not establish with certainty whether the laws applied to them or not. Again, because of constitutional limitations, Work Choices could not cover corporate entities that were not corporations within the meaning ascribed to that term in the constitution. The ABS estimated that the coverage of 9 per cent of employees across Australia was uncertain,<sup>1335</sup> meaning that these employees, and their employers, did not know which laws applied to them. The distinction caused particular problems for incorporated not-for-profit entities, and incorporated local government entities. Litigation addressing the coverage of such entities by Work Choices became common subsequent to its implementation.<sup>1336</sup>

#### *Complexity of transitional provisions*

The mechanism by which former state-system employers and employees were drawn into the coverage of Work Choices also created significant confusion and uncertainty.

Work Choices provided for the creation of ‘notional’ industrial instruments applying to each former state award employer and employee. ‘NAPSAs’, as they were known, incorporated by reference terms dealing with some matters (but not others) derived from the previously applicable state awards and state laws which Work Choices excluded.

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<sup>1329</sup> Access Economics for DEEWR, ‘Economic analysis of a single national workplace relations system for the private sector’, 18 December 2008, p. iv.

<sup>1330</sup> Workplace Relations Amendment (Work Choices) Bill 2005, second reading speech.

<sup>1331</sup> Excepting matters within Victoria’s inherent state power: *Re Australian Education Union & Ors; Ex parte the State of Victoria & Anor* (1995) 184 CLR 188.

<sup>1332</sup> ‘Jurisdictional coverage of pay-setting arrangements’, *Australian Labour Market Statistics, January 2008*, Cat. No. 6105.0, ABS, Canberra, 2008, as cited by Andrew Stewart in ‘Testing the boundaries: towards a national system of labour regulation’, A Forsyth & A Stewart, *Fair Work: the new workplace laws and the Work Choices legacy*, Federation Press, p. 27.

<sup>1333</sup> Queensland Government, ‘The coverage and characteristics of the state jurisdiction under a new industrial relations system’, submission to Queensland Industrial Relations inquiry into the Impact of Work Choices on Queensland Workplaces, Employees and Employers, Appendix 1, Queensland Government, Brisbane, 2006, as cited by Andrew Stewart, op. cit.

<sup>1334</sup> *State Wage Order* [2008] WAIRC 00347, Schedule, as cited by Andrew Stewart, op. cit.

<sup>1335</sup> ‘Jurisdictional coverage of pay-setting arrangements’, *Australian Labour Market Statistics, January 2008*, Cat. No. 6105.0, ABS, Canberra, 2008, as cited by Andrew Stewart, op. cit.

<sup>1336</sup> See, for example, *AWU (Qld) v Etheridge Shire Council* [2008] FCA 1268; *Bell v Dalwallinu*, WAIRC 01269, (14 August 2008); *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)* [2008] WASCA 254; *Bankstown Handicapped Children’s Centre Association Inc & Anor v Hillman & Ors* [2010] FCAFC 11.

These notional instruments did not physically exist, as they were never reduced to writing, and their precise content was uncertain.

Further, Work Choices no longer relied upon the previously used constitutional power of conciliation and arbitration of interstate industrial disputes. Accordingly, some non-corporate employers and their employees, previously in the federal system, were removed from coverage during the transitional period. Additional complexity resulted from this aspect of the system because each single pre-Work Choices award bifurcated into both a 'pre-reform Award' for constitutional corporations and a 'transitional Award' for non-constitutional corporations. The content rules for each differed, as did the application of the Australian Fair Pay and Conditions Standard (AFPCS). Each had to be varied separately. Again, the precise content of each type of instrument was uncertain, as they did not physically exist in their post Work Choices form—similarly to NAPSAs, they were never reduced to writing.

The Government considered that the mechanisms employed under Work Choices added considerable complexity and uncertainty about the applicability or otherwise of its provisions. This created an unacceptable situation whereby simply ascertaining which laws, rights and obligations applied to an employer or employee at any given time was a complex and difficult task.

### **Problems with the safety net**

#### *Complexity and ineffectiveness of the AFPCS*

The Work Choices safety net consisted of the AFPCS, a set of five statutory minimum standards regulating wages, annual leave, personal leave, parental leave and hours of work.

The Government considered that there were a number of problems with the AFPCS.

First the AFPCS contained only the barest of protections for employees and has been described as a 'dramatic weakening of protective regulation in Australia'.<sup>1337</sup>

Second, one of the five standards did not achieve its own stated objective, which was to prescribe maximum ordinary hours of work. While the AFPCS purported to 'lock in maximum ordinary hours of work of 38 hours a week, an accepted community standard'<sup>1338</sup>, the capacity to average hours over a 12-month period permitted weekly hours of unlimited duration. A separate requirement that 'additional hours' be 'reasonable' did not apply to averaging arrangements. The standard therefore permitted hours beyond 38 to be worked in any week, with no requirement that those hours be reasonable. There is evidence of some employers implementing agreements to this effect.<sup>1339</sup>

Third, the Work Choices minimum wage setting process and outcomes were regarded as problematic. The Australian Fair Pay Commission (AFPC) was responsible for setting and maintaining minimum wages that had previously been contained in awards. The AFPC was permitted to determine the timing and frequency, scope and manner of its wage reviews<sup>1340</sup> and could inform itself in whatever way it considered appropriate.<sup>1341</sup> The processes of the AFPC lacked transparency, undermining confidence in the system. A report commissioned by the AFPC in 2008 detailed stakeholder concerns about the absence of transparency in its consultations and decision-making.<sup>1342</sup>

Further, upon their removal from awards, minimum wage rates were converted, again in only a 'notional' sense, to 'Preserved Australian Pay and Classification Scales'.<sup>1343</sup> Determining which pay scale applied was unnecessarily complex

<sup>1337</sup> P Waring, A de Ruyter & J Burgess, 'Advancing Australia Fair: the Australian Fair Pay and Conditions Standard', *Journal of Australian Political Economy*, vol. 56, pp. 105, 111.

<sup>1338</sup> Australian Government, *Work Choices—A New Workplace Relations System*, p. 15.

<sup>1339</sup> See, for example, 'Annualised hours could abolish overtime in Esselte AWAs: NUW', *Workplace Express*, 26 May 2006; Queensland Industrial Relations Commission, *Final report: inquiry into the impact of Work Choices on Queensland workplaces, employees and employers*, 29 January 2007, p. 70.

<sup>1340</sup> Work Choices, s. 24(1).

<sup>1341</sup> *ibid.*, s. 24(2).

<sup>1342</sup> A Southwell & N Wearne, *Report commissioned by the Australian Fair Pay Commission, 2008: stakeholder research*.

<sup>1343</sup> Work Choices, s. 208.



in the absence of published pay rates—neither employers nor employees knew with certainty the correct pay rate to apply. It was reported in April 2007 that while DEEWR had issued summaries of 240 out of 4000 pay scales, they came with a disclaimer that the Government did not guarantee their accuracy. Many employers raised these problems in submissions to the AFPC. Another key problem was the risk of penalties of up to \$33,000 for inadvertently underpaying employees. One employer group indicated it was considering spending money to resolve such an issue in the court, which ‘under the old system would have been easily dealt with’.<sup>1344</sup>

Finally, the AFPCS was complex and difficult to apply. The five standards ran to a total of 149 sections of the legislation, and were unnecessarily lengthy, detailed and inflexible. A Victorian government report found that the complexity of Work Choices was ‘evidenced by the fact that most employers are not aware of key employment obligations under the WR Act including conditions embodied in the AFPCS’.<sup>1345</sup>

In summary, the Government considered that the AFPCS was complex and difficult to apply and did not provide sufficient protections for employees required to work beyond 38 hours in a week. The failure to publish pay scales meant that employers and employees were uncertain about which pay rates applied, and the pay-setting processes of the AFPC lacked transparency.

#### *Ineffectiveness of awards*

Nominally, the second part of the Work Choices safety net was awards. Despite the focus on agreements under Work Choices, awards continued to set the safety net for, or directly determine, conditions for about 1.6 million employees.<sup>1346</sup> A number of aspects to awards under Work Choices were regarded by the Government as a problem.

First, as Work Choices imposed significant limits on the content of awards, previously applicable protections for employees were lost. For example, awards could not include matters such as: conversion from casual employment, restrictions on the range or duration of training arrangements and restrictions on independent contracting and labour hire.

Second, employees and employers did not know with certainty what their rights and obligations were. This is because while these limits applied immediately upon commencement of Work Choices, they were never reflected in published documents. A process of award rationalisation and simplification provided for under Work Choices was not concluded. Therefore, the actual content of physical awards did not match the enforceable content of awards under Work Choices.

Also, the capacity to vary award content was extremely limited under Work Choices. This was regarded as problematic because awards could not be easily updated to reflect changed community standards.

In addition, Work Choices allowed protections for employees contained in awards to be lost. Awards no longer applied as the safety net for agreement making. Instead a more limited set of ‘protected award conditions’ applied. These included rest breaks, incentive based payments and bonuses, annual leave loading, public holidays, allowances, loadings and penalty rates. Initially, agreements needed only to expressly exclude any or all of these conditions to remove their application. After the fairness test was introduced, the content of agreements was required to provide ‘fair compensation’ in comparison with protected award conditions only. This occurred particularly through the use of Australian Workplace Agreements (AWAs), which disadvantaged vulnerable, low skilled workers and resulted in employees being engaged on conditions that were lower than the established safety net (see further below). In many industries characterised by low skilled, low paid employment, such as cleaning and retail trade, the shift towards

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<sup>1344</sup> ‘Pay scale stand-off: bosses risk fines’, *Sydney Morning Herald*, 9 April 2007.

<sup>1345</sup> Victorian Government, Office of the Workplace Rights Advocate, *Report of the inquiry into the impact of the federal government’s Work Choices legislation on workers and employers in the Victorian retail and hospitality industries*, November 2007, p. 123.

<sup>1346</sup> B van Wanrooy, S Wright & J Buchanan, *Who bargains?*, report prepared for the NSW Office of Industrial Relations by the Workplace Research Centre, University of Sydney, May 2009, pp. 46–47.

individual agreements on a 'take it or leave it' basis expanded managerial prerogative.<sup>1347</sup> In many workplaces where employees were most disadvantaged in their ability to bargain with management, AWAs were used to undermine existing wages and conditions.

Work Choices further limited how awards applied. It provided that awards ceased to apply, and would never apply again (with the exception of protected award conditions) when any form of statutory agreement was made. Also, awards applying to transferring employees would cease to apply after 12 months. Awards did not apply to new businesses. Further, there was little scope for binding additional employers to an award.

The Government considered that the ineffectiveness of awards as part of the safety net had the potential to be extremely problematic, as awards were the direct source of minimum entitlements for 1.6 million employees. When the award ceased to apply, so did those entitlements. The interaction of various aspects of the regulatory scheme described above meant that, over time, awards would remain frozen and cease to apply to most employers and employees. The demise of awards did not ultimately eventuate to any significant degree because of the introduction of the Fair Work legislation.

#### *Difficulties with obtaining an equal remuneration order*

The final problem identified by the Government with the safety net under Work Choices was the difficulty in obtaining equal remuneration orders. Although Commonwealth workplace relations legislation since 1993 had contained provisions allowing for equal remuneration orders to be made, there were a number of procedural and substantive hurdles to obtaining such an order that prevented any successful applications being made. Work Choices introduced additional restrictions on when the AIRC could deal with an equal remuneration application, based on whether the employees' and comparators' wages were set by the AFPCS. The Government's initial submission to the equal remuneration test case for the social and community services sector suggested that the two most significant hurdles were that the difference in remuneration was due to discrimination rather than undervaluation and that the requirement to identify work of 'equal value' was restrictive.<sup>1348</sup>

#### **Problems with the bargaining and agreement making framework**

##### *Over-regulation of the bargaining framework*

The Work Choices agreement making framework was heavily regulated, both in the types of agreement which could be made and their content requirements.

