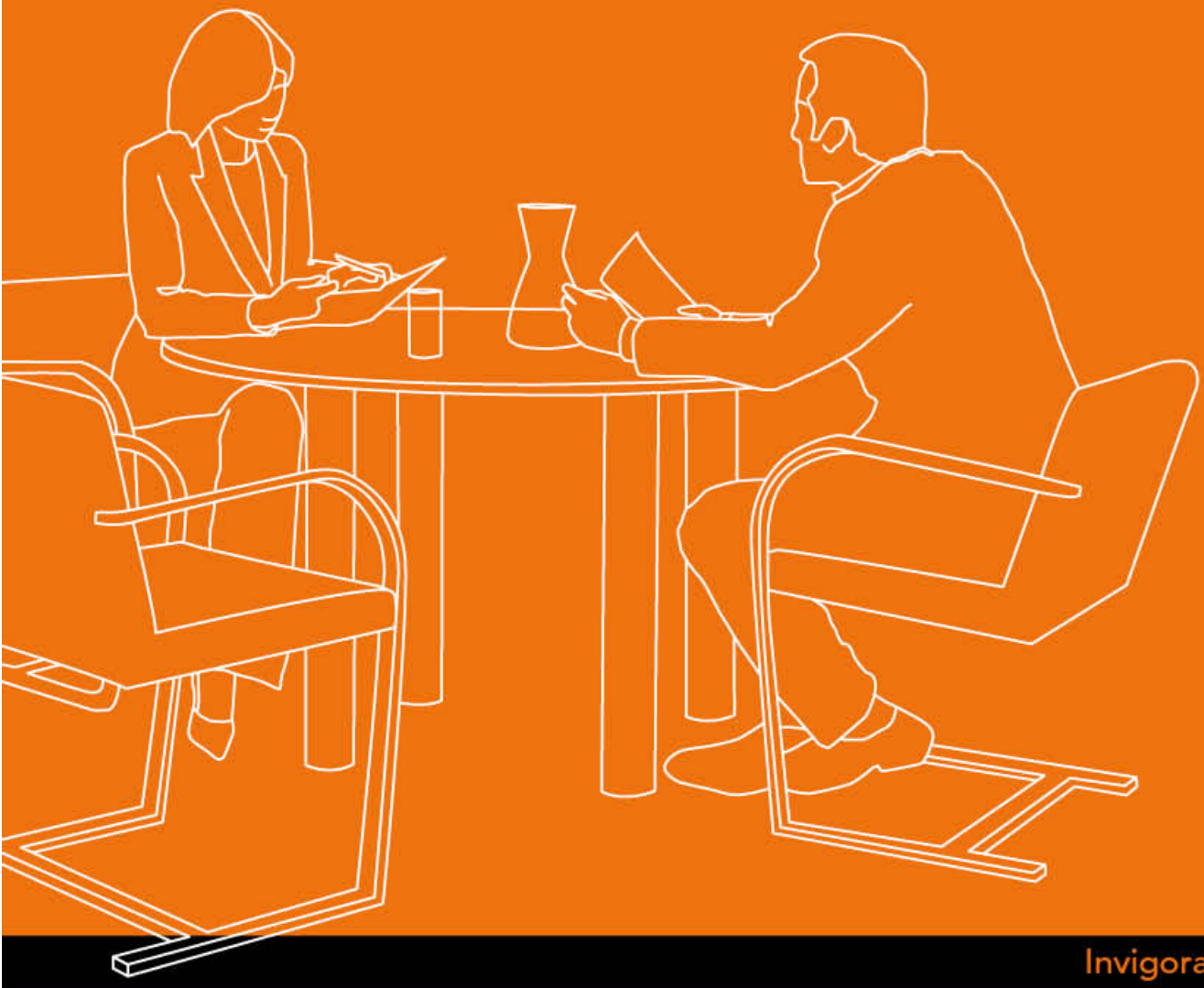
SUBMISSION

FAIR WORK ACT REVIEW



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1. Introduction

This submission is made by the New South Wales Business Chamber (NSWBC) and its industrial relations affiliate Australian Business Industrial (ABI). NSWBC/ABI thanks the Panel for the opportunity to comment.

Both organisations have their origins in the Chamber of Manufactures of NSW, which was formed in 1886 to promote the interest of members in a wide range of areas including trade and industrial relations.

NSWBC represents the interests of and provides services to around 30,000 companies across NSW and the ACT.

ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* and its State registered counterpart is also a Peak Council for employers under the *Industrial Relations Act 1996 (NSW)*. It is also responsible for advising the NSWBC's Council on workplace policy and industrial relations matters. ABI represents the interests of not only individual employer members but also other industry associations, federations and groups of employers who are members or affiliates.

This submission has arisen from information obtained from many sources:

- The issues raised by members with the Workplace Advice Unit (WAU). The WAU provides information and advice to members on a wide range of workplace relations matters including modern awards and relevant legislation. The WAU services around 25,000 calls a year.
- The experience of practitioners from within NSWBC's wholly owned legal practice Australian Business Lawyers and Advisors (ABLA). ABLA has offices in NSW and Queensland.
- The ABI Council whose membership includes workplace practitioners from significant businesses and representatives from affiliated organisation.

- A web-site specifically developed to enable members to provide direct feedback on the impact of the Fair Work Act on the way they conduct their business.
- A comprehensive program of member consultation sessions (15) held in metropolitan and regional centres throughout NSW and the ACT.
- A full day workshop facilitated by Professor Peter Sheldon involving representatives from major employers.

NSWBC and ABI have also commissioned a report which seeks to identify the drivers of productivity improvement in the Australian economy and the impact of the Fair Work legislation on those. The project seeks to assess whether the Fair Work legislation assists, hinders or is irrelevant to those productivity drives. As part of the project more than 50 personal interviews have been undertaken with employers and employees. The interviews were not directed by the questions raised by the Panel, and virtually all of them preceded the Discussion Paper, but were based around the small number of broad research questions and drilling down on the answers. These interviews have also been relevantly drawn upon. The report is expected to be finalised by early-mid March and will be provided to the Review Panel when it becomes available.

Both NSWBC and ABI are continuing to receive input from members and may make a supplementary submission depending on any comments in response to this submission or in response to submissions by others.

The context of the Panel's review is important.

Because the bills giving rise to the *Fair Work Act 2009* and the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* were given Prime Ministerial exemptions the legislation has not been subject to the assessment of the Office of Best Practice Regulation (OPBR) which has necessitated a post-implementation review. Post-implementation reviews are normally required within 2 years of commencement. The OBPR is intended to achieve best practice regulation which is effective in addressing an identified problem and efficient in maximising benefit having regard to cost.

The terms of reference ask the Panel to report upon the extent to which the effects of the Fair Work legislation have been consistent with the object of the *Fair Work Act 2009* [s 3].

The Fair Work legislation was foreshadowed by *Forward with Fairness* (April 2007) and subsequently by *Forward with Fairness – Policy Implementation Plan* in August 2007. *Forward with Fairness* said:

> **Labor is the party which decentralised wage fixing and, in the early 1990s, first introduced enterprise bargaining in Australia to drive productivity through cooperative workplace arrangements. An old centralised wage fixing system is not relevant to Australia's modern workplaces and modern economy.**
>
> **Australia now needs a third round of economic reform to meet the needs of our 21st century economy. Labor understands a critical component of this next vital reform project must be a new industrial relations system based on driving productivity in our private sector.**[1]

Importantly the foreshadowed Fair Work legislation was intended to be legislation which promoted productivity improvement and economic growth, and promised flexibility:

> **A Rudd Labor Government will deliver national industrial relations laws which are fair to working people, flexible for business and which promote productivity and economic growth for the future economic prosperity of our nation.**[2]

Promotion of productivity was also a consideration for minimum wage adjustment policy:

> **Fair Work Australia will consider all the evidence available to it and make a decision which is fair to Australian working families, promotes employment growth, productivity, low inflation and downward pressure on interest rates.**[3]

In *Forward with Fairness*, collective bargaining had a significant role to play in the promotion of flexible local arrangements which underpinned productivity improvement:

> **Enterprise level bargaining enables the development of fair and flexible employment arrangements that are tailored to suit the needs of an individual business and the needs of employees. Collective enterprise bargaining fosters team work, employee involvement and commitment to the workplace. It improves loyalty and morale, lowers labour turnover which in turn delivers better performance and productivity.**[4]

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[1] P1 Forward with Fairness
[2] P6 *Forward with Fairness*
[3] P11 *Forward with Fairness*
[4] P13 *Forward with Fairness*

Productivity promotion received less attention in *Forward with Fairness – Policy Implementation Plan*. Productivity improvement or growth is mentioned twice, both times in the context of collective agreement making. When discussing individual flexibility arrangements and non-union bargaining *Forward with Fairness – Policy Implementation Plan* says:

> **In many workplaces employees work as a team and they would prefer to work together as a team to agree their terms and conditions of employment with their employer. This is fair to the employees involved and there is plenty of evidence that collective enterprise agreements are drivers of productivity growth.**[5]
>
> …
>
> **As acknowledged in *Forward with Fairness*, there are many workplaces where no employee is a union member and where employees would still like to bargain their terms and conditions of employment as a team. Indeed, there are many workplaces where the employer will want to bargain with all of the employees in order to drive productivity improvements.**[6]

By the time that the Fair Work legislation was enacted bargaining had become the promoter or driver of productivity. The objects of Part 2-4 of the *Fair Work Act* is to provide the simple, flexible and fair framework that promotes collective bargaining for agreements which deliver productivity benefits.

This focus on the contribution of the workplace relations system to promoting or driving productivity improvements which was outlined in the originating policy documents did not translate into the Fair Work legislation comfortably. The main thrust of Section 3 of the *Fair Work Act* is that it should provide a balanced framework for cooperative and productive workplace relations that promote economic prosperity and social inclusion. That is, there is something of a focus on the quality of the workplace relations, rather than the achievement of productive workplaces.

This difference in emphasis is perhaps best seen the range of subject matter which is permissible for enterprise agreements. Although modern awards provide conditions of employment enterprise agreements can be bargained for a range of matters which go well

[5] P13 *Forward with Fairness – Policy Implementation Plan*
[6] P13 *Forward with Fairness – Policy Implementation Plan*

beyond conditions of employment. The question of whether an agreement makes each employee covered better off is determined by the circumstances of the employees under the relevant modern award(s). Modern awards do not contain matters which pertain to the relationship between the employer and the relevant union(s), but these latter matters can be bargained for, can be subject of protected industrial action, can directly impact costs and productivity, and managerial capacity to effectively manage, and for a number of members, have proved to be what stops or significantly delays finalisation of an agreement, where employee conditions are no longer at issue.

The contribution of a workplace relations system to productivity outcomes is difficult to assess quantitatively and the subject of quite strong disagreement. For example, labour productivity (essentially the amount produced per unit of time spent to produce it) will increase where the employee works faster but might be significantly more increased by a new tool or new way of producing the product.

Accepting that the measurement and attribution of productivity change is difficult, the different factors associated with productivity change can move in different directions and major changes, such as the impact of greater resource export reliance and the associated capital investment can swamp other contributors, it still remains the case that the system of workplace relations can promote or discourage productivity growth.

Members do not perceive the Fair Work legislation as contributing to productivity improvement, nor do they perceive it as creating a clear framework of laws (such as bargaining laws, or general protections) or outcomes (such as simple, easy to understand awards or confidence about rights and obligations). Many of them report spending more time on their human resources achieving compliance and dealing with higher levels of uncertainty (uncertainty about entitlements, uncertainty about processes and uncertainty about outcomes) than in the past for no benefit to the business.

NSWBC/ABI has set out in this submission the practical experiences and views of its members as expressed by them. Should the Panel wish to receive more granular

information on these experiences and views NSWBC/ABI is available to provide this *in camera* with the Panel.

This submission follows the structure of the 69 questions posed by the Panel. Many of the questions overlap and as such the submission deals with some question groups together and others specifically.

The submission seeks to address issues of both practical operability as well as areas where the *Fair Work Act* has not in members experience lived up to the initial promise.

2. Recommendations

In this submission NSWBC/ABI has made a series of recommendations, some of the recommendations have identified specific drafting changes while others have stated the nature of the change that should be made.

3. General

Q1. Has the Fair Work Act created a balanced framework for cooperative and productive workplace relations that promote national economic prosperity and social inclusion for all Australians? If so, how? If not, why not?

Q2. Can the Fair Work Act provide flexibility for businesses and is this being achieved? If so, how? If not, why not?

Q3. Does the Fair Work Act adequately take account of Australia's international labour obligations?

Q4. Has the Fair Work Act facilitated flexible working arrangements to assist employees to balance their work and family responsibilities?

Q5. Has the Fair Work Act's focus on enterprise level collective bargaining helped to achieve improved productivity and fairness?

Q6. What has been the impact, if any, of the Fair Work Act on labour productivity?

NSWBC/ABI members do not believe that the Fair Work system has operated to promote national prosperity and social inclusion. They see the system as cumbersome and difficult to navigate, making workforce management more difficult than in the past, requiring significantly more management effort for no particular business benefit.

Many members feel the Fair Work system was not developed with their workplace in mind. It seems heavy handed, addressing the worst case, reducing flexibility (including by making access to flexible arrangements desired by employees more difficult and uncertain) and it seems based around the idea that "normal" work is undertaken in full time standard hours' jobs which are pretty much guaranteed for life and that departures from this model are aberrations and socially undesirable. Bargainers see the system as complicated, excessively rules bound, and smaller employers see the bargaining framework as not reflecting how things are done in their workplaces.

Member concern about the cumbersome compliance regime was echoed in the research project. During the course of their interviews employer respondents commented on the additional work required for compliance, many really saying that their efforts were not confined to what was needed to comply, but also the efforts required to demonstrate compliance which was absorbing management time. One supplier of temporaries reported spending in excess of two weeks' of management working time satisfying the Fair Work Ombudsman that staff were not being supplied under sham contracting arrangements. Another said:

> **In our business I'd never get away with that sort of ROI [for additional compliance oriented activity]**.

Many members have commented upon how existing individual arrangements, such as an individual starting and finishing time, forgoing meal or tea breaks to finish early, or flexible part-time work became untenable under the Fair Work system, and that many job applicants did not want "normal" work.

Others have commented upon the assumption embedded in the Fair Work system that workplace relations are inherently antagonistic, the system of workplace regulation needs to focus on providing rules for that and remedies. Put simply, these members are saying that the Fair Work system focuses on bargaining rules and orders instead of focussing on the substance of positions, claims, conduct and outcomes. Others have been deeply concerned that the legislation disenfranchised long standing workplace forums (site consultative committees etc) through which a workplace not only bargained but built key work place engagement.

This is not to say that members disagree with the idea that the workplace relations system should promote fairness and inclusion as well as productivity – members are supportive of these goals and also believe that there does need to be adequate protection for vulnerable employees. Rather members are concerned about system inflexibilities, its underlying assumptions and its failure to cater to different circumstances, including different types of working arrangements and patterns.

There has been a growth in small employers and service based jobs and full time employment is less typical. As shown in the Table 1 below this is not a new phenomenon in response to the global financial crisis and its continuing impact.[7]

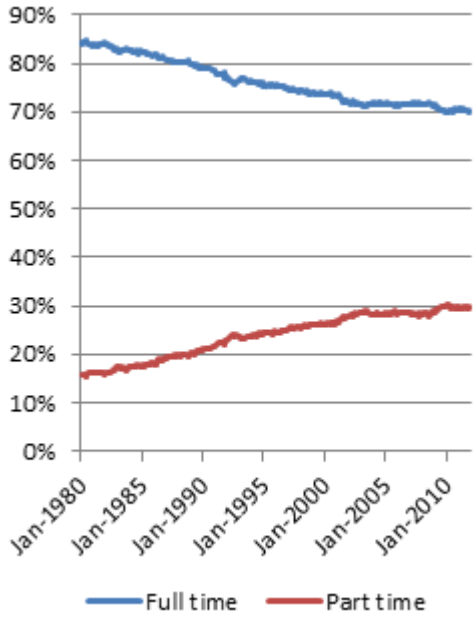

Table 1 – Percentage of workforce by employment status

Much has been made of Australia's two-speed, or perhaps multi-speed, economy. It is clear that there has been a significant increase in mining export activity, a sustained increase in the terms of trade, significant appreciation of the Australian dollar and subdued activity in many areas and sectors of the economy. One response is that there is and will be a transfer of resources, such as appropriately skilled employees into the mining sector. However, this is not the same as saying that those displaced from a poorly performing sector will be accommodated in an expanding one.

