
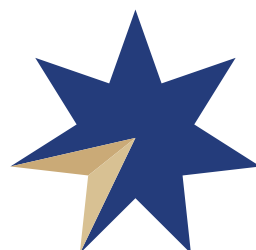


Working for business.
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Inquiry into the incidence of, and trends in, corporate avoidance of the Fair Work Act 2009

30 November 2016



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Chamber of Commerce
and Industry



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1 Introduction

The Australian Chamber of Commerce and Industry (Australian Chamber) thanks the Senate Education and Employment References Committee (Committee) for the opportunity to make submissions in relation to its inquiry into the incidence of, and trends in, corporate avoidance of the *Fair Work Act 2009* (Cth)(Inquiry). The Macquarie Dictionary (2003) defines “avoid” as “to keep away from; keep clear of; shun; evade”. When considered in the context of “avoidance” of the *Fair Work Act 2009* (Cth)(Act) the Australian Chamber understands this term to have a negative connotation generally implying deliberate non-compliance.

The Australian Chamber does not consider it sinister or evidence of “avoidance” if businesses organise their labour affairs in a manner permitted by the law, which best suits their (often changing) operational needs and has approached this inquiry on that basis.

The Australian Chamber denounces deliberate breaches of employment laws which create an unfair competitive environment for legitimate operators and it acknowledges the continued efforts of the Fair Work Ombudsman (FWO) in seeking to facilitate compliance with the Act and pursue enforcement action where appropriate.

From time to time cases of deliberate wrongdoing by employers emerge in the public arena which will have the potential to create negative perceptions about employers generally. However the FWO has stated:

In our experience, most employers want to do the right thing. There are a range of reasons why an employer may not be compliant with workplace laws, including the complexity of the system, or an oversight or misunderstanding of the legislation.¹

The Australian Chamber urges the Committee to acknowledge, as the FWO has, that most employers endeavour to do the right thing and to be mindful of the crucial role that private sector employers play in creating wealth, prosperity and opportunities for social and economic participation for Australians.

The private sector makes the major contribution to employment in Australia creating around 10.3 million jobs, almost 87 per cent of all employment. Around 45 per cent of these jobs (or 4.8 million) are provided by small and medium enterprises. ‘Corporations’ come in all sizes. As such, we urge the Committee to exercise caution so as not to avoid damaging the performance and competitiveness of Australian business through adoption of recommendations that would increase the regulatory burden or impose inappropriate restrictions in what is already a complex system.

2 Use of labour hire and contracting arrangements

The terms of reference direct the Committee to consider “...the use of labour hire and/or contracting arrangements that affect workers’ pay and conditions”. This aspect of the terms of reference does not sit comfortably with the Inquiry’s focus on avoidance given that use of labour hire and independent contracting is not itself a deliberate non-compliance with the Act.

¹ Fair Work Ombudsman, Annual Report 2014-2015, pp 42-43.

However in relation to contracting arrangements, the Australian Chamber acknowledges that there are circumstances in which these have been and can be misused through the deliberate disguising of an employment relationship as a contractual relationship or “sham contracting”. The Australian Chamber is opposed to sham contracting. Legitimate employers are disadvantaged directly by having to compete against other firms whose costs are reduced via an unlawful means. Sham contracting is specifically prohibited by the Act, with section 357 providing:

Misrepresenting employment as independent contracting arrangement

- (1) *A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.*

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) *Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:*

- (a) *did not know; and*
(b) *was not reckless as to whether;*

the contract was a contract of employment rather than a contract for services.

The regulatory framework as it relates to sham contracting appears to be working effectively and the consequences of breaching the provisions are significant. As well there has been increasing attention paid to its enforcement. In its 2014-2015 Annual Report the Fair Work Ombudsman stated:

We take action against employers who deliberately engage employees as contractors to avoid paying minimum entitlements. In one case decided, a Melbourne travel services company was penalised \$228 000 for paying flat hourly rates of \$9-\$11 to a migrant worker who should have been paid as a casual employee. The underpayments totalled \$19 567 over eight months.

In another case, the court found two travel businesses deliberately misclassified workers as independent contractors to unlawfully cut costs. Six workers, who should have been classified as employees, were underpaid more than \$25 000. As our attempts to rectify the situation were ignored, and with consideration to the seriousness of the matter, we initiated legal action. The businesses were penalised a total of almost \$138 000.²

The Productivity Commission also identified that in 2014-15, the FWO finalised 301 complaints relating to misclassification and sham contracting — 29 per cent of complaints were sustained (the

² p. 37.

contravention rate), the FWO issued 23 letters of caution, and commenced six sham contracting matters in court.³

Beyond the specific provisions relating to sham arrangements the Act's general protections provisions also provide broad protections to persons (including contractors and labour hire employees) regarding workplace rights.

Noting the Inquiry's focus on 'avoidance' it should be acknowledged that an employer in an employment relationship, whether it is conducting a labour hire business or a business of another kind, has obligations under the Act along with many other laws that regulate aspects of the employment relationship. Failing to comply with the safety net of terms and conditions provided in the form of National Employment Standards and modern awards can result in penalties of up to \$54,000 per offence as well as exposure to liability for back pay and potential litigation.

The Act and FWO compliance policy provides significant deterrence for businesses to knowingly engage labour hire employees who are not being paid in accordance the law by the employing agency. The FWO has warned that "...[b]usinesses that benefit from the labour of underpaid workers in their supply chain risk legal liability and damage to their reputation". The Act provides a mechanism through which persons other than the employer can be considered an accessory to contraventions of the Act which the FWO is increasingly availing itself of. In particular, section 550 of the Act provides that:

- (1) *A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.*
- (2) *A person is involved in a contravention of a civil remedy provision if, and only if, the person:*
 - (a) *has aided, abetted, counselled or procured the contravention; or*
 - (b) *has induced the contravention, whether by threats of promises or otherwise;*
or
 - (c) *has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or*
 - (d) *has conspired with others to effect the contravention.*

The FWO has increased its focus on accessorial contraventions under section 550 in recent times and the consequences of a contravention are significant. For example, in its 2014-2015 Annual Report, the FWO reported that in that year 26 matters involved an accessory with \$571,889 in penalties ordered against the individuals.⁴ This suggests there is no regulatory or enforcement inadequacy in relation to employers who are in deliberate breach of their obligations or in relation to third parties involved in contraventions.

While not specifically addressed within the terms of reference, unions often raise concerns about work modes that vary from the model of permanent full-time employment, labelling these arrangements as "insecure" and therefore inappropriate. Anticipating that these concerns may be raised again in this inquiry the Australian Chamber encourages the Committee to acknowledge

³Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 808.
⁴Inquiry into the incidence of, and trends in, corporate avoidance of the Fair Work Act 2009 – 30 November 2016

that while flexible ways of working may present challenges for both unions and employers in terms of member/worker engagement, the needs of the modern economy will not be met by employing only permanent employees working between 9am and 5pm Monday to Friday. The issue is not to seek to regulate all labour engagements as if they fell into this preferred model, but to recognise the diversity of forms of engagement, the need for them and to regulate for them accordingly.

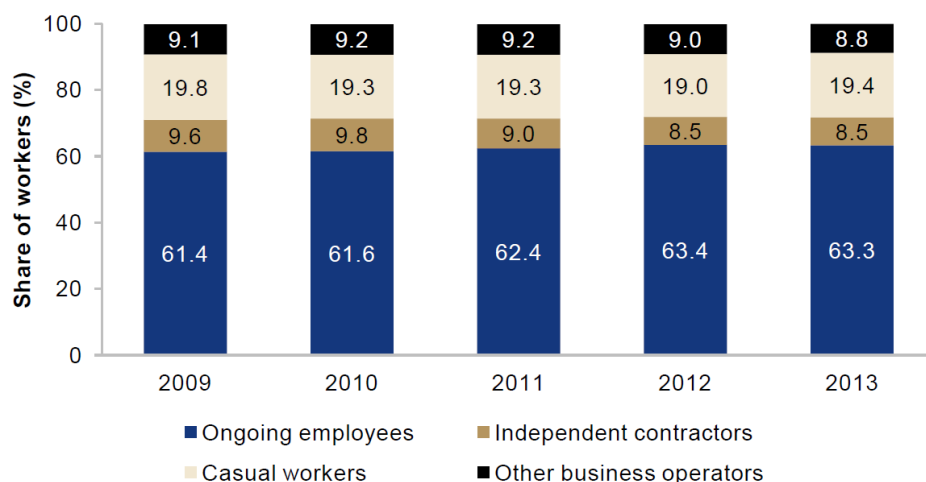
Our constantly changing environment and community expectations about the availability of services mean that organisations need to adapt. A workforce that is agile enough to enable adjustments to be made in response to change and to service the market is critical to business sustainability. Work modes that vary from the model of permanent employment such independent contracting and labour hire play a key role in supporting this outcome and should not be considered inferior or undesirable.

In today's society people will undertake multiple types of work under a variety of arrangements across their working life. There is no 'one size fits all' employment model that will suit the circumstances of all employees or all employers and no single 'right method' of labour engagement. The Productivity Commission has suggested "[f]or workers, the attractiveness of various forms of work depends largely on the associated financial and non-pecuniary benefits".⁴

The Productivity Commission identified that collectively "[i]ndependent contracting, labour hire and casual workers comprise just under 40 per cent of the workforce" and that this figure had decreased slightly in recent times.³¹ More specifically, it identified that between 2009 and 2013, the proportion of the workforce engaged under "alternative employment forms" fell from 38.4 to 37.7 per cent.³² The ABS classifies employment forms as ongoing employees, independent contractors or casual workers and as can be seen from the Productivity Commission's analysis below, there has been relatively stability in the forms of employment in recent times:

Stability in the forms of employment

2009–2013, per cent of total workers



⁴ Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 801.
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Source: Productivity Commission Draft Report, p. 714 ABS 2014, *Forms of Employment, Australia, November 2013*, Cat. No. 6359, released 7 May 2014.