Under Work Choices, a distinction was maintained between union and non-union collective agreements. This resulted in disputes over the type of agreement that would be negotiated, thus inhibiting the resolution of agreements and in some cases leading to industrial action. While there is no data that identifies the extent of this problem, there is anecdotal evidence. Two examples included the Cochlear dispute and the Boeing dispute. Cochlear involved a protracted industrial dispute over whether to make a union or non-union agreement. Similarly, the Boeing dispute continued for over nine months, including over 70 days of strike action, because the employer and employees could not agree on whether to negotiate a union or non-union agreement.<sup>1349</sup>

The distinction between union and non-union collective agreements was regarded by the Government as unnecessary and therefore industrial disputes arising from it were avoidable.

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<sup>1347</sup> B Ellem, M Baird, R Cooper & R Lansbury, "'Work Choices': myth making at work", *Journal of Australian Political Economy*, vol. 56, December 2005, pp. 13–31; EM, p. xxxi.

<sup>1348</sup> Australian Government submission in the matter of C2010/3131—Equal remuneration case for social and community services workers, Australian Government, Canberra, 18 November 2010, accessed at [www.fwa.gov.au](http://www.fwa.gov.au), pp. 29–30.

<sup>1349</sup> EM, p. xxxi.

Work Choices restricted the range of matters which parties could bargain over, and include in agreements, by listing 'some 30 matters'<sup>1350</sup> as prohibited content. This caused uncertainty about what could and could not be included in agreements. As employers were also subject to penalties for inclusion of prohibited content in agreements, they often sought advice from the Workplace Authority about the content of a proposed agreement before lodging the agreement, which lengthened the agreement making process. In addition, a 2006 study concluded that the agreement making provisions of Work Choices did not promote workplace innovation and diversity as they did not allow parties to determine the approach most appropriate for their situation, but rather forced conformity with the legislation.<sup>1351</sup> Finally, parties sought to circumvent the restrictions on agreement content by making a separate agreement, purportedly under common law, which contained prohibited content. These side-deals unnecessarily complicated the bargaining process and had an uncertain legal status. There is anecdotal evidence that this practice was widespread.<sup>1352</sup>

In summary, these aspects of the regulatory framework for collective bargaining were regarded by the Government as unnecessarily impeding efficient agreement making in some cases, because disputes arose about the unnecessary distinction between types of agreements, and administrative delays and side deals arose from the prohibitions on agreement content.

#### *Problems with voluntary bargaining*

Under Work Choices, there was no mechanism for a group of employees to require their employer to bargain collectively. Also, without the parties' express agreement there was no mechanism to assist parties where bargaining had broken down. The bargaining framework did not, therefore, actively promote bargaining and agreement making.<sup>1353</sup> This meant many employees could not bargain, and many employers would not bargain.

The Government regarded this as a problem because it considered collective bargaining and agreement making at the enterprise level to be beneficial for both employees and employers. For employees, enterprise bargaining was viewed as an important tool to improve incomes and working conditions. For employers, studies by the Productivity Commission<sup>1354</sup> showed that collective agreement making is good for productivity. Collective agreements allow employees and employers to negotiate working arrangements at the enterprise level that tie wage increases to productivity improvements. Keeping wage increases in line with productivity improvements helps to contain inflation. Research undertaken by Fry, Jarvis and Loundes<sup>1355</sup> found that organisations entering into agreements with their workers reported substantially higher levels of self-assessed labour productivity relative to their competitors. Another study by Tseng and Wooden<sup>1356</sup> found that firms where all employees were on enterprise agreements had almost 9 per cent higher levels of productivity than comparable firms where employees relied upon conditions specified in an award.

The absence of mechanisms to require bargaining where a majority of employees wished to do so was also out of step with other countries, such as the US, UK, Ireland and Canada, where there is a mechanism for employees to decide whether to collectively bargain and then to have that choice recognised by the employer.<sup>1357</sup>

A 2009 study found that only 33 per cent of employees reported collective bargaining. Whether or not employees participated in bargaining under Work Choices depended upon two main influences: the level of bargaining power and structural factors such as the size of the workplace. Women, regardless of their position in the labour market, were less

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<sup>1350</sup> EM, p. xxxii.

<sup>1351</sup> Dr S Cooney, 'Command and control in the workplace: agreement-making under Work Choices', *The Economic and Labour Relations Review*, vol. 147, p. 7.

<sup>1352</sup> EM, p. xxxii.

<sup>1353</sup> EM, p. xxxiii.

<sup>1354</sup> Productivity Commission, *Microeconomic reforms and Australian productivity: exploring the links, volume 2: case studies*, research paper, AusInfo, Canberra, 1999, and A Johnston, D Porter, T Cobbold & R Dolamore, *Productivity in Australia's wholesale and retail trade*, Productivity Commission staff research paper, AusInfo, Canberra, 2000.

<sup>1355</sup> T Fry, K Jarvis & J Loundes, *Are pro-reformers better performers?*, Melbourne Institute Working Paper No. 18/02, September 2002.

<sup>1356</sup> Y-P Tseng & M Wooden, *Enterprise bargaining and productivity: evidence from the Business Longitudinal Survey*, Melbourne Institute Working Paper No. 8/01, July 2001, p. 28.

<sup>1357</sup> C Sutherland, *Agreement-making under Work Choices: the impact of the legal framework on bargaining practices and outcomes*, report prepared for the Office of the Workplace Rights Advocate, October 2007, p. 13.

likely to bargain. Structural factors, such as sector and size of the workforce were also important bargaining influences. Collective bargaining was concentrated in the public sector while the private sector relied more on individual bargaining and the award system. Large enterprises tended to bargain collectively and small enterprises were more likely engaged in individual negotiation. Young people and casual employees were less likely to have their pay and conditions negotiated. Individual bargaining was more common in the private sector, and more likely to be reported by men in higher skilled or managerial jobs, earning high incomes and working longer hours.<sup>1358</sup>

It was particularly difficult for low-paid workers to engage in collective bargaining under Work Choices. The study found that employees with limited bargaining power were not involved in workplace negotiation. These tended to be low-paid, low-skilled workers and those with weaker attachment to the workforce such as part-time workers and casuals. Many of these workers were award reliant. There were approximately 213,000 full-time non-managerial adult employees earning on or close to the Federal Minimum Wage of \$543.78 per week in 2008.<sup>1359</sup>

Work Choices had no general mechanism to address inappropriate bargaining conduct. The requirement for a union and employees to be genuinely trying to reach agreement in order to take industrial action meant that ballot order applications became a forum for scrutiny of union bargaining conduct, without a corresponding forum for employers.<sup>1360</sup> The Government was concerned that this permitted parties to act capriciously or unfairly in bargaining without repercussions. In the absence of any alternative mechanism for employees to address employer intransigence in bargaining, industrial action was more likely which would exacerbate a dispute.<sup>1361</sup> For example, in 2005 and 2006 Boeing maintenance workers at Williamstown RAAF base took strike action for 256 days because Boeing would not bargain with them for a union agreement. The company later negotiated a non-union collective agreement, eight months after the strike concluded, which included many of the claims originally sought by the striking workers.<sup>1362</sup> At the time, the AWU said that the striking workers were being paid \$20,000 less than equivalent employees in other companies.<sup>1363</sup> While there is no data that demonstrates the extent of 'bad faith bargaining', there are anecdotal examples of employers engaging in conduct such as withdrawing from bargaining<sup>1364</sup>, refusing to recognise employees' chosen representatives<sup>1365</sup> and pre-emptively putting agreements to a vote.<sup>1366</sup>

Work Choices had no mechanism to address disputes over the scope of a proposed agreement. While there is no data indicating the extent of this problem, there is anecdotal evidence that it occurred. For example, during bargaining between the CPSU and Telstra in 2008<sup>1367</sup>, Telstra 'decided to withdraw from bargaining with the unions in mid-July 2008. It then progressively issued 140 non-union, non-negotiated employee collective agreements to small work groups, based on its preferred outcome'.<sup>1368</sup> Telstra surveyed employees on proposed agreements and only offered them to business units that indicated strong support for them.<sup>1369</sup> There is also at least one example of Telstra re-offering an agreement that had initially been voted down to a narrower group of employees, while pressuring the employees to support the agreement to ensure it was approved.<sup>1370</sup> The approach taken by Telstra resulted in strikes by employees that may otherwise have been avoided and court action being taken by the company and unions. The

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<sup>1358</sup> B van Wanrooy, S Wright & J Buchanan, *Who bargains?*, report prepared for the NSW Office of Industrial Relations by the Workplace Research Centre, University of Sydney, May 2009, pp. 2, 3, 12, 32, 46.

<sup>1359</sup> *Employee Earnings and Hours, Australia, Aug 2008*, Cat. No. 6306.0, ABS, Canberra.

<sup>1360</sup> G Orr & S Murugesan 'Mandatory secret ballots before employee industrial action', *Australian Journal of Labour Law*, vol. 20, 2007, p. 272, cited in EM, p. xxxiv.

<sup>1361</sup> EM, p. xxxiv.

<sup>1362</sup> J Whittard et al., 'The Boeing dispute at Williamstown: what right to bargain collectively?' *Proceedings of the 21st Conference of the Association of Industrial Relations Academics of Australia and New Zealand*, University of Auckland, New Zealand, 2007, pp. 1, 8–9.

<sup>1363</sup> WorkplaceInfo, 19 December 2005, 'Boeing dispute passes 200th day', Australian Business Consulting and Solutions.

<sup>1364</sup> CPSU, p. 5.

<sup>1365</sup> See A Forsyth, 'The impact of "good faith" obligations on collective bargaining practices and outcomes in Australia, Canada and the United States', *Canadian Labour & Employment Law Journal*, vol. 16, pp. 1, 42.

<sup>1366</sup> See, for example, 'Collective TAB action wins, Work Choices agreement voted down', *ASU Union Active SA + NT Branch News*, August 2009.

<sup>1367</sup> While the Transition Act applied at this time, it had not altered the relevant features of Work Choices.

<sup>1368</sup> CPSU, p. 5.

<sup>1369</sup> 'Telstra tests the water with new "framework" agreement', *Workplace Express*, 23 October 2008.

<sup>1370</sup> 'Telstra has first non-union agreement win as strike ballot commences', *Workplace Express*, 21 November 2008.

Government thus regarded the absence of a mechanism to determine a fair scope for agreement as a problem, as it facilitated the 'divide and conquer' approach described in this example.

In summary, while many employers and employees voluntarily bargained, the Government was concerned that the aspects of the regulatory system described above facilitated resistance to bargaining and resulted in industrial disputation in some cases.

#### *Problems with individual agreements*

Problems with individual agreements identified by the Government are outlined in 6.2 of the Report.

#### *Problems with the approval process for agreements*

##### The fairness test

The Government regarded the 'fairness test' for measuring proposed agreement content, which ultimately formed part of Work Choices, as having a number of deficiencies. Sutherland and Riley have outlined these deficiencies in detail. They observed, first, that the fairness test only required consideration of the terms of the proposed agreement against a selected number of existing entitlements of an employee. For example, it omitted matters such as long service leave entitlements, rostering and minimum hours of work. Second, it allowed the work patterns operating at the time the agreement was lodged to be taken into account. This meant a business that did not operate on a weekend at the time of lodgment could remove weekend penalty rates in an agreement without compensation, but subsequently commence weekend operations. Third, they observed that the fairness test involved only an assessment of the 'overall effect' of the agreement on employees, meaning that only an unspecified proportion of employees were required to be fairly compensated to meet the test.<sup>1371</sup> This led to agreements being approved which provided for conditions and wages below the relevant award standard.<sup>1372</sup>

##### The approval process

The Government also identified a number of problems with the process of approving agreements. First, agreements commenced on lodgment and could subsequently be found not to pass the fairness test. Second, parties were not provided with reasons for approval decisions. This was exacerbated by the absence of any publication of or academic access to AWAs, and the absence of publication of collective agreements for seven months after the test was introduced, meaning that examples of how it was applied were not available to bargaining parties. Third, there was no avenue of appeal against a decision to approve or not approve an agreement. Fourth, there were inordinate delays in the approval of agreements. Almost six months after the introduction of the test, 64 per cent of agreements lodged for approval had still not received an outcome from the Workplace Authority about whether they had passed the test or not.<sup>1373</sup> Delay within the Workplace Authority meant that parties to agreements sometimes discovered that the agreement had not been approved months after it had begun operation. This created practical and legal uncertainty for all parties concerned.<sup>1374</sup>

#### *Problems with rights to be represented in bargaining*

Under Work Choices, employees had no capacity to require an employer to recognise and bargain with their union in a meaningful way. Even when an employee specifically appointed their union as their 'bargaining agent' in a non-union agreement, the employer was only required to meet and confer with the bargaining agent in the seven days before the approval of an agreement. The Government was concerned that this meant that in some cases employees were

<sup>1371</sup> C Sutherland & J Riley, 'Industrial legislation in 2007', *Journal of Industrial Relations*, vol. 50, no. 3, pp. 417, 422–423.