Table 2 shows employment in manufacturing and mining as a proportion of all jobs since February 1990. The increase in mining jobs is significantly less than the loss in manufacturing[8].

[7] ABS Cat: 6202.0
[8] ABS Cat # 6291. 0.55.003, Table 5, original figures.

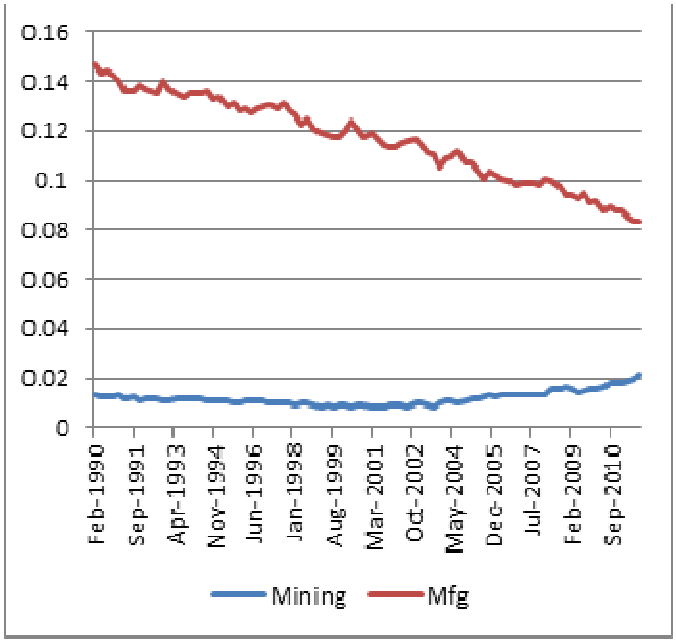

Table 2 – Proportion of jobs between manufacturing and mining

Flexibility was promised in the policy, but arguably the model for providing flexibility was poorly positioned. In *Forward with Fairness – Policy Implementation Plan* business flexibility is perhaps too much presented as the capacity to depart from the normal operation of the Act and its instruments rather than being directly embodied in standards and instruments. Thus, in *Forward with Fairness – Policy Implementation Plan*, collective genuine flexibility for employers and employees arises from (high income) guarantee of earnings and flexibility clauses in awards or agreements[9]. (*Forward with Fairness - Policy Implementation Plan* also provided that the test for a lawful flexibility arrangement was that an employee under a flexibility arrangement who was covered by an award or agreement was not disadvantaged in comparison with the award or agreement[10]).

In practice, however, under the Fair Work legislation system is achievable in any of four ways. First, the National Employment Standards can provide for their implementation more or less flexibly. In many cases the NES fails this test. For example, s 62 of the *Fair Work Act* provides for a maximum of 38 ordinary hours in any week despite the fact that the most common way of working a 38 hour week, particularly amongst award covered

[9] P 1, *Forward with Fairness - Policy Implementation Plan*
[10] Pp 11, 14, *Forward with Fairness - Policy Implementation Plan*

employees, is under an average 38 hours/week cycle. Conceptually, employees working a 19 day month Monday to Friday have the capacity to reasonably refuse to work the last two hours of work three Fridays in four.

Second, modern awards can provide conditions which allow for flexible implementation. *Forward with Fairness– Policy implementation Plan* stated:

> **Under Labour awards will be relevant to our modern economy. Awards will not be prescriptive; they will be flexible. Awards will not enshrine inefficient work practices; they will promote flexible and family friendly work arrangements**.[11]

The extent to which this has occurred varies – there is little consistency in the modern award system in level of prescription, nor in the extent to which they contemplate diversity of implementation – some are good some others less so, and this disparity does not arise from the differences in industry.

Third, employees and employers can enter individual flexibility arrangements. Individual flexibility arrangements do not provide an adequate mechanism for providing flexible working arrangements. Both employers and employees are dissuaded from entering them because of the capacity of a party to terminate unilaterally on written advice providing not more than 28 days' notice [s 145(4)(a)] and the term in the standard clause precluding an IFA as a term of employment. The capacity to bargain their terms means that significant bargaining time can be spent on them, usually resulting in reduced coverage.

Fourth, business flexibility is also affected by other statutory rights which are provided by the Fair Work legislation. Obvious examples of this are restrictions on termination of employment provided by Part 3-2 and protection of rights under Part 3-3.

To avoid misunderstanding it should be noted that NSWBC/ABI, and their members, accept that vulnerable employees should be protected from arbitrary termination, and they do not propose exempting classes of employer. The broad capacity to bring or threaten

[11] P 15, *Forward with Fairness– Policy implementation Plan*

actions under part 3-3, the costs of formal (and informal) defence, and the uncertainty of outcome impacts both performance management[12] and flexibility detrimentally and disproportionately.

The importance of flexibility is also dealt with further below.

Section 3(a) provides as a part object of the *Fair Work Act* that it provide the framework in a way which takes account of Australia's international labour obligations. There is no reason to suppose that the Fair Work legislation breaches international labour obligations nor that amendments to the legislation would have that effect. In the face of a specific complaint, the Committee on Freedom of Association did not find any breach of conventions 87 or 98, but requested that it be kept informed of the operation of some aspects of the *Fair Work Act*.[13]

As with the Fair Work legislation itself there is a general question about the contemporary relevance of the underlying assumptions behind individual conventions, recommendations and protocols. For example, a tripartite meeting of experts recently examined convention 158 (*Termination of Employment*) and recommendation 166 to investigate ways of improving levels of ratification.[14] Whilst the meeting could not reach an agreed position it is clear that the ILO is wanting to ensure continuing relevance of its standards in a fast changing world.

More generally, the Governing Body is examining the question of a review of standards to ensure that ILO standards are up-to-date and respond to needs of the world of work, the

[12] This was a consistent theme amongst members; the introduction of a workplace right arising from the ability to make a complaint in employment has blossomed claims and threats of almost exponentially which has eroded management confidence even when undertaking reasonable and proper performance management.

[13] Governing Body agenda, 3rd item, GB.308/3, June 2010 at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_142021.pdf

[14] Final Report, Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), (Geneva, 18–21 April 2011),athttp://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcms_165186.pdf

protection of workers and promotion of sustainable enterprises.[15] Amongst its projected outcomes the standards review mechanism is intended to ensure that, in light of the major challenges that have transformed or are transforming the world of work, the body of international labour standards remains capable of responding to present-day needs and conditions whilst also being sufficiently flexible to address future challenges[16]

The Fair Work legislation preferences enterprise level negotiations. As discussed below productivity outcomes are the outcomes of individual organisations (employing entities), this is the level at which work is undertaken, and employment offered. Both *Forward with Fairness* and *Forward with Fairness - Policy Implementation Plan* identify the central role of enterprise agreements. *Forward with Fairness* stated:

> **Collective enterprise agreement making and democracy will be the heart of Labor's industrial relations system. Collective bargaining allows balanced, cooperative arrangements that foster improved productivity across a business and provide the flexibility employers and employees want**[17].

Most of NSWBC/ABI's larger members are mature bargainers. This means not only are they practised at bargaining but they have spent a great deal of effort at developing and sustaining a positive organisational culture of which bargaining is but a part.

Whilst collective bargaining has given rise to many agreements with the formal figures showing interventions by Fair Work Australia (FWA) suggesting only a small percentage of negotiations are externally impacted contrary to this paradigm, the reality appears somewhat less positive. Members report increased difficulties in negotiating new agreements.

Rules based bargaining, the intrusion of general protections, the expansion of the bargaining regime to include union rights have made bargaining significantly more time consuming and difficult for experienced bargaining members, and they report that

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[15] Governing Body agenda, 5th item, GB.312/LILS/5, November 2011 at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_166502.pdf

[16] P 3 GB.312/LILS/5

[17] P 3, *Forward with Fairness*

negotiation of employee conditions is often not the major sticking point. Some members report that the bargaining process is less co-operative than in the past and the cultural legacy less positive with many now experiencing a negative bargaining cycle progressively eroding workplace culture, few members report better outcomes than in the past, or more co-operative negotiations.

The Discussion Paper shows changes in labour productivity since the September quarter 1995. On one reading very recent developments in labour productivity are mildly encouraging – the trend line is heading in the right direction and has re-climbed above the zero line. As noted, short-term productivity figures are volatile, and measurement between cycles is preferable. Unfortunately cycles only complete when they do, so contemporaneous readings are difficult.

In its Intergenerational Report[1] Treasury also modelled movements in labour productivity and its approach is shown in the Table 3. This shows movements in labour productivity on an annual basis (year to June - blue line) and a moving five year average (red line).[2]

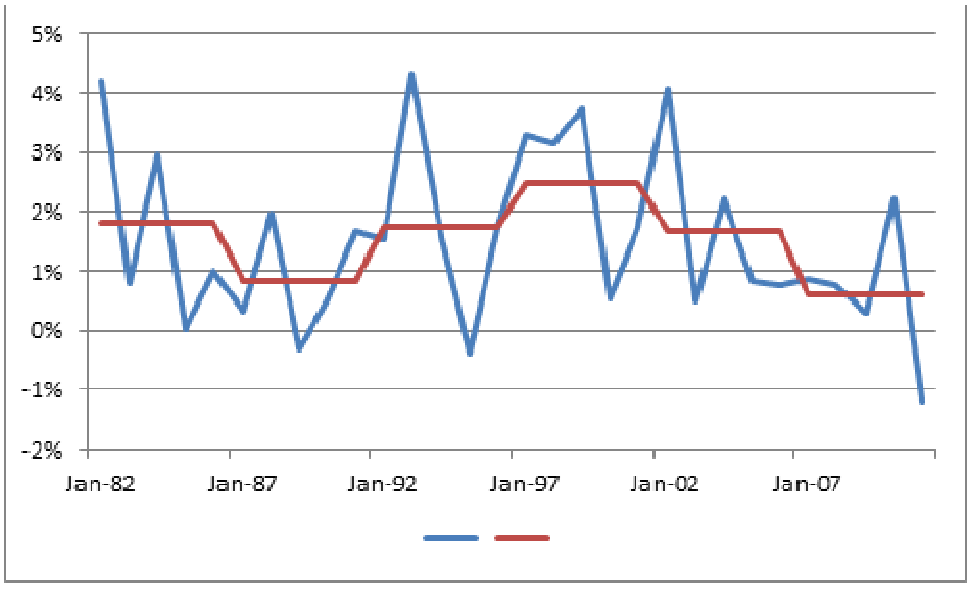

Table 3 – Labour productivity

[1] Intergenerational Report 2010, Australia to 2050 – Future Challenges, Jan 2010, (see P 14 for the equivalent table) at http://www.treasury.gov.au/igr/igr2010/report/pdf/IGR_2010.pdf

[2] ABS cat 5206.0

Importantly NSWBC/ABI believes that the problems with the bargaining regime do not arise from its enterprise focus but the bargaining rules themselves.

In its 2007-08 Annual Report the Productivity Commission addressed the question of enhancing Australia's productivity growth. The Commission summed up Australia's longer term growth (starting in the 1970s) including the contribution of labour productivity:

> **[The reported chart] shows the contribution to the average income growth of Australians over the past four decades, from changes in labour utilisation, the terms of trade, and labour productivity. Labour productivity growth, which reflects both MFP growth *and* the increase over time in the amount of capital per hour worked, has been the main source of income growth in every decade. Changes in the terms of trade — the prices of Australian exports relative to imports — have had a small effect over longer periods with the exception of the most recent decade where sustained high commodity prices have made a large contribution to income growth. Increases in labour utilisation have made generally small and positive contributions to output growth over the past four decades.**[18]

The Commission wrote:

> **Productivity growth at the economy-wide level comes from innovation by enterprises, diffusion of these improvements to others and the reallocation of resources from less to more productive organisations and industries. For both the public and private sectors, it is at the level of organisations that innovation and diffusion occur. This requires both knowledge accumulation and application.**[19]

The Commission identified three types of interlinked policy which were required to promote innovation and diffusion – incentives, flexibility and capability. Incentive is promoted by policies which foster competition and flexibility, the capacity to change to meet market demands is the result of labour arrangements and regulation impacting production decisions, much of which falls within the realm of workplace regulation. The Commission said:

> **The three determinants of innovation performance — incentives, flexibility and capabilities — are strongly interactive. All three need to be attended to in a policy framework to promote innovation by organisations, and diffusion of best practices among them. The Cutler Report placed particular emphasis on the importance of capabilities, but a successful innovation policy has to place such capabilities in the context of the incentives and flexibility to drive change and apply those capabilities productively. Successful innovation is rarely supply driven — the generation of knowledge and capabilities does not ensure their effective application. It is competition that forces organisations to absorb and apply new knowledge in order to improve their profits and to survive. Australia's own history of decades of relatively weak innovation**

[18] P 4, Annual Report 2007-08, Productivity Commission at http://www.pc.gov.au/__data/assets/pdf_file/0006/83868/chapter01.pdf

[19] P 13, Annual Report 2007-08, Productivity Commission

and productivity growth coinciding with a relatively highly-educated workforce underlies this.[20]

Many members have said that simply defending existing flexibility and the capacity to manage their business is a positive (win) outcome from their bargaining experiences under the *Fair Work Act*.

In simple terms NSWBC/ABI members have responded in the negative to Questions 1-6 when viewed from the employers' perspective.

Q7. What has been the impact of the creation of a national workplace relations system for the private sector? What has been the impact of the system being constitutionally underpinned by referrals of subject matters/powers from the states as well as the corporations power of the Constitution?

NSWBC/ABI support the establishment of a single national system (as well as a single national system of occupational health and safety) however NSWBC/ABI is not supportive of, and regrets, the conditions which arose to attract referrals. The federal referral legislation, the *Fair Work Amendment (State Referrals and Other Measures) Act 2009*, was developed in the context of an intergovernmental agreement (the Multilateral Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector) which was finalised by Workplace Relations Ministers Council WRMC members at their 25 September 2009 meeting[21] (as were state counterparts). This IGA followed the "fundamental workplace relations principles" agreed by WRMC at its 23 May 2008 meeting.

As a consequence there are significant limitation on the Commonwealth's capacity to amend the FW legislation and the combination of the IGA and the enacted fundamental principles also provide a relative indefinite veto power to individual jurisdictions. This means that the Commonwealth is circumscribed in how it can legislate and no government is particularly accountable for the outcome of legislation. Individual jurisdictions are less

[20] P 15, Annual Report 2007-08, Productivity Commission
[21] Of the states, only Victoria, Tasmania and South Australia signed the agreement on 25 September.

accountable under this arrangement than they were when there were multiple jurisdictions. This is a highly undesirable policy position.

4. Safety Net

Q8. Is the safety net established under the Fair Work Act fair and relevant?

Q9. Is the safety net simpler, more streamlined and easier to read and apply than the previous arrangements?

Q10. What are the advantages and disadvantages of the Fair Work Act providing a safety net of employment conditions on a national basis through the National Employment Standards and modern awards rather than a state by state basis?

Q11. Does the Fair Work Act allow for safety net terms and conditions of employment to be set in a way that is appropriately industry or occupationally specific? If not, why not?

Q12. Are employees responsible for the care of young children using the right to request provisions under the National Employment Standards to negotiate flexible working arrangements or request additional unpaid parental leave in order to care for children? If not, why not?

Q13. Do Individual Flexibility Arrangements, as provided for in modern awards, allow employers and employees to individually tailor modern award conditions to meet their genuine personal needs? If so, how? If not, why not?

Q14. Are employees appropriately protected when making Individual Flexibility Arrangements? Is the safety net of minimum employment conditions appropriately guaranteed and protected from being undermined?

Q15. How could the operation of the safety net be improved, consistent with the objects of the Fair Work Act and the Government's policy objective to provide a fair and enforceable set of minimum entitlements?

The *Fair Work Act* contains safety net provisions in:

- The National Employment Standards (sections 59 to 131 of the *Fair Work Act*).
- The creation of modern awards.

The questions surrounding the operation of the "safety net" as set out in the *Fair Work Act* drew a great deal of discussion from members.

All members support the inclusion of a safety net within an Australian workplace relations system. Having said this few members consider the *Fair Work Act* safety net as a safety net. The view expressed by members was that a safety net should protect the vulnerable and contain those conditions which all Australian's deem appropriate to apply at large. The *Fair Work Act* safety net was not seen as representing this but rather a substantial level of prescriptive minimum terms that largely constrained business[22]. This is arguably a deeper conversation than the one before the Panel.