The majority of ‘non-standard’ work is casual employment and the Productivity Commission has noted that “labour hire and subcontracting is rare in most industries”.⁵ The ABS categories make it difficult to quantify the prevalence of labour hire and people engaged via labour hire arrangements. However, the Productivity Commission has made reference to a recent estimate suggesting that labour hire employees make up around one per cent of the workforce.³⁴ Recent ABS data suggest that the number of labour hire workers paid by a labour hire firm or employment agency is approximately 124,400, only approximately one per cent of the total number of persons employed.³⁵

Notwithstanding that such forms of engagement are not the “norm”, these forms of engagement have an increasingly important role to play in ensuring an agile and productive workplace.

Fixed term contracts and labour hire

<i>Employment category</i>	<i>Number</i>	<i>Share of employed</i>
Fixed term contract prevalence	(‘000s)	(per
Employees on fixed term contracts	367.2	3.2
Employees not on fixed term contractors	9 267.8	80.1
Non-employees	1 931.6	16.7
Labour hire prevalence		
Employed people who are in labour hire	144.4	1.2
Employed people who are not in labour hire	11 429.3	98.8

^a From ABS 2013, *Forms of Employment, Australia*, Cat. No. 6359.0. ^b The share of total employment was obtained from ABS 2011, *Forms of Employment*, Cat. No. 6359.0 and applied to total employment for November 2013. Sourced from Productivity Commission, Draft Report, March 2015, p. 100.

Acknowledging that the prevalence of labour hire and independent contracting is driven by both supply and demand factors the Productivity Commission has also observed:

*Given that not everybody wants to work under the same conditions, these alternative employment forms partly satisfy the wide variety of preferences across the workforce. Whether it be the autonomy of independent contracting, the flexibility and the higher wage rate of the casual worker or the reduction in job search costs for the labour hire worker, each of these employment forms has some appeal to a large number of workers.*⁶

The Productivity Commission considered that preserving the freedom to contract in respect of these arrangements “is unlikely to undermine employee bargaining power to any great extent”.⁷ It also noted that “alternative employment arrangements can increase productivity and lower costs, with benefits that ultimately flow to the community as a whole through lower prices.”⁸

In recognising the importance of flexible forms of labour the Productivity Commission considered

⁵ Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 686.

⁶ Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra p. 802.

⁷ Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 817.

⁸ Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra p. 803.

that "...[t]here are grounds for changes to the FW Act to limit the capacity of agreements to regulate the use of contractors and labour hire (which are in any case, in spirit, contrary to the *Competition and Consumer Act 2010* (Cth)).⁹ Specifically, the Productivity Commission recommended that:

Terms that either restrict the engagement of independent contractors, labour hire and casual workers or regulate the terms of engagement for independent contractors or labour hire workers should constitute unlawful terms under the FW Act. The FW Act should also specify that enterprise agreement terms could not restrict an employer's prerogative to choose the employment mix suited to their business.¹⁰

This recommendation is strongly supported by the Australian Chamber. Contractual arrangements in which people provide services on commercial terms to other business as independent contractors or through a labour hire agency are legitimate and no less appropriate than other forms of genuine and consensual labour engagement. They provide flexibility, efficiency and productivity dividends. Regulating them so as to make them impracticable and uneconomic would be poor policy as it would narrow the range of opportunities people have to participate in paid work. It would place work opportunities at risk of going elsewhere.

3 Voting to approve enterprise agreements

The terms of reference direct the Committee to consider "the use of artificially small and unrepresentative voting cohorts to approve enterprise agreements with a broad scope to cut workers' pay and conditions". This aspect of the terms of reference would appear to be a misnomer given that an enterprise agreement is required to pass a better off overall test such that current and prospective employees covered by an award will (at the test time) be better off overall if the agreement applied rather than the relevant award.¹¹ In fact, there are detailed provisions within the Act that regulate enterprise agreement approval. Before approving an enterprise agreement the Fair Work Commission must be satisfied, among other things, of the general requirements that:

- if the agreement is not a greenfields agreement--the agreement has been genuinely agreed to by the employees covered by the agreement; and
- if the agreement is a multi-enterprise agreement:
 - the agreement has been genuinely agreed to by each employer covered by the agreement;¹² and
 - no person coerced, or threatened to coerce, any of the employers to make the agreement; and
 - the terms of the agreement do not contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); and
- the agreement passes the better off overall test;¹³

⁹ Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 686.

¹⁰ Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, p. 797.

¹¹ *Fair Work Act 2009* (Cth), s 193.

¹² See section 188 for requirements regarding when employees have genuinely agreed to an enterprise agreement.

¹³ Inquiry into the incidence of, and trends in, corporate avoidance of the Fair Work Act 2009 – 30 November 2016

- the group of employees covered by the agreement was fairly chosen.¹⁴

The Fair Work Commission's close scrutiny of these requirements is explained in its 2015-2016 Annual Report which states:

Under the process, a team of administrative staff analyse agreements to form a preliminary view of whether they meet the statutory requirements required by the Fair Work Act. The analysis includes completing a checklist that was developed by senior Commission Members. The team's analysis assists Commission Members, who continue to make the decisions on whether or not to approve agreements.

In addition to the improvements in timeliness, other benefits of the centralised process include a greater capacity to identify and respond to trends and systemic issues. Agreement approval applications in particular industries are generally allocated to the same Member to consider. This is one of the ways the process promotes greater consistency and rigour in the approach to agreement approval applications, which has contributed to a greater number of applications being withdrawn. When issues that may lead to an agreement not being approved are drawn to the parties' attention, the application is often withdrawn. In 2015–16, 595 applications were withdrawn, compared to 407 in 2014–15 and 294 in 2013–14, despite similar numbers of applications for approval being made.

By the end of the reporting period, the new process applied to 90 per cent of applications for approval of agreements.¹⁵

In relation to the issue of whether a group of employees has been fairly chosen the Fair Work Commission is required to exercise judgement and in circumstances where the agreement does not cover all of the employees of the employer(s) covered by the agreement, and must take into account whether the group is geographically, operationally or organisationally distinct.¹⁶ There is an initial statutory presumption that operationally related activities should be subject to the same terms and conditions.

The Fair Work Commission's Enterprise Agreement Benchbook (Benchbook) states:

When determining whether a group of employees has been fairly chosen, the Commission may have regard to matters such as:

- *the way in which the employer has chosen to organise its enterprise, and*
- *whether it is reasonable for the excluded employees to be covered by the enterprise agreement, having regard to the nature of the work they perform and the organisational*

¹³ s 186(2). The FWC may approve an enterprise agreement that does not pass the better off overall test if approval would not be contrary to the public interest (see section 189). It may also approve an enterprise agreement with undertakings (see section 190).

¹⁴ s 186(3).

¹⁵ p. 65.

¹⁶ s 186(3A).

*and operational relationship between them and the employees who will be covered by the enterprise agreement.*¹⁷

The Benchbook also refers to the Full Bench decision *Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union; The Australian Workers' Union; "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU); Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia*¹⁸ from which principles emerge:

1. *"The selection of the group of employees to be covered by an agreement on some objective basis (as opposed to an arbitrary or subjective basis) is likely to favour a conclusion that the group was fairly chosen."*¹⁹
2. *"Given the context and the legislative history it can reasonably be assumed that if the group of employees covered by the agreement are geographically, operationally or organisationally distinct then that would be a factor telling in favour of a finding that the group of employees was fairly chosen. Conversely, if the group of employees covered by the agreement was not geographically, operationally or organisationally distinct then that would be a factor telling against a finding that the group was fairly chosen."*²⁰
3. *"It is important to appreciate that whether or not the group of employees covered by the agreement is geographically, operationally or organisationally distinct is not decisive, rather it is a matter to be given due weight, having regard to all other relevant considerations."*²¹
4. *"It is not appropriate to seek to exhaustively identify what might be the other relevant considerations. They will vary from case to case and will need to be demonstrated to the satisfaction of the tribunal".*²²
5. *"The word 'fairly' suggests that the selection of the group was not arbitrary or discriminatory. For example, selection based upon employee characteristics such as date of employment, age or gender would be unlikely to be fair."*²³
6. *"...selection based on criteria which would have the effect of undermining collective bargaining or other legislative objectives would also be unlikely to be fair."*²⁴

¹⁷ p. 40.

¹⁸ [2012] FWAFFB 2206.

¹⁹ [2012] FWAFFB 2206 at [16].

²⁰ [2012] FWAFFB 2206 at [18].

²¹ [2012] FWAFFB 2206 at [20].

²² [2012] FWAFFB 2206 at [21].

²³ [2012] FWAFFB 2206 at [21].

²⁴ [2012] FWAFFB 2206 at [21], not however *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* [2015] FCAFC 16 (24 February 2015 at [67] in which the Court found at [67] that "[a]lthough the Full Bench was directed by s 578(a) to take into account the objects of Part 2-4 (as stated in s 171) it is far from clear how the Full Bench was able to conclude that an agreement made with three employees could "undermine" collective bargaining, or that it was relevant to state any conclusion in such broad terms".

7. *“It is also appropriate to have regard to the interests of the employer, such as enhancing productivity, and the interests of employees in determining whether the group of employees was fairly chosen. In this regard, it is not only the interests of the employees covered by the agreement that are relevant; the interests of those employees who are excluded from the coverage of the agreement are also relevant.”*²⁵

The Benchbook also states that when determining whether a group of employees has been fairly chosen, the Fair Work Commission may have regard to matters such as:

- *the way in which the employer has chosen to organise its enterprise, and*
- *whether it is reasonable for the excluded employees to be covered by the enterprise agreement, having regard to the nature of the work they perform and the organisational and operational relationship between them and the employees who will be covered by the enterprise agreement.*²⁶

The matter of *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd*²⁷ is also of utility in examining the question of when a group of employees had been found to be fairly chosen. The Court in finding that the Full Bench had erred in deciding that a group of employees had not been fairly chosen stated that it was not correct to take into consideration “...other employees who had been denied a chance to bargain”:

*The “other employees” referred to were potential (and unknown) possible future employees who would never have a chance to bargain unless there was no agreement in place when they were engaged. Deprivation of that opportunity would arise in the case of **any employee engaged during the term of an agreement** (emphasis added).*²⁸

Relevantly, the Court also stated:

It has not been suggested that it was impermissible for three employees to be asked to make an agreement or vote to do so. The FW Act permits such an agreement to be made and requires that it be approved if the statutory tests are met. Unless the proposed agreement failed to meet a relevant statutory test there could be no basis for introducing a further, more general, requirement of the kind adopted by the Full Bench.