<sup>1372</sup> See, for example, 'Fairness test approves big cuts for meatworkers', <http://www.workplaceinfo.com.au>, 10 October 2007.

<sup>1373</sup> C Sutherland & J Riley 50(3), 423; Workplace Authority, *Workplace Agreement Data October 2007*.

<sup>1374</sup> 'Workplace authority delays frustrating for employers', *Workplace Info*, 25 August 2008, <http://www.workplaceinfo.com.au/payroll/payroll-management/workplace-authority-delays-frustrating-for-employers>.

required to bargain, or consider the contents of a proposed agreement, without the benefit of advice and assistance of their union. Further, the seven-day limitation meant that employers were only required to meet with an employee's bargaining agent *after* the terms of the agreement had been finalised and distributed to employees to vote upon. The details of this problem are further addressed under 'problems with voluntary bargaining'. This was considered to be particularly problematic in the context of the legislative environment introduced by Work Choices. A study conducted for the Victorian Government identified at least 15 ways in which the legal framework shifted the balance of bargaining power away from employees.<sup>1375</sup> The widespread replication of template collective agreements (in the retail and hospitality industry) suggested 'little genuine bargaining'<sup>1376</sup> following a reduction in the involvement of the AIRC or unions in agreement making.

#### *Problems with employer greenfields agreements*

Work Choices included the capacity for an employer when establishing, or proposing to establish a new business, project or undertaking, to unilaterally determine the contents of an agreement through an 'employer greenfields' agreement. These were not 'true' agreements, as there was no other party to them. The Government regarded this as a problem, as it allowed terms and conditions of employment that differed from the safety net to be imposed upon employees without them having had an opportunity to have their interests represented in the development of those terms and conditions. The Government regarded this as inappropriate.<sup>1377</sup>

DEEWR data compares the incidence of greenfields agreements under the WR Act and Work Choices.<sup>1378</sup> Under the WR Act, when greenfields agreements were required to have more than one party, they made up 5.4 per cent of all agreements. Under Work Choices, the use of greenfields agreements expanded to 9.2 per cent of all agreements, with 5.3 per cent comprising employer greenfields agreements and 3.9 per cent comprising union greenfields agreements.

Construction, Manufacturing and Mining together accounted for 86.7 per cent of all greenfields agreements made in the WR Act period. By contrast, in the Work Choices period this figure dropped to 56.6 per cent. However, this decline was not due to a reduction in the number of greenfields agreements in these industries. Instead, it was caused by a significant increase in greenfields agreements in the Accommodation and Food Services industry (from 1.5 per cent to 11.1 per cent), the Health Care and Social Assistance industry (from 0.4 per cent to 7.3 per cent) and the Retail Trade industry (from 0.4 per cent to 5.8 per cent). In Accommodation and Food Services and Retail Trade, most greenfields agreements in the Work Choices period were employer greenfields agreements.

Accordingly, the introduction of employer greenfields agreements appears to have resulted in a significant expansion of the use of greenfields agreements, both overall and in particular in the Retail Trade and Accommodation and Food Services industries.

A study of employer greenfields agreements made in Western Australia during the first year of Work Choices, conducted by Peter Gahan, led to the conclusion that Work Choices was associated with a significant reduction in entitlements for employees working under employer greenfields agreements; that employees working under most of those agreements did not receive fair compensation for the loss of protected award conditions; and that there was significant non-compliance with minimum wage standards, likely associated with the complexity of these provisions and the difficulty in determining the appropriate APCS. He also found that employer greenfields agreements in other states were more likely to remove protected award conditions than in Western Australia.<sup>1379</sup>

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<sup>1375</sup> C Sutherland, *Agreement-making under Work Choices—the impact of the legal framework on bargaining practices and outcomes*, report for the Victorian Government, Monash University, October 2007.

<sup>1376</sup> *ibid.*, p. ii.

<sup>1377</sup> See, for example, DEEWR submission to the FW Bill inquiry, p. 21.

<sup>1378</sup> WR Act period: 1 January 2004 to 31 December 2005; Work Choices period: 1 April 2006 to 31 March 2008.

<sup>1379</sup> P Gahan, *Employer greenfield agreements in Western Australia: a report prepared for the Western Australian Fair Employment Advocate*, Work and Employment Rights Research Centre and Department of Management, Monash University, 17 August 2007.

### *Other problems*

The Government was concerned that Work Choices contained obstacles to voluntary multi-employer bargaining that restricted the capacity for employers to enter a single agreement when they sought to do so. In particular, authorisation to make a multiple business agreement was required, and could only be granted if it was in the public interest, having regard to whether the matters could be dealt with more appropriately by another kind of agreement. This process created unnecessary red tape. Further, the absence of a mechanism for employers to bargain as a single enterprise in some circumstances lead to illegal industrial action.

The Government was also concerned that agreements which had passed their nominal expiry date could be terminated unilaterally by giving 90 days' notice, which would result in employees' reverting to only the minimum statutory standards and 'protected award conditions'.

### **Industrial action**

#### *Complicated, prescriptive and unfair protected action ballot process*

Work Choices introduced the requirement that employees intending to take industrial action must first vote in favour of doing so through a secret ballot. The purpose was 'to establish a transparent process which allows employees directly concerned to choose, by means of a fair and democratic secret ballot, whether to authorise industrial action supporting or advancing claims by organisations of employees, or by employees'.<sup>1380</sup> However, the Government regarded the provisions as overly complicated and prescriptive.<sup>1381</sup> For example, a bargaining period was first required to have been notified and in place; the action was required to be duly authorised according to the union's rules (where, as in most cases, the applicant was a union); and a declaration that the action was not in support of prohibited content was required to be made, when the scope of prohibited content was itself both wide and unclear. The provisions relating to obtaining a protected action ballot order alone ran to 44 sections.<sup>1382</sup> The Government concluded that this was a problem as it imposed administrative burdens on applicants for ballot orders that were unnecessary in achieving the objects of the provisions.

Second, Work Choices required the applicant for a ballot order to pay 20 per cent of the costs of the ballot, with the Commonwealth funding the remaining 80 per cent. The EM notes that at the time of writing, only one application for a ballot order had been made by an employee and that application was made with the help of a union.<sup>1383</sup> The EM suggests that this was 'likely due to the complexity of the process and the liability of the applicant to meet 20 per cent of the costs of the ballot'.<sup>1384</sup> The Government considered that this acted as an unfair barrier to taking industrial action which, again, was unrelated to the purpose of the provisions.

Third, the employer who would be the subject of the industrial action, was given a significant role in the ballot application. Work Choices provided the employer a statutory right to be heard in each application. The Government was concerned that this was regularly used as a mechanism to indirectly impose good faith bargaining requirements on employee representatives.<sup>1385</sup> Further, the 'bringing of an appeal and the obtaining of a stay order based only on the establishment of an arguable case would provide a ready, and it would appear unintended, means of frustrating the substantive and legislated right to engage in protected industrial action, where sanctioned by Part 9 the Act'.<sup>1386</sup> This delayed the timely determination of ballot applications.

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<sup>1380</sup> Work Choices, s. 449(1).

<sup>1381</sup> EM, p. lvii.

<sup>1382</sup> EM, pp. lvii–lix.

<sup>1383</sup> EM, p. lvii.

<sup>1384</sup> EM, p. Lvii.

<sup>1385</sup> G Orr & S Murugesan, 'Mandatory secret ballots before employee industrial action', *Australian Journal of Labour Law*, vol. 20, 2007, p. 272, cited in EM, p. xxxiv.

<sup>1386</sup> DEEWR submission to the FW Bill inquiry, pp. 58–59, referring to *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Biffinger Berger (Australia) Pty Ltd* AIRC BP2008/3448 (22 October 2008).

A review of the early case law considering secret ballot applications under Work Choices demonstrates some of the technical and procedural hurdles associated with these provisions.<sup>1387</sup> The authors of that review concluded first, that many ballot applications were formalities, and accordingly there may be a case for simplifying the process to minimise wasting the time and resources of the tribunal and unions. Second, they observed that the Work Choices secret ballot provisions ‘tilt[ed] the playing field further towards employers’ in circumstances where there was already ‘a multiplicity of legal avenues’ available to employers to address employee industrial action.<sup>1388</sup>

Protected industrial action was an important bargaining tool for employees, and the Government considered that secret ballot provisions imposed a disproportionate procedural and administrative burden on employees. Although the objective for the secret ballot provisions under Work Choices was regarded by the Government as desirable, taken together the provisions acted as a significant barrier to taking lawfully mandated industrial action and shifted the balance in favour of employers and away from employees.

#### *Non-responsive lockouts*

Under Work Choices, protected employer industrial action could be taken to support or advance the employer’s claims in respect of a proposed agreement. These pre-emptive or non-responsive lockouts, in circumstances when employees had not taken industrial action, were regarded by the Government as an unnecessarily offensive industrial tactic<sup>1389</sup> and were unusual in an international context.<sup>1390</sup> Research indicates that after they were introduced in 1993, employer lockouts increased substantially while employee industrial action decreased. Between 1998 and 2003, more than half of disputes of more than one month in length were due to employer lockouts.<sup>1391</sup>

Accordingly, the circumstances in which lockouts could be used under Work Choices were considered to be inappropriately broad and shifted the balance of power in the employment transaction in favour of employers.

#### *Suspension and termination of industrial action*

There were two problems identified by the Government with the suspension and termination of industrial action.

First, Work Choices allowed the termination of protected industrial action in a number of circumstances without any subsequent corresponding power for the AIRC to ultimately resolve the relevant bargaining dispute by determining the matters at issue. This meant that the capacity for employees to press their claims and conclude an agreement subsequent to the termination of industrial action was all but removed in the event of a termination. This incongruity was considered problematic in light of the importance of protected industrial action to the bargaining scheme.

Second, the Government was concerned that the range of grounds on which action could be suspended or terminated included punitive, technical grounds such as when industrial action had been taken to support claims made by non-union members. Yet in contrast, Work Choices failed to include any basis for suspension or termination of industrial action based on the harm to the bargaining parties themselves.

The Government considered that these matters did not facilitate genuine agreement making.

### **Right of entry**

While the procedures and rules for exercising right of entry were generally regarded by the Government as appropriate, Work Choices significantly restricted rights of employees to be represented in the workplace by limiting the circumstances in which right of entry could be exercised. To exercise a right of entry, a union itself was required to be

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<sup>1387</sup> G Orr & S Murugesan, *op. cit.*, pp. 286–292.

<sup>1388</sup> *ibid.*

<sup>1389</sup> PCS.

<sup>1390</sup> S McCrystal, *The right to strike in Australia*, Federation Press, 2010, p. 183.

<sup>1391</sup> C Briggs, ‘The return of lockouts down under in comparative perspective: globalization, the state and employer militancy’, *Comparative Political Studies*, vol. 39, pp. 855–6; S McCrystal, *The right to strike in Australia*, Federation Press, 2010, pp. 182–3.



bound by an applicable industrial instrument. This excluded unions from many workplaces even though a member or person eligible for membership worked on the premises. In particular:

- Where only an award or awards applied to a workplace, only the union party to that award or awards could enter the workplace (noting that awards were displaced by all other instruments in the system)
- Where a union collective agreement applied to a workplace, only the union party to that agreement could enter the workplace (noting that all other unions were excluded)
- Where a non-union collective agreement or employer greenfields agreement applied to a workplace, no union could enter the workplace
- Where all employees at a workplace were covered by AWAs, no union could enter the premises.

