australian council of trade unions

Australian Unions
Working for a better life.

Submission
to the
Post Implementation Review
of the
Fair Work Act 2009

17 February 2012

Volume 1

About the ACTU

The Australian Council of Trade Unions is the nation's peak body for organised labour, representing Australian workers and their families.

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Authorised by Jeff Lawrence, Secretary

The Working Australia Papers

The Working Australia Papers are an initiative of the ACTU to give working people a stronger voice about social and economic policy. Although low and middle income Australians ultimately bear the costs of poor policy decisions made in relation to tax, infrastructure, retirement incomes, welfare and services, their voice is too often absent from national debates about these issues.

Working Australia Paper 2/2012

ACTU D No. 6/2012

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Introduction

The ACTU is the peak trade union body in Australia, representing almost 2 million workers.

When the *Fair Work Act* commenced on 1 July 2009 it was the culmination of the long campaign for all Australians to repeal *Work Choices* and restore rights at work. Restoring rights at work meant ending AWA individual contracts; restoring unfair dismissal protections; strengthening the safety net; providing good faith bargaining; and improving the independent umpire's role in resolving disputes.

Australians unions play a pivotal role in improving the living standards of millions of Australians and their families. Industrial legislation is a critical component of this work — it is a key to ensuring that the rights of workers are respected, and that they are able to advance their interests.

We welcome the opportunity to make a submission to the Panel's post-implementation review of the Act. Within the limited parameters of this review, we welcome the opportunity to hold employer claims about the Act to objective scrutiny. Our submission analyses the operation of the Act against the policy aims expressed in the objects, and provides suggestions for reform. The submissions of our affiliated unions will provide detailed case studies to illustrate the issues that we raise.

The proper approach to the review

The ACTU accepts that this review is a formal Post-Implementation Review of the Act, to be conducted in accordance with the Office of Best Practice Regulation's rules in relation to PIRs. Such reviews are limited to considering whether legislation is meeting its stated objectives, or whether these objectives could be achieved in a more 'efficient and effective way'.[1] They are not an opportunity to consider whether different policy objectives should, or should not, have been pursued. This is especially true for legislation, like the Act, which implements 'a specific election commitment'.[2]

The review of the legislation must not occur in a vacuum. Rather, the Act must be compared against the status quo which prevailed before it was passed: namely, the *Work Choices* regime.[3] The review must ask whether the Act better meets the statutory objectives identified in section 3 of the legislation (productivity, fairness, representation, etc) than did *Work Choices*. The review must also measure the Act against relevant international standards (including those which we are obliged by international law to implement) and, where domestic standards differ from international standards, must 'justify' the variation.[4]

The examination of the impact of the legislation must be 'comprehensive'. The PIR must consider the 'economic, social and environmental costs and benefits' of the legislation on the 'community as a whole', not just on businesses.[5] The distribution of costs and benefits between different groups must also be considered. 'Costs' to the community may be non-financial, such as a 'reduction in

[1] OBPR, *Best Practice Handbook* (2010) 21.
[2] Ibid, 15.
[3] Ibid, 17.
[4] Ibid.
[5] Ibid, 37.

health and safety' or an 'undesirable redistribution of income and wealth'.[6] Benefits may be non-financial too, such as 'improvements in the information available to business [or] the workforce'.[7]

PIRs must be strictly evidence-based. 'All assessments of costs and benefits, whether quantitative or qualitative, should be based on evidence, with data sources and assumptions clearly identified.'[8] The nature and 'depth' of the evidence required depends on the significance of the matter under consideration: while 'detailed qualitative analysis' supported by available quantitative evidence might suffice 'if the impacts of the proposal are not likely to be highly significant'. However, 'major' issues will generally require a full quantitative cost-benefit analysis. [9]

The emphasis on the need for reliable evidence underscores the danger of accepting anecdotes as evidence. Individual examples, where they cannot be said to be properly illustrative of a wider pattern, are of limited probative value in making assessments about the overall operation of the legislation. They are also more likely than not to be complaints *per se* about the legalisation rather than an assessment of its performance against its objects and stated policy intent. 'Survey' evidence, particularly surveys from selected (non-representative) groups, and those which ask self-serving questions (ie those designed to elicit a particular response), should likewise be treated with extreme caution.

Finally, we note that future policy processes would be assisted by the collection and publication of stronger empirical data. It is incumbent on Government to ensure that sufficiently detailed data on the operation of the system is collected and analysed. The decision of the Howard Government to discontinue important work like AWIRS left a very significant hole in our collective knowledge about the Australian workplace.