NSWBC/ABI supports the concept of the National Employment Standards ("the NES"). The NES are one of the pillars of the *Fair Work Act* and contain fundamental ingredients in employment conditions for all employees covered by the national system. Accordingly, it is important that the NES be relevant to the modern workforce and provide the minimum protection that they set out to do.

Maximum weekly hours

The NES provides an ability to average the weekly hours of award/agreement free employees. The averaging arrangement must be over a specified period of not more than 26 weeks.

There are no averaging provisions in the NES for employees whose terms and conditions are set by modern awards.

What the NES provide is that the terms of a modern award or enterprise agreement may provide for averaging of weekly hours.[23]

Most, if not all of the modern awards, contain some form of averaging provisions. Unfortunately, in some modern awards the period over which an average of 38 hours per

[22] Subject to how many modern awards apply to a business, the actual safety net could be many hundreds of pages of prescription.
[23] S63(2) of the Fair Work Act

week is to be worked is not stipulated. An example of this is the *Business Equipment Award 2010*.

Clause 27.1(a) of the *Business Equipment Award 2010* states:

> **Subject to this award, the ordinary hours of work for day workers are to be an average of 38 per week of no more than 8 hours per day, between the hours of 6.30am to 6.30pm at the discretion of the employer on any day or all of the days of the week, Monday to Friday**.

The *Business Equipment Award 2010* does not provide the period over which an average of 38 hours per week can be worked. This is generally not the case with modern awards as some period is usually stipulated in the award over which hours can be averaged. However, there are exceptions.

In order to cater for those exceptions, the NES should be amended to create an ability over which the hours worked by employees whose employment is covered by an award can be averaged over a particular period. This is basically a fall-back position should an award fail to stipulate the period over which hours may be averaged.

Recommendation 1

Section 63 of the *Fair Work Act* should be amended to include sub-section (3) as follows:

Should the terms of a modern award or enterprise agreement fail to stipulate the period over which weekly working hours may be averaged, an employer may average 38 hours per week for workers over a 4 week period.

Requests for Flexible Working Arrangements

The *Fair Work Act* introduced for the first time the ability for parents or those who have the responsibility for the care of a child (as defined) to make a request for flexible working arrangements.[24]

[24] Section 65(5) of the *Fair Work Act*

An employer may refuse the request only on reasonable business grounds. If the employer refuses the request, the employer must include details of the reasons for the refusal.[25]

The Act provides little or no details as to the meaning of "reasonable business grounds". This has created confusion amongst some members and unnecessary debate at the enterprise level. It would be beneficial for both employers and employees for the *Fair Work Act* to contain some definitional guidelines as to the meaning of "reasonable business grounds".

Some guidance can be found from the *Employment Act* 2002 (UK) which provides that business grounds must be from amongst the following reasons:

- burden of additional costs
- detrimental effect on ability to meet customer demand
- inability to reorganise work among existing staff
- inability to recruit additional staff
- detrimental impact on quality
- detrimental impact on performance
- insufficiency of work during the periods the employee proposes to work
- planned structural changes

Recommendation 2

The *Fair Work Act* should be amended to include a definition of "reasonable business grounds" consistent with the guidance from the *Employment Act* 2002 (UK) above.

Annual Leave

The minimum entitlement to paid annual leave is 4 weeks for each year of service. Special entitlements may apply to shift workers.

[25] Section 65(6) of the *Fair Work Act*

In relation to taking paid annual leave, the *Fair Work Act* only provides that paid annual leave may be taken for a period agreed between an employee and his or her employer.[26]

There is no ability under the *Fair Work Act* for an employer to direct employees to take annual leave even those employees with excessive amounts of accrued annual leave.

Under the *Annual Holidays Act* 1944 (NSW) which applied prior to the introduction of the Workchoices legislation, employers had the ability to direct the taking of annual leave on the provision of one month's notice. The Workchoices legislation removed the ability of an employer to provide one month's notice for an employee to take annual leave but included the ability for an employer to direct an employee to take one quarter of the amount of the credited annual leave where the employee had at least 8 weeks accrued.[27]

Most members have shown concern that the *Fair Work Act* does not provide adequate provision to enable the management of the accrual of annual leave. The *Fair Work Act* provides that modern awards or enterprise agreements may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.[28] Further, a modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave.[29]

Modern awards deal with the taking of annual leave in different ways. There is an element of inconsistency between the modern awards. For example:

- The *Clerks - Private Sector Award 2010* allows an employer to require an employee to take annual leave by giving at least 4 weeks notice as part of a close down of its operations or where more than 8 weeks leave is accrued.[30]
- The *Manufacturing and Associated Industries and Occupations Award 2010* allows an employer to give not less than 4 weeks notice for employees to take annual leave during an annual close down. This Award also allows an

[26] Section 88 of the *Fair Work Act*
[27] Section 236(6) of the *Workplace Relations Act* 1996
[28] Section 93(3) of the Fair Work *Act*
[29] Section 93(4) of the Fair Work *Act*
[30] Clause 29.5 of the *Clerks - Private Sector Award 2010*

employer, after generally trying to reach an agreement with an employee, to direct an employee to take annual leave who has excessive leave.[31]

- The *Nurses Award 2010* provides for the taking of annual leave during a close down and also provides that annual leave will be given and taken within 6 months of the employee becoming entitled to annual leave for more than 5 weeks.[32]
- The *Fast Food Industry Award 2010* has no provision for the taking of annual leave.
- The *Broadcasting and Recorded Entertainment Award 2010* states that annual leave must be taken within 18 months of the entitlement accruing.[33]

What is evident is that there is an inconsistent approach amongst the modern awards.

An amendment to the *Fair Work Act* is required to set a minimum standard in relation to the taking of annual leave. The minimum standard should also apply to award/agreement free employees who, similar to those employees covered by modern awards or enterprise agreements are required to take a period of annual leave, but only if the requirement is reasonable.

There is a level of uncertainty as to what is meant by "the requirement is reasonable"[34].

Recommendation 3

To avoid the level of uncertainty which has been raised by members, the *Fair Work Act* should be amended to allow employers to require employees to take annual leave upon the provision of at least 4 week's notice.

The next issue in relation to annual leave relates to the payment of untaken annual leave on termination. Section 90(2) of the *Fair Work Act* provides that 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.

[31] Clause 41.6 of the *Manufacturing and Associated Industries and Occupations Award 2010*
[32] Clause 31.2 of the *Nurses Award 2010*
[33] Clause 23.6 of the *Broadcasting and Recorded Entertainment Award 2010*
[34] Sections 93(3) and 4(5) of the Act

The Fair Work Ombudsman has taken the view that annual leave loading is payable on any accrued annual leave entitlements on termination of employment where it is otherwise payable during employment. This view is not consistent with the terms of some awards.

For example, clause 29(2) of the *Road Distribution and Transport Award* provides that:

> **Annual leave loading payment is payable on leave accrued and taken but is not payable on leave paid out on termination.**

There is a clear inconsistency between the express provisions in some of the modern awards, such as the *Road Distribution and Transport Award,* and the way in which the Fair Work Ombudsman is interpreting section 90(2) of the *Fair Work Act* in relation to annual leave loading. This inconsistency needs to be corrected.

Recommendation 4

The *Fair Work Act* should be amended in such a way that any confusion is removed and that the provisions of the modern awards in relation to the payment of annual leave loading on termination of employment apply.

Individual Flexibility Arrangements in Modern Awards

All modern awards contain the ability to enter into individual flexibility arrangements. Similar provisions can be found in enterprise agreements.

The views of NSWBC/ABI's members in relation to individual flexibility arrangements have been expressed below under the topic of Enterprise Bargaining. The views and recommendations expressed below also apply to the flexibility provisions in modern awards.

Q16. Do the criteria for Fair Work Australia's (FWA) setting of minimum wages fairly balance social and economic factors?

Q17. What has been the impact of requiring FWA to implement minimum wage adjustments from 1 July each year, rather than at a time of the tribunal's choosing?

Q18. Without examining particular content in modern awards (which is a matter to be dealt with in FWA's review of modern awards), what has been the impact on employers, employees and regulators of consolidating the large number of state and federal awards and transitional instruments that applied before the Fair Work Act and replacing them with significantly fewer modern awards made on a national basis?

Q19. What has been the impact of providing an award system which includes modern awards that cannot be varied (except in limited circumstances) other than during four-yearly reviews by FWA, or in the initial FWA interim review in 2012?

Part 2-6 of the *Fair Work Act* provides for annual wage reviews, with effect from 1 July each year.

The provisions of Part 2-6 are somewhat convoluted. FWA must review award minimum wages so as to maintain a safety net of fair minimum wages taking into account various factors. It must then review the national minimum wage order, make any relevant variations to modern award minimum wages taking into account the new national minimum wage order which it must and is to set. Orders and determinations varying modern award minimum wages come into operation on 1 July each year unless there are special circumstances justifying later operation.

The statutory 1 July operational date for minimum wage increases differs from the practice of the Australian Industrial Relations Commission (AIRC) under its wage fixing principles and their counterparts in the various state jurisdictions. National and State case increases generally took effect at different times in different awards – generally linked to the anniversary of the award's previous increase. The result was that award increases were staggered which reduced their impact over the total wages bill.

NSWBC/ABI does not seek a return to the previous system of staggered increases. Reducing award reliance has reduced the impact of a co-ordinated increase (although the extent of indirect award reliance – where there are over-award payments but award movements are used to increase workplace rates – means this reduction could be overstated). During the AIRC era, many workplaces which increased wages because of award movements preferred to have a single date applying to all employees.

There are some problems, however, with the timing of the process arising from present arrangements. There is not much time between the Minimum Wage Panel's decision and the commencement of the new wages, and this is exacerbated by the fact that movements in allowances is not simple or obvious and final figures are not available until close to, or after 1 July. This is a statutory problem, not a question about how FWA undertakes and times its review. The Minimum Wage Panel properly factors the Budget into its review timetable and this should be continued with.

These timing difficulties, which present administrative problems for many employers, and can present contractual problems for various service providers, are further exacerbated by phasing arrangements.

In the case of determinations varying modern award minimum wages, s 286(3) provides that where there is a deferral of operation until a date after 1 July, the determination comes into operation on the date specified in the determination. S 286(4) provides that FWA cannot provide that the effect of a determination is deferred past the date the determination is to come into operation. Putting aside the fact that a determination affects (applies to) employees from the first pay period on or after it comes into operation [s 286(5)] the cumulative effect of s 286(3) and 286(4) appears to be that whilst FWA can defer the date of operation of a determination varying award wages for specified employees subject to the exceptional circumstances there is no capacity for FWA to entertain incapacity to pay orders. Particularly in current economic conditions and the foreseeable future this appears an unhelpful restriction on FWA powers.

Recommendation 5

Part 2-6 of the *Fair Work Act* should be amended to provide that national minimum wage orders and determinations varying minimum award wages come into effect on 1 August whilst retaining current timing requirements for the review.

Wage setting is conditioned by the minimum wages objective which has five branches. One, s 284(1)(a), addresses economic factors, three, ss 284(1)(b) – (d), address social factors and one, s 284(1)(e), addresses coverage. This is suggestive.

As well, there is an inherent confusion of aims between the objective of setting "fair minimum wages" which are defined in terms of the social considerations (social inclusion as opposed to gaining work, relative living standards as opposed to a safety net) and the role of bargaining under the *Fair Work Act* (achieving productivity and fairness through an emphasis on enterprise bargaining). The better off overall test requires employees to be advantaged under the agreement than under the award which means that wages under the agreement need to be better than those under the award despite the fact that minimum wages are themselves fair in the sense meant by the minimum wage objective.

This tension is particularly apparent in the case of the low paid authorisation provisions. Low paid authorisations can issue where FWA is satisfied it is in the public interest following its assessment of a number of matters, including the employees' current terms and conditions in comparison with relevant industry and community standards. Current conditions cannot lawfully be lower than those provided by the award. There is no sensible linkage in the FW legislation between minimum wage setting and bargaining.

Recommendation 6

Part 2-6 of the *Fair Work Act* should be amended to allow FWA to issue incapacity to pay orders.

5. Bargaining and Agreement Making

Bargaining, in its modern form, commenced in New South Wales in 1991. It therefore evolved for some 15 years before the operation of the WorkChoices Legislation. With some noticeable exceptions:

(a) bargaining was effectively facilitated by both State and Federal Industrial tribunals;

(b) most bargaining was undertaken utilising existing enterprise based consultative structures (many having operated since the late 1980's); and

(c) disputation was not common place and tribunals played a strong role in resolving bargaining disputes to generate mutually beneficial outcomes[35].

Simply put prior to 2006 a lot was going well and bargaining did not work against direct employee engagement and the promotion of progressive workplace culture. Conduct and for the most part claims and outcomes were reasonable and business performance and productivity were properly considered when relevant along with broader pre GFC labour market dynamics.

The period from 2006 to today has been characterised by intense politicisation of industrial law which has markedly affected the bargaining framework in Australia and in many respects diverted the pre 2006 bargaining evolutionary path.

The bargaining framework in the Workchoices Legislation and the *Fair Work Act* operate with the same "backbone"; an American concept of settled and unsettled rights, industrial action being lawful when rights are unsettled, a minimal role for the industrial umpire, largely consensual arbitration, a technical procedural based approach to bargaining and

[35] As late as 2006 the largest employing State, NSW continued to operate with arbitration as a key feature having not adopted the settled/unsettled rights, protected/unprotected industrial action model.

with economic power and direct conflict being the primary method of resolving bargaining disputes.

The Panel's focus should not be on a comparison between the bargaining framework operating under the *Fair Work Act* and the Workchoices Legislation but how (accepting what has occurred between 2006 and today) we can re-orient bargaining closer to its pre 2006 evolutionary path and focus on substance, employee engagement and the facilitation of mutually beneficial outcomes at the enterprise level within an environment of mutual co-operation.

Q20. Does the bargaining framework promote discussion and uptake of measures to improve workplace productivity?

The proper answer to this question requires a consideration of:

- the underlying philosophy of the *Fair Work Act* in terms of workplace productivity
- what constitutes the bargaining framework under the *Fair Work Act*
- a discussion on workplace productivity
- analysis as to whether or not the framework promotes discussion and uptake of measures to improve workplace productivity

The *Fair Work Act* has as a key principle the advancement of workplace productivity. Section 3 (f) and 171 (a) are directly relevant:

3 Object of this Act

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; and**

(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; and**

(c) **ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and**

(d) **assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and**

(e) **enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and**

(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; and**

(g) **acknowledging the special circumstances of small and medium-sized businesses.**

171 Object of this Part

The objects of this part are:

(a) **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; and**

(b) **to enable FWA to facilitate good faith bargaining and the making of enterprise agreements, including through:**

(i) **making bargaining orders; and**

(ii) **dealing with disputes where the bargaining representatives request assistance; and**

(iii) **ensuring that applications to FWA for approval of enterprise agreements are dealt with without delay.**

(emphasis added)

While section 3 and 171 of the *Fair Work Act* refer to "productivity" in the context of collective bargaining the bargaining framework the *Fair Work Act* creates does nothing to directly promote discussion and uptake of measures to improve workplace productivity and as discussed below many things ultimately work against this.

Putting aside the consideration of productivity at the macro level in Section 2 of this submission, business sees workplace productivity as the number of units of 'production' or 'services' produced per unit of labour. In such a context labour could be measured in terms of head count, hours of work and/or the cost of labour itself. When examined in this basic form there are eight ways in which a 'real' workplace will operationally improve productivity. Those are:

1. Removing (artificial barriers) that restrict output
2. Reducing the cost of labour
3. Working 'harder' (assuming some level of underutilisation exists)
4. Increasing employee competency and proficiency
5. Adopting a continuous improvement methodology to improve work process and workflow
6. Introducing capital to replace labour

7. Improving workplace culture to increase the level of discretionary effort made available by employees
8. Innovation

1. Removing (artificial barriers) that restrict output

In many respects this approach to improving productivity is usually obvious and relatively binary. Barriers that restrict output usually come in the following forms:

- Those practice that artificially restrict output, labour utilisation or increase the cost of labour such as one person one machine, one in all in overtime etc.
- Those practices or "rules" that slow or restrict a businesses' capacity to respond to changes in the market by changing their work organisation or work process quickly.

These can arise through the imposition of industrial practice or from relevant form of industrial regulation itself.