In the absence of any positive statutory obligation to bargain with a union, it was within the employers' discretion to select the relevant statutory agreement to achieve that result. This restricted an employee's capacity to be represented.

In addition, Work Choices made provision for an employer to determine the location at the workplace where a union could meet its members or other eligible employees, unless the location was unreasonable. This resulted in employees being required to meet their representatives in inappropriate locations, such as a toilet block.<sup>1392</sup>

Representation at work assists with communication and consultation between employers and employees, gives employees a 'voice' in the workplace, helps resolve grievances and makes negotiations more effective.<sup>1393</sup> Thus the problem with right of entry under Work Choices identified by the Government was that it discouraged or removed employee representation in the workplace leaving employees, particularly those with less bargaining power, more exposed.

### **Transfer of business**

The Government considered that Work Choices failed to provide adequate protection of employee entitlements upon a transfer of business.

The circumstances that were classed as a transfer of business were not always clear, and a series of court decisions had been confined in an unduly narrow way. In particular, the High Court had developed the 'business characterisation' test which had the effect of excluding many outsourcing arrangements.<sup>1394</sup> There was also 'difficulty involved in determining the threshold question of whether a transmission of business has actually occurred' under the Work Choices test. This was demonstrated, for example, by a number of cases considering the entitlements of meter readers arising from the privatisation of Victorian power utilities.<sup>1395</sup>

Also, when a transfer of business *did* fall within the test, Work Choices only allowed an employee's terms and conditions to continue with the new employer for 12 months<sup>1396</sup>, and were then extinguished. The employee then reverted to the minimum wage and the AFPCS only, except for redundancy entitlements, which, following an amendment of the legislation in 2007, were extinguished after 24 months. This meant that an employee was unilaterally stripped of their existing conditions by the passage of time, and therefore, there was no incentive for a new employer to bargain above the minimum.

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<sup>1392</sup> See report of the inquiry of the Standing Committee on Education, Employment and Workplace Relations into the Fair Work Bill 2008, February 2009, [7.2].

<sup>1393</sup> ACAS, *Representation at Work*, November 2010, [www.acas.org.uk](http://www.acas.org.uk).

<sup>1394</sup> DEEWR submission to the FW Bill inquiry, p. 55, citing *PP Consultants Pty Ltd v Finance Sector Union of Australia* [2000] HCA 59.

<sup>1395</sup> DEEWR submission to the FW Bill inquiry, p. 55, citing *ASU v Automated Meter Reading Services* (PR922053); *Australian Services Union v Electrix Pty Ltd* [1999] FCA 211; and *Urquhart v Automated Meter Reading Services (Aust) Pty Ltd* [2008] FCA 1447.

<sup>1396</sup> DEEWR submission to the FW Bill inquiry, p 19.

## Unfair dismissal

Statutory unfair dismissal rights for employees had been a feature of Australian industrial relations systems since 1972<sup>1397</sup>, and federally since 1993.<sup>1398</sup> The Government was concerned that Work Choices curtailed unfair dismissal rights for a large number of employees.<sup>1399</sup> Under Work Choices, the unfair dismissal laws applied only to employees working in businesses with more than 100 staff.

Estimates based on ABS data indicate that about 4.6 million employees (52 per cent of all employees) were not eligible for an unfair dismissal remedy under Work Choices.<sup>1400</sup> It is not possible to estimate precisely the number of employers affected by this change as the relevant ABS data release, *Counts of Australian businesses, including entries and exits, Jun 2007 to Jun 2011* (ABS Cat. No. 8165.0) does not provide a breakdown to the relevant employment size categories. A rough estimate of the proportion of businesses employing 1–100 employees is 37–39 per cent of all businesses (or roughly 94 per cent of employing businesses). However, employees in businesses of more than 100 employees may also have been excluded from making a claim due to other exemptions under Work Choices.

Removing unfair dismissal provisions was especially difficult for vulnerable employees. Elton and Pocock<sup>1401</sup> studied a group of 20 vulnerable employees working in retail, clerical, aged care, hospitality and community sector jobs in South Australia. Seventeen reported that their concerns about or experience of job insecurity had increased and this was linked to the removal of unfair dismissal rights in firms employing less than 101 employees.<sup>1402</sup> Twelve participants had been dismissed or forced to resign in circumstances that could have been challenged as unfair or constructive dismissal before Work Choices. Participants in three other states experienced similar levels of unfair dismissal or forced resignation with little or no warning and without an effective remedy.<sup>1403</sup> The authors concluded that the threat of dismissal with no effective remedy worked to silence their voice at work.

Employees dismissed for 'genuine operational reasons' were also excluded from making an unfair dismissal claim. This exemption excused dismissals for operational reasons when those reasons did not necessitate termination. In *Carter v Village Cinemas Australia Pty Ltd*<sup>1404</sup> a cinema manager with 19½ years service in various positions, at nine different locations, was terminated when the cinema he then worked at closed down. He had requested that rather than be dismissed, he use his 6 months' accrued long service leave, during which time a position may arise in another cinema where he could be redeployed. The Full Bench found that the relevant 'genuine operational reason' need not *require* the termination, and whether the employer could have done something other than terminate the employment was irrelevant.<sup>1405</sup>

Finally, when a claim *could* be made by an employee, the process provided for under Work Choices was unduly formal and legalistic, placing an unnecessary burden on business.

## General protections

Work Choices contained a number of protections against discrimination and unfair treatment; however, the scheme was considered by the Government to lack regulatory coherency, involve duplication and contain inconsistencies. The Work Choices protections were scattered throughout the Act, and were not always easy to understand or enforce.<sup>1406</sup> There were gaps in the range of conduct that Work Choices proscribed, and inconsistency in the processes and remedies available in some instances.

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<sup>1397</sup> A Chapman, 'The decline and restoration of unfair dismissal rights' in A Forsyth & A Stewart, *Fair Work: the new workplace laws and the Work Choices legacy*, Federation Press, 2009, p. 208.

<sup>1398</sup> *ibid.*

<sup>1399</sup> EM, pp. xiv–li.

<sup>1400</sup> DEEWR calculations based on ABS statistics. See Appendix G for detailed of calculations.

<sup>1401</sup> J Elton & B Pocock, 'The effects of Work Choices on vulnerable South Australian workers and their households', *Labour and Industry*, April 2008.

<sup>1402</sup> *ibid.*, p. 98.

<sup>1403</sup> *ibid.*, p. 109.

<sup>1404</sup> *Carter v Village Cinemas Australia Pty Ltd* [2007] AIRCFB 35.

<sup>1405</sup> *ibid.*, [28].

<sup>1406</sup> PCS.

## Institutions and compliance

Under Work Choices, many separate statutory agencies shared responsibility for the various aspects of the workplace relations system. These included the AIRC, Australian Industrial Registry, AFPC, Workplace Authority, Workplace Ombudsman, Australian Building and Construction Commission, as well as the Federal Court, Federal Magistrates Court and, in some cases, state and territory courts. The Government considered that this array of institutions resulted in overlap and confusion, particularly in the areas of agreement approval, enforcement, education and information.

One example was the overlap in functions of the Workplace Authority and the Workplace Ombudsman, a problem exacerbated by their similar titles. Functions of the Workplace Authority Director included promoting an understanding of Commonwealth workplace relations legislation, including publishing information and guidance; and providing education and assistance to employees, employers and organisations about their rights and obligations under the legislation.<sup>1407</sup> Functions of the Workplace Ombudsman were to help employees and employers understand their rights and obligations under the legislation, and promote compliance with the legislation including by providing assistance and advice and disseminating information.<sup>1408</sup> The Government regarded the distinctions between these functions as unclear, and was concerned that employees and employers seeking advice about their rights and obligations were often not sure which institution to approach.

Despite agreement making being central to the operation of the system under the WR Act, the approval process for agreements was initially splintered and then removed from the AIRC altogether under Work Choices. From the end of 1996, the Employment Advocate had responsibility for AWAs, with the AIRC maintaining certification powers for collective agreements. Under Work Choices, AWAs and collective agreements were lodged with the Workplace Authority.

The problem identified with the transfer of the minimum wage setting function from the AIRC to the AFPC under Work Choices is described in more detail above. Creating a new body (along with the removal of wage rates from awards) contributed to uncertainty about who was responsible for publishing revised minimum rates. Many employers, employees and unions experienced difficulty in obtaining clear information about wage rates following AFPC decisions.

In addition, the processes adopted by agencies like the AFPC<sup>1409</sup> and the Workplace Authority were criticised<sup>1410</sup> for lacking transparency, and, in the case of the Authority, for creating significant delays in the processing of agreements.<sup>1410</sup> The absence of an accessible appeal right against a refusal by the Authority to approve an agreement added to the frustration.

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<sup>1407</sup> Work Choices, s. 150B.

<sup>1408</sup> Work Choices, s. 166B.

<sup>1409</sup> B Schneiders, 'Union push for big pay rises', *The Age*, 8 February 2010.

<sup>1410</sup> C Sutherland & J Riley, 'Industrial legislation in 2007', *Journal of Industrial Relations*, vol. 50, no. 3, p. 423.

## Appendix C: The Transition Act

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### Introduction

Implementation of the Government's Fair Work reform package began with the enactment of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (the Transition Act), which commenced operation on 28 March 2008. The Transition Act amended Work Choices to implement some key government reforms including removing the ability to make Australian Workplace Agreements (AWAs), introducing a new 'no-disadvantage test' and enabling the Australian Industrial Relations Commission (AIRC) to undertake the award modernisation process in the terms of a request made by the Minister. The Transition Act also included the making of Individual Transitional Employment Agreements (ITEAs) during the transition to the *Fair Work Act 2009* (FW Act).

While the terms of reference for this Review include considering the impact of the Transition Act as well as the FW Act, very little was said about the Transition Act in submissions. Even less was said about the Transition Act during the Panel's consultations with key stakeholders, reflecting perhaps the forward looking focus of those discussions.

Given the lack of evidence from stakeholders about its effects, our analysis is based on what little quantitative data is available.

### Elimination of AWAs and the introduction of ITEAs

In its Policy Implementation Plan the Government reaffirmed its commitment that statutory individual employment agreements would not be available under the Fair Work system. It provided that AWAs 'will be scrapped' and noted that 'AWAs have resulted in working Australians losing penalty rates, overtime, shift allowances and redundancy entitlements with no compensation'.<sup>1411</sup>

As promised, the Transition Act removed the capacity to make AWAs. AWAs made before the commencement date remained in force. These could only be terminated according to the existing rules, namely by agreement between the parties during the term of the AWA or by one party providing 90 days' notice to the other after the nominal expiry date of the AWA.

The Implementation Plan foreshadowed 'transitional arrangements to make it easier for everyone to move to our new fairer industrial relations system and provide them with certainty during the time it will take to put the system in place'.<sup>1412</sup>

A key feature of the transitional arrangements was the availability of ITEAs. ITEAs were only available to employers who employed an employee on an AWA at 1 December 2007. The second reading speech for the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 (the Transition Bill) provided that 'ITEAs will give these employers time to transition to the [G]overnment's new workplace relations system'.<sup>1413</sup> These employers could use ITEAs for new employees or for existing employees who were on AWAs. ITEAs were required to have a nominal expiry date of no later than 31 December 2009.

#### Evidence of impacts

The Implementation Plan noted that AWAs were the least used industrial instrument in Australia at the time. ABS data from May 2006 indicated that 38.1 per cent of Australian employees were on registered collective agreements, 31.7 per

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<sup>1411</sup> Forward with Fairness—Policy Implementation Plan, p. 1.

<sup>1412</sup> *ibid.*, pp. 5–6.