AWIRS, conducted in 1990 and 1995, was a large scale survey of workplace industrial relations undertaken by the then Commonwealth Department of Industrial Relations[10]. Prior to 1990, 'there were no comprehensive and statistically reliable nationwide data available on workplace relations and it was to fill this knowledge gap that the first AWIRS was conducted.'[11] The AWIRS were large-scale surveys involving structured questionnaires focussed on industrial relations at the workplace level. In 1995, the project surveyed both employers and employees. Critically, periodic repetition of AWIRS allowed for analysis of the impact of regulatory changes and other trends at the workplace level. A longitudinal component via a panel survey was included which allowed for analysis of what had changed in individual workplaces.

This sort of research is invaluable to policy makers, analysts and system participants. We suggest that the Panel should recommend to the Government that the AWIRS project be revived.

The legislative and policy context

It is important to remember the historical background against which the Act must be considered and judged. The *Work Choices* legislation marked a radical attack on the rights of workers and unions. Amongst other things, it:

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[6] Ibid, 38.
[7] Ibid, 39.
[8] Ibid, 36.
[9] Ibid, 37.
[10] A Morehead et al, *Changes at Work: The 199 5Australian Workplace Industrial Relations Survey* (1997); R Callus et al, *Industrial Relations at Work: The Australian Workplace Industrial Relations Survey* (1991).
[11] A Morehead et al, ibid, 1.

- Encouraged employers to use AWAs, non-union collective agreements and employer greenfield 'agreements', either to reduce wages and conditions (in low-paid industries) or to avoid collective bargaining and exclude unions from workplaces (seen in mining, banking, telecommunications and the federal public service);

- Tried to kill off the award system, by removing award coverage for employees working in new businesses as well as employees who had previously been covered by a statutory agreement;

- Frustrated genuine collective bargaining with unions, by restricting the matters that could be included in an agreement, such as job security clauses and union representation;

- Undermined freedom of association, by introducing a cumbersome balloting procedure that frustrated and delayed the taking of lawful action, and by penalising striking workers with a minimum 4 hour pay deduction (no matter how short the action taken);

- Gutted the power of the independent umpire, by removing its power to arbitrate disputes under awards and agreements upon the application of any party, thereby giving the employer the final say in most disputes;

- Removed unfair dismissal protection from most workers.

We comprehensively set out the evidence of the negative impact of *Work Choices* in our submission to the Senate committee inquiry into the Fair Work Bill (see vol 2 of this submission, item 2, pp 1-16).

The ACTU's *Your Rights at Work* campaign had the objective of replacing *Work Choices* with a fair set of industrial relations laws, with six key features:

1. An end to AWAs;

2. A strong safety net;

3. A good faith collective bargaining system;

4. An effective right to representation;

5. Real protection from unfair dismissal; and

6. A strong independent umpire.

Following this campaign, the Australian people emphatically rejected *Work Choices*, and industrial relations extremism, at the 2007 election. Labor's *Forward with Fairness* policy took up the objectives of the *Your Rights at Work* campaign. It promised new legislation that would provide:

1. An end to AWAs;[12]

2. A strong safety net, consisting of the NES and modern awards, that could not be undercut by agreement-making;

3. A good faith collective bargaining system, including a low-paid bargaining stream;

[12] However, ITEAs were provided (between March 2008 and December 2009) as a transitional instrument.

4. An effective right to be represented (in workplace bargaining, consultation over workplace change, and rights to seek union assistance in the workplace);

5. Real protection from unfair dismissal (and removal of *Work Choices* exclusions); and

6. The creation of Fair Work Australia as a strong independent workplace umpire.

Unions strongly supported these policy objectives, and they were consistent with our campaign.

Following Labor's 2007 election victory, the Fair Work Bill was drafted using a highly consultative process involving unions, employers and government officials. The Committee on Industrial Legislation (a technical sub-committee of the National Workplace Relations Consultative Committee) met on an in-camera basis over a fortnight to consider drafts of the Bill in 2008. This process, where the views of system participants were exhaustively considered, had not occurred in relation to *Work Choices* or the WR Act.

The result of these consultations – with very minor amendments by non-government parties in the Senate – was the Act. The Act delivered on the fundamental commitments made by Labor, and was welcomed by the union movement.

While unions did not support every aspect of the legislation as passed, we have always supported its major underlying policy premises. On the other hand, it is clear from public statements and material already released that some employer organisations never accepted the government's mandate to pass the Act, and intend to simply re-agitate positions advanced in the course of the debates leading up to the repeal of *Work Choices*. Many of the recent public claims in relation to the Act are not objections to its operation but to its objects and the framework per se. Submissions seeking to overturn the Fair Work framework are, in our view, clearly outside the scope of this review.

The ACTU submission

In the main body of this submission, we begin by setting out a history of the evolution of federal industrial relations laws over the last 20 years, in order to put the changes brought by the Act into their proper context.