2. Reducing cost of labour

Simply reducing the unit cost of labour can make a workplace more productive when measuring labour in terms of cost. This usually arises when:

- Work is outsourced utilising a blended labour mix including directly employed employees and labour hire and/or contractors.
- Off-shoring where work is transferred to labour markets operating with a cheaper labour model.
- Introducing a different mix of employment forms such as part time employment or casual employment in preference to a largely or solely full time model to better match labour demand.

3. Working harder (assuming some level of underutilisation exists)

This assumes that there is some level of labour underutilisation operating in the relevant workplace. Many workplaces operating in this context can improve productivity by

introducing greater focus on performance utilising the adoption of relevant KPI and benchmarking metrics and appropriate employee communication and feedback processes.

4. Increasing employee competency and proficiency

Undertaking additional training to improve employee competency and proficiency can sometimes be a necessary requirement to operate with one of the other productivity drivers discussed here but can also improve productivity in terms of reducing down time, waste etc. Relevantly improving employee competency and proficiency if attached to nationally recognised competency standards provides some broader benefit for the employee and is often an important component in improving workplace culture generally through reinvestment in employees.

5. Adopting a continuous improvement methodology to improve work process and workflow

The adoption of continuous improvement methodologies has been common place in Australia since the late 1970s with quality assurance and total quality management giving way to more sophisticated approaches such as lean manufacturing and six-sigma. All of these methodologies have similar approaches including the reduction of waste (materials, time, costs) direct employee engagement and involvement, the development of 'standard operating procedures' and structured feedback loops.

6. Introducing capital to replace labour

Reinvestment in plant and equipment is an important method for improving workplace productivity and arises from reduced downtime, increasing output capacity per hour of work or per employee or by reducing the units of labour required to produce given output either by reducing head count through redundancies or the reduction of reliance on overtime or additional shifts.

7. Improving workplace culture to increase the level of discretionary effort made available by employees

One of the important contributors to workplace productivity is the level of employee engagement in the workplace which research has demonstrated largely drives the level of discretionary effort provided by employees both intellectual and physical. Workplace culture is a key determinant of the level of engagement and discretionary effort. Workplaces that adopt a multifaceted approach to improving workplace culture strive to develop participative or largely self-managed culture with associated productivity benefits.

8. Innovation

Innovation is usually invert by the promotion of a "culture of innovation", the adoption of strong innovation process and project management to move from idea to market quickly, effective "gate" keeping to weed out non-marketable ideas and separate innovation capital structure and focus.

While it is convenient to describe these drivers of workplace productivity individually in a real workplace setting these drivers will be operating together in a holistic manner. For instance in a workplace that is focused on improving workplace productivity you would expect to see:

- Development of a coherent employee relations strategy that seeks to remove barriers that directly restrict output through industrial practice or industrial regulation or indirectly through imposing rules that diminish the businesses opportunity to exercise managerial prerogative and undertake change in a timely and necessary manner to meet changes in the market.
- An on-going review of the optimum labour mix model including the balance between full time and non-full time employment, the extent to which specialist work is undertaken by external contractors, whether or not non-base line labour capacity is best obtained through labour hire companies and subject to the nature of the business

concerned, whether or not some work activity can be off-shored such as back office data processing etc.

- A focus on performance through the setting of relevant KPIs and benchmarks, adopting suitable communication and feedback processes to monitor performance and institute on-going performance management or improvement activities to achieve KPIs and benchmarks.
- Employees undertaking an array of training and competency development from basic induction to on-the-job training or as is the case with many medium to large size companies in Australia ensuring that competency training and assessment is undertaken in accordance with the Australian Quality Framework, driving greater proficiency of performance but also operating as an attraction and retention tool for good employees.
- The adoption of a continuous improvement methodology such as Lean Manufacturing and/or Six Sigma. These allow for a high level of shop floor employee engagement in improving the work organisation and work process and use various tools and techniques to drive continuous improvement as a "way of working" from the bottom up in a business. Particular emphasis in both methodologies is given to eliminating all forms of waste along the total length of the supply chain from initiation of business ideas through production, logistics to the customer with appropriate feedback loops built in.
- Subject to the financial parameters a business is operating under, the allocation of capital funding to both stay in business and growth capital expenditure. Businesses will usually be required to ensure that appropriate justifications are prepared for capex after funding etc. It is customary in such justifications to identify how the capital expenditure will create labour related savings for the business.
- A focus on the particular culture that the workplace operates with to ensure employee engagement is optimised and the maximum level of discretionary effort is provided by employees. This involves a consideration of the management philosophy of a company and in particular what vision and values it intends to operate with. It also requires a consideration of the structure of the company and the training and development of managers and executives to ensure that the company operates in a fashion aligned to the vision and values that the company has adopted.
- The promotion of an innovation culture with supporting processes and capital structure.

As can be inferred from this consideration, a holistic approach to business improvement (productivity) rests heavily on a foundation of:

- sound values based management
- direct engagement with employees
- a balance of top-down and bottom-up process
- sound participative workplace culture
- an overarching environment of business optimism

The challenge in answering question 20 therefore is to determine whether the bargaining framework promotes discussion and uptake on the measures (and perhaps as, if not more importantly the foundations) identified here or whether or not it promotes discussion and uptake of other things.

The Bargaining frame work

The adoption of the term 'bargaining framework' is astute. The question does not simply focus on the granular provisions of the *Fair Work Act* but seeks a broader and better understanding of the bargaining framework which is enlivened by a combination of:

- The underlying philosophy that the bargaining rules are based on
- The bargaining rules contained within the *Fair Work Act*
- How these rules are applied by FWA
- How this system is characterised in the media and the broader community

Underlying Philosophy

Putting aside the stated objects in section 171 of the *Fair Work Act*, it is difficult to identify the true underlying philosophy of the bargaining framework other than to reflect on the 'American' characterisation set out above and to say that it seems to represent an unsatisfactory and seemingly contradictory hybrid.

It:

- blends a very real sense of democratisation (appointment of bargaining representatives discussed below) but taints this by giving trade unions special status as bargaining representatives
- does not create "union agreements" as has always been the case previously (excluding Greenfields agreements)
- espouses the critical value of bargaining being focussed at the enterprise level but allows pattern bargaining to flourish
- introduces complex technical rules that are open to being played for tactical advantage but offers little in terms of substantive reasonableness during bargaining itself
- constrains the 'umpires' role so that it is limited to an administrative and compliance focus leaving an important void when active facilitation for reasonable outcomes is required
- expressly states that enterprise agreements will deliver productivity benefits and then does nothing to make this happen
- allows resort to industrial action as a first not last resort

Commencing bargaining

Abandoning the notion of a "bargaining period" was a sensible change to bargaining process, with bargaining initiated by the employer, by agreement or through the operation of a Majority Support Determination[36]. An alternative model to this could have been to shift further to an American model and require a MSD before any bargaining commences thus ensuring that there is true collective support for it to occur but the Commonwealth have not taken this step.

Clearly the decisions in the JJ Richards[37] cases have confused and distorted what NSWBC/ABI believe was the original and proper intention of the *Fair Work Act*, that is that the bargaining cycle must have commenced prior to a protected action ballot occurring.

[36] Part 2-4 Division 8 of the *Fair Work Act*

[37] JJ Richards & Sons Pty Ltd v TWU [2011] FWAFB 3377 (1 June 2011), TWU v JJ Richards & Sons Pty Ltd [2011] FWA 973 (16 February 2011), JJ Richards & Sons Pty Ltd v TWU [2010] FWAFB 9963 (23 December 2010), TWU v JJ Richards [2010] FWA 8766 (12 November 2010)

Who bargains?

The *Fair Work Act* has introduced a new concept; Bargaining Representatives (BR)[38]. In part, this represents a true democratisation of the process allowing employees to appoint who they want to bargain subject to sensible and practical industrial rules:

- If a union is chosen it must have constitutional coverage of the work to be covered by the enterprise agreement
- A BR cannot be unduly influenced by another BR

The appointment process has been complicated by the fact that there is no pro forma appointment or revocation of union as a default BR form provided in the Regulations or Rules to accompany the Notice of Representational Rights[39].

It is difficult to understand why unions are accorded preferential status as default BRs. In many workplaces where unions are not a dominant feature, absent payroll deductions an employer will struggle to even know if an employee is a union member and Freedom of Association laws make it imprudent for them to ask. A number of practical issues have arisen in terms of union involvement as a BR:

- While the registered body is technically the BR unions will often present at the bargaining table with a number of officials who often have sectional or regional based interests
- Union delegates are often prompted to appoint themselves to 'oblige' an employer to allow them time to participate in the negotiation process

In NSWBC/ABIs experience there is a gradual increase in the number of employee BRs being appointed; employees appointing themselves or a group appointing another employee. As this develops there may be a need for the Commonwealth to make available a dedicated advice line or BR training materials to better equip such BRs.

[38] Part 2-4 Division 3 of the *Fair Work Act*
[39] 2.05 of the *Fair Work Act Regulations 2009*

One very real negative of the BR process has been that many long standing employee based structures have been disenfranchised; the site or enterprise based consultative committee through which many enterprise agreements were historically negotiated. Many of these structures date back to the late 1980's and have served and been a focal point for direct engagement between employees and management and the drive to improve operational performance and productivity. Simply failing to provide for these committees to have an on-going role in bargaining has been a retrograde step for many employees and managers. This has introduced an unnecessary level of formality doing little for the process itself.

Bargaining process

The notion of "Good Faith Bargaining" (GFB) within the *Fair Work Act* has simply created a forum for tactical legal debate. The GFB provisions are not material to the substance of bargaining itself. They are best described as a modern day form of Marquis of Queensberry rules. Essentially they represent legal tactics to place pressure on an opponent or take it off. Anybody experienced in bargaining under the *Fair Work Act* would know that "you are not bargaining in good faith" is the most used and most miss-used phrase etc. Many unions appear more interested in positioning themselves in bargaining to play the 'GFB card' than find a mutually beneficial outcome.

GFB is purely procedural and as such gives rise to ever more 'unreal' behaviour. Rather than say "is this in the best interests of reaching a mutually acceptable outcome" as was usually the case when bargaining started in the early 1990s (we shall return to this below) you now hear "if we do X in this way can we argue that we have met the GFB requirements in the *Fair Work Act*".

GFB as encapsulated in the *Fair Work Act* reinforces a shift from bargaining being about substance to bargaining being about process. You can make as many claims as you like and they can be as absurd as you like as long you meet the GFB requirements. Logs of claim extending to 100+ items are now not uncommon not just to put pressure on an employer but also to increase the chances that an employer might slip up in applying GFB procedural rules.

One of the great failings of the *Fair Work Act* is that it does very little to prevent "pattern bargaining". Poorly defined, the *Fair Work Act* has allowed the continuation of uniform pattern agreements to be negotiated in such industries as the Melbourne building industry with impunity. The operation of such agreements has yielded substantial wage costs for no real productivity benefit, structurally defeating any employer attempt to do something different and relevant to their enterprise.

The role of industrial action

It is common policy of both major political parties to support industrial action being lawful during bargaining. What has become clear is that the ability to use industrial action very early has increasingly moved bargaining away from a relational based search for mutually beneficial outcomes to a more blunt transactional conflict. The 'weak' test to undertake a protected action ballot[40] and the limited capacity of FWA to intervene in bargaining disputes has developed a culture of threatening industrial action as a first option rather than a last resort. Unchecked this will evolve further resulting in a marked dichotomy of workplaces. Again experience would support the view that strong opportunistic union involvement and a transactional approach to bargaining will be a major driver of regressive workplace culture over time and with it business performance and productivity.

One of the material inequities that the *Fair Work Act* has created is in the notification process surrounding the taking of industrial action. The creation of the '3 day notice rule'[41] was intended to allow an employer reasonable time to take steps to protect their business. Unions have been freed by FWA to apply this rule for 'all gain and no pain'. As was highlighted in the Boral/AWU[42] case, unions can give notice to for instance go on strike, wait until an employer has changed their operation and locked in protective or mitigation measures and then simply have its members turn up for work and get paid. This was a

[40] Part 3-3 Division 8 of the *Fair Work Act*
[41] Section 414 of the *Fair Work Act*
[42] Boral Resources (NSW) Pty Ltd [2010] FWAFB 1771

factor in the QANTAS dispute that in part appeared to drive QANTAS to move to lock out its employees.

The shift to an American style of bargaining has occurred in Australia with very little real debate being held about it. If you accept that the construct of settled and unsettled rights is sound and that when rights are unsettled that industrial action should be lawful then a more Australian hue can be placed upon the framework that seeks to drive parties closer together in substance rather than freeing them up to play legal tactics with process rules and utilise direct conflict and economic power to settle differences. This can be properly accommodated by:

- The threat of or resort to industrial action to resolve bargaining disputes being a last resort
- Enforced conciliation being a mandatory step before industrial action is taken
- FWA being required to utilise a broader sweep of powers doing all things reasonably necessary to bring the parties to a mutually beneficial outcome and failing this issue a statement at the conclusion of conciliation about the substantive merits of the BRs positions and conduct

Content

A great deal of early disputation under the *Fair Work Act* has revolved around mandatory terms[43], the proper form of disputes procedures[44], union issues and contractors/labour hire.

Even allowing for the inclusion of Model clauses dealing with consultation and individual flexibility arrangements[45] and the clear terms of section 186 (6) of the *Fair Work Act,* a large part of bargaining disputes have related to union attempts to:

[43] Part 2-4 Division 5 of the *Fair Work Act*
[44] Section 186 (6) of the *Fair Work Act*
[45] Schedule 2.2 and 2.3 of the *Fair Work Act Regulations 2009*

- Enlarge dispute resolution beyond that properly provided for by the section 186 (6) of the *Fair Work Act* and in clear contradiction of the underlying philosophy of settled/unsettled rights[46]
- Seeking to fundamentally change the Model consultation clause (which reflected long held and well settled law[47]) to retard or slow down a business's capacity to introduce change
- Rendering nugatory IFA clauses[48]

Assuming these clauses were seen as fundamental (hence section 186 (6), Part 2-4 Division 5 and the Model clauses) why the Commonwealth did not simply make them mandatory in their Model state has proved highly inefficient and damaging to business. It further reflects how the *Fair Work Act* has operated against business performance and productivity growth.

Similarly the re-introduction of allowing matters pertaining to union/employer relations to go into enterprise agreements has also been highly inefficient and damaging with many enterprise agreements being 'delayed' over such matters while matters concerning the employer and employees were long since resolved (e.g. pay).

The Commonwealth would have produced a simpler and more efficient bargaining framework if it had created a standard form of clause on union industrial matters (e.g. recognition of delegates etc).

Contractors

Freedom of contract is a foundation on which our system of commerce operates. Persons freely entering into lawful contracts for the provision of services should be allowed to do so in the knowledge that those contracts will not be interfered with.

[46] Boral Resources (NSW) Pty Ltd v Transport Workers Union of Australia [2010] FWAFB 8437
[47] See Termination of change and Redundancy Case [1984] 8IR p.34
[48] Most unions have run national campaigns on this issue with many enterprise agreements now offering so called individual flexibility only on such things as the taking of annual leave loading!

Utilising contractors to undertake specialist or non-core work and/or to improve the performance of a business is an entirely legitimate practice and should be supported by the Commonwealth. Unfortunately the distinction between the legitimate worlds of employment and contractors has been blurred.

The *Fair Work Act* makes it clear that terms in an enterprise agreement containing a general prohibition on an employer engaging labour hire employees or contractors is not within the scope of matters permitted to be in agreements. However, the Explanatory Memorandum to the Fair Work Bill then puts forward an example of the terms that are intended to be within the scope of permitted matters, i.e. those matters which may lawfully be placed in enterprise agreements. It states that one such permitted term relates to:

> **conditions or requirements about employing casual employees or engaging labour hire or contractors if those terms sufficiently relate to employees' job security - e.g. a term which provided that contractors must not be engaged on terms and conditions that would undercut the enterprise agreement.**[49]

Following on from that proposition, FWA has permitted so-called 'pay parity' and 'terms and condition parity' clauses to be placed in enterprise agreements. . The tribunal has not articulated how these terms 'sufficiently relate to employees' job security' nor sought evidence of the manner in which independent contractors threaten employment, but has merely asserted that to be the case.

Application of rules

It would be improper to identify individual members of FWA although NSWBC/ABI's experience is that the application of the bargaining rules by FWA is characterised by an inconsistency of "approach" in terms of Part 2 - 4 Enterprise Agreements of the Fair Work Act and particularly the process for the approval of enterprise agreements. This adds cost and uncertainty for business.