<sup>1413</sup> Second reading speech to the WR Amendment (Transition to Forward with Fairness) Bill 2008, Gillard, 17 March 2008, p. 977.

cent were on common law individual arrangements, 19 per cent were covered by awards and only 3.1 per cent were on registered individual arrangements like AWAs.<sup>1414</sup> A reasonable estimate of the extent of AWAs at February 2008 was that between 5 and 7 per cent of employees had an AWA.<sup>1415</sup>

DEEWR's 'Agreement making in Australia under the Workplace Relations Act, 2007–09' report indicates that 530,508 operational individual agreements were lodged during the reporting period, a 23 per cent decrease from the 2004–06 reporting period when 688,151 operational AWAs were lodged.<sup>1416</sup> This decrease was primarily attributed to the impact of the Transition Act, which prevented new AWAs being made after 28 March 2008 and allowed ITEAs to be made in limited circumstances. Lodgments of ITEAs were considerably lower than of AWAs under Work Choices, either before or after the introduction of the Fairness Test.<sup>1417</sup>

Table 1 below highlights the decreasing trend in operational AWAs and ITEAs, by regulatory period, during the 2007–09 reporting period. The final column shows the number of ITEAs that came into operation between 28/3/2008 and 31/12/2009 (the entire period in which ITEAs could be made).

Table C.1—Operational AWAs and ITEAs, by regulatory period

	Pre-fairness test 1/1/2007–6/5/2007	Fairness test 7/5/2007–27/3/2008	No-disadvantage test 28/3/2008– 31/12/2009
Operational agreements <sup>1418</sup>	131,475	274,108	118,568
Average lodgments per month	31,000	26,750	13,175

Source: DEEWR, *Report on agreement making 2007–2009*.

By August 2008, six months after the Transition Act prevented the making of new AWAs, the proportion of non-managerial employees whose pay was set by a federally registered individual agreement (AWA or ITEA) was down to 2.2 per cent (174,300), a deduction of 0.9 per cent from the May 2006 figure.<sup>1419</sup> The ABS stopped collecting this data after the release of the 2008 publication. Nevertheless, it could reasonably be assumed that the number of federally registered individual agreements would now be extremely small due to laws preventing their creation.

The data indicates that the Transition Act was effective in reducing the number of Australian employees whose pay and conditions were set by individual workplace agreements. Data is not available, however, to show whether these employees transitioned to modern awards, collective agreements or common law contracts. In its submission to the Review, NSW Business Chamber & Australian Business Industrial advised that 'as a machinery device individual transitional employment agreements served their purpose effectively once the decision was taken to phase out Australian Workplace Agreements'.<sup>1420</sup>

## Replacement of the fairness test with a new no-disadvantage test

The Transition Act replaced the fairness test, which had been a feature of Work Choices since the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* commenced operation on 1 July 2007, with a new no-disadvantage test

<sup>1414</sup> *Employee earnings and hours*, Cat. No. 6306.0, ABS, Canberra, May 2006.

<sup>1415</sup> See 6.2..

<sup>1416</sup> RAM, 2007–09, p. 120.

<sup>1417</sup> *ibid.*, pp. 120–122.

<sup>1418</sup> That is, individual agreements that came into operation. Does not include agreements that were rejected as invalidly lodged or that did not pass the fairness test of NDT.

<sup>1419</sup> *Employee Earnings and Hours*, Cat. No. 6306.0, ABS, Canberra, May 2006, August 2008.

<sup>1420</sup> NSWBC & ABI, p. 60.

(Transition Act no-disadvantage test) for all individual and collective agreements made after the start date of the Transition Act. To pass the Transition Act no-disadvantage test, ITEAs were required to not disadvantage an employee against an applicable collective agreement or, if there was no such collective agreement, an applicable award, and the Australian Fair Pay and Conditions Standard (AFPCS). Collective agreements were required to not disadvantage employees in comparison with an applicable award and the AFPCS. The Transition Act no-disadvantage test also applied to variations of both new and existing agreements.

The Government anticipated that the introduction of the Transition Act no-disadvantage test would 'end the compliance nightmare created by the backlog of agreements that has piled up under the fairness test changes'.<sup>1421</sup>

### **Evidence of impacts**

The implementation of the fairness test by the previous government resulted in a considerable backlog of agreements needing to be approved. Much of the problem stemmed from its retrospective application. At a June 2008 Senate Estimates hearing, the then director of the Workplace Authority, Barbara Bennett, told the Committee:

We are aware that between 8 May, when it was announced that the fairness test would be introduced, and 1 July, when the legislation came into effect, we had about 55,000 workplace agreements on the books. I think it would be fair to conclude that most of those did not meet the requirements of the fairness test, nor did they provide accurate information, and therefore they took a very long time to process. In fact, an estimate is that of those 55,000 agreements that were made only about 45,000 passed the fairness test without a variation being made or not applying.<sup>1422</sup>

Ms Bennett went on to tell the Senate Estimates hearing that Transition Act no-disadvantage test agreements could be finalised in a shorter timeframe than fairness test agreements for three reasons: there were fewer individual statutory agreements when the Transition Act no-disadvantage test was being applied; the test did not apply retrospectively; and agreements were in operation from approval not lodgment.<sup>1423</sup>

The introduction of the Transition Act no-disadvantage test also ensured individual and collective agreements were assessed against a higher benchmark than was required by the fairness test, which only required that an employee be compensated for the modification or removal of a limited range of protected award conditions. The Transition Act no-disadvantage test, in comparison, required assessment of whether the employee was not disadvantaged against the whole of the relevant reference instrument used for comparison.

## **Capacity to extend and vary pre–Work Choices agreements**

The Transition Act permitted certain pre–Work Choices certified agreements to be extended and varied on application to the AIRC. This meant that parties to a pre–Work Choices agreement did not need to make a new workplace agreement under a transitional framework only to need to make a new agreement again once the FW Act came into effect. Both employer and employee representatives sought this mechanism during consultations with the Committee on Industrial Legislation, to eliminate 'double transition' costs.<sup>1424</sup>

The Transition Act specified that the AIRC could only grant an application to extend or vary a pre–Work Choices certified agreement if satisfied (among other things) that the parties genuinely agreed and the employees covered by the agreement approved. In situations where the AIRC decided to extend the nominal expiry date of an agreement, the maximum extension possible was three years from the date on which the order was made.

### **Evidence of impacts**

The Government enabled the preservation of pre–Work Choices certified agreements so that employers and employees

<sup>1421</sup> Second Reading Speech of the WR Amendment (Transition to Forward with Fairness) Bill 2008, Gillard, 17 March 2008, p. 977.

<sup>1422</sup> Evidence to Senate Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 3 June 2008 (Barbara Bennett).

<sup>1423</sup> *ibid.*

<sup>1424</sup> Second reading speech to the WR Amendment (Transition to Forward with Fairness) Bill 2008, Gillard, 17 March 2008.

on these agreements did not need to negotiate a new one within the narrower parameters of the ‘prohibited content’ rule of the Work Choices amendments.

A total of 1211 pre-Work Choices agreements covering 305,251 employees<sup>1425</sup> were varied and extended by this mechanism. At 30 April 2012, 112 of these agreements covering 23,815 employees were yet to pass their nominal expiry date.<sup>1426</sup> Under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, these agreements can continue to operate until terminated or replaced by an enterprise agreement, but can only be varied in limited circumstances, such as to remove ambiguity or uncertainty. This represents less than half of 1 per cent of the total of 22,731 agreements current at 30 September 2011,<sup>1427</sup> and is likely to continue to decline.

## New commencement dates for agreements

Under Work Choices, workplace agreements took effect from the date they were lodged with the Workplace Authority, with the result that, if they failed the fairness test, employers had to pay back-pay to affected employees under those agreements.

In contrast, the Transition Act provided that ITEAs for existing employees and new collective agreements would only commence operation after they had been assessed as passing the Transition Act no-disadvantage test and were approved by the Workplace Authority.

However, to provide a level of certainty for employers and new employees in the transition period, ITEAs for new employees, and employer greenfields or employer and union greenfields agreements, continued to commence operation from lodgment.

### Evidence of impacts

At the June 2008 Senate Estimates hearing Ms Bennett was asked whether the Workplace Authority had quantified the costs to business caused by the delays in processing workplace agreements under the fairness test. Ms Bennett gave evidence that there was no quantitative data; however, anecdotal information suggested employers were concerned about the potential impact on their business of a delayed finding that back-pay is owed to employees.<sup>1428</sup>

The benefits to employees and employers as a result of agreements being operational from approval rather than lodgment were significant. Knowing that an operational agreement was legal and that the terms and conditions being paid were correct provided certainty to both parties and removed the capacity for employers to be liable for back pay at a later stage.

## Award modernisation

A key aspect of the Government’s election commitments was the creation of new modern awards. To enable the award modernisation process to begin, the Transition Act set out the award modernisation function of the AIRC and specified the objectives of award modernisation and requirements for modern awards. The then Deputy Prime Minister made a formal request to the then President of the AIRC on the same day the Transition Act took effect, requesting the AIRC create new modern awards during the transition period. Several variations to this request were made during the course of the award modernisation process in response to stakeholder concerns.

The Transition Act at s. 576A specifies that modern awards:

- (a) must be simple to understand and easy to apply, and must reduce the regulatory burden on business, and

<sup>1425</sup> Employee coverage is estimated based on the number of employees covered by the original agreement.

<sup>1426</sup> DEEWR Workplace Agreements Database.

<sup>1427</sup> *Trends in federal enterprise bargaining*, September quarter 2011, DEEWR.

<sup>1428</sup> Evidence to Senate Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 3 June 2008 (Barbara Bennett).

- (b) together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees, and
- (c) must be economically sustainable, and promote flexible modern work practices and the efficient and productive performance of work, and
- (d) must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements, and
- (e) must result in a certain, stable and sustainable modern award system for Australia.

### **Evidence of impacts**

The award modernisation process undertaken by the AIRC involved reviewing more than 1500 awards and other instruments, holding over 100 days of consultation and evaluating thousands of submissions for stakeholders. It also included issuing exposure drafts of modern awards for comment. This resulted in 122 industry and occupation-based modern awards to replace about 3700 state and federal awards, NAPSAs and pay scales.

During the bedding down phase of the award modernisation process (between 1 July and 31 December 2009) there were 200 applications made to the AIRC to vary modern awards. Of these, the AIRC determined 93 before 31 December 2009. FWA determined the remainder before 31 March 2010. Between 1 January and 30 June 2010 there were 96 applications to vary modern awards, of which 54 were determined. Between 1 July 2010 and 30 June 2011 there were 204 applications made to vary modern awards with 212 determinations made during the reporting period.<sup>1429</sup>

FWA continued the award modernisation process from 1 January 2010, dealing with Division 2B state awards, applications to modernise enterprise awards and the termination of award-based transitional instruments and pay scales. Division 2B state awards set the employment conditions of award-reliant employees transitioning to the national workplace relations system as a result of referrals of powers over workplace relations matters from the states.

The making of modern awards was not intended to reduce the take-home pay of employees, or to increase costs for employers. It was however acknowledged in the drafting of the FW Act and in the award modernisation request that the modernisation and consolidation of so many awards may result in some changes to conditions. To allow businesses time to adjust to modern awards, five-year transitional arrangements apply in most modern awards, involving a phasing-in of changes to pay-related matters. Under the model transitional arrangements, phasing-in will occur in five equal instalments, one each year. If an employee believes that their rate of pay decreases as a result of award modernisation, they or an employee organisation that represents them can apply to FWA for a take-home pay order.

The award modernisation process employed by the AIRC was extremely consultative and appears to have resulted in a set of modern awards that largely meet the objective set out in s. 576A of the Transition Act. While the Panel acknowledge the difficulties imposed on employers with the complex phase-in arrangements for modern awards, we are convinced that the end result will be a complete, stable and easy-to-apply set of modern awards. Forsyth and Stewart as well as the SDA were of a similar view.<sup>1430</sup>

## **Other matters**

### **Workplace Relations Fact Sheet**

The Transition Act repealed the requirement for employers to provide a copy of the Workplace Relations fact sheet that explained the operation of the fairness test to their employees. This lessened the regulatory requirements for employers. The Panel notes that the FW Act reintroduced a similar requirement for employers to distribute the Fair Work information statement to employees.

<sup>1429</sup> Fair Work Australia Annual report 2010–11, p. 15.

<sup>1430</sup> Forsyth and Stewart, pp. 3–4; SDA, p. 3.