We then turn to consider whether the legislation meets key policy objectives, in accordance with the PIR guidelines, set out above. We address the following eight topics, in line with the main objects set out in section 3 of the Act, and the areas of emphasis set out in the Background Paper:

1. Productivity and economic growth;

2. Ensuring a guaranteed safety net;

3. Providing an emphasis on collective bargaining;

4. Enabling representation at work;

5. Resolving grievances and disputes;

6. Protection against unfair treatment;

7. The institutional framework; and

8. Impact on women workers.

As we indicated above, the provisions of the Act differ from the policy position of the ACTU and unions in a number of important respects. At Appendix 1 to this volume, we attach a list of the more significant policy reforms that we conclude are necessary in order for the Act to better meet its objectives of providing fairness and representation at work, as well as strong economic growth.

At Appendix 2 to this volume, we also include a list of technical problems with the legislation. We suggest that the Panel recommend that, following its report, the Department convene a meeting of the Committee on Industrial Legislation to consider these technical matters, and any other technical issues raised by the Panel's report, with a view to preparing a Bill to make minor and technical improvements to the Act, in areas free of major policy controversy.

In volume 2 of this submission, we attach a number of ACTU reports and publications which the Panel may find of assistance in conducting its task.

Finally, we note that the ACTU has already conducted its own review of the Act, in July 2011, to mark the second anniversary of its operation. The Act was judged against the standard of what the trade union movement considers to be fair and balanced industrial relations laws. Our conclusion has not fundamentally changed since then, and so we set it out again here:

> *The Fair Work Act restored the rights of working people and their families, but there is always more work to be done. Australian unions and workers will continue to campaign for improved rights at work, and to lift living standards. In particular, we believe:*
>
> - *Construction workers need the same rights as all other workers;*
> - *Bargaining should meet the needs of the modern economy and the workers in it;*
> - *Recognition needs to be given to the important role of delegates and workplace representatives through positive rights;*
> - *Occupational health and safety must be of the highest standard;*
> - *Equal pay must be made a reality;*
> - *Government can lead the way in ensuring fairness and rights at work through contracting only to service providers who are committed to decent workplace protections.*

The evolution of federal workplace relations laws

The historic heart of Australian industrial regulation is the recognition that the bargain between an employer and an employee is inherently unequal, absent the intervention of the state in the form of legislation and the existence of trade unions. This fact must be balanced against the appropriate limits of managerial prerogative.

In the following pages we set out in table form the key elements of Australia's system of industrial regulation as it has evolved. In our view, it is clear that the critical reform point was the introduction of the *Industrial Relations Reform Act 1993* (Cth), which saw the transition from centralised wage-fixing to enterprise bargaining (underpinned by awards to act as a safety net).

Reference to the material in the table also demonstrates the extent to which the fundamental architecture of the Act (which builds on the changes of the early 1990s) is a product of logical evolution: a national system, a modernised safety net, collective bargaining with good faith obligations, rights to representation, protection in relation to termination of employment and an independent umpire.

With the exception of the issue of statutory individual contracts (a feature essentially without parallel in overseas jurisdictions), the essential components of the current architecture are seriously contested only at the margins. As we indicated above, a range of businesses took advantage of the opportunity presented by AWAs (and employer greenfield 'agreements') to unilaterally determine, with very few limitations, the terms and conditions of employment of their workforce. The expansion of management prerogative by the Howard Government in relation to termination of employment, individual contracts and restrictions on bargaining were the radical point of departure from the evolution of a modern industrial relations regime.

The reforms of the early 1990s are relevant for another reason. By 2012, many key parts of the Australian economy have been covered by bargaining agreements for more than twenty years. In many enterprises there is a mature bargaining environment, with six or seven generations of agreements having been negotiated. Multiple reviews and consolidations of the content of awards have occurred over the same period. In such circumstances, it is no surprise that much of the 'low-hanging fruit' in relation to bargaining over terms and conditions has been picked long ago. Discussions in relation to productivity and its relationship with industrial regulation must take this fact into account.