*In my respectful view, the criticism expressed by the Full Bench in [30] and [34] of its decision which I set out earlier was misplaced. The “employees” to whom the Full Bench referred were future employees. It was not to the point that an agreement was made before some employees were engaged: that was a feature of the process. It would be the inevitable result also of any greenfields agreement when no employee covered by the agreement would have an opportunity to vote to accept its terms.*²⁹

²⁵ [2012] FWAFB 2206 at [21].

²⁶ p. 40.

²⁷ [2015] 2015] FCAFC 16 (24 February 2015).

²⁸ *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* [2015] FCAFC 16 (24 February 2015).at [68].

²⁹ *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* [2015] FCAFC 16 (24 February 2015).at [71] – [72].

Three types of agreements can be made under the Act: single enterprise agreements, multi-enterprise agreements and greenfields agreements for new enterprises that have not yet engaged employees (which can take the form of single enterprise or multi-enterprise agreements). The Court acknowledged that:

The consequences of a greenfields agreement (made before any employee is employed) is that the restrictions on employee bargaining referred to in the preceding paragraph in the Full Bench decision are equally imposed. The FW Act recognises each form of bargaining. It does not prefer one over the other.

The Australian Chamber encourages the Committee to take this into consideration as it approaches this inquiry. An employer who lawfully enters into an agreement with a small group of employees is not, on account of that fact, avoiding its obligations under the Act. There are legitimate reasons why employers will seek approval of an agreement where only a small number of employees are employed, including (without limitation) commercial certainty and to attract talent. Subject to the qualifiers stated above the Act does not prohibit the making of agreements with small groups of employees or with no employees at all in the case of greenfields agreements. In fact, it expressly permits these later types of arrangement and on good policy grounds. Greenfields agreements have particular utility in the delivery of construction projects, particularly in relation to resource and infrastructure projects, as they are able to ensure a period of industrial stability and certainty of labour costs. Given the significant levels of investment required for such projects, the certainty offered by greenfields agreements is an important consideration in evaluating the viability of such investment.

Of note, in the context of greenfields agreements the Act does not allow employers to determine the conditions for future employees in new work sites absent negotiation and agreement with one or more relevant employee representatives (typically unions). This is a departure from the arrangements under the WR Act which enabled an employer to utilise employer greenfields agreements or individual statutory agreements where there was no agreement with the union. This did not mean that union greenfields agreements did not exist under the WR Act. The WR Act encouraged unions to negotiate with employers because being named a party to the agreement enabled right of entry for that union.³⁰ However it is worth noting that there no equivalent incentive for unions to bargain in good faith under the current Act.

It is also worth noting that in the case of single employer enterprise agreements a bargaining representative may apply to the Fair Work Commission for a “scope order”³¹ if they have concerns that bargaining is not proceeding fairly because they consider the agreement’s proposed coverage is not appropriate. The Act also enables a bargaining representative to apply to the Fair Work Commission for a “majority support determination”³² where a majority of employees want to bargain with their employer and the employer has not agreed to bargain or initiated bargaining. In either case, the Fair Work Commission must address the question (similarly to section 186(3) and (3A)) whether “...the group of employees who will be covered by the agreement was fairly chosen” and

³⁰ *Workplace Relations Act 1996* (Cth), ss 351, 747 and 760

³¹ *Fair Work Act 2009* (Cth), ss 238-239.

³² *Fair Work Act 2009* (Cth), ss 236-237.

whether the group is geographically, operationally or organisationally distinct (section 237(2)(c), (3A); s 238(4A)).

4 Termination enterprise agreements

The terms of reference direct the Committee to consider "...the use of agreement termination to cut workers' pay and conditions".

Enterprise agreements can only be terminated by agreement before their nominal expiry date has been reached³³ or, if the agreement has reached its nominal expiry date, on application by either party.³⁴

If an employer requests employees to approve a proposed termination of an enterprise agreement pursuant to section 220 of the Act, before making this request it is required to:

- take all reasonable steps to notify the employees of:
 - the time and place at which the vote will occur;
 - the voting method that will be used, and
- give employees a reasonable opportunity to decide whether they want to approve the proposed termination.

Section 221 of the Act provides that the termination of an enterprise agreement is agreed to when a majority of employees who cast a valid vote approve the termination. A person covered by the agreement must then apply to the Fair Work Commission for approval of the application for termination, accompanying the application with a statutory declaration.³⁵

Section 223 of the Act provides that the Fair Work Commission must approve the termination if it:

- is satisfied that each employer covered by the agreement complied with the requirement to give employees a reasonable opportunity to decide whether they want to approve the proposed termination,
- is satisfied that the termination was agreed to by employees (as above);
- is satisfied that there are no other reasonable grounds for believing that the employees have not agreed to the termination; and
- it considers that it is appropriate to approve the termination taking into account the views of the union or unions (if any) covered by the agreement.

Section 225 of the Act provides that if an enterprise agreement has passed its nominal expiry date, any of the following may apply for the termination of the agreement:

- one or more of the employers covered by the agreement;
- an employee covered by the agreement; or

³³ *Fair Work Act 2009* (Cth), s 219.

³⁴ *Fair Work Act 2009* (Cth), s 219. Note that a greenfields agreement can only be terminated by agreement if one or more of the persons who will be necessary for the normal conduct of the enterprise concerned, and are covered by the agreement, have been employed.

³⁵ *Fair Work Act 2009* (Cth), s. 222.

- a union covered by the agreement.

If such an application for the termination of an agreement is made it must also be accompanied by a sworn statutory declaration by the applicant. The Fair Work Commission will grant the application pursuant to section 226 of the Act if it:

- is satisfied that it is not contrary to the public interest to do so;
- considers it appropriate to terminate the agreement taking into account all the circumstances including:
 - the views of the employees, each employer, and each union (if any), covered by the agreement, and
 - the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.

Of note, the decision of the Full Bench of the Australian Industrial Relations Commission in *Re Kellogg Brown and Root, Bass Strait (Esso) Onshore/Offshore Facilities Certified Agreement 2000*³⁶ which was concerned with a corresponding provision of the WR Act is of utility in understanding the public interest requirement in section 226(a) of the Act. In that matter the Commission found:

The absence of any reference to the interests of the negotiating parties in s.170MH(3) is significant. It follows that the views of persons bound by the agreement may be relevant to the exercise of the discretion if they shed light upon the effect of termination on the public interest, but they should not be given any independent weight. To do so would be to import into the application of the section something which on its proper construction it does not include.

The notion of public interest refers to matters that might affect the public as a whole such as the achievement or otherwise of the various objects of the Act, employment levels, inflation, and the maintenance of proper industrial standards. An example of something in the last category may be a case in which there was no applicable award and the termination of the agreement would lead to an absence of award coverage for the employees. While the content of the notion of public interest cannot be precisely defined, it is distinct in nature from the interests of the parties. And although the public interest and the interests of the parties may be simultaneously affected, that fact does not lessen the distinction between them.³⁷

An employer that seeks to terminate an enterprise agreement in accordance with the Act's provisions is not engaged in avoidance with its legal obligations. There are good and practical reasons as to why employers and other parties may apply to have their enterprise agreements terminated, including for example because they have been made at a particular point in time and their terms are no longer relevant to or meeting the needs of the employer and employees in a workplace. The pay and conditions that can be sustainably provided through enterprise bargaining

³⁶ (2005) 139 IR 34.

³⁷ (2005) 139 IR 34 at 40.

will also vary depending on market conditions and economic cycles. Indeed requiring an employer to consider, each time they enter negotiations for an enterprise agreement, whether the costs it establishes for the future are an effective and sustainable floor for evermore would be the antithesis of a flexible system. If agreement terms and conditions were intended to continue in perpetuity, the inclusion of a nominal expiry date in agreements would also be pointless.

This issue was highlighted in the matter of *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd*³⁸ which considered the application and construction of section 226 of the Act. That matter referred to the following passage from the decision in *Resources of Australia Pty Ltd v Liquor Hospitality and Miscellaneous Union*³⁹ :

Enterprise bargaining lies at the heart of the workplace relations system and has done so since the early 1990s. Enterprise instruments have had different titles and have been subject to different rules, but there is nevertheless consistency in many respects.

Enterprise Agreements made and approved under the FW Act, Workplace Agreements made under the WR Act, and Certified Agreements made under the Industrial Relations Act 1988 have all been required to have a specified duration with an upper limit on that duration.

The prevailing legislative provisions have provided for the continuation of agreements after their nominal expiry date subject to an ability to make application to terminate the Agreement.

*Different tests have applied, some more limited than the current provisions and some less restricted. **It is clear that enterprise agreements are intended to apply for a limited period and either be renegotiated, renewed, varied, replaced, terminated or left unaltered depending on negotiations between the parties and the operation of the legislative provisions** (emphasis added).*

In the specific context of this matter, the agreement applying to Aurizon (which was QR National before privatisation of the rail freight operator by the Queensland Government) contained a number of legacy conditions including an employment guarantee (prohibiting redundancies) which had expired as well as other provisions impeding the employer's capacity to effectively manage its operation, strict work demarcations and rostering arrangements that constrained flexibility and a dispute resolution clause that enabled unions to delay workplace changes. Efforts had been made to bargain for new agreements that provided greater flexibility but after a considerable number of meetings and conferences it was apparent that the parties had reached a stalemate in negotiations. In its consideration of section 226 of the Act the Full Bench's findings⁴⁰ (which were upheld on appeal to the Federal Court) included:

³⁸ [2015] FCAFC 126 (3 September 2015)

³⁹ [2010] FWA 2434 at [24]- [27].

⁴⁰ Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd [2015] FWCFB 540.

- the expiry of an enterprise agreement that has passed its nominal expiry date is not inconsistent with the continuation of bargaining in good faith or the Act's objects;
- employees and their representatives still had available to them "the full arsenal of tools under the Act to assert legitimate industrial pressure on Aurizon to bargain and to reach agreement";⁴¹
- an enterprise agreement is required pass the "Better off Overall Test" which is underpinned by the safety net of terms and conditions of employment as contained within the National Employment Standards and Awards, as opposed to the previous agreement.