[49] Explanatory Memorandum, Fair Work Bill, item 672

Had FWA been able to convene a hearing of major industrial parties at the commencement of the *Fair Work Act* and posed relevant questions about the operation of the bargaining framework then a great deal of the 'drip feed' and inconsistency would have been avoided to the benefit of all industrial parties.

Characterisation in the media and the broader community

In light of the above it should not be surprising that the general characterisation in most forms of popular media and therefore the view seen by the majority of the community in Australia is that the bargaining framework promotes:

- Excessive claims largely made by trade unions when acting as bargaining representatives
- The introduction into Australian society of "aggressive" industrial conflict to settle bargaining disputes
- Economic power and direct conflict being the determinant of victory in bargaining disputes rather than a broader rational sense of fairness
- An industrial umpire largely operating at the margins and being ineffective to moderate excessive claims or to prevent industrial action except in the most extreme of cases
- The introduction into Australian society that the imposition of lock outs against employees is a socially accepted and necessary part of our industrial relations system to resolve bargaining disputes

In the context of this discussion, what would you expect to see in a bargaining framework that promotes discussion and uptake of measures to improve workplace productivity?

In answering this question it is both interesting and relevant to consider the discussions that were occurring when enterprise bargaining became an important feature of employment regulation in Australian in the late 1980s and early 1990s.

Putting aside for the moment that various State and Federal tribunals had for many years made enterprise based awards and also putting aside the operation of such statutory provisions as section 11 of the *Industrial Arbitration Act 1940* (NSW) bargaining in the contemporary context had its genesis largely in NSW and then progressively Federally and in other States. The initial shift to an enterprise focus occurred on the tailcoats of the dramatic change in wage fixation arising from the National and State Wage Cases of 1987 and 1988 which relevantly introduced firstly the Restructuring and Efficiency wage fixation principle and then the Structural Efficiency wage fixation principle out of the Accord process.

The relevant chronology of events was:

- The *Industrial Arbitration (Enterprise Agreements) Amendment Act* 1990 (NSW) was assented to on 18 December 1990 and came into operation on 25 January 1991
- The *National Wage Case April* 1991[50] considered but deferred the introduction of an 'Enterprise Agreements' wage fixation principle arising from Accord Mark IV
- The NSW *State Wage Case May* 1991[51] introduced the Enterprise Arrangement wage fixation principle
- The *National Wage Case* October 1991[52] introduced the Enterprise Agreements wage fixation principle
- The NSW *State Wage Case* May 1992 [53] undertook a comprehensive inquiry into holistic workplace reform aimed at driving improved productivity

The *Industrial Arbitration (Enterprise Agreements) Amendment Act* 1990 (NSW) was the first legislative shift in Australia towards the creation of an enterprise bargaining framework. It was comprehensive and introduced many new elements including the capacity to make binding industrial agreements directly with employees rather than solely with registered industrial organisations of employees.

It is relevant to note that the tests applied for the approval of enterprise agreements made under that legislation were broad in nature and required the application of some level of

[50] (1991) 36 IR 120
[51] (1991) 36 IR 362
[52] (1991) 39 IR 127
[53] (1992) 41 IR 239

discretion by the Deputy President assigned with the task. Importantly, in circumstances where enterprise agreements sought to increase wages beyond the generally available increases arising from the wage fixation principles of the day they had to be justified in terms of improvements in productivity and efficiency at the enterprise concerned.

The relevant section of the legislation dealing with this is section 13I and is in the following terms:

13I(1) An enterprise agreement may be lodged with the registrar for approval for registration.

(2) the commission is to approve for registration each enterprise agreement so lodged, but only if the commission is satisfied:
(a) that the agreement is not contrary to the public interest; and
(b) that the agreement is not unfair, harsh or unconscionable; and
(c) that the agreement was not entered into under duress; and
(d) that the agreement complies with all other requirements made by this Division.

(3) An enterprise agreement that, in the opinion of the commission, fails to comply with the commission's wage fixation principles is not contrary to the public interest if the parties to it satisfy the commission;

(a) that it will improve the productivity and efficiency of the enterprise concerned to such an extent as to justify failure to comply with those principles; and
(b) that it is in the interests of the parties who will be bound by it.

(4) The commission may obtain and take into account the views of any State peak organisation as to whether or not an enterprise agreement is contrary to the public interest.

(5) Before an enterprise agreement is approved for registration, the registrar must forward a copy of the agreement for consideration by the Commissioner for Enterprise Agreements and the commission must take into account any submission concerning the agreement made, within such time as the registrar specifies, by the Commissioner.

(6) The functions of the commission under this section are to be exercised by a Deputy President designated by the President for the purposes of this section.
(7) In this section:

'State peak organisation' means the Labour Council of New South Wales and any association for employers that, in the opinion of the commission:

(a) operates primarily throughout New South Wales; and
(b) is representative of a significant number of member associations of employers;

'wage fixation principles' means principles established by the commission that apply to the determination of wages and conditions of employment, other than wages and conditions of employment fixed by enterprise agreements."

Relevantly then, from the inception of the first statutory shift to the making of enterprise agreements the notion of improvement in productivity and efficiency at the enterprise level was positively at the heart of the process where wage outcomes were in excess of those generally available to the community through other wage fixation processes.

The Australian Industrial Relations Commission deferred the adoption of enterprise bargaining in its *National Wage Case April* 1991[54]. In that decision the AIRC concluded that:

- There many large unresolved issues requiring careful attention and further debate. Parties and interveners needed to clarify their ideas and objectives
- It would be inappropriate to endorse any new form of enterprise bargaining until that was done
- A system of enterprise bargaining had to be durable. Fundamental deficiencies in the system would in all probability cause industrial disputation and excessive outcomes leading to the system's collapse

The NSW Industrial Relations Commission took up the issue in the NSW *State Wage Case May* 1991[55] of introducing within its wage fixation principles a framework for enterprise based agreements in the (ahead of the then Australian Industrial Relations Commission) and it is worthwhile considering the comments made by them:

> ***A new Enterprise Arrangements principle***
>
> **The Commission has taken an initiative of historic dimensions in announcing a new Enterprise Arrangements principle. The form of the new principle is based upon a draft tendered by the Labour Council but was developed having regard to submissions from other parties.**
>
> **This new principle will result in a major re-direction of industrial relations in New South Wales towards enterprise negotiation and agreements.**
>
> **Parliament recently passed an Act providing for enterprise agreements. The Act sets up the basic criteria of "productivity and efficiency". The new Enterprise Arrangements principle is designed to permit administrative compatibility with the terms of the new Act.**

[54] (1991) 36 IR 120
[55] (1991) 36 IR 362

In introducing the Enterprise Arrangements principle the Commission has unlocked some 500 active awards held within the State system which serves the needs of more than 60 per cent of the State's working people.

The 500 awards represent a vast resource of derivative legislation built up largely by consent of the parties which systematically applies to a multitude of employments throughout the State.

Unless the new Enterprise Arrangements principle is utilised to penetrate this large structure of awards, it is hard to see how changes would reach workplace levels on a wide scale.
Under the Enterprise Arrangements principle, every award will contain a clause permitting negotiations at workplace level to allow flexibility and innovation by agreements which can adjust the award to the needs of individual enterprises, businesses, undertakings or projects. Conciliation and arbitration and the Commission's quick reaction dispute settlement procedures are fully maintained for those who need it.

Inclusion of new principle

The new principle provides that, on a hearing for the approval of an enterprise arrangement, the Commission is to consider, in addition to the industrial merits of the case, questions of public interest, unfairness, harshness and unconscionability and duress. An arrangement may be regarded as being in the public interest if increases in wages and salaries or improvements in conditions which it proposes are justified on grounds of productivity and efficiency, if it is in the interests of the parties who will be bound by it and if it is appropriate having regard to general economic considerations.

The Commission has over recent years felt that is industrial constituency in this State has worked harmoniously and successfully at the difficult task of industrial reform. Industrial relations have been maintained substantially on an even and productive course with low rates of industrial disputation. Employers and unions have, in large measure, overcome the "them and us" syndrome to their mutual advantage. We see in enterprise arrangements a further prospect for mutually beneficial co-operation between the parties.

The structural efficiency programmes since 1987 have been the most successful programmes of industrial reform in the post-war era. The proposal that the whole programme be brought up to date and consolidated before taking major new initiatives ought to be accepted. We hope that it is not too late to do so and that a re-appraisal will take place, before lasting damage is done to the reform process and economic recovery.

Enterprise agreements: the future

We consider that, in a measured and orderly way, wage fixation should be redirected towards agreements and arrangements between parties, with an enterprise focus. This initiative should start now with the present State Wage Case.

We have concluded that there is general support for moving towards enterprise bargaining and enterprise arrangements. There appears to be further support that this process should proceed with recourse to the Commission where necessary for both conciliation and arbitrations and for the techniques of monitoring and report back.[56]

[56] (1991) 36 IR 362

In the *National Wage Case* October 1991[57] the AIRC then moved on the question of enterprise agreements by introducing its own wage fixation principle on this matter.

Given this fundamental shift in industrial relations and wage setting the NSW *State Wage Case* May 1992 [58] undertook a detailed inquiry into holistic workplace reform at that time. Its Statement and accompanying Guidelines are instructive:

STATEMENT

This *State Wage Case* has provided a forum for industrial parties in New South Wales to address a new direction for industrial relations in the decade of the 1990s, and the nature and quality of changes needed to produce a co-operative industrial culture and a truly productive economy.

This *State Wage Case* arises out of a decision of the Australian Industrial Relations Commission in the *National Wage Case - October 1991*, which for the first time, approved an Enterprise Bargaining principle.

In May 1991 the Industrial Commission of New South Wale had introduced an Enterprise Arrangements principle and recommended a model clause for the implementation of the principle.

All parties at the hearing sought the continuation of the Enterprise Arrangements principle with adjustments. It therefore became the task of the Industrial Commission to harmonise the State Enterprise Arrangements principle with the Australian Commissions' Enterprise Bargaining principle according to provisions contained in the *Industrial Arbitration Act 1940*.

Before the hearing began, two conferences were held under the chairmanship of the President of the Commission, between major employer parties on both private and public sectors, and the Labour Council of New South Wales. At these conferences it was suggested that the parties might discuss the subject of holistic reform, as distinct from piecemeal reform. Comparatively new doctrines of international best practice, just-in-time, benchmarking, total quality management, dynamic comparative advantage, a new dimension to training, the post tariff economy and the internationalisation of the Australian economy were raised. None of these entities had been dealt with explicitly in the Commission's awards or agreements, though there are some registered agreements and awards that do show evidence of holistic, or basic and fundamental reform of enterprises.

Extensive further discussions were held between the parties. In the result, when it came to present their cases to the Commission, there was predominant agreement between the Labour Council of New South Wales and private sector employers and significant agreement between the public sector representation and the Labour Council as to how the matter should proceed.

In coming to such a major area of reform, this degree of commonality in the approach of the parties is encouraging.

[57] (1991) 39 IR 127
[58] (1992) 41 IR 239

What this hearing has been about is a redirection of industrial relations in the 1990s and the beginning of major changes in work education, training, and our industrial culture. Mr Sams, for the Labour Council, said that to continue on the path of reform, in the long run, could only benefit the workers, industry and ultimately Australian society. Mr Ward, for the private sector employers, welcomed the Commission offering observations in the form of guidance to the parties, as to how the actual process of enterprise bargaining could be developed and entered into. Mr Boland, for the MTIA, thought that it was highly desirable for the Commission to assist parties and to indicate the Commission's expectations in the implementation of the Enterprise Arrangements principle.

Accordingly, the Commission has published 12 guidelines. A copy is annexed to this Statement. The guidelines are advisory only, not mandatory.

The evidence tended strongly to support the view that industrial relations are in a transitional phase from programmes of reform based on restructuring and efficiency in a piecemeal or itemised manner, to a more comprehensive sophisticated thoroughgoing or holistic reform, frequently in the context of enterprise bargaining. The emphasis will be on quality and productivity. A new ethic will emerge. International best practice, benchmarking, total quality management, world competitive advantage, just-in-time, all reflect upon productivity and micro economic reform.

The North Europeans and North Asians, after 45 years of post war reconstruction based explicitly on management/employee consensus models, have ensured a manufacturing culture where quality and productivity are goals, not options. There is a national consensus about the significance of maintaining a high value added manufacturing based economy. Australia's economic history has left a legacy of antipathy or at best, complacency, to suggestions as to strategic planning for productivity and to reliance on blunt economic instruments such as tariffs and occupational demarcations in management and workforce. In Australia the co-operative culture needed to make enterprise bargaining work in the manufacturing industry is still in its infancy.

From the evidence, the Commission has concluded that improved productivity and efficiency provides the essential catalyst for the opportunity for workers to obtain real gains in their standards of living. Increased in money wages, whether based on the consumer price index or some other statistical factor, are illusory. The emergence and development of total quality management concepts, through consultative processed, involving all levels of management and the workforce, was an encouraging sign of the acceptance by all parties of the vulnerable position of the economy and the urgent need to improve productive performance. This economic position highlights the fact that increases in wages, to have any meaning, must be backed by the contribution of the parties involved in the productive process.

The Commission discussed the pace at which these enterprise agreements were coming forward, which was said to be relatively slow. The commission considered that the relatively slow rate was understandable. In the Commission's experience of holistic reforms, none has taken less than several months in gestation, and most have taken the better part of a year or more. True productivity agreements cannot be fixed up like old fashioned wage agreements, by a couple of days discussion around a table. Enterprise agreements are not just about changing wages and conditions. Changing attitudes of both management and work force is necessary, and is much harder than changing methods, but that is what has to be done to get quality work.

Holistic reform and productivity reform are employer led. Comprehensive reforms require management initiatives of a high order. When Carlton and United Breweries signed a Development agreement (for major export orientated holistic reforms), the first clause proceeded:

The parties acknowledge the requirement for the creation of mutual trust, co-operation and common understanding.

Critical to the achievement of Workplace reform is the understanding and acceptance of meeting international standards of adaptability, reliability, improvement, service, productivity, innovation, customisation and leadership.

ANNEXURE 1

GUIDELINES

At the request of the parties, the Commission proposes to furnish guidelines concerning Enterprise Arrangements, Restructuring and Efficiency, and Productivity Agreements.

The *guidelines* are intended to be advisory, not prescriptive.

1. **The Commission will receive and examine on a case by case basis, the merits of all Enterprise Arrangements in accordance with the Enterprise Arrangements principle.**
2. **The Commission will place emphasis on the Enterprise Arrangements clauses (f), (g) and (h), and in particular the public interest.**
3. **Where difficulties or questions are encountered in relation to any application, the Commission may consult in the proceedings with State peak organisations, including the Employers' Federation of New South Wales, The Chamber of Manufactures of New South Wales and the Labour Council of New South Wales.**
4. **The general economic considerations noted in paragraph (g)(iii) of the Enterprise Arrangements principle will include, for the life of the present principle, the need for reappraisal and re-evaluation of reduced rates of inflation in the economy and the need to avoid actions which could encourage wage inflation or adversely affect employment.**
5. **The Commission recognises the need for parties to achieve flexibility in industrial relations and will do its best to assist.**
6. **Applications that substantially relate to restructuring and efficiency are required to be brought as Special Cases. These cases will be considered in a way similar to the way such cases have been considered in the past. The claims should be limited to a figure or a percentage claimed, and should be consistent in form with earlier restructuring and efficiency programmes.**
7. **On the hearing of any restructuring and efficiency Special Case, the Commission, to avoid double counting, will review earlier SEP cases affecting this parties, to ensure that the proposals do themselves advance restructuring and efficiency.**
8. **Applications based upon productivity agreements should claim payments as agreed, subject to the results of the programme. Outcomes should directly relate to the value of any increased productivity achieved, as measured or indicated.**
9. **Enterprise bargaining for its success requires a consultative approach and a mutual acceptance of self-regulation. Parties should discuss the nature and quality of their relationship when commencing negotiations.**
10. **The new Act provides much greater flexibility for consenting parties than non-consenting parties, for example, in the variation of awards. The Commission suggests that parties should consider a new role for consent in the industrial proceedings. When matters need to be arbitrated, the Commission recommends that parties agree in advance that whatever the outcome the parties should consent to the reopening and variation of the award.**
11. **The major reason for the success of other economies, why we are benchmarking them and they are not benchmarking us, is that over the last forty years they have produced the cooperative culture needed to make enterprise bargaining work.**

12. These principles, if accepted, lay down the cultural preconditions needed for a new system for parties with the imagination to use them.[59]

It is clear therefore that bargaining had its genesis in a framework that positively required a consideration of and outcomes based on improved productivity and efficiency at the enterprise level operating in a culture of cooperation and mutuality.