	Pre-1994	1994-6	1996-06	2006-09	2009-
Coverage of system	Awards cover the parties to an interstate industrial dispute; Cth public service; Territories; interstate/international aviation, shipping, coal mining.	Award coverage as before. Agreements can cover corporations & parties to an interstate dispute.	Award coverage as before, plus Victoria. Agreement coverage as before, plus Victorian employers.	System covers corporations, Territories & Victoria.	System covers private sector (except WA non-corporations); some local government (Vic /Tas) and some public sector (Cth/Vic).
Minimum wages	Scale of minimum wages contained in industry & enterprise awards. Some 'paid rates' awards. Awards indexed to CPI; from 1986, adjusted periodically by AIRC, according to own criteria. Additional wage increases tied to reform of awards (1991).	Scale of minimum wages contained in industry & enterprise awards. No new 'paid rates' awards allowed. Awards adjusted annually by AIRC according to own criteria of fairness and relevance. Additional wage increases tied to adoption of enterprise bargaining (1995).	Scale of minimum wages contained in industry & enterprise awards. Awards adjusted annually by AIRC without statutory criteria.	Scale of minimum wages (APCS) derived from awards. Award-free employees only entitled to Federal Minimum Wage (FMW). APCS adjusted annually by Fair Pay Commission according to statutory criteria promoting employment (especially for unemployed) and competitiveness.	Scale of minimum wages contained in modern awards. Modern awards updated annually by FWA Minimum Wages Panel according to statutory criteria balancing economic interests with considerations of fairness, relevance, social inclusion and the needs of the low paid.
Conditions of employment (via awards & statute)	Awards contain minimum conditions (on any 'matter pertaining'). Enterprise-level variations negotiated with unions and ratified by AIRC, through creation of firm-specific clauses or standalone enterprise awards. State legislation on LSL, public holidays, OH&S.	Awards contain minimum conditions on any 'matter pertaining'. Enterprise-level variations negotiated with unions (under 'enterprise flexibility' terms) or through creation of enterprise awards. Statutory rights to equal pay, notice of dismissal, parental leave (based in ILO conventions); federal legislation on superannuation; State legislation on LSL, public holidays, OH&S.	Awards contain minimum conditions on 20 'allowable' matters. Enterprise-level variations available as before. Statutory rights as before.	Five statutory conditions (AFPCS); awards provide 15 'allowable' matters, but 18 topics excluded, including: matters dealt with in AFPCS; rights for union officials and delegates; restrictions on the use of contractors and labour hire workers. 'Enterprise flexibility' terms prohibited; no new enterprise awards to be created. Statutory rights as before.	Modern awards may deal with 20 matters (including 10 that are also dealt with in the NES). Enterprise-level variation possible (within limits) at the election of employer, or by agreement with a majority of employees. Statutory rights as before.

	Pre-1994	1994-6	1996-06	2006-09	2009-
Bargaining disputes (& industrial action)	Informal bargaining occurs. If agreement reached (on a 'matter pertaining'), AIRC can make consent award; if no agreement reached, AIRC can arbitrate. Parties can take industrial action (but may constitute award breach); however, AIRC can decline to arbitrate.	Parties can bargain about 'matters pertaining'; AIRC can order parties to bargain in good faith. If agreement reached, collective agreement made; if no agreement, AIRC can arbitrate. Parties can take protected industrial action (without employee ballots), but may be suspended or terminated by AIRC on several grounds (eg party not 'genuinely' trying to reach agreement, action endangers life or economy, etc).	Parties can bargain about 'matters pertaining'; AIRC has coercive conciliation powers. Corporate employers can put agreement direct to employee vote. AIRC cannot arbitrate. Parties can take protected industrial action (AIRC <u>may</u> order a ballot), but <u>may</u> be suspended or terminated by AIRC on several grounds (eg party not 'genuinely' trying to reach agreement, action endangers life or economy, etc).	Parties can bargain about 'matters pertaining' but not 'prohibited content' or 'pattern' claims. AIRC has voluntary conciliation powers. Employers can put agreement direct to employee vote. AIRC cannot arbitrate. Parties can take protected industrial action (after mandatory secret ballot), but <u>must</u> be terminated or suspended by AIRC in certain cases.	Parties can bargain about any matter (but term not enforceable if not a 'matter pertaining'). FWA can order good faith bargaining. Employers can put agreement direct to employee vote. FWA cannot arbitrate. Employees/union can take protected industrial action (after mandatory secret ballot), and employers can respond with a lockout; but these activities <u>must</u> be terminated or suspended by FWA in certain cases.
Individual arrangements	Many award clauses specifically empower an employer and individual (or group) to agree to vary the operation of specific terms of the award, within limits.	As before.	As before, plus employers can make AWAs with employees (subject to a No-Disadvantage Test). AWAs can be made a condition of employment and prevail over collective agreements.	As before, but AWAs can undercut the award (until a modified No-Disadvantage Test is restored in May 2007). Also, now when AWAs expire, the underlying award and/or agreement does not revive.	Many award clauses specifically empower an employer and individual (or group) to agree to vary the operation of specific terms of the award, within limits. Employers can make an IFA with employees (subject to the BOOT test): they cannot be made a condition of employment; employees can resign from them (with notice); when they end, the award/agreement revives.