We note this inquiry is concerned with avoidance of legal obligations and provided an employer has followed the required process for termination of an agreement there will be no avoidance as such. In the Australian Chamber's view, if there are changes to be made in this area, they should be made with a view to freeing up the Fair Work Commission to act more quickly and decisively in terminating outdated enterprise agreements that are no longer appropriate for the circumstances of the enterprise.

While outside the intended scope of this inquiry, in previous inquiries and reviews the Australian Chamber has also highlighted that the complexity in the current legislative framework underpinning bargaining does not assist parties in a workplace who may want to negotiate new enterprise agreements. Under the current model, businesses that decide to implement an enterprise agreement are at high risk of failing to meet the procedural requirements and having their agreements rejected even if they are agreed to, including for example if a notice of employee representational rights contains a minor flaw. In addition to the procedural rules, the regulation attached to the content of agreements and administration of the better off overall test can be problematic in their application. The Productivity Commission's inquiry into the workplace relations framework examined these issues and the Australian Chamber will seek to be involved in any consultation processes intended to consider the recommendations arising from that inquiry.

5 Transfer of business provisions

The terms of reference direct the Committee to consider "...the effectiveness of transfer of business provisions in protecting workers' pay and conditions". The Australian Chamber considers that there is a serious question to be asked regarding the impact of the existing transfer of business provisions in the Act and whether they strike the right balance.

The Act introduced a new test for determining whether industrial instruments applying at the former employer's enterprise transfer with an employee formerly employed there if (s)he accepts employment with the new employer. In contrast to the WR Act's transmission of business provisions this test focusses on the employee's activities and work performed rather than the character of the business. At the time of this change it was suggested that the intention was to

17 | ⁴¹ Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd [2015] FWCFB 540 at 160. Inquiry into the incidence of, and trends in, corporate avoidance of the Fair Work Act 2009 – 30 November 2016

simplify matters.⁴² However, the amendments in the Act, purportedly for simplification, were in fact “...designed to broaden the circumstances in which a transfer occurs...”⁴³

In particular, Part 2-8 of the Act currently provides that where a ‘transfer of business’ occurs, the industrial instrument covering the old employer and employee will automatically transfer with the employee to the new employer. A transfer of business will generally be satisfied if:

- the employment of an employee of the old employer has terminated;
- within three months after the termination, the employee becomes employed by the new employer;
- the work performed for the new employer is the same or substantially the same as the work the employee performed for the old employer;
- there is a ‘connection’ between the old employer and the new employer (as described in any of subsections 311(3) to (6)) of the FW Act.⁴⁴

Where a transfer of business occurs any enterprise specific industrial instrument covering the old employer and transferring employee covers the new employer and transferring employee until terminated or a new instrument comes into effect. The transferring instrument may also apply to new employees that didn’t transfer from the old employer if there is no other instrument in place that covers them.

If a party does not want the instrument to cover the new employer and transferring employee, application would need to be made to the Fair Work Commission to make an order to this effect pursuant to section 318 of the Act. This is not a straightforward process and in deciding to make an order the Fair Work Commission is required to take into account a detailed set of criteria as set out in section 318(3) and which includes:

- (a) *the views of:*
 - (i) *the new employer or a person who is likely to be the new employer; and*
 - (ii) *the employees who would be affected by the order;*
- (b) *whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;*
- (c) *if the order relates to an enterprise agreement--the nominal expiry date of the agreement;*
- (d) *whether the transferable instrument would have a negative impact on the productivity of the new employer's workplace;*
- (e) *whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer;*
- (f) *the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;*
- (g) *the public interest.*

⁴² McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, June 2012 at p. 201.

⁴³ Ibid. p.201 and footnote 979 on that page.

⁴⁴ *Fair Work Act 2009* (Cth), s. 311(1).

The *Fair Work Amendment (Transfer of Business) Act 2012* further amended the Act to provide that any state industrial instruments applying to an employee of a state public sector employer would transfer with the employee when there is a transfer of business from that employer to a private sector employer. The effect of the amendments was that the previous approach of negotiating transmissions of business and transfers of employment from state public sector employers which accommodated both movement into the private and the nature of the employees involved is now no longer lawful.

The broad economic and social environments within which the public and private sectors operate are very different. Governments, often operating actual or effective monopolies, have developed public sector entitlements which do not easily fit with those in private sector economic activities.

There are significant differences between public sector and private sector conditions and in most jurisdictions there has been a very long tradition of separate awards, agreements, employment statutes and formal policies covering public sector employees. This can be seen in industries where there is a great deal of public-private sector employee interchange such as health or community services. Ultimately public sector wages policy and conditions of employment are a matter for government and the abovementioned amendments to the rules covering the transfer state public sector employers were unwarranted and unhelpful.

A clear impact of the amendments is to reduce the likelihood that the new business service provider will engage former state public sector employees, particularly where specialist skills are not required. These changes also create a disincentive to outsource by locking in public sector terms and conditions of employment, no matter how restrictive, antiquated or expensive they are. By removing the pressure of credible competition they create a disincentive for public sector reform that would otherwise drive efficiency, better services and result in savings for taxpayers.

As with other significant changes introduced by the Act, the transfer of business provisions and their expansion with the *Fair Work Amendment (Transfer of Business) Act 2012*, were not subject to the pre-legislative review process of the Office of Best Practice Regulation. Both bills received the Prime Minister's exemption. The review panel tasked with reviewing the Act (Review Panel) acknowledged that "[t]he transfer of business provisions under the FW Act are a departure from the previous arrangements and are novel in many ways".⁴⁵ The Review Panel recognised additional cost, complication and complexity for business, but was much less sure about the balance, stating in its report:

- *"It is not possible to accurately estimate the number of businesses that have been affected by the changes to the transfer of business provisions. On our analysis, the new provisions are likely to have resulted in transitional costs to some employers as they adjust to the new regulatory framework, although exactly how much is difficult to estimate. The new provisions also place some additional burden on some employers in that they expand the circumstances in which a transfer of business will be considered to have occurred. Again, the magnitude of this cost is difficult to estimate, and must be weighed against the clear*

⁴⁵ McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, June 2012 at p. 208.

benefit to employees, along with the employer's capacity to neutralise any additional costs by applying to FWA."

- *"The new provisions may make outsourcing and insourcing more complicated or expensive for businesses, which may have an impact on decisions to go down this path. However, the evidence is inconclusive."*
- *"If the additional complexity outweighs what are considered to be substantial cost benefits available through outsourcing, there may be a reduction in the practice. However, it is not clear from the evidence, and probably too early to tell, if this has occurred."⁴⁶*

The Review Panel recognised that an industrial instrument will transfer even in circumstances where the transfer is at the employee's initiative. The only way to prevent this outcome is to apply FWC for an order and the Review Panel said:

The question for the Panel is whether it is necessary to require the parties to apply to FWA on every occasion an employee voluntarily seeks to transfer to a similar position in a related entity. We believe it would be preferable to spare both parties the time and expense of making such an application. This could be achieved by amending s. 311(6). Such an amendment is unlikely to increase the risks of employees having their terms and conditions of employment diminished through transfers to associated entities.

This rationale is reflected in the following recommendation of the Review Panel:

Recommendation 38: *The Panel recommends that s. 311 be amended to make it clear that when employees, on their own initiative, seek to transfer to a related entity of their current employer they will be subject to the terms and conditions of employment provided by the new employer.*

The Government attempted to give effect to this recommendation through the *Fair Work Amendment Act 2015* (Cth) but this bill was passed in significantly amended form and did not include changes to the transfer of business provisions. *The Fair Work Amendment (Remaining 2014 Measures) Bill 2015* (Cth) (Remaining Measures Bill) sought to revive those amendments from the *Fair Work Amendment Bill 2014* (Cth) (FWA Bill) that did not pass the Senate in October 2015. The Remaining Measures Bill was not passed by the last Parliament and the Australian Chamber maintains its support for the measures contained in it.

On the question of whether the transfer of business provisions strike the appropriate balance, the Productivity Commission has suggested that they do not, finding in its inquiry into the workplace relations framework that:

Transfer of business provisions need to balance competing goals. They should not frustrate structural adjustment or limit employment opportunities; but nor should they allow an

⁴⁶ McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, June 2012 at pp 206-207.

employer to restructure their business specifically to avoid the application of an industrial instrument (typically an unwanted enterprise agreement).

Currently, the provisions protect the latter at the expense of the former and some re-balancing should occur.

- The object of the provisions — currently to provide a balance between the protection of employees' terms and conditions and the interests of employers in running their enterprises efficiently — should be expanded to also encompass the interests of continuing employment for the transferring employees.*
- Any employment agreement transferred to a new business should automatically terminate 12 months after the transfer, except for transfers between associated entities.*
- Voluntary movements between associated entities, at an employee(s) initiative, should be exempt from the provisions entirely, with the transferring employee(s) automatically covered by the new employer's employment conditions.⁴⁷*

The Australian Chamber agrees that the transfer of business provisions do not strike the right balance. The Productivity Commission's Report into the Workplace Relations Framework summarised the concerns employers have in relation to the current scheme which include:

- the potential to incur significant costs by agreeing to employ some or all of the transferring employees, including for instance:
 - higher unit labour costs;
 - operation of multiple payroll systems;
 - carrying over the period of service from the previous employer, with effects on entitlements and the application of the unfair dismissal provisions;
 - lower productivity if the employment arrangements for the transferring employees are only partly comparable with the operating environment of the new enterprise (e.g. with regard to scheduling and rostering arrangements);
 - conflict created by differences in conditions of employees undertaking the same work;
 - differences in nominal expiry dates of agreements that can lead to multiple agreement negotiations and associated costs;
- disincentives to move employees to jobs where their skills are best used (even where they consent) within and between entities;
- discouragement of business acquisitions.⁴⁸

The former "transmission of business" provisions under WR Act and its predecessors were intended as anti-avoidance provisions to deter employers from transferring employees into what was essentially the same business to avoid the operation of an agreement or a respondent based award. Over time the High Court developed rules which (subject to the emergence of grey areas) were understood, more balanced, workable and did not act as a major disincentive for innovation nor for incoming employers to take on existing staff. The transfer of business rules disturbed these

⁴⁷ Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra p. 827.