It is unfortunate that this early paradigm has been abandoned.

From an employer perspective for a bargaining system to promote discussion and take up of measures to improve workplace productivity that framework would operate much as the original framework did requiring wage outcomes above community standard outcomes to be justified on the grounds of productivity and/or at the very least promote and encourage:

- an approach to bargaining that is relational and consensual not transactional and conflict based
- structuring regulation at an enterprise level (usually not higher than where the profit and loss is drawn)
- the take up of local outcomes that support improved operational performance (productivity) relevant to that enterprise, the markets it operates in, its financial performance and the specific needs and considerations of the employees working in it
- reasonable conduct of those involved in the bargaining process, extending beyond their simple behaviour and including the substantive reasonableness of any claims or demands made and their justification for pursuing them in the context of that enterprise
- an environment and a process that does not erode the direct relationship between the employer and the employee
- an overarching sense of business confidence both to invest and in terms of consistent behaviour from relevant institutions associated with the process
- a reasonable level of individual flexibility at the local level within the operation of overarching industrial instruments
- outcomes that do not unduly retard or hamper the enterprises ability to respond to changes in the market by introducing workplace change

[59] (1991) 41 IR 239

- the resolution of disputation in an efficient manner which does not unduly damage business performance or the direct relationship between employers and employees

A series of amendments to the *Fair Work Act* command themselves to achieve this:

Recommendation 7

To move resort to industrial action to a last resort, Part 2-4 of the *Fair Work Act* should be amended so that prior to a BR being able to make an application for a protected action ballot:

(a) FWA must have instituted a mandatory period of conciliation (not less than 45 days not more than 90) during which BRs are required to be involved in an active conciliation process; and
(b) FWA must do all things reasonable to bring the parties to a mutually beneficial outcome and failing this at the conclusion of this process FWA must issue a statement (to be made available to all BRs, employees and management) setting out their opinion on the (substantive) conduct and position of each BR in negotiations and a list of agreed and disputed issues.

Recommendation 8

Part 2-4 of the *Fair Work Act* should be amended so that Pattern Bargaining is broadly and practically defined and then made unlawful.

Recommendation 9

Part 2-4 of the *Fair Work Act* should be amended to mandate the inclusion (in a standard form only) of clauses dealing with:

(a) Consultation (refer Model Consultation Term Schedule 2.3 Fair Work Regulations 2009)
(b) Individual Flexibility Arrangements (refer Model Flexibility Schedule 2.2 Fair work Regulations 2009)
(c) Dispute Resolution

Recommendation 10

The standard dispute resolution clause referred to in Recommendation 9 should only apply to those matters set out in section 186 (6)(a)(i) and (ii) of the *Fair Work Act* thus remedying the issues raised by the Boral/TWU case[60] that appear to defeat the underlying philosophy of the *Fair Work Act*.

Recommendation 11

Part 2-4 of the *Fair Work Act* should be amended so that once given, notice under section 414 of the *Fair Work Act* can only be withdrawn by the consent of the employer[61].

Recommendation 12

Part 2-4 of the *Fair Work Act* should be amended to move away from a tactical/technical procedural focus to a focus on substance, whenever an application is made for a bargaining order under Part 2-4 Division rather than be limited to the narrow issue of GFB compliance etc, FWA should be required to undertake active compulsory conciliation with FWA empowered to do "all things reasonable" in the circumstances to assist and facilitate bargaining to a mutually beneficial outcome.

Recommendation 13

Part 2-4 of the *Fair Work Act* should be amended so that upon being satisfied that a prima facie case has been made out for the making of a Majority Support Determination, it should be validated by a secret ballot.

Recommendation 14

Part 2-4 of the *Fair Work Act* should be amended to allow properly constituted enterprise based Consultative Committees to be the bargaining unit rather than separate bargaining representatives. The *Industrial Arbitration (Enterprise Agreements) Amendment Act* 1990 (NSW) provides a useful model for this.

Recommendation 15

Part 2-4 of the *Fair Work Act* should be amended to remove unions being a "default" bargaining representative.

[60] Boral Resources (NSW) Pty Ltd v Transport Workers Union of Australia [2010] FWAFB 8437

[61] See Boral Resources (NSW) Pty Ltd [2010] FWAFB 1771

Recommendation 16

Part 2-4 of the *Fair Work Act* should be amended to provide a standard bargaining representative appointment form and should recommendation 15 not be adopted a standard default union bargaining representative revocation form.

Recommendation 17

Part 2-4 of the *Fair Work Act* should be amended to ensure that Union officials should not be allowed to be appointed in persona unless their employing union has constitutional coverage of the work under the proposed enterprise agreement.

Q21. How have employers pursued productivity improvements during bargaining for a new enterprise agreement? Are there any obstacles to achieving productivity improvements in bargaining in the legislation? How do these obstacles differ from the situation that existed prior to the Fair Work Act?

To a large extent the answer to Question 20 covers the key issues raised by Question 21 and NSWBC/ABI has largely set out in Question 20 what it believes represents the obstacles in the legislation and how some of those obstacles could be overcome without fundamentally changing the operation of the *Fair Work Act*.

In practical terms NSWBC/ABI experience since the inception of the *Fair Work Act* has been that most employers have been on the back foot in bargaining especially where the bargaining is union driven by unions with strong one size fits all national agendas.

It has not been unusual to see negotiations last between 12-18 months with issues such as wages being resolved relatively early and on-going debate focussing on the matters above. This has been particularly the case with negotiations involving the CFMEU, AMWU and TWU.

Q22. Have enterprise agreements helped employees to better balance work and family responsibilities?

It is difficult to effectively answer this question absent a specific context. Enterprise agreements as a device are not in and of themselves a driving force for the balance of work

and family responsibilities. The real issue that employers, and to some extent employees, face here is a combination of considerations including:

- The part of the labour market the business operates in and the market segments that labour is sourced from (gender, age etc.)
- Whether it is necessary or desirable to include as a feature in their employment offering benefits or conditions of employment aimed at balancing work and family responsibilities to compete for labour or to develop the desired workplace culture
- The capacity of the business and the market they operate in to sustain these benefits or conditions

Where business sees these forces align, it will usually ensure that its employment offering does include benefits or conditions targeting the balance of work and family responsibilities and more often than not as a strategy some employers will include these in their enterprise agreement to sell or promote the enterprise agreement to employees.

A very good example of this can be found in enterprise agreements that regulate banking and finance related institutions which operate with a large diverse workplace.

Q23. What has been the impact of allowing a wider range of matters to be included in enterprise agreements by removing the list of "prohibited content" provided under the Workplace Relations Act? What has been the impact on bargaining and productivity? What has been the impact on employees' capacity to be represented in the workplace?

In many respects the answer to this question relies heavily on whether or not a particular business operates with little or no union involvement, influential but minority union involvement or majority union involvement.

In NSWBC/ABI's experience in the first case there has been little, if any impact, in the removal of prohibited content from enterprise agreements. At the other extreme in the latter case NSWBC/ABI has seen many companies engaged in what appears to be a two agenda bargaining process when undertaking the making of their first enterprise agreement under the Fair Work bargaining framework. This process was largely characterised by an agenda of matters directly relevant to the employer and employees and then secondly an agenda dealing with union industrial matters that, while of interest to employees, were largely relevant to the union as an organisational institution. This secondary agenda usually included:

- The codification of rights and benefits to be extended by the employer to union delegates
- The taking of paid trade union training leave and other union related leave
- The enlargement of dispute settlement procedures going beyond matters contained in the enterprise agreement or the National Employment Standards to the employment relationship as a whole
- The evaporation of individual flexibility provisions to be largely meaningless
- The redrafting of the Fair Work Act standard consultation provisions to increase the level and bring forward the timing of consultation involving the union

(NSWBC/ABI has discussed this in response to question 21)

In many cases the prosecution of this secondary agenda meant that many negotiations continued on for months and in cases well beyond a year. In simple terms the shift in focus was away from the actual terms and conditions of employment governing the relationship between the employer and employee to a secondary debate around union influence and the containment or erosion of managerial prerogative.

Ultimately, in many of these negotiations and in the context of potential direct action commercially damaging a business, many employers conceded on these issues where union imprimatur was largely required to achieve a majority vote. Anecdotal evidence however supports the view that many employees were frustrated and somewhat bemused by these secondary agendas and debates.

The long term effects of this are yet to be understood as many enterprise agreements made in this context now operate with diminished capacity for individual flexibility, increased capacity for unions to retard or slow business change and an increased opportunity for independent union intervention in the business. In some respects these phenomena operate as "sleepers" arising from the Fair Work bargaining framework and it may be some time before their true implications are understood for businesses and sectors where they are in play.

Q24. Did Individual Transitional Employment Agreements help to provide greater certainty of wage costs for employers using Australian Workplace Agreements and assist in the transition to a system focussed on enterprise level collective bargaining?

As a machinery device individual transitional employment agreements served their purpose effectively once the decision was taken to phase out Australian Workplace Agreements.

Q25. Are Individual Flexibility Arrangements allowed for under the flexibility terms of enterprise agreements providing employers and employees with the flexibility to tailor working arrangements to meet their genuine needs? If so, how? If not, why not?

As discussed above, before answering this question in more granular detail there is a plenary issue which is the extent to which individual flexibility arrangement clauses have

gone into enterprise agreements either in the Model form or the extent to which they have gone into enterprise agreements in a much denuded fashion as has been the case with many unions pursuing national campaigns to achieve this.

From the outset therefore, without a uniform examination of all enterprise agreements, anecdotal evidence would suggest that a large number of agreements involving unions operate with individual flexibility arrangements that are potentially meaningless in terms of providing employers and employees with genuine flexibility.

NSWBC/ABI's experience suggests that the actual take up of the use of individual flexibility arrangements when they operate as envisaged by the standard clause through enterprise agreements has at this stage been limited. It is not entirely clear why this has been the case whereas in contrast anecdotal experience would suggest that there has been a higher take up of individual flexibility arrangements where employees are not covered by enterprise agreements but are otherwise covered by modern awards.

A simply and perhaps obvious explanation for this is that in circumstances where individual flexibility arrangements operate against the back drop of a modern award there is greater scope for the employer in terms of packaging the arrangement so that it meets the requisite test. In circumstances where an enterprise agreement operates on top of a modern award this scope would obviously be substantially diminished.

Q26. Are employees appropriately protected when making Individual Flexibility Arrangements?

In our view, employees are overly protected when making individual flexibility arrangements and this in part might explain why anecdotally some sectors have been resistant in utilising them. It seems unduly paternal to require an individual flexibility arrangement to be tested against the relevant enterprise agreement but then to allow them to be terminated on such short notice (28 days). As these arrangements might involve the changing of rostering etc this lack of certainty for both the employer and employee is wholly unsatisfactory.

This essentially means that individually flexibility arrangements simply live on month to month only and for many employers (and employees) it is clear that the creation of such arrangements especially if they relate to working patterns in the organisation need to operate with greater longevity and certainty. Accordingly, in our view, individual flexibility arrangements once entered into should continue to operate as agreed between the employer and the employee or failing agreement, able to be terminated on 90 days notice by either party.

Recommendation 18

Part 2-4 of the *Fair Work Act* and the Model Flexibility Term should be amended to allow Individual Flexibility Arrangements to 'live' as agreed to by the employer and employee or failing agreement able to be terminated on 90 days notice by either party.

Q27. Did the replacement of the fairness test with the no-disadvantage test and then the better off overall test improve protection of employment conditions in the agreement-making process?

This question is largely rhetorical in that it is axiomatic that as these tests were changed they were designed to ensure an enterprise agreement was tested against an ever increasing balance of terms and conditions of employment. The better question is simply what constitutes a proper safety net and this is largely a question of how far the Australian labour market should be prescriptively regulated.

Q28. Has the new approval process under the Fair Work Act expedited the approval of agreements and provided greater certainty for employers and employees compared to the approval process under the previous legislation? If so, how? If not, why not? What has been the impact on employers, employees and their representatives of the changes to the agreement approval processes?

NSWBC/ABI has witnessed little discernible difference in the approval process under the *Fair Work Act* compared to the Workchoices Legislation.

What is experientially apparent however is that as the test for approval of an agreement was enlarged with the operation of the better off overall test and the need to ensure compliance with National Employment Standards rather than being system driven is more individually

driven. That is so say that different members of FWA adopt distinctly different approaches to the approval process. Some members seem satisfied when industrial parties known to them have lead the bargaining process and the approval process is largely undertaken on the papers. Conversely, some tribunal members appear almost always to convene a full hearing in relation to approval and essentially take a line by line, clause by clause investigative approach. Essentially from an employer's perspective this leads to uncertainty and potential cost.

Recommendation 19

The efficient operation of the approval process would be greatly assisted by the adoption of a standard process set out in a practice rule that is then utilised uniformly by all of the Fair Work members. This would allow a desirable level of consistency and confidence in how the approval process is undertaken and how relevant parties prepare themselves for it.

Q29. How have the good faith bargaining requirements affected enterprise agreement negotiations?

(a) Are there ways in which the good faith bargaining requirements could be improved to better facilitate bargaining?

(b) Are the powers possessed by FWA adequate to remedy breaches of the good faith bargaining requirements?

This question has been addressed in response to question 20.

Q30. Have majority support determinations and scope orders encouraged enterprise bargaining? If so how? If not, why not?

This question has been addressed in response to question 20.

Q31. Has the low-paid bargaining stream encouraged bargaining in workplaces and/or industries that have not historically engaged in enterprise bargaining?

Given the limited number of low-paid bargaining applications it is too early to comment upon this.

6. Equal Remuneration

Q32. What has been the impact of the changes to the test for the making of an equal remuneration order?

Q33. Have FWA's powers in relation to equal remuneration helped to ensure equal remuneration between men and women workers for work of equal or comparable value?

To date there has only been one matter to come before FWA under Part 2-7[62]. The application may have been an unfortunate first case because it essentially sought to import a decision made in a different jurisdiction under different rules, and to alter award relativities. Although such applications are not explicitly precluded by Part 2-7 they sit uncomfortably with its provisions and do not seem to be an intended use of them. Section 26(2) (d) of the *Fair Work Act* excludes state and territory laws which provide for making equal remuneration orders. To the extent that equal remuneration orders which were made before the jurisdiction was subsumed by the national system are deemed to be equal remuneration orders under the *Fair Work Act* [63] (transitional pay equity orders) it is to protect the wages determined by the order for those employees, not to establish levels of equal remuneration under the *Fair Work Act*.

Part 2-7 does not require an applicant to demonstrate that there was discrimination in the setting of remuneration, merely there is not equal remuneration for men and women performing work or equal or comparable value as a threshold for FWA to consider making an equal remuneration order[64] . This is a significant change from previous federal equal remuneration provisions and clearly makes applications less onerous, because it removes a leg from the case to be made out, one which several previous applications foundered on. In the Equal Remuneration Case discrimination was not made out and relevant findings suggested that it would have been difficult to demonstrate[65]. Nonetheless undervaluation

[62] Equal Remuneration Case, C2010/3131
[63] Item 43 Schedule 3 and item 30A (Division 2B State Reference Transitional Awards), Schedule 3A (Division 2B State Awards), *Fair Work (Transitional and Consequential Provisions) Act 2009*
[64] P 189, para 1192
[65] Para 233, Equal Remuneration Case, [2011] FWAFB 2700

attracting a remedy needs to be shown to be attributable to gender; any lower test would open Part 2-7 to all manner of applications.

Second, the introduction of "comparable value" as a test to assess whether there is equal remuneration has significantly changed the likelihood of claims. The "comparable value" test may have been the impetus for the Equal Remuneration Case application. The reason for widening the test to comparable value was to better enable comparisons with dissimilar work. Assessing comparable worth is relevant in determining value when there is no work which is the same as the work which is purportedly undervalued for gender ascribable reasons. This would seem to be appropriate when an application is brought in respect of a single employer, a workplace or agreement where men and women may well be performing different work the circumstances which seem contemplated by the Explanatory Memorandum. It states:

> **However, the [equal remuneration] principle is intentionally broader than this [requiring assessment of equal value], and also requires equal remuneration for work of comparable value. This allows comparisons to be carried out between different but comparable work for the purposes of this Part. Evaluating comparable worth (for instance between the work of an executive administrative assistant and a research officer) relies on job and skill evaluation techniques**[66].