	Pre-1994	1994-6	1996-06	2006-09	2009-
Disputes - award covered workplaces	Any party may submit disputes to the AIRC for (compulsory) conciliation. AIRC can arbitrate (and make enterprise award or enterprise-specific variation). Parties can take industrial action (which may constitute award breach), but AIRC may refuse to arbitrate while action on foot & may order action to stop.	Any party may submit disputes to the AIRC for (compulsory) conciliation. AIRC can arbitrate (and make enterprise award or enterprise-specific variation). Parties can take industrial action (which may constitute award breach), but AIRC may refuse to arbitrate while action on foot & may order action to stop.	Any party may submit disputes to the AIRC for (compulsory) conciliation. AIRC can arbitrate (and make enterprise award or enterprise-specific variation). Parties can take industrial action (which may constitute award breach), but AIRC may refuse to arbitrate while action on foot & may order action to stop.	Any party may submit disputes to the AIRC for voluntary conciliation. AIRC cannot arbitrate (without consent). If parties take unprotected industrial action, AIRC must stop the action.	Any party may submit disputes to FWA for compulsory conciliation. FWA cannot arbitrate (without consent). If parties take unprotected industrial action, FWA must stop the action.
Disputes - agreement covered workplaces	If dispute over unregistered agreement, or in relation to claims not covered in the agreement, any party can seek compulsory conciliation and arbitration in the AIRC (leading to the making of an award). Parties can take industrial action (but may constitute award breach); AIRC can arbitrate (but may refuse to do so if action on foot & may order action to stop).	All agreements must contain procedures for settling disputes about matters 'arising' under the agreement; AIRC could be nominated to 'settle' disputes about the 'application' of the agreement. As before. However, if industrial action taken over matters dealt with in agreement, AIRC may release employer from agreement.	As before. As before. However, now unlawful to take industrial action over matters dealt with in agreement. Other claims can be dealt with in a second agreement, or by award variation.	All agreements must contain term for settling disputes about matters 'arising under' the agreement (but not required to provide 3rd party arbitration). Unlawful to take industrial action during life of agreement, on any matter. No supplementary agreement possible.	All agreements must contain term allowing a 3rd party for to settle disputes about matters 'arising under' the agreement. As before.
Dismissal rules	From 1984, awards contain unfair dismissal protections. Enforced by penalties in the courts.	Statutory unfair dismissal regime. Employees can seek reinstatement or compensation (capped at 6 months' pay). AIRC conciliates, court adjudicates. Exclusions (from 1994) for high-income earners, short contracts (< 6 months), probationary employees, and short-term casuals (< 6 months).	Statutory unfair dismissal regime. Employees can seek reinstatement or compensation (capped at 6 months' pay). AIRC conciliates and arbitrates. Exclusions for non-corporate businesses, high-income earners, fixed-term contracts, probationary employees, and short-term casuals (< 12 months).	Statutory unfair dismissal regime. Employees can seek reinstatement or compensation (capped at 6 months' pay). AIRC conciliates and arbitrates. Exclusions for small/medium business (<100 employees), high-income earners, fixed-term contracts, new employees (<6 months), and short-term casuals (< 12 months).	Statutory unfair dismissal regime. Employees can seek reinstatement or compensation (capped at 6 months' pay). FWA conciliates and arbitrates. Exclusions for high-income earners, fixed-term contracts, new employees (<12 months in small business, <6 months otherwise), and irregular casuals (without expectation of ongoing work).

	Pre-1994	1994-6	1996-06	2006-09	2009-
Protection from discrimination (on grounds of personal attributes)	No specific protections, but in the 1960s and 70s, the AIRC ended direct wage discrimination against women and Aborigines in the award system. Junior wage rates were retained.	AIRC given jurisdiction to rectify unequal pay due to gender. AIRC to take into account federal anti-discrimination laws (race, sex) when performing all functions. Junior wage rates retained.	Equal pay jurisdiction. Unlawful to dismiss due to race/sex/age etc (but junior rates retained). AIRC to remove discriminatory content from awards, reject discriminatory agreements.	Equal pay jurisdiction. Unlawful to dismiss due to race/sex/age etc (but junior rates retained). AIRC must remove discriminatory content from awards, reject discriminatory agreements.	Equal pay jurisdiction (amended to allow inter-industry comparisons). Unlawful to take 'adverse action' (ie discriminate or victimise) or dismiss due to race/sex/age etc (but junior rates retained). FWA to remove discriminatory content from awards, reject discriminatory agreements.
Union activity	From 1974, statutory right of entry for officials to investigate breaches. Awards can provide additional rights. Unlawful to dismiss employees because of union or industrial activity.	As before. As before.	Statutory right of entry for permit-holders to investigate breaches and hold discussions with employees. Awards can provide additional rights; agreements can also provide additional rights (but after the 2004 *Electrolux* decision, only if the clause 'pertains' to the employment relationship). Unlawful for employers to victimise or discriminate against employee because of lawful industrial activity.	Statutory right of entry for permit-holders to investigate breaches and hold discussions with employees (but not if site covered by non-union agreement or AWAs). Awards and agreements cannot provide additional rights. As before.	Statutory right of entry for permit-holders to investigate breaches and hold discussions with employees. Awards and agreements cannot provide right of entry for investigation or discussion purposes, but can provide other rights of entry. Unlawful for employers to take 'adverse action' against employees (victimise/ discriminate) because of lawful industrial activity.
Outsourcing & business transfer	Awards bound any 'successor' to the business, in respect of all its employees.	Awards & agreements bind any 'successor' to the business, in respect of all its employees.	Awards bind any 'successor' to the business, in respect of all their employees; agreements only bind a successor employer in part of the business acquired. In 2000, the High Court rules that a successor' is an employer that operates the same 'kind' of business as the old employer, so excludes most outsourcing cases are not covered. From 2004, AIRC can order than an agreement or award not bind a successor.	Awards, agreements and AWAs bind a 'successor' employer, but only if new employer operates same 'kind' of business; the instrument only applies to employees who transfer to the new employer; and the instrument only operates for 12 months after the transfer. AIRC can order than an agreement or award not bind a successor.	If a business is transferred/ outsourced/insourced, the agreement binds the new employer in respect of transferred employees; FWA can order that the agreement not transmit, or can vary its terms.