⁴⁸ Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra pp. 832-833.

established principles about transmission which had been developed by the High Court over many years.

The Australian Chamber recommends that the existing transfer of business rules should be amended to reflect the balance that the transmission of business provisions in the WR Act and predecessor legislation provided. The Australian Chamber also supports the recommendations of the Productivity Commission that are intended to achieve greater balance, including the imposition of a maximum time limit for transferring industrial instruments.

6 Redundancy entitlements and unfair dismissal protection for labour hire employees

The terms of reference direct the Committee to consider “...the avoidance of redundancy entitlements by labour hire companies and “...the lack of protections afforded to labour hire employees from unfair dismissal”. As stated earlier in this submission an employer in an employment relationship, regardless as to whether it is conducting a labour hire business or a business of another kind, is obliged to comply with the Act.

6.1 Unfair dismissal

Section 382 of the Act provides that a person is protected from unfair dismissal at a time if, at that time:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:
 - (i) a modern award covers the person;
 - (ii) an enterprise agreement applies to the person in relation to the employment;
 - (ii) the sum of the person’s annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

An employee's period of employment with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.⁴⁹

An employee who meets this criterion is no less protected by the provisions by reason of being a labour hire employee. The Australian Chamber is aware of the recent findings of Professor Forsyth in the Victorian Inquiry into the Labour Hire Industry and Insecure Work (Victorian Inquiry) which suggest that that:

- The current unfair dismissal provisions in the Act operate, in practice, to limit substantially the protections from unfair dismissal for labour hire workers. This principally arises from the exclusions of most casuals, as well as fixed term/specified task employees and contractors, from being able to bring an unfair dismissal claim.

⁴⁹ *Fair Work Act 2009* (Cth) s 384.

- Even for labour hire employees who can bring an unfair dismissal claim, the relevant provisions are sometimes interpreted by the Fair Work Commission so as to enable the labour hire agency to 'hide' behind the actions of the host and/or their commercial relationship with the host. This approach enables both the host and the labour hire employer to avoid having to account for their respective roles in causing or contributing to the termination of the labour hire employee's employment.
- These limitations of the unfair dismissal provisions act to reduce job security for labour hire workers, and likely act as an incentive for businesses to utilise labour hire rather than engage direct employees.⁵⁰

The Australian Chamber respectfully disagrees with these findings.

Section 386(2) of the Act provides that a person has not been dismissed for the purposes of the unfair dismissal provisions if the person was employed under a contract of employment for a specified period of time, for a specified task or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season.

Casual employees are not protected from unfair dismissal laws unless, in accordance with section 384 of the Act, their employment was on a regular and systematic basis and they had a reasonable expectation of continuing employment on that basis. The nature of employment pursuant to contracts for a specified time, task, season or on a casual basis that does not meet the description above is that work is not ongoing or guaranteed. It is entirely reasonable for the statute to contemplate that the termination of employment in these circumstances is not harsh, unjust or unreasonable.

Flexible forms of employment such as casual employment and employment for a specified time, task or season are legitimate and necessary and are consistent with the *Termination of Employment Convention*. It should come as no surprise that people are employed under these arrangements by labour hire agencies. Labour hire workers typically know their pipeline of work is uncertain and they agree to that uncertainty when accepting this type of work. However labour hire agencies can play an important role in helping people working under these arrangements to achieve greater income security by finding new work placements for them as their work assignments terminate. Evidence of this was presented to the Victorian Inquiry.⁵¹ In this regard, it can be said that labour hire employees may have enhanced employment security relative to other casual employees or employees engaged for a specified time, task or season. The fact of their employment by a labour hire agency does not make them any more or less eligible for unfair dismissal protections.

In circumstances where employees are protected from unfair dismissal, the criteria for considering whether the dismissal was harsh, unjust or reasonable is also the same regardless as to whether the employer is operating a labour hire business or otherwise. In particular, section 387 of the Act requires the Fair Work Commission to take into account:

⁵⁰ Victorian Inquiry into the Labour Hire Industry and Insecure Work, 2016, p. 20.

⁵¹ Victorian Inquiry into the Labour Hire Industry and Insecure Work, 2016, p. 109.

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussion relating to the dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the size of the employer's enterprise would be likely to impact the procedures followed in effecting the dismissal; and
- (h) any other matters the FWC considers relevant.

While the Victorian Inquiry raised concern about "...limitations of the unfair dismissal provisions" that "act to reduce job security" about the impacts of, it is worth noting that the current operation of the unfair dismissal provisions in the Act creates disincentives to employment. The Australian Chamber has made comprehensive submissions to the Productivity Commission's inquiry into the workplace relations framework addressing this issue.

In considering the operation of the unfair dismissal provisions, the Productivity Commission has observed that:

The most problematic aspect of the current legislation is that an employee who has clearly breached the normal expectations of appropriate work behaviour may nevertheless be deemed to have been unfairly dismissed because of procedural lapses by the employer. For example, in one case a business dismissed two employees after they assaulted their supervisor. The FWC concluded that their physical assault was a valid reason for dismissal, but that the employer's failure to follow certain procedures meant that the dismissals were unjust, unreasonable and therefore unfair.⁵²

As noted in the Australian Chamber's initial submission made to the inquiry, behavioural economics has a significant impact on hiring and firing decisions, particularly for small and medium sized employees who are less able to absorb the risk of a poor recruitment decision. As noted in the Australian Chamber's initial submission, Harding (2002) found that:

...intended changes in human resource management procedures also have a number of unintended effects on firm behaviour that must be weighed against the intended effects in any assessment of the UFD laws. Some 47.9 per cent of small businesses reported that their recruitment and selection decisions are influenced by the UFD laws (see Table 13). These changes, more details of which are in Table 14, involve the following:

24 | ⁵² Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra p. 30.
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- 11.6 per cent of businesses reported greater use of fixed term contracts;
- 1.3 per cent reported that they employ more casuals and fewer permanent staff;
- 20.7 per cent reported that they employ more family and friends; and
- 26.6 per cent reported use of longer probationary periods.

The strongest effect on recruitment and selection decisions, however, was that 39.5 per cent of businesses reported that the UFD laws meant that there were certain types of job applicant that their business was less likely to hire (see Table 14). The types of job applicant disadvantage by the UFD laws are: a person who has changed jobs a lot for no apparent reason (35.1 per cent of businesses); a person who is currently unemployed (15.9 per cent of businesses); a job applicant who has been unemployed for more than one year (27.4 per cent of businesses); a person who has been unemployed for more than two years (30.3 per cent of businesses) (see Table 15).

Harding considered these ‘unintended’ consequences that could reduce fairness and equity and concluded that young people, the long-term unemployed and less literate would receive unequal treatment due to the laws because they were over-represented in the pool of job applicants and thereby victims of the influence the laws were having on the recruitment and selection decisions of nearly half of employers.⁵³

Businesses need greater confidence to take risks in hiring decisions as well as to better address the performance and behaviour of employees and reforms are required to achieve this outcome. The Australian Chamber remains concerned that a valid reason for termination, the assessment of which specifically includes the impact of the terminated employee’s conduct on the safety and welfare of other employees, can be too easily downgraded due to six other criteria directed to process as well as the catch-all ‘*any other matters that the FWC considers relevant*’ in section 387(h). Employers are in an unenviable position as they also grapple with their duties under work health and safety laws to provide a safe workplace and their obligations under discrimination and anti-bullying laws.

The Productivity Commission has suggested that “moderate incremental reform”⁵⁴ is needed and made a number of recommendations including amending the Act so that procedural errors alone are not sufficient to award compensation or restore employment in what would otherwise be a valid dismissal.⁵⁵ The Australian Chamber supports the substance of these recommendations.

6.2 Redundancy

Section 119 of the Act provides that:

- (1) An employee is entitled to be paid redundancy pay by the employer if the employee’s employment is terminated:

⁵³ Harding, D., ‘*The effect of unfair dismissal laws on small and medium sized businesses*’, Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, 29 October 2002. p.iv & v.p.iv and 26.

⁵⁴ Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra p 30.

⁵⁵ Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra p 31.

- (a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
- (b) because of the insolvency or bankruptcy of the employer.

An employee's entitlement to redundancy will depend on the nature of the employment arrangements in place. In the case of labour hire arrangements, the 'ordinary and customary turnover of labour' exemption described above will exempt many labour hire businesses from the requirement to pay redundancy for numbers of their employees due to the short term contracting arrangements and uncertainty of work in the pipeline. 'Ordinary and customary turnover of labour' is longstanding national law and practice and employers that lawfully apply this exception are not avoiding their obligations. On the other hand, applying this exception unlawfully can, like other breaches of the National Employment Standards, result in serious consequences including the potential for penalties of up to \$54,000. Whether the exception applies will depend on the circumstances at hand.

A recent Full Bench Decision sets out some useful historical analysis of the exception's genesis. In the matter of *Compass Group (Australia) Pty Ltd v National Union of Workers and United Firefighters' Union of Australia*⁵⁶ the Full Bench identified that the exception emerged from the Termination Change and Redundancy (TCR) Case in which two decisions were issued. The following extracts from the TCR case were considered in its decision:

[16]...In the first decision the Full Bench said that in determining the circumstances in which severance pay should be granted it should pay regard to the most recent decisions of the Commission and other industrial tribunals 6. The Bench said that it had paid particular regard to a number of specified decisions including the decision of Justice Fisher of the NSW Industrial Commission in a case concerning the NSW Employment Protection Act⁷. The Full Bench then said⁸: The Full Bench then said⁸:

"Our reasoning in these proceedings, other decisions of this Commission and various decisions of other industrial authorities, are also inconsistent with the general severance pay prescription being granted where termination is as a consequence of misconduct, where employees have been engaged for a specific job or contract, to seasonal and/or casual employees, or in cases where provision is contained in the calculation of the wage rates for the itinerant nature of the work. In addition, we are of the opinion that where termination is within the context of an employee's retirement, an employee should not be entitled to more than he/she would have earned if he/she had proceeded to normal retirement."