Noticeably, the explanatory memorandum contemplates a close examination of the work of the applicant group and comparators using job and skill evaluation. This does not seem feasible in the case of an application which seeks to apply across general award coverage. There was no job or skill evaluation undertaken in the Equal Remuneration Case, and nor was the gender neutral value of the work assessed against any specific comparator(s). This seems a quixotic outcome, particularly as general claims raise questions about the structure of relativities across the modern award structure (and the stability and sustainability of the system) and also the role of bargaining in achieving productivity and fairness.

[66] P 189, para 1191, Fair Work Bill 2008 - Explanatory Memorandum

S 306 provides that the term of an award or agreement has no effect to the extent that it is less beneficial to an employee than a term of an equal remuneration order and s 193 provides that an agreement passes the better off overall test (BOOT) if each employee is better off that they would have been under the modern award. S 306 operates to increase the award rates to those of the equal remuneration order for the purposes of the BOOT[67] which seems to reduce the capacity of those subject to an equal remuneration order to enterprise bargain.

Recommendation 20

Part 2-7 of the *Fair Work Act* should be amended to make clear that one or more gender neutral comparators are required to be assessed to determine the appropriate gender neutral vale of the work to be covered by an equal remuneration order.

Recommendation 21

Part 2-7 of the *Fair Work Act* should be amended so that while the terms of an equal remuneration order form covered employees' minimum enforceable terms the relevant award continues to be the instrument against which the BOOT is assessed.

[67] Para 78, Equal Remuneration Case, [2012] FWAFB 1000

7. Transfer of Business

Q34. Does the new broader definition of transfer of business help to clarify when a transfer of business occurs?

Q35. What has been the effect of the new transfer of business provisions on corporate restructuring activities, such as in-sourcing and outsourcing?

Q36. Do the range of matters which FWA must consider when making an order in relation to a transfer of business strike the right balance between protecting employee and employer interests?

The test under the *Workplace Relations Act* was whether the second, subsequent or new employer was a 'successor, transmittee or assignee' of another business. The limitations of these provisions under the *Workplace Relations Act* were tested in the decisions of the Federal and High Courts in *PP Consultants v FSU* (2000) 201 CLR 648 (PP Consultants); *Minister for Employment v Gribbles Radiology* (2005) 163 IR 237 (Gribbles).

Removing the focus of the test from the transaction to whether there has been a transfer of work between the two employers has created the situation where:

- An employee moving from one entity to the other (where they are associated entities) will often amount to a transfer of employment. This creates a disincentive for redeployment.
- An employee whose work is affected by outsourcing, is more likely to be dismissed and made redundant rather than obtaining ongoing employment, because an incoming contractor is discouraged to take on an employee who will bring with them liabilities that relate to service. This creates a disincentive for offering employment to employees affected by outsourcing.

Any concern or ambiguity that may have existed about the transfer of business principles under the *Workplace Relations Act* was settled by the High Court in Gribbles, PP Consultants and a range of decisions in the Federal Court and associated jurisdictions.

Recommendation 22

The transmission of business rules under the *Workplace Relations Act* were sufficient and should be reinstated.

Recognition of service

The Transfer of Business provisions in Part 2-8 of the *Fair Work Act*, Transfer of Business are complemented by a range of provisions that ensure, in certain circumstances, that the service of transferring employees is recognised with a second, subsequent or new employer involved in a transfer of business. These sections include:

- sub-sections 22(5) to 22(8) of the *Fair Work Act*, when service with one employer counts as service with another employer
- section 91 of the *Fair Work Act*, transfer of employment situations that affect entitlement to payment for period of untaken paid annual leave
- section 122 of the *Fair Work Act*, transfer of employment situations that affect the obligation to pay redundancy pay
- section 384 of the Fair Work Act, period of employment for casual employees

There are significant shortcomings in sections 91 and 122 of the *Fair Work Act* whereby if a second employer decides not to recognise the employee's service with the first employer (for the purpose of this Division), neither the *Fair Work Act* or the *Fair Work Regulations* provide for a process in terms of the timing or requirement for notice as to how and when

an employer goes about making a declaration about a decision not to recognise service. The provisions relating to the recognition of service need to be improved so that an obligation is placed on a second, subsequent or 'new' employer in a transfer of business situation to make a positive declaration in a particular way and at a particular time. For example, in relation to the recognition of service for casual employees who have been subject to a transfer of business, section 384 of the *Fair Work Act* requires that, a new employer must have made a declaration:

(a) in writing;

(b) before the new employment starts; and

(c) specifying that the service will not be recognised.

The current situation under sections 91 and 122 of the *Fair Work Act* does not place a requirement as to how or when a declaration may be made. It is not clear for a second, subsequent or new employer as to when and how such a declaration must be made.

The absence of a specific requirement regarding a declaration about the recognition of service creates significant uncertainty for employees, who might be told subsequent to a transfer that their service will not be recognised. If the former employer has closed operations and moved on, this may result in an employee being denied their benefits.

The issue of recognising service under the *Fair Work Act* currently only extends to annual leave, redundancy and casual employees (in certain circumstances) but should be extended to cover long service leave, personal/carer's leave and all forms of service related entitlements.

The situation involving transfer of business for entitlements under an industrial instrument is a separate issue and is not appropriately dealt with under the *Fair Work Act*. In this

regard, an entitlement under an industrial instrument should be dealt with in the same way as the entitlement under the *Fair Work Act* National Employment Standards, where those entitlements should be subject to a declaration about the recognition of entitlements by a second, subsequent or new employer.

Recommendation 23

The *Fair Work Act* should be amended to include a specific requirement as to how and when a declaration about the recognition of service, for all purposes, should be made.

Recommendation 24

The *Fair Work Act* should be amended to require a declaration for the recognition of all service based entitlements, including long service leave (which may be delayed until a national scheme is in place), personal/carer's leave and all forms of leave/service based entitlements.

Recommendation 25

The *Fair Work Act* should be amended to include a requirement as to the recognition of service for the purposes of service based entitlements under an industrial instrument.

8. General Protections

Q37. Do the general protections provisions provide adequate protection of employees' workplace rights, including the right to freedom of association and against workplace discrimination?

Q38 Do the provisions provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of the general protections?

Q39. Should dismissed employees be able to invoke the general protection provisions to challenge their termination without any time limit on making an application? If so, why, and if not, why not?

Q40. Has the consolidation and streamlining of workplace protections into the general protections provisions made it easier for employers and employees to understand their rights and obligations? What impact has this had?

Q41. Section 351 of the Fair Work Act proscribes discrimination "because of the person's" race, sex, etc. This provision appears in Part 3-1 Division 5. This Division is headed "Other Protections". Would section 351 and any related provisions be better placed in a Division dealing solely with discrimination?

While the origins of the general protections provisions are largely drawn from the former freedom of association and unlawful termination provisions of the *Workplace Relations Act* 1996 (Cth). Similar provisions have existed for some time in State based legislation, such as the provisions contained in the 'Principles of Association', Part 1 of Chapter 5 of the *Industrial Relations Act 1996* (NSW) (NSW Victimisation Provisions).

The current form of protections in the *Fair Work Act* now provides an unprecedented and significant increase in the scope of protection in terms of both who is covered and the extent of the protections.

NSWBC/ABI addresses the following aspects of the general protections provisions:

(a) The scope of the general protection provisions in terms of who is covered (Scope);

(b) The extent of the provisions in terms of the 'rights' or type of conduct that is covered and the 'reverse onus' (Extended Provisions);

(c) The effect of general protections claims (Track Record); and

(d) Question 39 regarding the time limits on applications (Timing for the making of Applications).

Scope

The provisions now go beyond the protection of employees and extend to cover prospective employees and independent contractors.

In circumstances where prospective employees are already afforded protection by the existing discrimination laws at both a State and Federal level, it was unnecessary to include a protection for this class of individuals. Likewise, independent contractors are afforded significant protections under the *Independent Contractors Act* 2006 (Cth) which reflects the commercial nature of the relationship entered into and accordingly should have remained within that legislation.

Recommendation 26

The protection for independent contractors should be removed from the *Fair Work Act* and dealt with under the *Independent Contractors Act* 2006 (Cth).

Extended Provisions

While the general protections provisions in the *Fair Work Act* now extend to 'workplace rights' and to circumstances arising during the employment (as opposed to the unlawful termination provisions in the *Workplace Relations Act* 1996 (Cth)) that include entitlements arising under a workplace law or instrument, such as a modern award or enterprise agreement, such protections already existed, in large part, in the NSW Victimisation Provisions, which include protections in circumstances where a person:

(a) exercises functions conferred under the NSW Act;

(b) claims a benefit to which the person is entitled under the industrial relations legislation or an industrial instrument;

(c) informs any person of an alleged breach by an employer of the industrial relations legislation or of an industrial instrument; and

(d) participates, or proposes to participate, in proceedings relating to an industrial matter.

In circumstances where the NSW Victimisation Provisions had become inaccessible to employees covered by the federal legislation under both the Workchoices Legislation and the *Fair Work Act*, it was appropriate for similar provisions to be adopted at a Federal level. However, in doing so, the rights have been extended so that employees now have unprecedented 'protection' by the inclusion of section 341(1) (c) (ii) of the *Fair Work Act*, which provides protection as follows:

> **A person has a workplace right if theperson is … able to make a complaint or inquiry… if the person is an employee … in relation to his or her employment.**

While at first glance this protection appears to contemplate the former protection against unlawful termination in section 659(2) (e) of the *Workplace Relations Act* 1996 (Cth), it is in-fact intended to go further than previously provided for. This is made clear by the Fair Work Explanatory Memorandum that provides:

> **1370. Subparagraph 341(1) (c) (ii) specifically protects an employee who makes any inquiry or complaint in relation to his or her employment. Unlike existing paragraph 659(2) (e) of the WR Act, it is not a pre-requisite for the protection to apply that the employee has 'recourse to a competent administrative authority'. It would include situations where an employee makes an inquiry or complaint to his or her employer.**

The extended scope of the rights is now also supported by the test of a reverse onus of proof, which did not previously exist for the former protections that arose during employment, for example, under the NSW Victimisation Provisions, which provided:

> **That presumption is rebutted if the employer or industrial organisation satisfies the Commission that the alleged matter was not a substantial and operative cause of the detrimental action.**

The onus in NSW Victimisation Provision cases was qualified by the requirement that it be a 'substantial and operative cause' as opposed to the broader onus under the *Fair Work Act* that it need only be a reason for the adverse action if it includes a prohibited ground. Similarly, looking back to the onus arising in case of victimisation in section 5(4) of the *Conciliation and Arbitration Act* 1904 (Cth) was set out in the following terms:

> **In any proceedings for an offence against this section, if all the relevant facts and circumstances, other than the reason or intent set out in the charge as being the reason or intent of an action alleged in the charge, are proved, it lies upon the person charged to prove that that action was not actuated by that reason or taken with that intent.**

The onus under the *Conciliation and Arbitration Act* 1904 (Cth) required that all the 'facts and circumstances… are proved' before the person charged is obliged to prove that the action was 'not actuated by that reason or taken with that intent', which includes a subjective test as to the intentions of the party charged with an alleged breach.

The decision of the Full Court of the Federal Court in *Barclay v The Board of Bendigo Regional Institute of TAFE* [2011] FCAFC 15 (Barclay) will no doubt be mentioned at length in the various submissions made in this Review. However, the Barclay case is a good example of how difficult it is going to be for employers to discharge the reverse onus, particularly against the background of the Extended Provisions.
A majority of the Court in that matter held that the reason for the adverse action is the:

objectively assessed, causative reason, not the subjective motivation of the decision-maker

The representatives for the Respondent's in the Barclay case have submitted that an employer could never discharge the reverse onus of proof in the general protections regime, in those circumstances, where a union officer engaged in misconduct in his or her capacity as a union officer. Based on the reasoning in the Barclay case, this now appears to be the case, whereas historically industrial activity or industrial status could not protect against misconduct or wrongful actions.

There is a history of jurisprudence examining the issue of adverse treatment of individuals due to their industrial status in circumstances of wrongful actions, which can be traced back to some significant decisions, such as the decision in *Re Dispute at Broken Hill Pty Co Ltd Steel Works, Newcastle* (No 2)[68] (also referred to as 'the Newcastle Steel Works Case'), where a Full Bench of the NSW State Industrial Commission made the following comments about dismissing a union delegate:

> **'.... [the issue] requires anxious consideration by the tribunal with a view to ensuring that no man be unjustly penalised for his participation in legitimate activity as a representative of his union. ... Men who are willing to play a part in the affairs of an industrial union are entitled to expect that they will not be prejudiced in their employment because of any legitimate actions they take in any union office they assume. Indeed, it is an offence ... for an employer to dismiss an employee or injure him in his employment or alter his position to his prejudice by reason of the fact that the employee is an officer, delegate or member of a trade or industrial union. But,**

[68](1961 AR 48)

while this Commission will be vigilant to protect the position of any delegate unjustly dealt with by an employer for legitimate activity on behalf of his union, it certainly will not regard delegate ship as a *magic cloak* conferring on the wearer immunity from liability for wrongful actions.'

That decision has been cited and relied upon in a range of jurisdictions in Courts and Tribunals at both a Federal and State level.

Recommendation 27

The reverse onus and multiple reasons provisions in sections 360 and 361of the *Fair Work Act* should be subject to a test of 'sole or dominant reason' or 'substantial and operative cause'.

Recommendation 28

The very broad provision in section 341(1) (c) (ii) of the *Fair Work Act* regarding the making of a complaint or inquiry about anything, should be qualified by a requirement for the complaint to be a formal complaint or inquiry about specified matters (such as alleged violation of laws or regulations or an application to a competent administrative authority) and must not be frivolous, vexatious or lacking a reasonable basis for making the complaint or inquiry.

Recommendation 29

The provisions dealing with 'other protections' that relate to discrimination ("because of the person's" race, sex, etc.) are largely a duplication of the protections that already exist in both Federal and State jurisdictions. In view of this, the discrimination provisions should be removed and left to those jurisdictions already entrusted in dealing with such matters.

Track Record

The general protections provisions have resulted in a significant increase in the number of claims being brought in relation to termination of employment. The following table indicates that a significant number of claims have been made and there is an upward trend in the number of applications being made, where the vast majority of those matters appear to be settled before proceeding further, having regard to the number of matters finalised.

Quarter ending[69]	Sept 2010	Dec 2010	Mar 2010	June 2010	Sept 2011	Dec 2011	Total since start
Applications - dismissal [s365]	434	464	449	524	516	526	4101
Applications finalised	398	459	391	520	540	471	N/A
Certificate issued [s 369]	125	165	134	184	208	212	N/A
Applications – no dismissal [s 372]	113	133	117	139	152	137	1045
Finalised	97	116	107	151	151	114	N/A

Anecdotal evidence indicates that:

- Some employees were bringing adverse action claims to delay a termination in the middle of a disciplinary proceedings because they could get an interim injunction, which could be an advantage to them.
- Some employees with "no interest at all" in reinstatement were nevertheless asking for it because securing it put them in a better position to negotiate a more generous payout: "The Federal Court has said that you have to reinstate me - what will you pay me not to insist upon that right?"
- There also seemed to be "quite a lot of unmeritorious claims" being brought for the "very vague" allegation of bullying and harassment following some kind of performance management.
- There is possibly a poor understanding of these provisions, of what actually constitutes a workplace right. Perhaps it demonstrates that we no longer have in every workplace an effective union representative who can assist employees with their problems and their claims and help them understand what the law is and their rights.
- While many were failing at the first hurdle, some of the unmeritorious claims were going "all the way up the system", and were even being conciliated in a non-compulsory conference by Fair Work Australia. "You have to say that Fair Work Commissioners are busy, expert well-paid people - are they the right people to be knocking heads together?".[70]

The current process for applications under the general protections provisions involves a doubling up of dispute resolution procedures, whereby a Respondent who attends at a

[69] Source: extracted from FWA's quarterly report for December 2011
[70] Joellen Riley at the 10th Annual Workforce Conference on 5th September 2011

conference at FWA for the purposes of seeking to reach resolution of a claim is then required to attend a further conference by way of mediation at the Federal Magistrate's Court of Australia in circumstances where matters do not resolve at the FWA stage. 'Go away' money is prevalent in circumstances where a Respondent is faced with paying legal fees that are usually unrecoverable despite succeeding in defending a claim. Faced with increasing costs and poor prospects of recovery, Respondent's are held to ransom and end up paying significant amounts to resolve matters. Equally, applicants are usually unable to recover their costs.