Promoting productivity and economic growth

The Act is intended to promote productivity and economic growth,[13] which will in turn create jobs and lift real wages as well as profits. Productivity is obviously important as the primary means by which Australian incomes can grow over time.

Employment

There are 509 600 more people in work than there were in the month before the Act took effect. Total employment has grown by 5%, while the working-age population grew by only 4.3% over the same period. As a result, the proportion of working-age Australians who are employed rose from 61.6% in June 2009 to 61.8% in December 2011. Full time work represented around 350 000 of the net additional employment, a strong result. Over the period the Act has been in effect, the unemployment rate has fallen from 5.9% to 5.2%.

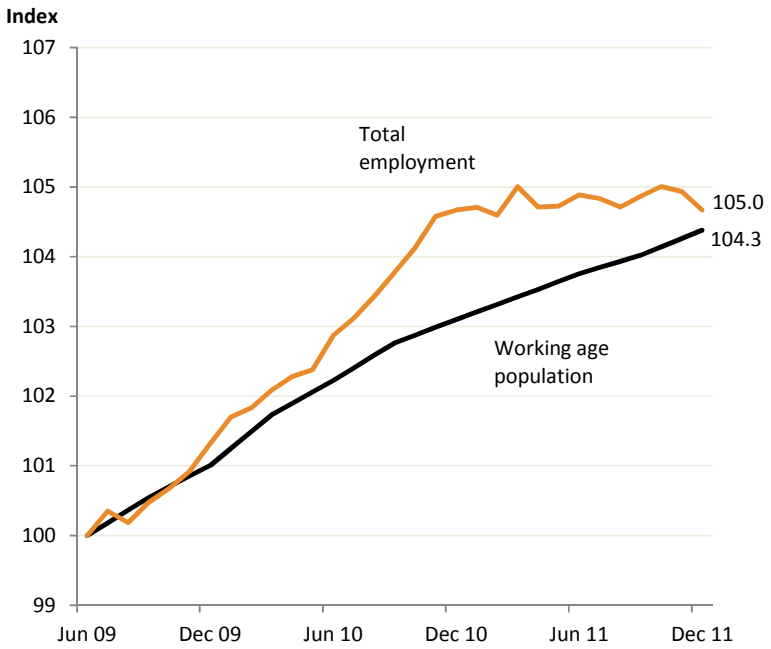
Of course, there are many factors other than industrial relations legislation that can affect the rate of employment growth. Overall macroeconomic conditions are clearly the primary factor affecting employment, and the weakening conditions in 2011 have been reflected in somewhat stagnant labour force outcomes. However, this slowing in growth is due to factors unaffected by changes in Australian labour law, including:

- the effect of an unusually strong Australian dollar on trade-exposed industries;
- the effect of the European and US recessions on confidence and exports;
- the shift by Australian consumers towards deleveraging and saving; and
- the natural disasters in Australia and key trading partners (Japan and New Zealand) in late 2010 and early 2011.

The labour market outcomes that were achieved in the first 18 months of the Act show that the current legislation is entirely compatible with strong employment growth, if macroeconomic conditions are favourable. In the first 18 months after the Act took effect, employment grew much more rapidly than the working age population. This is shown in Figure 1, overleaf.

[13] Section 3(a).