[17] In the second decision the Full Bench said: 9

"In our decision at 55-6 we made reference to a number of definitions of redundancy and our draft order was based on the definition of the Chief Justice,

⁵⁶ [2015] FWCFB 8040.
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Bray J. in the South Australian Supreme Court. Further, at 61 of the decision we decided that there should not be any fundamental distinction, in principle, based on the causes of redundancy. Nevertheless, it was not our intention that the redundancy provisions should apply to the “ordinary and customary turnover of labour”; an expression used by Mr Justice Fisher in his decision related to the Employment Protection Act in New South Wales ((1983) 7 I.R. 273).

However, notwithstanding the helpful submissions of the parties in these proceedings, we have some difficulty in finding a suitable expression to make our intention clear. There is no doubt that we did not intend the redundancy provisions to apply where an employee is dismissed for reasons relating to his/her performance, or where termination is due to a normal feature of a business. Furthermore, there is an overlap between the definition of redundancy for the purposes of any award and the categories of employees exempted from severance pay. To some extent the same can be said for the provisions relating to the introduction of change.

In the circumstances, we are prepared to provide that the redundancy provisions shall not apply where the termination of employment is “due to the ordinary and customary turnover of labour” but we will not include the other categories referred to by the employers. We are also of the opinion that the employer should provide all relevant information “in writing”.⁵⁷

The Full Bench also considered an extract from the decision of Justice Fisher referred to in the extract above⁵⁸:

*There is of course in industry and always has been a general turnover of labour. It has been customary for employees' services to be dispensed with because it is the view of management that they are in some way less than satisfactory employees, not appropriately skilled, not appropriately motivated, unreliable or exhibiting other forms of unhelpful conduct in an industrial context, but not amounting to misconduct. Many employees, particularly in the building construction, contracting and sub-contracting industries are employed on terms which contemplate intermittency in employment. Provisions for compensating for holidays and annual leave by making an allowance in the calculation of hourly or weekly rates of pay are often made. Many awards contain a specific factor to compensate for “following the job”, ie., for intermittency in employment when one job cuts out and another has to be obtained. Payments on severance would appear to be inappropriate to these circumstances and may contain an element of double counting. (See *Australian Workers' Union v. Victorian Employers Federation* (Print D6429).)*

Similarly employees have at the height of economic prosperity been dismissed because of seasonal shifts in markets, loss of contracts or changes in contracts not relating to

⁵⁷ [2015] FWCFB 8040 at [16]- [17].

⁵⁸ [2015] FWCFB 8040 at [18], (1983) 7 IR 273.

recession, changes in model or product, shifts in marketing emphasis and many other day to day causes removed from the present recession and its mounting toll of unemployment. All these employees are dismissed, almost invariably upon notice. If redundancy or severance payments applied generally to them a significant charge would apply to the turnover of labour generally. This would involve a major shift in the principles normally applied by this and other industrial tribunals to retrenchment situations. These types of dismissals contrast with dismissals which do not arise in any way from the behaviour of the employee or from ordinary changes in the incidents of employment, but where the employee is dismissed on a collective basis along with others and where the reason for the dismissals lies in the force of adverse economic circumstances, restricting employment opportunities and resulting in collective redundancies. Dismissals arising out of technological change or out of major company restructuring have similar characteristics.

I am not aware of any system which loads an ordinary and customary turnover of labour with a significant costs burden in relation to severance as such, or where the object of remedial legislation cannot be fairly described within the three classifications of retrenchment to which I have referred. I would therefore require to be affirmatively persuaded by clear language that it is the intention of this statute to impose upon almost all dismissals, regardless of cause, a costs burden in the midst of the worst economic recession in the last 50 years...

The Full Bench disagreed with the Commissioner's application of these decisions at first instance and found that there was no basis for excluding from the exception dismissal arising from the loss of contracts where this is a normal feature of the business.⁵⁹ In considering the TCR Full Bench decisions it found:

...Redundancies that arise because of economic circumstances, technological change or company restructure involve a common element of unexpected termination. Termination of employment where an employee has been engaged for a job or contract is in a different category. The TCR Full Bench expressly stated this. It adopted the wording of an Exception developed from previous cases. In the first decision it referred to the decision of Justice ⁶⁰Fisher and mentioned employees engaged for contracts. In the second decision it again referred to the decision of Justice Fisher and drew on his formulation of the Exception. Justice Fisher expressly refers to loss of contracts as encompassed within the concept ordinary and customary turnover of labour.⁶¹

The Full Bench then went on to consider the High Court's consideration of the TCR Full Bench's reasoning in *Amcor Limited v Construction, Forestry, Mining and Energy Union & ors*⁶² which confirmed an understanding that:

⁵⁹ [2015] FWCFB 8040 at [20].

⁶⁰ Specifically, *KMC Constructors Pty Ltd v The Amalgamated Metal Workers' Union and another* Dec 156/87 M Print G6958 [1987] AIRC 92 (1 April 1987); *Tempo Services Ltd v TM Klooger and Ors* (2004) 136 IR 358; *Australian Liquor, Hospitality and Miscellaneous Workers' Union re Nationwide/AWU and LHMU Australian Defence Forces Services Consent Award 1992* PR904940; *Kilsby v MSS Security Pty Ltd T/A MSS Security* [2014] FWC 7475; *Garcia and Ors v Limro Pty Ltd* PR933625

⁶¹ [2015] FWCFB 8040 at [21].

⁶² [2005] HCA 10; (2005) 222 CLR 241, p.256, per Gummow, Hayne and Heydon JJ.

- redundancy refers to a job becoming redundant and not to a worker becoming redundant;⁶³
- the TCR Full Bench appears to have been seeking words to accommodate:
 - its intention that redundancy provisions would not apply where an employee is dismissed for reasons relating to his/her performance, or where termination is due to a normal feature of a business;
 - its understanding that the relevant inquiry was whether employment in a particular kind of work then being undertaken was to come to an end and if it was to come to an end, why was that to happen. I.e. was it because the employer no longer wanted the job, then being done by the employee done by anyone or was it instead due to the ordinary and customary turnover of labour?⁶⁴

The Full Bench noted it had considered single member decisions regarding the exception (which it suggested did not conflict with the above approach)⁶⁵ and also noted the reasoning of the Industrial Court of NSW in the matter of *Transport Workers' Union (NSW) v Veolia Environmental Service (Australia) Pty Ltd*⁶⁶ in which it was found:

- *that establishing whether a termination did not take place in the ordinary and customary turnover of labour is a question of fact, which requires regard to be had to “the normal features of the business wherein the employee worked”, as well as whether it was customary to dismiss employees regardless of their service history upon the loss of contracts;*
- *that other decided cases on the question of “ordinary and customary turnover of labour” have examined whether there is a known or understood lack of continuity of work.*⁶⁷

Based on its consideration of these previous decisions the Full Bench found that the relevant terminations were properly described as falling within the ordinary and customary turnover of labour and that this is a question of fact, to be determined on the basis of the circumstances of each termination and each business, with a focus on the business circumstances of the employer.⁶⁸

In considering the facts of the matter under consideration, the Full Bench found that it was common practice of the employer to terminate employees when a contract is lost and that;

*The notion of employing employees for a particular contract implies a link between the contract and employment. It carries with it the understanding that loss of the contract could well lead to termination of employment. Indeed this was expressly stated in many of the relevant contracts.*⁶⁹

⁶³ [2005] HCA 10; (2005) 222 CLR 241, p.256, per Gummow, Hayne and Heydon JJ at 22 and quoting Bray CJ in *R v Industrial Commission (SA); Ex parte Adelaide Milk Supply Co-operative Ltd* (1977) 16 SASR 6, 8.

⁶⁴ [2005] HCA 10; (2005) 222 CLR 241, p.256, per Gummow, Hayne and Heydon JJ at 22.

⁶⁵ [2015] FWCFB 8040 at [25].

⁶⁶ [2013] NSWIRComm 22.

⁶⁷ [2015] FWCFB 8040 at [26].

⁶⁸ [2015] FWCFB 8040 at [27].

⁶⁹ [2015] FWCFB 8040 at [35].

The Full Bench concluded that the terminations of employment arose from a loss of contracts and that this was due to the ordinary and customary turnover of labour in the context of the business, including its long standing practice of not making redundancy payments at the conclusion of contracts pursuant to the exception.⁷⁰

The Australian Chamber encourages the Committee to remain cognisant that employers are not ‘avoiding’ redundancy entitlements by simply applying an exemption which has accompanied redundancy entitlements since they were first constructed. It is commonly the case that labour hire workers know their pipeline of work is uncertain and they agree to that uncertainty when accepting this type of work. Consensual labour hire arrangements in which workers provide services on commercial terms to companies on a short term, contract or project basis as required through a labour hire agency are legitimate arrangements that add value to the Australian economy. The Productivity Commission has identified that reasons firms and workers choose labour hire arrangements can include the ease at which these arrangements enable firms to fill temporary positions and meet fluctuations in demand and the access that such arrangements can provide to flexible hours and potentially to ongoing employment. Such forms of labour engagement are no less appropriate than other forms of genuine and consensual labour engagement and provide flexibility, efficiency and productivity dividends.

7 Engaging workers on visas

The terms of reference direct the Committee to consider “...the extent to which companies avoid Fair Work Act obligations by engaging workers on visas”. It should be noted that engaging workers on visas does not absolve an employer from their responsibility to comply with its obligations arising under the Act. While the Australian Chamber considers that the regulatory framework is sufficient strong, we welcome enhanced enforcement by the FWO, particularly with regard to cohorts of workers that may be considered vulnerable to exploitation. The Australian Chamber notes the Government’s Policy to Protect Vulnerable Workers which proposes to:

- increase the penalties that apply to employers who underpay workers and who fail to keep proper employment records;
- introduce an even higher penalty for “serious contraventions” that would apply to any employer that has intentionally “ripped off” workers, regardless of the employer’s size;
- introduce a new offence that captures franchisors and parent companies who fail to deal with exploitation by their franchisees (this policy was in response to the recent 7-Eleven scandal that revealed systematic underpayment of workers in the franchise);
- deliver \$20 million in extra funding for the Office of the Fair Work Ombudsman for its enforcement and compliance activities;
- strengthen the Office of the Fair Work Ombudsman to more effectively deal with employers who “intentionally exploit” workers;
- establish a Migrant Workers Taskforce within the Office of the Fair Work Ombudsman (FWO) to target employers who exploit skilled migrants. In this context we have discussed with the FWO having representation on or input into this Taskforce.