### **Termination of agreements**

The Transition Act repealed the Work Choices provisions which allowed employers to unilaterally terminate a collective workplace agreement which had passed its nominal expiry date and return their staff to a limited number of minimum standards. The Transition Act, instead, provided that a collective agreement could only be terminated if the parties agreed, or by the AIRC when termination would not have been contrary to the public interest. The Transition Act also provided that when an agreement was terminated, employees would revert to whatever award or workplace agreement would have otherwise applied to them. While this change reduced some of the flexibility employers enjoyed under Work Choices, it greatly strengthened protections for employees by ensuring they could not be stripped of their collective agreement in favour of only a limited number of conditions.

### **AWA/ITEA employees—participation in collective bargaining**

Work Choices prevented an employee on an AWA from voting on a proposed collective agreement without first terminating their existing arrangement. The Transition Act addressed this by providing that an employee on an AWA or ITEA that had passed its nominal expiry date could approve new collective agreements and variations to collective agreements before terminating their individual agreement.

## **Conclusion**

The Panel considers that the Transition Act was an effective piece of legislation that achieved what the Government intended it to. In the process, it reduced the regulatory burden on employers and the regulatory bodies responsible for assessing workplace agreements. The Transition Act also considerably strengthened the safety net and protections for employees via the introduction of the Transition Act no-disadvantage test and other measures and provided all parties with greater certainty about the legality of operational agreements. The Transition Act successfully encouraged employers and their employees to terminate individual statutory agreements. Importantly, it provided a sensible range of transitional arrangements that made the transition away from statutory individual agreements to a system with greater focus on enterprise-bargaining less costly and radical than it might otherwise have been.

## Appendix D: Shift share analysis

The purpose of this analysis is to measure the contribution of different industries to productivity growth in the whole economy. Labour productivity rather than MFP is used because it allows the use of a simple additive decomposition and because labour productivity is considered to be more relevant to the Review of the FW Act. What follows is a brief description of the methodology: see Ewing et al. (2007)<sup>1431</sup>

We use the following decomposition of the change in labour productivity for the economy as a whole:

$$\Delta LP = \sum_i (s_i \cdot \Delta LP_i + \Delta s_i \cdot (LP_i - LP) + \Delta s_i \cdot \Delta LP_i)$$

$LP$  is labour productivity (henceforth ‘productivity’), defined as real gross value added at market prices divided by hours worked (i.e., in \$/hour, 2009-10 prices). The subscript  $i$  denotes industry  $i$ , the absence of a subscript the whole economy. Industry  $i$ ’s share of hours worked in the economy is  $s_i$ . A plain variable denotes a base year value, and  $\Delta$  the change from the base to the final year.

The first term—the change in productivity for each industry weighted by its base year employment share—shows the effect of productivity growth *within* individual industries. When summed over all industries, it shows the change in productivity for the economy as a whole if all industries had retained their base year shares of hours worked.

The second term—the change in the share of hours weighted by base year productivity relative to the economy-wide average—represents the effects of structural change *between* industries: the change in productivity resulting from changes in shares of hours worked, if all industries retained their base year level of productivity. (The adjustment for average productivity assumes that the opportunity cost of an hour worked in industry  $i$  is equal to the average level of productivity in the economy.) This between-industries effect is positive if an industry with above average productivity increases its share of hours worked, or if an industry with below average productivity reduces its share of hours worked.

Finally, the third term is just the interaction between the within-industry and between-industry effects: positive if there is an increase (decrease) in the hours share of an industry with positive (negative) productivity growth.<sup>1432</sup>

### 2001–2011

We first perform this exercise with 2001 as the base year, and 2011 as the final year (calendar years). The results are shown in Table D.1 below.

Table D.1—Decomposition of labour productivity growth, 2001–2011

Decomposition of labour productivity growth, 2001–2011						
Industry	Productivity growth (%)	$\Delta$ Hours share (p.p.)	Within effect (p.p.)	Between effect (p.p.)	Interaction (p.p.)	Total (p.p.)
Agriculture, Forestry & Fishing	53.1%	-2.2	1.6	1.1	-0.6	2.0
Mining	-54.6%	1.5	-5.0	10.6	-6.6	-1.0

<sup>1431</sup> R Ewing, S Fenner, S Kennedy & J Rahman, ‘Recent productivity outcomes and Australia’s potential growth’, *Economic Roundup Winter 2007*, Australian Treasury.

<sup>1432</sup> The interaction term may be combined with either the within or between term, with the effect of changing from base to final year weights. More generally, there are multiple ‘correct’ ways to perform the decomposition, which lead to different results and interpretation.

Decomposition of labour productivity growth, 2001–2011						
Manufacturing	19.4%	-3.2	2.3	0.2	-0.6	1.9
Electricity, Gas, Water & Waste Services	-38.0%	0.5	-1.2	1.0	-0.6	-0.7
Construction	25.8%	2.2	1.7	-0.4	0.5	1.7
Wholesale Trade	19.7%	-0.3	1.0	0.0	-0.1	0.9
Retail Trade	20.0%	-0.4	1.0	0.2	0.0	1.2
Accommodation & Food Services	1.1%	-0.4	0.0	0.2	0.0	0.2
Transport, Postal & Warehousing	18.6%	0.0	1.0	0.0	0.0	1.0
Information Media & Telecommunications	50.8%	-0.6	1.8	-0.2	-0.4	1.2
Financial & Insurance Services	38.2%	0.0	3.5	0.0	0.0	3.5
Rental, Hiring & Real Estate Services	-9.7%	0.1	-0.3	0.0	0.0	-0.2
Professional, Scientific & Technical Services	6.6%	1.0	0.5	0.0	0.1	0.5
Administrative & Support Services	-2.7%	-0.2	-0.1	0.0	0.0	-0.1
Public Administration & Safety	-10.6%	0.8	-0.7	0.1	-0.1	-0.7
Education & Training	-1.6%	0.2	-0.1	0.0	0.0	-0.1
Health Care & Social Assistance	10.2%	1.6	0.6	-0.5	0.1	0.2
Arts & Recreation Services	6.6%	0.3	0.1	-0.1	0.0	0.0
Other Services	2.4%	-0.6	0.1	0.3	0.0	0.3
All Employing Industries	<b>11.9%</b>	<b>0</b>	<b>7.9</b>	<b>12.3</b>	<b>-8.4</b>	<b>11.9</b>

Source: Calculations from ABS 5206.0 and 6291.0.55.003 and seasonal adjustment of hours worked data were conducted by DEEWR.

The first three columns list the industry sectors, their productivity growth in percentage terms ( $\Delta LP_i / LP_i$  in the above notation), and the change in their share of hours worked. While labour productivity in the whole economy<sup>1433</sup> rose by

<sup>1433</sup> More precisely, all employing industries, which excludes ownership of dwellings.

nearly 12 per cent over the decade, several industries actually showed falling productivity levels. This fall was particularly large in Mining but also occurred in Electricity, Gas, Water and Waste, and several service industries. Productivity growth was strongest in Agriculture, Forestry and Fishing, Information Media and Telecommunications, and Finance and Insurance. Construction, Health Care and Social Assistance, and Mining showed strong growth in their shares of hours worked, while the shares of Manufacturing, and Agriculture, Forestry and Fishing fell significantly.

The next columns show the results of the decomposition analysis: the within-industry, between-industry and interaction terms for each industry. These numbers are additive both by rows, to give the total industry contribution to growth in the final column, and by columns, to give the within-industry, between-industry and interaction components of productivity growth in the whole economy (final row).

Glancing first at this final row, the 'Between' total shows that, if all industries had retained their 2001 level of productivity—meaning *no productivity growth at all* at the industry level—productivity for the entire economy would still have increased by over 12 per cent, as a result of the shift in hours towards industries with higher levels of productivity. Conversely, the 'Within' total shows that, if the hours share of each industry had remained at its 2001 level, productivity growth within industries would have added up to total growth of less than 8 per cent.<sup>1434</sup> The 'Interaction' total is large and negative, indicating that, on average, the share of hours worked increased in industries where productivity was falling.

Mining is particularly important in this regard. Its falling productivity obviously had a negative effect on the productivity of the whole economy: if mining had kept only its 2001 share of hours worked, the fall in productivity would have taken five percentage points from productivity growth. On the other hand, the increase in the share of hours worked in mining had a positive effect, since its productivity level was well above average: if mining had maintained its 2001 productivity levels, the increase in its share of hours worked would have contributed nearly eleven percentage points to productivity growth! When one takes into account the large negative interaction between the fall in productivity and the rising share of hours worked, the net contribution of the mining industry to productivity growth was negative, but barely so: only one percentage point.

The industry effects in Mining dwarf those of all other industries in the between-industry and interaction components. Within industries, however, the effects were spread much more widely, with Finance and Insurance; followed by Manufacturing; and Construction, being the largest contributors (that is, having the largest positive effects). This ranking does not follow the above ranking of industries by productivity growth: Manufacturing's large share of hours worked translated into a large contribution despite productivity growth only being slightly above average.

The overall picture, then, is that structural change—changes in industry shares of hours worked, driven overwhelmingly by Mining—is important in accounting for productivity growth in the last decade. Just how important—whether it accounts for only a minority, albeit a large one, of total growth, or whether it more than accounts for the total—depends on the essentially arbitrary choice between base or final year weights.<sup>1435</sup>

### 1991–2001

For the sake of comparison, we repeat the above exercise for the decade from calendar year 1991 to calendar year 2001. The methodology is identical to the 2001 to 2011 analysis.

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<sup>1434</sup> These are descriptive accounting exercises, not plausible economic scenarios. Productivity growth within an industry and changes in its share of hours are not necessarily independent of each other—for example, the rapid growth of the mining sector is often cited as a reason for its poor productivity performance.

<sup>1435</sup> As shown above, using 2001 relative productivity weights yields a 'between' contribution that is slightly larger than total productivity growth (12.3 vs. 11.9 percentage points). However, if 2011 weights are used (by adding the interaction term), the 'between' contribution falls to 3.9 percentage points. Another way of putting this is that if 2011 instead of 2001 hours shares are used to calculate the 'within' contribution, it actually becomes negative (−0.5 percentage points)! The size of the interaction term, and hence the choice of weights, is so important in this exercise (c.f. Ewing et al. who do not even report it) because of the large proportional size of some changes, in turn due to the decade-long time period and the significant structural change that occurred during it.

Table D.2—Decomposition of labour productivity growth, 1991–2011

Decomposition of labour productivity growth, 2001-2011						
Industry	Productivity growth (%)	Δ Hours share (p.p.)	Within effect (p.p.)	Between effect (p.p.)	Interaction (p.p.)	Total (p.p.)
Agriculture, Forestry & Fishing	49.2%	-0.9	1.5	0.5	-0.2	1.8
Mining	60.7%	-0.3	5.5	-1.7	-1.2	2.6
Manufacturing	18.7%	-1.9	2.7	0.0	-0.4	2.4
Electricity, Gas, Water & Waste Services	55.3%	-0.5	2.0	-0.7	-0.7	0.6
Construction	5.9%	0.7	0.4	0.0	0.0	0.4
Wholesale Trade	84.0%	-1.5	3.9	0.3	-1.0	3.2
Retail Trade	31.7%	-0.2	1.6	0.1	0.0	1.6
Accommodation & Food Services	17.6%	0.6	0.5	-0.2	0.1	0.4
Transport, Postal & Warehousing	28.9%	-0.2	1.6	0.0	-0.1	1.6
Information Media & Telecommunications	44.4%	0.4	1.2	0.1	0.2	1.5
Financial & Insurance Services	76.8%	-0.6	5.7	-0.4	-0.7	4.6
Rental, Hiring & Real Estate Services	12.3%	0.2	0.4	0.1	0.0	0.5
Professional, Scientific & Technical Services	12.4%	2.1	0.7	0.2	0.3	1.2
Administrative & Support Services	2.8%	1.1	0.1	0.2	0.0	0.3
Public Administration & Safety	14.0%	0.0	1.0	0.0	0.0	1.0
Education & Training	6.3%	0.3	0.4	0.0	0.0	0.4
Health Care & Social Assistance	15.4%	0.6	0.9	-0.2	0.1	0.8
Arts & Recreation Services	-5.3%	0.2	-0.1	0.0	0.0	-0.1
Other Services	17.3%	0.0	0.5	0.0	0.0	0.5
<b>All Employing Industries</b>	<b>25.3%</b>	<b>0</b>	<b>30.5</b>	<b>-1.7</b>	<b>-3.5</b>	<b>25.3</b>

Source: Calculations from ABS 5206.0 and 6291.0.55.003 and seasonal adjustment of hours worked data were conducted by DEEWR.