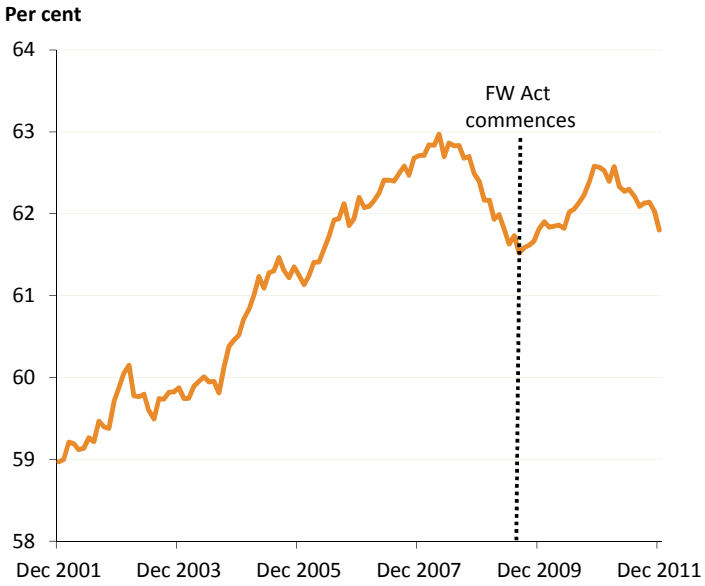
Figure 1: Employment and population growth since mid-2009



Source: ACTU calculations based on ABS 6202.0

As macroeconomic conditions weakened in 2011, employment growth slowed. However, total employment growth has still outpaced population growth since the Act came into effect. The employment-to-population ratio has fallen since the peak it reached in late 2010, but it remains at historically high levels. Notably, it remains higher than the levels that were recorded during most of the period the *Workplace Relations Act 1996* was in effect. Figure 2 shows the employment to population ratio over the ten years to December 2011.

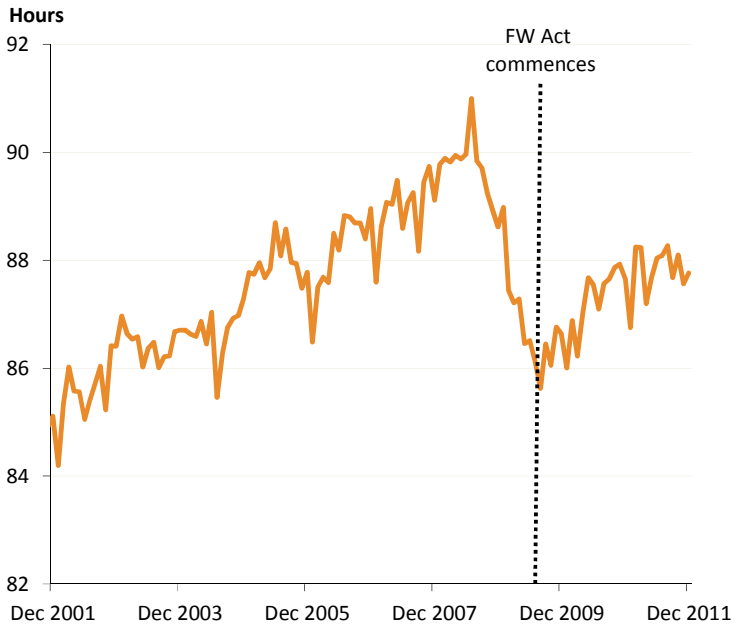
Figure 2: Employment to population ratio



Source: ABS 6202.0

There are a number of ways to measure the extent of labour utilisation; familiar measures such as the unemployment rate and employment-to-population ratio capture important dimensions of the labour market, but do not tell the whole story. Another measure is presented in Figure 3 – the number of hours worked per month per working-age Australian resident. This had fallen to around 86 hours at the time the current Act took effect, and has risen to around 87.8 hours as at December 2011. Again, this measure suggests that the current legislation has not impeded the labour market recovery from the downturn of 2008-09.

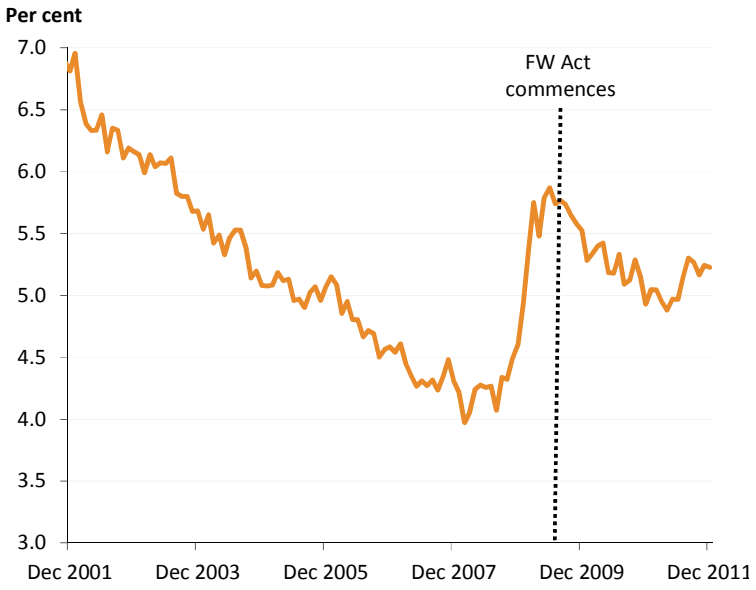
Figure 3: Hours per working-age person per month