⁷⁰ [2015] FWCFB 8040 at [34].

The Australian Chamber will participate in ongoing consultation to ensure that implementation of that policy appropriately targets employers that deliberately and systematically do the wrong thing as intended by the policy.

Of note the FWO's 2015-16 Annual Report states:

We focused our efforts on areas where we could have the greatest impact, in particular on matters involving those vulnerable to exploitation. Visa holders and young workers are more likely to face significant barriers to taking their own action, making them priority groups for the FWO. The figure below shows a decrease in completed dispute forms relating to these workers compared with 2014-15. This reflects the overall decrease in dispute forms and that visa holders are a growing proportion of our customers who submit these forms. The amount in underpayments recovered increased, highlighting the impact of our work in this area and the importance of continuing to focus on these vulnerable worker groups.

The figure referred to above shows that:

- in 2015-16 visa holders comprised 13% of 1894 dispute forms finalised and that the FWO recovered \$3 087 133 in underpayments;
- in 2014-15 visa holders comprised 11% of 1971 dispute forms finalised and that the FWO recovered \$1 640 499 in underpayments.

This is indicative of the FWO's heightened focus on visa holders suggests that a targeted, risk based approach to enforcement of the Act is being effectively implemented. The FWO also provides targeted resources for visa holders, including specialised fact sheets and workplace information translated into a variety of languages.

It should also be noted that Taskforce Cadena was established in June 2015 to protect temporary visa holders against fraud and exploitation. This Taskforce, led by the Department of Immigration and Border Protection and the FWO, is working with relevant agencies to detect, investigate and prosecute the exploitation of vulnerable visa holders in the workplace, including the exploitation of workers to perform unlawful unpaid work.

8 National Employment Standards and modern awards

The terms of reference direct the Committee to consider "...whether the National Employment Standards and modern awards act as an effective 'floor' for wages and conditions and the extent to which companies enter into arrangements that avoid those obligations".

Section 44(1) of the Act provides in clear terms that an "...employer must not contravene a provision of the National Employment Standards" and section 45 of the Act provides that a "...person must not contravene a term of a modern award" and these are civil remedy provisions. Where contraventions do occur, this is a matter for enforcement. To the extent that the Act permits variation of award conditions through the making of enterprise agreements and individual flexibility arrangements, employees are generally required to be 'better off overall' as described earlier in this submission.

The Australian Chamber respectfully submits that examining the appropriate level of the safety net does not sit comfortably with a terms of reference concerned with corporate avoidance of legal obligations as contained within the Act. Notwithstanding this, in the course of previous inquiries and reviews the Australian Chamber has identified a number of problems with the National Employment Standards and modern awards that it submits need to be addressed.

For example, there are some important technical amendments to the NES that are required and which were flagged by the Review Panel tasked with reviewing the Act, critical among them amendments to clarify that:

- annual leave loading is not payable on termination of employment unless expressly provided for in the relevant industrial instrument;
- leave does not accrue and cannot be taken where an employee is off work and in receipt of workers' compensation.

Such amendments were removed from the *Fair Work Amendment Act 2015* (Cth) but were picked up again in the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* (Cth) that did not pass during the last term of Parliament. In particular, Schedule 1, Part 1 of that Bill had sought to amend section 90(2) of the Act to provide that upon termination of employment, the employer must pay an employee for a period of untaken annual leave based on the employee's rate of pay. Schedule 1, Part 1, Item 3 proposed to do this by repealing and substituting the existing subsection 90(2) so that it provides that if an employee has a period of untaken paid annual leave at the time when the employment of the employee ends:

- the employer must pay the employee an hourly rate for each hour of paid annual leave that the employee has accrued and not taken; and
- that hourly rate must not be less than the employee's base rate of pay that is payable immediately before the termination time.

This change would reflect the historical position that, on termination of employment, if an employee has a period of untaken annual leave, the employer is required pay the employee in respect of that leave at the employee's base rate of pay.

Currently, section 90 of the FW Act provides as follows:

Payment for annual leave

- (1) *If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.*
- (2) *If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.*

The proper construction of subsection 90(2) is a source of contention. During the 4 yearly review of modern awards unions contended that subsection 90(2) has the effect that all amounts that might be paid by an employer during a period of annual leave (whether such amounts derive from contracts of employment, employment policies, enterprise agreements or awards) are required by the Act to be paid on accrued leave on termination of employment. The Australian Chamber maintains the view that this cannot have been the intended application of the Act. The Review Panel acknowledged that such an interpretation would mean that longstanding arrangements under awards and enterprise agreements would be disturbed.⁷¹ Yet the regulatory analysis set out within the Explanatory Memorandum to the *Fair Work Bill 2009* (Cth) (Explanatory Memorandum) did not contemplate any increase in costs for employers as a result of the new annual leave provisions of the NES, stating:

57. *The NES will not change the coverage or quantum of the annual leave entitlement. However, the NES will replace complex formulae in the current Standard about the accrual and crediting of paid annual leave with a simplified system – paid annual leave simply accrues and is taken on the basis of an employee’s ‘ordinary hours of work’. The NES enables modern awards to make provision for additional leave for shift workers and for cashing out of annual leave with appropriate safeguards.*
58. *As noted above, the major regulation change under this NES is to simplify complex rules around annual leave accrual. The Department is unable to quantify the regulation impact of the simplification of these rules and formulae.⁷²*

The Explanatory Memorandum to the Remaining Measures Bill noted that of the current 122 modern awards, 113 contained an entitlement to annual leave loading. Around 17 per cent (or 19 modern awards) provided that annual leave loading is not paid on termination and around 68 per cent (77 modern awards) were silent on whether it is payable.⁷³ Employers, in good faith and in attempting to comply with their obligations under the complex award structure rely on the text of the awards, text which was included when the modern awards were made in 2010 under the Act’s new and which remained unaltered during the two-yearly review of modern awards.

The amendment proposed in the Remaining Measures Bill remains necessary and would operate in a way that is fair to all parties. It is not formulated with the intention of taking entitlements away from employees but instead seeks to restore the historical position that, on termination of employment, if an employee has a period of untaken annual leave, the employer must pay the employee in respect of that leave at the employee’s base rate of pay unless the award or enterprise agreement expressly provides for a more beneficial entitlement. It does not disrupt arrangements where an award or agreement expressly provides that annual leave loading is payable on termination.

⁷¹ McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, June 2012, p. 100.

⁷² Explanatory Memorandum, *Fair Work Bill 2009* (Cth), pp. xvii-xviii.

⁷³ Explanatory Memorandum, *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* (Cth), p. xxxiii.

The proposed amendment also broadly reflects recommendation 6 made by the Review Panel “...that s. 90 be amended to provide that annual leave is not payable on termination unless a modern award or enterprise agreement expressly provides to that effect.” In making this recommendation the Review Panel acknowledged that this recommendation was “[b]acked with the weight of past practice” and that a contrary interpretation of the requirement in section 90(2) “...would have the most negative impact on affected small businesses”.⁷⁴

It is unfair to expect employers to meet the cost of paying annual leave loading on termination when this had not historically been required, intended by the statute or where their industrial instrument expressly stated that they did not have to pay annual leave loading on termination. It would be monumentally unfair if what seems to have been a drafting error was to result in breaches and liabilities for employers due to an adverse interpretation of the current provision. The emergence of recent case law on this issue resulting in findings of employer liability mean the passage of these amendments is now critical.

Another important amendment to the NES was contained within Schedule 1, Part 2, Item 4 of the Remaining Measures Bill which sought to repeal subsection 130(2) of the Act with the effect that an employee who is absent from work and in receipt of workers’ compensation will not be able to take or accrue leave under the FW Act during the compensation period. This proposed amendment is strongly supported by the Australian Chamber and responds to the following recommendation of the Review Panel:

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

In making this recommendation and having observed that only two of Australia’s jurisdictions unequivocally allow leave accrual while on workers compensation, the Review Panel found:

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

⁷⁴ McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the FairWork legislation*, June 2012, p.100

*employees accruing annual leave while receiving workers' compensation payments, despite what is written to the contrary in state or territory workers' compensation laws.*⁷⁵

The Review Panel also noted that "...s. 130 of the FW Act is, regrettably in the majority of the Panel's view, not clearly worded" and that the situation was "confusing for affected parties and may involve costs – for example, in obtaining legal advice".⁷⁶

The majority of state and territory workers' compensation systems do not allow employees to accrue annual leave whilst on workers compensation. As a matter of principle, it would seem an anomalous outcome to permit the accrual or taking of annual leave (intended for the purposes of rest and recreation) during a period in which the employee has not undertaken service with their employer because they have been out of the workplace and in receipt of payments under a statutory insurance scheme which typically focuses on recovery and rehabilitation.

The amendment does not produce an unfair outcome. Arguably, enabling a person to 'take a break' from their recovery and rehabilitation is at odds with the objects of an effective workers compensation system and a focus returning the employee to the workplace in accordance with the appropriate return to work plan and as soon as it is safe to do so.

Beyond the various technical matters of concern, conditions in a number of awards such as excessive penalty rates, prescriptive minimum engagement periods and part-time hours clauses create a disincentive to employ or offer more hours. Award consolidation has occurred via the award modernisation process however the modern awards have not departed significantly from their pre-modern content and remain as long and complex documents that are poorly designed for those required to comply with them, particularly small businesses. A number of Australian Chamber members are pursuing changes to award conditions as a part of the 4 yearly review of modern awards provided for by the Act. Seeking to affect modest changes to the modern awards is a difficult and resource intensive process.

The Australian Chamber has consistently expressed support for a genuine safety-net of minimum terms and conditions. However, the Australian Chamber maintains its concern that the existing multi-layered and highly regulated approach to minimum wages and conditions via the NES and industry/occupational awards is too complex and inflexible and has highlighted these concerns in submissions to the Productivity Commission's inquiry into the Workplace Relations Framework.