Two differences between this and the subsequent decade immediately stand out. First, the overall growth in productivity is much higher in the earlier period: 25 per cent as opposed to 12 per cent. Second, the decomposition is very different: the within-industry contribution is greater than the total, with the between-industry and interaction terms both being negative. In other words, the 1990s was a decade in which productivity growth within industries was much higher, and structural change was less important.

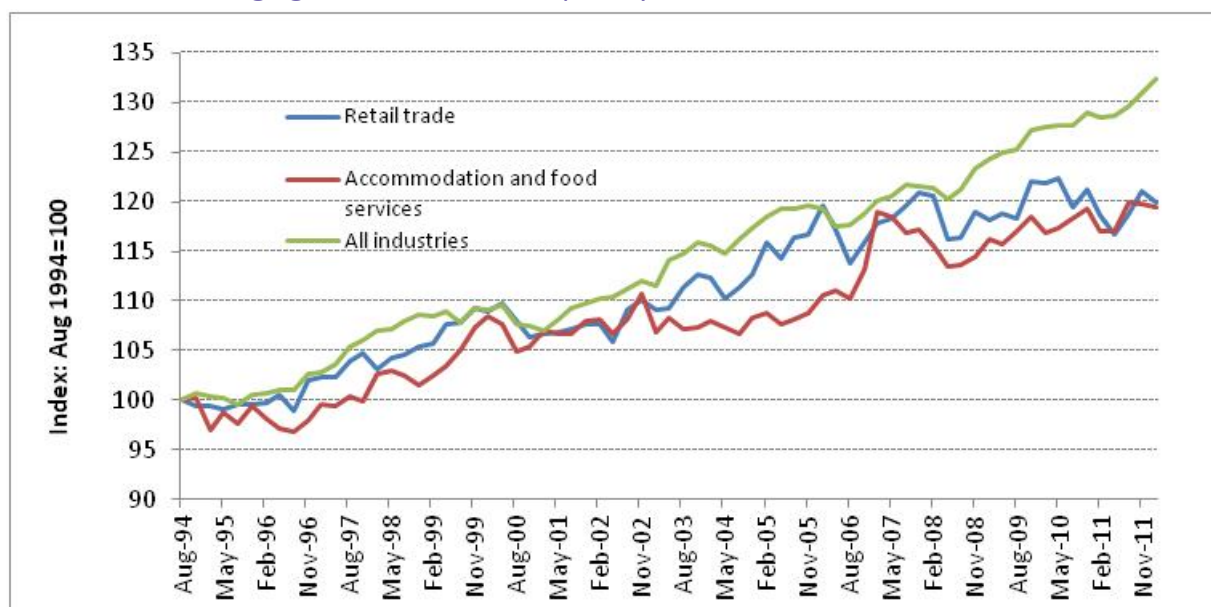
Productivity rose in all industries except Arts and Recreation Services. Wholesale Trade; and Financial and Insurance Services showed the greatest gains. Professional, Scientific & Technical Services had the largest increase in share of hours worked. Manufacturing; and Wholesale Trade had the largest decreases.

Reflecting the broad-based productivity gains, the within-industry contributions were widely spread. Financial and Insurance Services topped the list, followed by Mining.

By comparison, the between-industry and interaction terms were small both individually and collectively, though Mining had a noticeable negative effect on both.

## Appendix E: Bargaining and agreement making data

Chart E.1—Real wage growth of Retail, Hospitality and all industries



Source: ABS (2012), *Labour price index, Australia, March 2012* (ABS Cat. No. 6345.0)

Table E.1—Majority support determinations

Majority support determination decisions reviewed
<i>LHMU v MSS Security Pty Ltd</i> [2010] FWA 314
<i>AMWU v Seawind Catamarans Pty Ltd</i> [2009] FWA 1510
<i>AMWU v Cochlear Ltd</i> [2009] FWA 67; [2009] FWA 125
<i>LHMU v Coca-Cola Amatil (Aust) Pty Ltd</i> [2009] FWA 101; [2009] FWA 668
<i>AMWU v Kinkaid P/L t/as Cadillac Printing</i> [2009] FWA 1123
<i>TCFUA v Kennon Auto Pty Ltd</i> [2009] FWA 1377
<i>ASU v Regent Taxis Ltd t/as Gold Coast Cabs</i> [2009] FWA 1642
<i>CFMEU v Xstrata Glendell Mining Pty Ltd</i> [2009] FWA 1682
<i>CFMEU v Mammoet Pty Ltd</i> [2009] FWA 1945
<i>AWU v Flocast Australia Pty Ltd</i> [2010] FWA 308
<i>NUW v CMC Coil Steels Pty Ltd</i> [2010] FWA 410
<i>AWU v Bluescope Steel Ltd</i> [2010] FWA 874
<i>CFMEU v CBI Constructors Pty Ltd</i> [2010] FWA 2164; [2011] FWA 7642
<i>CFMEU v Freo Group Ltd</i> [2010] FWA 2592; [2010] FWA 3489
<i>AMIEU v Hans Continental Smallgoods Pty Ltd</i> [2010] FWA 2673
<i>ASU - NSW and ACT (Services) Branch v IBM Australia Ltd</i> [2010] FWA 3340
<i>CFMEU v Sunbury Wall Frames and Trusses (Aust) Pty Ltd</i> [2010] FWA 3681
<i>AIMPE, Queensland Branch v Port of Brisbane Corporation</i> [2010] FWA 4419
<i>TWU</i> [2010] FWA 5128
<i>AWU v Austral Brick Co Pty Ltd t/as Austral Bricks</i> [2010] FWA 5819

Majority support determination decisions reviewed
<i>CEPU v Monadelphous Engineering Associates Pty Ltd</i> [2010] FWA 6357
<i>ASU v AIDS Housing Action Group of Victoria Inc</i> [2010] FWA 6736
<i>NUW v Duratray International t/as Conymet Duratray Pty Ltd</i> [2010] FWA 7104
<i>APESMA - Collieries' Staff Division v Endeavour Coal</i> [2010] FWA 7497
<i>IEU v The Academy of Interactive Entertainment Ltd t/as Academy of Interactive Entertainment</i> [2010] FWA 7733
<i>Mr Douglas Heath v Gravity Crane Services</i> [2010] FWA 7751
<i>TWU v JJ Richards &amp; Sons Pty Ltd</i> [2010] FWA 7805
<i>CFMEU v Oz Linemarking Pty Ltd</i> [2010] FWA 8485
<i>AWU v Sneddon &amp; Kingston Plastics Pty Ltd</i> [2010] FWA 9043
<i>ASU v Equity Valet Parking Pty Ltd</i> [2011] FWA 2036
<i>United Voice v Berkeley Challenge Environmental Services Pty Ltd</i> [2011] FWA 3422
<i>AMWU v ASC Pty Ltd</i> [2011] FWA 3682
<i>AWUE Queensland v Peace Lutheran Church Gatton Inc t/as Anuha Services</i> [2011] FWA 4054
<i>Broken Hill Town Employees Union</i> [2011] FWA 4331
<i>AWU v Debco Pty Ltd</i> [2011] FWA 4393; [2011] FWA 5490.
<i>Union of Christmas Island Workers v Resolve FM Pty Ltd</i> [2011] FWA 5099
<i>ASU v Transfield Services Ltd</i> [2011] FWA 5415
<i>Mr Leon Carter v MTAA Super Fund (Secretariat Co) Pty Ltd t/as MTAA Superannuation Fund</i> [2011] FWA 5914
<i>NUW v GKK Enterprises Pty Ltd</i> [2011] FWA 5531
<i>AMWU v Christie Tea Pty Ltd</i> [2011] FWA 6956
<i>CFMEU v Porta Mouldings Pty Ltd t/as Porta</i> [2011] FWAFB 7243
<i>AWU v BlueScope Steel t/as BlueScope Lysaght</i> [2011] FWA 7525
<i>AMWU v Edlyn Foods Pty Ltd</i> [2011] FWA 7928
<i>CFMEU, AWU v IPA Personnel Pty Ltd</i> [2012] FWA 511
<i>ASU v Telecommunications Industry Ombudsman Ltd t/a Telecommunications Industry Ombudsman</i> [2012] FWA 66; [2012] FWA 716
<i>TWU v M J Rowles Pty Ltd</i> [2012] FWA 955
<i>TWU</i> [2012] FWA 1350
<i>NUW v Corporate Express Pty Ltd</i> [2012] FWA 1811
<i>AWU v Stagecraft Pty Ltd</i> [2012] FWA 2417

Table E.2—Multi-employer agreements, by type

FW Act multi-employer agreement, by type				
Type of multi-employer agreement	No. of agreements	%	No. of employees	%
Single interest employer	18	12.6	35,845	18.0
Multi-enterprise	73	51.0	106,705	53.7
Otherwise covers > 1 employer	52	36.4	56,113	28.2
Total	143		198,663	



Table E.3—Multi-employer agreements, by industry

FW Act multi-employer agreements, by industry				
Type of multi-employer agreement	No. of agreements	%	No. of employees	%
Accommodation and Food Services	15	11.03	17,105	8.61
Administrative and Support Services	5	3.45	1,506	0.76
Agriculture, Forestry and Fishing	3	2.07	164	0.08
Arts and Recreation Services	2	1.38	529	0.27
Construction	18	12.41	1,741	0.88
Education and Training	23	15.86	67,231	33.82
Electricity, Gas, Water and Waste Services	1	0.69	761	0.38
Financial and Insurance Services	2	1.38	14,783	7.44
Health Care and Social Assistance	41	28.97	84,496	42.56
Information Media and Telecommunications	2	1.38	676	0.34
Manufacturing	7	4.83	1,944	0.98
Other Services	2	1.38	520	0.26
Professional, Scientific and Technical Services	3	2.07	1,247	0.63
Public Administration and Safety	2	1.38	964	0.48
Retail Trade	13	8.97	4,736	2.38
Transport, Postal and Warehousing	2	1.38	140	0.07
Wholesale Trade	2	1.38	120	0.06
Grand total	143		198,663	

## Average annualised wage increase

Estimates of average wage increases are calculated for those federal enterprise agreements that provide quantifiable wage increases over the life of the agreement. Enterprise agreements for which average percentage wage increases could not be quantified (for example, those with inconsistent increases) are excluded from these estimates.

Average annualised wage increase (AAWI) data examines only increases to the base rate of pay, and does not take into account allowances and bonus payments that are paid separate to the base wage. The ABS produces the Labour price index, which is a more comprehensive dataset on total labour costs:

<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6345.0>

For agreements with quantifiable wage increases, the AAWI per agreement is calculated by:

- Adding the percentage wage increases to give a total percentage wage increase for each agreement (flat dollar increases are converted to a percentage using average weekly ordinary time earnings (AWOTE) (Drawn from Australian Bureau of Statistics, 6302.0—*Average Weekly Earnings*, Australia) for the relevant ANZSIC industry division and quarter). Wage increases awarded during the life of an agreement that compound based on the previous wage increase are taken into account. For example, for an agreement that contains three 4 per cent increases over three years, the AAWI is calculated based on percentage increases of 4 per cent, 4.16 per cent and 4.33 per cent.
- Annualising the total percentage wage increase by dividing it by the effective duration.

Trends report the AAWI per employee, which is calculated by weighting AAWI per agreement by the number of employees covered by that agreement. This is because AAWI per agreement provides only a simple unweighted average and would tend to overstate the average wage increase received by employees.

Estimates of AAWI generally exclude increases paid in the form of conditional performance pay, one-off bonuses, profit sharing or share acquisition, as these data cannot readily be either quantified or annualised.

Please note that AAWIs also do not include non wage costs eg increased allowances and they do not take into account any increased labour cost built into the starting rates of pay.

## Flexibility terms in enterprise agreements

DEEWR's most recent complete data in the Workplace Agreements Database shows that 57.4 per cent of FW Act enterprise agreements approved between 1 July 2009 and 30 September 2011, covering 60.8 per cent of employees, contain the model individual flexibility clause or a term that allows individual flexibility arrangements (IFAs) about any matter in the workplace agreement (unrestricted).