Recommendation 30

The process for Court ordered mediation should be removed in circumstances where a general protections application has already been subject to a conference before a FWA member.

Recommendation 31

The threshold for obtaining an order for costs should be amended so that costs should be 'costs in the cause' and should follow the event, i.e. a successful party should have an expectation of obtaining a costs order.

Timing for the making of Applications

Historically, the time limit for making applications for unlawful termination under the *Workplace Relations Act* 1996 (Cth) and other related protections, for example under the NSW Victimisation Provisions, was 21 calendar days with provision for the relevant tribunal to extend time.

The current time limit for applications for unfair dismissal was reduced from the former 21 days under the *Workplace Relations Act* 1996 (Cth) to a 14 calendar day time limit under the *Fair Work Act*.

Generally, actions are subject to time limits and litigants are required to explain any cause for delay. This has historically also required Courts and Tribunals to take into account the prejudice to be suffered by the parties.

The current time limit for applications of 60 days for termination applications is more than adequate, and in fact should be reduced to a 28 day period. This is 7 days more than the former 21 day time limit provided for under the Workplace Relations Act and under previous State legislation such as the NSW Victimisation Provisions.

The current time limit for general protections applications of 6 years for disputes that do not involve termination is unacceptable and should be reduced to a more reasonable period such as the 28 days recommended for termination applications above. In the alternative, a time limit should apply for a 28 day period after the employment terminates.

The current provisions already provide for a process to extend time for making an application. This process has historically proved to ensure that litigants in exceptional circumstances are afforded the opportunity to bring an action and are not denied 'justice'.

Recommendation 32

The current time limit for applications of 60 days for termination applications should be reduced to a 28 day period.

Recommendation 33

The current time limit for general protections applications of 6 years for disputes that do not involve termination should be reduced to 28 days.

9. Unfair Dismissal

Q42. Do the unfair dismissal provisions balance the needs of business and employees' right to protection from unfair dismissal?

Q43. Consistent with the Government policy objectives, does the Fair Work Act provide genuine unfair dismissal protection? If so, how, if not, why not?

Q44. Are the procedures for dealing with unfair dismissal quick, flexible and informal and do they meet the needs of employers and employees? What is the impact of the changed processes upon the costs incurred by employers and employees?

Q45. Has the ability of FWA to deal with unfair dismissal claims in a more informal manner improved the experience for participants?

Q46. What has been the impact of the introduction of qualifying employment periods before an employee is eligible to make a claim for unfair dismissal? Has the 12 month (small businesses) and 6 month (larger businesses) qualifying period provided clearer guidance to employers and sufficient time for employers to assess the suitability of an employee for a role?

Q47. Is FWA's emphasis on telephone conciliation in unfair dismissal matters desirable? If so, why, if not, why not?

Q48. Are the remedies available in the case of an unfair dismissal appropriate?

Q49. Is the Small Business Fair Dismissal Code an effective tool in helping small business to understand their obligations and fairly dismiss employees?

Q50. What has been the impact of removing the genuine operational reasons defence to an unfair dismissal claim and replacing it with the requirements for genuine redundancy?

Q51. Have the unfair dismissal provisions under the Fair Work Act had an impact on the ability and willingness of business to take on new employees?

One of the objects of the Act is to provide workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity.

One of the negative aspects of the unfair dismissal provisions under the Workchoices legislation was that employer associations asserted that for many businesses, the cost of

defending a claim would often exceed the cost of paying out an employee that threatened to make a claim, leading to the practice of paying "go away" money.[71]

There is good empirical evidence that after 2½ years of the operation of the unfair dismissal provisions of the *Fair Work Act*, the practice of paying "go away" money is continuing to the same extent, if not more, when compared with dismissals under the WorkChoices Legislation.

The following table shows the dismissal activity based on statistics supplied by Fair Work Australia.

Quarter ending	**Sept 2010**	**Dec 2010**	**Mar 2011**	**June 2011**	**Sept 2011**	**Dec 2011**	**Total since Act's start**
Applications for ufd remedy [s 394]	3115	3164	3219	3307	3417	3505	30843
Number settled without a decision	3091	2692	2944	3127	2805	3102	27043
Number finalised by FWA (decision or jurisdiction)	122	122	82	127	145	125	919
Number found unfair	42	49	24	35	31	27	260
Number found fair	49	39	40	49	72	51	335
Number involving small business	652	615	609	565	535	521	N/A
Number dismissed - consistent with SBUDC	0	0	2	2	3	0	16

Since the commencement of the *Fair Work Act* unfair dismissal provisions, there have been a total of 30,843 unfair dismissal applications. Of those, 27,043 were settled without a decision. The small number of finalised applications (that is, where Fair Work Australia has made a decision on the merits or on a jurisdictional basis) supports the view that there are a significant number of claims in the system that are being settled by the payment of "go away" money. Unfortunately, the statistics obscure the extent to which the Small

[71] Paragraph r211 of the Explanatory Memorandum of the Fair Work Bill 2008

Business Fair Dismissal Code operates to inhibit applications against small businesses. It is likely that small employers also pay "go away" money more often than they need to.

The Explanatory Memorandum for the Fair Work Bill 2008 provides at paragraph r226 as follows:

> **The new system administered by FWA will be simpler and easier for all parties to use. Under the current system, an unfair dismissal claim must go through an initial conciliation stage, which goes on to arbitration if not able to be conciliated. In the new system, FWA will be able to respond to claims in a flexible and informal manner. This includes through initial inquisitorial inquiries, and where there are contested facts, an informal conference or hearing. FWA will be able to make binding decisions following a conference, without the need for a formal, public hearing. Where conferences are held, they will be able to be conducted at alternative venues, such as the employer's place of business, which will minimise the cost in time and lost earnings an employer may face in defending a claim.**

Further, the Explanatory Memorandum at paragraph r227 states:

> **Overall the new system has more of a focus on early intervention and informal processes over the previous system. It will increase access to unfair dismissal remedies for employees whilst still imposing certain conditions on access that will benefit business, particularly small business.**

The process envisaged under the Explanatory Memorandum has not occurred, in particular:

- FWA does not respond to claims in a flexible and informal manner
- there is no initial inquisitorial enquiry
- informal conferences or hearings are not conducted where there are contested facts
- FWA does not make binding decisions following a conference without the need for a formal, public hearing
- conferences are not conducted at alternative venues except to the extent that this part of the process has been satisfied by telephone conferences

The process of an unfair dismissal claim made under the *Fair Work Act* is virtually the same as the process of an unfair dismissal made under the WorkChoices Legislation or the

pre-reform *Workplace Relations Act* 1996. The main steps in an unfair dismissal claim under the *Fair Work Act* are as follows:

- the employee files a claim
- the employer files an employer's response
- FWA arranges for a conciliation conference to take place by telephone
- conciliation occurs
- if the conciliation conference fails to settle the matter, the claim is referred to arbitration
- arbitration hearings are conducted by members of FWA

Apart from the fact that conciliation conferences are conducted by telephone, there is virtually no distinction between the process of an unfair dismissal claim under the WorkChoices legislation and the process under the *Fair Work Act*. Accordingly, the intention expressed in paragraph r226 of the Explanatory Memorandum in minimising the cost in time and lost earnings of an employer in defending a claim has not been met.

Recommendation 34

The *Fair Work Act* should be amended to require FWA to dismiss unmeritorious claims at the conciliation stage.

Small businesses get a special mention in the unfair dismissal provisions. The *Fair Work Act* contains a mechanism by which the Minister may declare a Small Business Fair Dismissal Code.

The definition of "small business" is contained in section 23 of the *Fair Work Act*. Basically, a national system employer is a small business employer at a particular time if the employer employs fewer than 15 employees at that time. This calculation is performed by headcount and is not on full time equivalents. A number of NSWBC/ABI members

raised as a result of counting a casual the same as a full-time employee in the calculation of employees to determine whether an employer is a small business employer.

Recommendation 35

The definition of small business employer in section 23(1) should be amended to: "A national system employer is a small business employer at a particular time if the employer employs fewer than 15 full time equivalent employees at that time".

Further, for the purpose of calculating the number of employees, employees employed by an associated entity are taken into account.

"Associated entity" has the meaning given by section 50AAA of the *Corporations Act 2001*. This definition is very broad and can include companies outside of Australia. For example, a company incorporated in Australia may have five employees employed in Australia. Its holding company is based in the United States of America and it has 15 employees. The holding company is an associated entity of the employer in Australia which means that the number of employees for the purposes of the unfair dismissal laws is 20. The small employer in Australia is not a small business employer as defined by the *Fair Work Act*.

By way of another example, an employer in Australia has ten employees. The same employer also has ten employees working in the United Kingdom. The ten employees working in the United Kingdom would be included in the count of employees for the purposes of the unfair dismissal provisions. Accordingly, that employer would not be a small business employer as defined in the *Fair Work Act*.

The definition of "small business employer" should not include employees of the employer or associated entities that are not employed within Australia.

Recommendation 36

In calculating the number of employees for the purposes of determining whether an employer is a small business employer, the employees of the employer and any associated entity who are not employed within Australia should be excluded.

10. Industrial Action

Q52. Is the process for applying for and conducting protected action ballots simpler under the new system? If so, why, and if not, why not?

Q53. What effect has the obligation for the Australian Government to fund the full cost of conducting a protected action ballot had on the propensity of employee bargaining representatives to make an application for a protected action ballot order?

Q54. Should applications for protected action ballots be permitted where no majority support determination has been made by FWA, and where the employer has not agreed to engage in collective bargaining? If so, why, and if not, why not?

Q55. Are the powers and procedures possessed by FWA to suspend or to terminate protected industrial action adequate to resolve intractable disputes? If not, why not, and if so, why?

Q56. Should compulsory conciliation play a more prominent role, either generally, in the enterprise bargaining regime, in settling disputes over the application of enterprise agreements or more especially in the machinery which governs the settlement of intractable disputes?

Q57. Are employees able to resort to protected industrial action more easily or quickly since the passage of the Fair Work Act? If so, which provisions of the Act facilitate this?

Q58. Is the taking of industrial action in support of pattern bargaining effectively prohibited by the Fair Work Act?

Q59. What has been the effect of the removal of the mandatory four hour minimum deduction of pay for protected employee industrial action?

Q60. What has been the effect of allowing for a proportion of an employee's pay to be withheld in the case of a partial work ban?

Q61. What has been the effect of removing the reverse onus of proof for employees taking industrial action out of a legitimate concern for his or her health or safety?

NSWBC/ABI has addressed the issues arising from these questions in Section 5 of this submission.

11. Right of Entry

Q62. What has been the impact of union right of entry being linked to the right of a union to represent the industrial interests of an employee, rather than coverage by a type of instrument?

Q63. Do the right of entry provisions balance the right of unions to enter workplaces to meet with employees and investigate breaches of legislation and the right of employers to go about their business without undue inconvenience?

The *Fair Work Act* right of entry provisions draw heavily upon well settled practice that operated before the Workchoices Legislation and as such NSWBC/ABI members have not reported any systemic issues with them but rather where problems have arisen they have largely been due to the approach of individual union officials or specific unions as was historically the case.

12. Institutional Framework

Q64. Are the processes and procedures set out in the Fair Work Act that apply to FWA, the Federal Magistrates Court of Australia and to the Federal Court of Australia appropriate having regard to the matters coming before it? What changes, if any, would you suggest?

Q65. Does the consolidation of workplace relations institutions provide more easily accessible services and information to users of the national workplace relations system?

Q66. Does the requirement for FWA to conduct and publish research relevant to minimum wages help to better inform parties who make submissions to the Minimum Wage Panel?

Q67. Do the enhanced powers of Fair Work Ombudsman (FWO) inspectors assist in the expeditious resolution of matters under investigation?

Q68. In comparison to the previous arrangements, does the increased educative role for the FWO help employers and employees to better understand their rights and obligations under the Fair Work Act?

Q69. What has been the impact of the new ability for the FWO to accept enforceable undertakings as an alternative to prosecution?

Under the *Fair Work Act* the broad functional responsibilities of what had previously been the Australian Industrial Relations Commission and the Australian Fair Pay Commission (AFPC) were consolidated. This conceptually put awards under the one tribunal and reunited Australian Pay and Classification Scales (APCSs) with their associated "award". However there are significant differences between award variations and the variation of minimum wages, which gave rise to the distinctive treatment of allowances and their variation in modern awards.

The treatment of allowances in modern awards might be said to conduce to the stability of the system but possibly not to its simplicity and ease of understanding. Work-related allowances are set as a percentage of a defined wage rate in the award (the standard rate) which is either the weekly or hourly rate of the specified classification, or classification increment, and so move in concert with any change in award minimum wages. Expense-related allowances are linked to defined components of the CPI prescribed in each modern

award and depend on movements in that component since the minimum wages were last varied.

The movement of allowances is automatic, and allowances are not expressed in modern awards as amounts of money (and were not expressed as amounts in modern awards when they were made so as to provide starting points). The more difficult issue is expense related allowances, since familiarity with the operation of the standard rate approach to work-related allowances does allow these to be calculated out of the award.

NSWBC/ABI notes that following its annual wage review decision FWA does issue draft determinations for expense related allowances and also a spreadsheet. This is a most helpful contribution and is welcomed. It does seem that FWA is close to the edge of its jurisdictional capacity in doing this, and it is beyond its jurisdiction to issue or order authoritative rates. More broadly, FWA and the Fair Work Ombudsmen are not consolidated agencies and nor is either consolidated into the court system. Nor should they be.

There are features of the Fair Work system which do not assist the provision of services and information. A key area where the current relationship between FWA and the Ombudsman does not operate to assist with accessible services and information, and one which impacts many employers, is the determination of actual award entitlements, particularly those required to calculate the make-up of employees' hourly rates. Undoubtedly some of the difficulty stems from the transitional provisions in modern awards, and their operational complexity. However there are statutory impediments as well.

The *Fair Work Act* was introduced with the view to moving from the *Workplace Relations Act* 1996 to the proposed new system. Under the *Workplace Relations Act* 1996, as it was when the Fair Work legislation commenced, what had previously been awards were decomposed into two distinct instruments, Australian Pay and Classification Scales (APCSs) and "awards" (pre-reform or transitional awards and notional agreements preserving state awards).

APCSs were derived from the award's provisions which determined basic rates of pay (and their application – coverage). There was no statutory capacity to make orders establishing the actual preserved APCSs.

The Australian Fair Pay Commission (AFPC) exercised a wage setting function, which empowered it to make wage setting decisions, but not to make specific orders varying each individual APCSs, nor to publish the varied APCS.

The transitional provisions depend on the difference between the former entitlement and the new entitlement under the modern award. The *Fair Work Act* contains no power in FWA to determine order and publish rates, loadings and penalties in award-based transitional instruments or transitional APCSs. Both FWA and the Fair Work Ombudsman provide information about award-based transitional instruments and transitional APCSs but FWA and Ombudsman information about these instruments is not authoritative, not fully comprehensive and is not consistent.

NSWBC/ABI supports the capacity of FWA to undertake research, and that of the AFPC before it, to assist submissions.

It might improve the value if the timing of the delivery of research projects were not so typically close to the time that submissions are due, however the main impediment to greater reliance on existing research output is that much of it is relatively inconclusive. This is always a feature of social research, but the fact that much of the research to date is inconclusive also seems attributable to

- The paucity of appropriate data
- The relative novelty of the research topics
- A tendency for individual projects to have scopes which are too broad or which become too broad

NSWBC/ABI supports the principle that the Ombudsman should have a significant educative function. Any effective compliance regime must be based on the view that most participants in the system seek to comply, and compliance regimes which do not operate on that premise are liable to be tyrannical and to conduce to pushing activities into the

informal economy. It is also consistent with the international view that labour administration agencies (wide term inclusive of but not confined to inspection services) provide information and educative services to assist with compliance:

> **As a main labour administration component, labour inspection is a public function and is at the core of effective labour law with wide powers and functions, including enforcement and sanctions that should be sufficiently dissuasive to deter violations of labour legislation while also providing corrective, developmental and technical advice, guidance, prevention tools and promoting workplace best practices. These functions should be regulated and balanced as part of a comprehensive compliance strategy in order to ensure decent working conditions and a safe working environment**.[72]

Member comments about advisory material on the Ombudsman's website is less positive. Members do not regard the Ombudsman's material as being written with the issues facing smaller enterprises in mind nor do they see that it's written in particularly accessible language.

[72] Para 12, Conclusions on Labour Administration and Labour Inspection, Report of the Committee on Labour Administration, 5th Item, International Labour Conference 2011.