In its inquiry into the workplace relations framework the Productivity Commission was tasked with consider the type of system that might best suit the Australian community over the longer term. This underlying term of reference is distinct from that underlying this inquiry which is concerned with avoidance of the Act. Consequently the Australian Chamber has not set out broad proposals

⁷⁵ McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, June 2012, pp. 99-100, with reference to Senate Education, Employment and Workplace Relations Committee, Additional Budget Estimates, 2010-11, pp 88-89.

⁷⁶ A McCallum, R., Moore, M. and Edwards, J., *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, June 2012, pp. 99-100, with reference to Senate Education, Employment and Workplace Relations Committee, Additional Budget Estimates, 2010-11, p. 88.

for reform as a part of this submission. However in light of the complexity of the safety net the Australian Chamber encourages the Committee to avoid the making of recommendations that would intensify the regulatory burden for employers.

9 WorkChoices and Australian Workplace Agreements

The terms of reference direct the Committee to consider "...legacy issues relating to WorkChoices and Australian Workplace Agreements".

The Australian Chamber is unaware of any problematic "legacy issues" associated with the use of Australian Workplace Agreements (AWAs) or the repealed *Workplace Relations Act 1996* (Cth). The *Fair Work (Transitional Provisions and Consequential Amendments Act) 2009* (Cth)(Transitional Act) provides that agreements made under the WR Act (including AWAs) continue to have effect as agreement-based transitional instruments.

AWAs made under the WR Act will have by now reached their nominal expiry date. In these circumstances, any party to an AWA may apply to the Commission to have one terminated.

When an employer or employee decides to terminate an AWA they may draft a notice of their intention to do so and provide it notice to the other party. This notice must:

- identify the transitional instrument (i.e. AWA);
- state that the employer/employee intends to apply to the Fair Work Commission for approval of the termination;
- state that if the Fair Work Commission approves the termination, the transitional instrument will terminate on the 90th day after the day on which the Fair Work Commission makes the approval decision.

The person covered by the AWA can then make application to the FWC to have the AWA terminated pursuant to item 19, Schedule 3 to the Transitional Act. The application must be accompanied by a statutory declaration. The FWC must approve the termination if satisfied that:

- the individual agreement-based transitional instrument applies to the employer and the employee, and
- the requirements for making the notice of intention to terminate the instrument and giving notice to the other party have been complied with.

As such, if any party to an AWA (or Individual Transitional Employment Agreement) is unhappy to have it continue they are at liberty to make application to the FWC to have the instrument terminated provided they satisfy the above requirements.

10 Economic impact of reducing wages and conditions

The terms of reference direct the Committee to consider "...the economic and fiscal impact of reducing wages and conditions across the economy".

The Australian Chamber notes that this inquiry is concerned with avoidance of legal obligations and understand this term of reference to be read in that context. Deliberate non-compliance creates an unfair competitive advantage against the majority of employers that are endeavouring to do the right thing. The Australian Chamber supports the efforts of the FWO in enforcing the Act.

The Australian Chamber submits that although cases of deliberate non-compliance with the Act will emerge from time to time most employers do and seek to do the right thing. This is acknowledged by the FWO. In this context the Australian Chamber does not consider there to be evidence of avoidance of the Act such that it can be described as "...reducing wages and conditions across the economy".

Reference has already been made to the efforts of employers in the making of applications to vary modern awards as a part of their 4 yearly review. Evidence tendered during these proceedings has demonstrated that effecting variations to awards, such as a reduction in penalty rates in the hospitality, retail and pharmacy industries would have positive impacts such as an increase in the number of persons employed and service available to customers. This evidence is currently under consideration by the Fair Work Commission.

It is also critical that the Act enables employers to adapt their wage and conditions structures to changing market conditions. Between 2003 and 2012, Australia experienced significant increases in export prices and booming terms of trade. The extraordinary level of capital investment in the mining sector during this period increased demand for labour. This dynamic translated to higher growth in employee earnings as described by Davis and others for the Reserve Bank of Australia:

During the terms of trade boom, average real unit labour costs declined: the cost of hiring an additional worker was relatively low compared with the expected price of the output that the worker could help to produce and, therefore, firms tended to hire more workers. Firms generally sought to expand their production capacity to take advantage of high output prices, which led to an increase in demand for productive resources such as labour and capital and, in turn, to higher growth in employee earnings.⁷⁷

The mining boom had a number of flow-on implications for the broader labour market which Davis and others have also described as including:

- an increase in demand for inputs from other sectors with many firms benefiting from providing goods and services to the mining including construction, engineering, legal and accounting services;⁷⁸
- greater competition for labour⁷⁹ and increased pace or growth in employee earnings;⁸⁰
- a range of workers transitioning from non-mining jobs to similar positions servicing the mining industry such as chefs, accountants and truck drivers. Mining employment doubled

⁷⁷ Kathryn Davis, Martin McCarthy and Jonathan Bridges, "The Labour Market during and after the Terms of Trade Boom", Reserve Bank of Australia, March 2016, p. 2.

⁷⁸ Ibid, p. 4.

⁷⁹ Ibid., p. 4.

⁸⁰ Ibid., p. 5.

as a share of total employment and mining related employment in other industries also increased sharply;⁸¹

- Australian labour becoming less competitive relative to overseas labour as nominal unit labour cost growth in Australia outpaced that in many comparable economies and the Australian dollar appreciated.⁸²

The terms of trade have declined since their peak in 2011 and the resource production phase has commenced which is less labour intensive thereby reducing demand for labour and creating a need for adjustment. Employers have therefore sought to adjust to this by restraining the pace of growth in employee earnings.⁸³ Davis and others note that the greater than expected decline in commodity prices has led to further reduced labour demand in the mining sector and mining firms seeking to reduce labour costs more generally.⁸⁴ This is not avoidance but is necessary to mitigate negative employment impacts and is commercially responsible. Davis and others noted that:

*This flexibility in employee earnings growth has prevented real unit labour costs from rising. This has provided some support to aggregate employment growth and so the unemployment rate has not risen to the extent that might otherwise have been expected.*⁸⁵

Wages should be determined in the context of economic conditions. Currently, there is low inflation, low interest rates, low business investment levels, low productivity and lower terms of trade. Resisting the temptation to increase labour costs will help the economy continue to adjust, improve Australia's international competitiveness and mitigate negative employment impacts during what is an ongoing period of change.

11 Concluding remarks

An employing business is required to comply with a wide range of legal obligations imposed on it by detailed and complex statutes including but not limited to the Act, differences in work health and safety and workers' compensation laws, federal and state anti-discrimination laws, superannuation laws, taxation laws and the *Migration Act 1958* (Cth). The Act in itself provides the basis for a highly complex framework that is challenging for employers to comply with.

The FWO has acknowledged the system's complexity, stating in a public address:

We are very much aware that workplace laws can be complex for the uninitiated.

We know they also exist amongst a whole pile of rules you have to follow about all sorts of things...

⁸¹ Ibid., p. 5.

⁸² Kathryn Davis, Martin McCarthy and Jonathan Bridges, "*The Labour Market during and after the Terms of Trade Boom*", Reserve Bank of Australia, March 2016, p. 4.

⁸³ Kathryn Davis, Martin McCarthy and Jonathan Bridges, "*The Labour Market during and after the Terms of Trade Boom*", Reserve Bank of Australia, March 2016, p. 7.

⁸⁴ Kathryn Davis, Martin McCarthy and Jonathan Bridges, "*The Labour Market during and after the Terms of Trade Boom*", Reserve Bank of Australia, March 2016, p. 7.

⁸⁵ Kathryn Davis, Martin McCarthy and Jonathan Bridges, "*The Labour Market during and after the Terms of Trade Boom*", Reserve Bank of Australia, March 2016, p. 7.

...
For those who aren't industrial experts, the margin for error is high.

...
...there are many people who are a long way from understanding the intricacies of things such as the interaction between the National Employment Standards and awards, or the difference between above award payments, enterprise agreements and an Individual Flexibility Arrangement.

This is why we are publicly acknowledging that the system could be simpler.

That we should take every opportunity to make the framework clearer.

...
If we can decrease complexity then this reduces the red tape you have to grapple with.

There is a clear productivity benefit.⁸⁶

The Australian Chamber shares the FWO's view that the system could be simpler and considers that broader reform is necessary to achieve this outcome. The complexity and prescription within the current framework is not appropriate for a modern and changing economy and fails to address the needs of most of the employers it seeks to regulate.

Australia needs an adaptable, nimble workplace relations framework that encourages rather than inhibits investment, growth and job creation and that promotes the variety of labour forms needed to allow companies maximum opportunity to hire as many people as possible. There are cogent reasons as to why all forms of labour engagement should not be uniformly regulated. The Australian Chamber has identified a number of principles and priorities to guide reform of the system and which include but are not limited to:

- better tailoring of workplace regulation to industry needs;
- broadening the range of agreement making options including an enterprise agreement option that is more appropriate to the needs of small business;
- amending the Act so that procedural errors alone are not sufficient to award compensation or restore employment in what would otherwise be regarded as a valid dismissal;
- reforming the general protections laws, which are overly broad, confusing and duplicative;
- strengthening deterrents to the making of claims that are frivolous, vexatious or otherwise without substance;
- amending the Act to ensure that enterprise bargaining is truly voluntary;
- providing the Fair Work Commission with discretion to overlook a procedural or technical defect when approving an agreement;
- making unlawful those enterprise agreement terms that restrict the engagement of independent contractors and labour hire workers, or which regulate the terms of their engagement;

⁸⁶ Fair Work Ombudsman (Natalie James), Speech for the National Small Business Summit: FWO's Deal with Small Business, 8 August 2014, Melbourne.

- not allowing enterprise agreement terms to restrict an employer's right to choose an employment mix suited to their business — for example by deterring or discouraging the use of labour hire or casual workers by restricting their hours of work.
- ensuring enterprise agreements can only contain terms about matters which pertain to the employment relationship;
- increasing penalties for unlawful industrial action to a level commensurate with the harm associated with that action;
- reforming workplace laws related to the sale or transmission of business as discussed above;
- generally streamlining and simplifying workplace regulation to ease the compliance burden.

12 About the Australian Chamber

The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses also get involved through our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We also represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

Australian Chamber Members

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NATIONAL ONLINE RETAIL ASSOCIATION OIL INDUSTRY INDUSTRIAL ASSOCIATION **OUTDOOR MEDIA**
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