A second category, comprising 43.9 per cent of FW Act enterprise agreements approved between 1 July 2009 and 30 September 2011, contain 'specific flexibility terms'. These differ from the model term in range and/or number of matters they cover.

The data does not demonstrate what proportion of agreements in the second category permit IFAs to be made about a greater or lesser number of matters than the model term. However, DEEWR analysed a sample of 140 enterprise agreements with specific flexibility terms.<sup>1436</sup>

In this sample of 140 specific flexibility terms:

- there were 2.55 matters listed on average in these agreements
- 34 per cent permitted IFAs to be made over only one matter, and a further 25 per cent permitted IFAs to be made over only two matters
- 92 per cent permitted IFAs to be made over four or less matters
- 8 per cent permitted IFAs to be made about five or more matters. However, only four of these permitted IFAs to be made about all five of the matters provided for in the model term as well as other flexibilities, and five included four of the model term matters in addition to other flexibilities.

The most commonly included matters in specific flexibility terms were hours of work (48 per cent), annual leave, including payment, timing and single days (22 per cent), overtime (21 per cent) and allowances (18 per cent). However, specific flexibility clauses also included a diverse range of other matters such as parental leave (17 per cent), compassionate leave (14 per cent), jury service leave (14 per cent), RDOs (9 per cent), remuneration (6 per cent), personal leave (4 per cent), breaks (9 per cent) and to a lesser extent matters such as TOIL (time off in lieu), seasonal variation of hours, duties and responsibilities, probation, public holidays, type of employment, call backs, stand down, job sharing, part-time work, casual work, income protection, contractors/labour hire, Christmas close-down, novated lease facilities, exclusivity (working outside company), overpayments, terminations, and training (2 per cent or less).

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<sup>1436</sup> One hundred agreements were analysed in September 2011 and an additional 40 agreements were analysed in April 2012. However, as this sample of 140 agreements represents less than 1 per cent of FW Act enterprise agreements made by 30 September 2011, care should be taken when interpreting the analysis, as it may not represent the character of all specific flexibility clauses in enterprise agreements and is subject to considerable margins of error when subjected to any kind of statistical extrapolation.

## Other flexibilities in enterprise agreements

Table E.4—Flexible methods of engagement

Flexible methods of engagement								
Agreements lodged	26/03/2006 – 27/03/2008				01/07/2009 – 30/09/2011			
Provision	Agreements	%	Employees	%	Agreements	%	Employees	%
<b>Flexible engagement</b>								
Part-time	9,394	66.9	1,224,134	87.1	9,151	64.1	1,765,753	91.1
Casual	12,944	92.2	1,298,254	92.4	13,156	92.1	1,865,627	96.3
Job sharing	372	2.6	215,262	15.3	682	4.8	378,849	19.5
Fixed-term and seasonal	4,324	30.8	890,079	63.3	4,334	30.3	1,310,100	67.6
<b>Flexible engagement*</b>	<b>13,314</b>	<b>94.8</b>	<b>1,374,520</b>	<b>97.8</b>	<b>13,523</b>	<b>94.7</b>	<b>1,908,403</b>	<b>98.5</b>
<b>Total</b>								
<b>Total</b>	<b>14,046</b>		<b>1,405,188</b>		<b>14,282</b>		<b>1,938,020</b>	

Note: Flexible engagement encompasses part-time, casual, job sharing, fixed-term and seasonal. None of these are mutually exclusive in agreements.

Table E.5—Flexible working arrangements

Flexible working arrangements								
Agreements lodged in the respective period (all industries)	26/03/2006 – 27/03/2008				01/07/2009 – 30/09/2011			
Provision	Agreements	%	Employees	%	Agreements	%	Employees	%
Hours may be negotiated	2,258	16.1	263,762	18.8	5,944	41.6	1,333,940	68.8
Hours decided by majority of emps	1,683	12.0	167,030	11.9	3,853	27.0	354,740	18.3
Overtime TOIL at ordinary rates	3,438	24.5	468,867	33.4	3,443	24.1	640,709	33.1
Overtime TOIL at penalty rates	931	6.6	460,477	32.8	1,634	11.4	648,388	33.5
Annualised salary	1,072	7.6	160,971	11.5	1,476	10.3	428,444	22.1
Loaded hourly rate	1,772	12.6	75,516	5.4	1,187	8.3	55,165	2.8
Compressed working week	294	2.1	48,947	3.5	313	2.2	41,933	2.2
Mutual agreement to vary RDO	3,451	24.6	223,888	15.9	5,389	37.7	572,034	29.5
Management may alter hours after consultation	1,424	10.1	112,223	8.0	4,133	28.9	589,509	30.4
Make-up time	1,714	12.2	405,519	28.9	1,754	12.3	640,808	33.1
Breaks—flexible timing	2,834	20.2	342,543	24.4	1,087	7.6	162,331	8.4
Breaks—not to interrupt continuity of work	3,075	21.9	182,940	13.0	4,761	33.3	515,473	26.6

## Appendix F: Sample of protected action ballots

Table F.1—Sample of protected action ballots: July 2009 – March 2012

Sample of protected action ballots					
Parties involved	Date of FWA order	Declaration of result	Who held ballot	Action agreed?	Days b/w order and result
AWU/Chemring Australia P/L	20 Dec 2011	17 Jan 2012	AEC	Yes	28
CEPU/ Energex Ltd	12 Dec 2011	10 Feb 2012	AEC	Yes	60
AMIEU/ NMP P/L	31 Jan 2012	16 Feb 2012	AEC	Yes	16
AWU (SA Branch)/ APA P/L	31 Jan 2012	28 Feb 2012	AEC	No quorum	28
AMWU/ Manildra Group— Shoalhaven Starches P/L; Sundyne P/L; Manildra Energy Australia P/L	10 Feb 2012	1 Mar 2012	AEC	Yes	20
AMWU/ Edlyn Foods P/L	23 Feb 2012	9 Mar 2012	AEC	Yes	15
CFMEU/ Alpine MDF Industries P/L	24 Feb 2012	15 Mar 2012	AEC	Yes	20
TWU/ Boral Resources	27 Feb 2012	23 Mar 2012	AEC	Yes	25
CPSU/ Parliament of Victoria	8 Mar 2012	5 Apr 2012	AEC	Yes	28
AMWU/ Sutton tools P/L	4 Apr 2012	19 Apr 2012	AEC	Yes	15
CFMEU/ Loy Yang Power Management P/L	3 Apr 2012	26 Apr 2012	AEC	Yes	23
AWU/ Parks Victoria	3 Apr 2012	26 Apr 2012	AEC	Yes	23
CEPU/ Tyco Australia P/L t/as Wormald	10 Apr 2012	27 Apr 2012	AEC	Yes	17
Sean Cox/ Australian Helicopters P/L	16 Mar 2012	30 Apr 2012	AEC	Yes	45
ASU/ Metropolitan Fire and Emergency Board	4 Apr 2012	30 Apr 2012	AEC	Yes	26
TWU/ Wettenhalls Group	10 Apr 2012	3 May 2012	AEC	Yes	23
AMWU/ Simplot Australia P/L	13 Apr 2012	4 May 2012	AEC	Yes	21
NUW/ Southern Stockfeed (Operations) P/L	20 Apr 2012	7 May 2012	AEC	Yes	17
AWU/ Department of Sustainability and Environment	13 Apr 2012	8 May 2012	AEC	No quorum	25
NUW/ Tasman Chemicals P/L	26 Apr 2012	10 May 2012	AEC	Yes	14

## Appendix G: Employee coverage of unfair dismissal laws

The following estimates of unfair dismissal laws coverage include employees in both small and large businesses, assuming service of relevant minimum qualifying periods have been satisfied.

Table G.1—Estimates of unfair dismissal laws coverage

Under Work Choices	No. of employees	% of employees
Total number of employees eligible for UFD (March 2012 estimate)	4,220,447	48
Total number of employees not eligible for UFD (March 2012 estimate)	4,591,374	52
Total number of employees (March 2012)	8,811,852	100
Under the Fair Work Act 2009 15 employee threshold (head count basis)—applicable from 1 January 2011	No. of employees	% of employees
Total number of employees eligible for UFD (March 2012 estimate)	6,989,448	79
Total number of employees not eligible for UFD (March 2012 estimate)	1,822,404	21
Total number of employees (March 2012)	8,811,852	100

Source: DEEWR calculations using ABS data.

Under Work Choices, approximately 48 per cent of employees had access to unfair dismissal laws. After changes to unfair dismissal laws under the FW Act, the proportion of employees with access to unfair dismissal laws increased to 79 per cent.<sup>1437</sup>

### Estimated number of employees covered by unfair dismissal laws under Work Choices

#### Employees of businesses with 100 or more employees

*Permanent employees (August 2008)*

A) Total number permanent employees (ex working proprietors)<sup>1438</sup> = 3,927,642

B) Number of permanent employees (ex working proprietors) with less than 6 months tenure = 351,939

*Casual employees (August 2008)*

C) Total number of casual employees = 765,789

<sup>1437</sup> The estimates of unfair dismissal law coverage in this statement relate to all employees and therefore include a small number of state system employees who may have an impact on the final estimates. However, due to limitations in the available data, these estimates cannot be disaggregated by federal/state jurisdiction.

<sup>1438</sup> Should also exclude fixed term contractors, as these workers are not covered by UFD laws. However, due to limitations in the August 2008 EEH data, it is not possible to separate employees into those who are permanent and those who are fixed term contractors. Therefore the final estimate slightly overestimates the true number of employees covered by UFD laws.

D) Total number of casual employees with less than 12 months tenure = 331,834

*Employees of businesses with 1–99 employees*

E) All employees excluded from UFD

*Employees eligible for unfair dismissal laws*

F) Total number of employees eligible for UFD (August 2008) = (A–B) + (C–D) = 4,009,657

G) Employment growth between August 2008 to March 2012 = 5.3 per cent

**H) Taking G into account, the total number of employees eligible for UFD (March 2012) = F \* (≈1.053) = 4,220,447**

(Conversely, total number of employees not eligible for UFD (March 2012) = 4,591,374)

## Estimated number of employees covered by unfair dismissal laws under FW Act<sup>1439</sup>

### Employees of businesses with 15 or more employees (head count basis)

*Permanent employees (August 2008)*

A) Total number permanent employees (ex working proprietors)<sup>1440</sup> = 5,497,113

B) Number of permanent employees (ex working proprietors) with less than 6 months tenure = 492,573

*Casual employees (August 2008)*

C) Total number of casual employees = 1,305,983

D) Total number of casual employees with less than 6 months tenure = 355,500

### Employees of businesses with 1–14 employees (head count basis)

*Permanent employees (August 2008)*

E) Total number of permanent (ex working proprietors) = 1,079,507

F) Total number of permanent (ex working proprietors) less than 12 months tenure = 199,543

*Casual employees (August 2008)*

G) Total number of casual employees = 488,201

H) Total number of casual employees with less than 12 months tenure = 211,549

*Non-award employees earning \$106,400 or more per year (high income threshold applicable in August 2008)*

I) Total number of non-award employees earning \$106,400 or per year (August 2008) = 471,326

*Employees eligible for unfair dismissal laws*

J) Total number of employees eligible for UFD (August 2008) = (A–B) + (C–D) + (E–F) + (G–H) – I = 6,640,313

K) Employment growth between August 2008 to March 2012 = 5.3 per cent

**L) Taking K into account, the total number of employees eligible for UFD (March 2012) = J \* (≈1.053) = 6,989,448**

(Conversely, total number of employees not eligible for UFD (March 2012) = 1,822,404 )

<sup>1439</sup> Based on a small business threshold of 15 employees on a head count basis—applicable from 1 January 2011

<sup>1440</sup> Should also exclude fixed term contractors, as these workers are not covered by UFD laws. However, due to limitations in the August 2008 EEH data, it is not possible to separate employees into those who are permanent and those who are fixed term contractors. Therefore the final estimate slightly overestimates the true number of employees covered by UFD laws.