Source: ABS 6202.0

The unemployment rate tells a similar story – the labour market has recovered strongly from the 2008-09 downturn, with some weakening in 2011 as macroeconomic conditions became less favourable. Even given this weakening, the unemployment rate remains among the lowest recorded in Australia for decades.

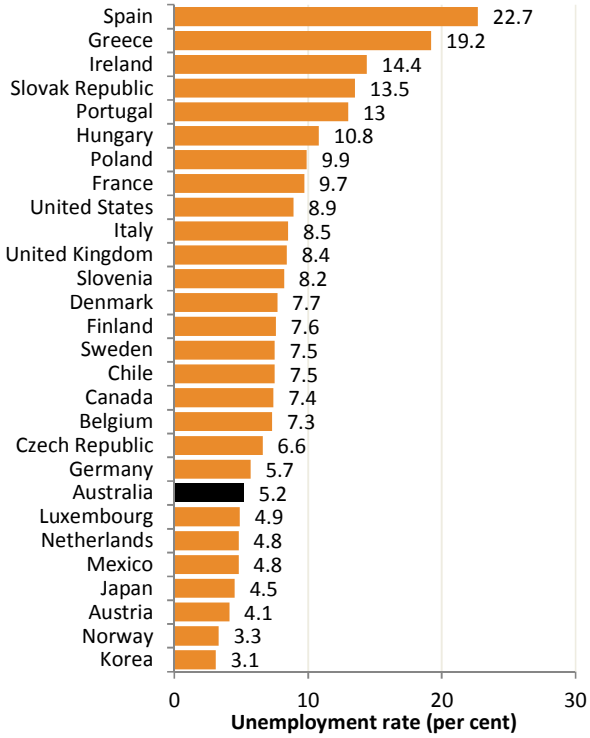
Figure 4: Unemployment rate



Source: ABS 6202.0

Australia's unemployment rate is also lower than most other advanced economies, and virtually all major advanced economies. Figure 5 compares Australia's unemployment rate in October 2011 with those of other OECD countries.

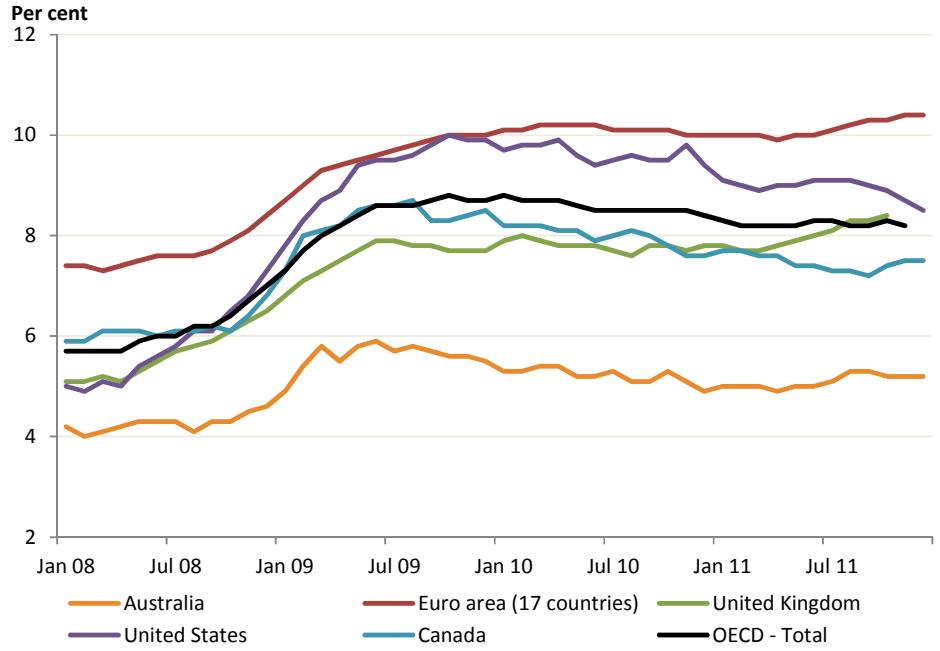
Figure 5: Unemployment rates in the OECD in October 2011



Source: OECD Stat, Harmonised Unemployment Rates. Includes all OECD members for which October 2011 data is available.

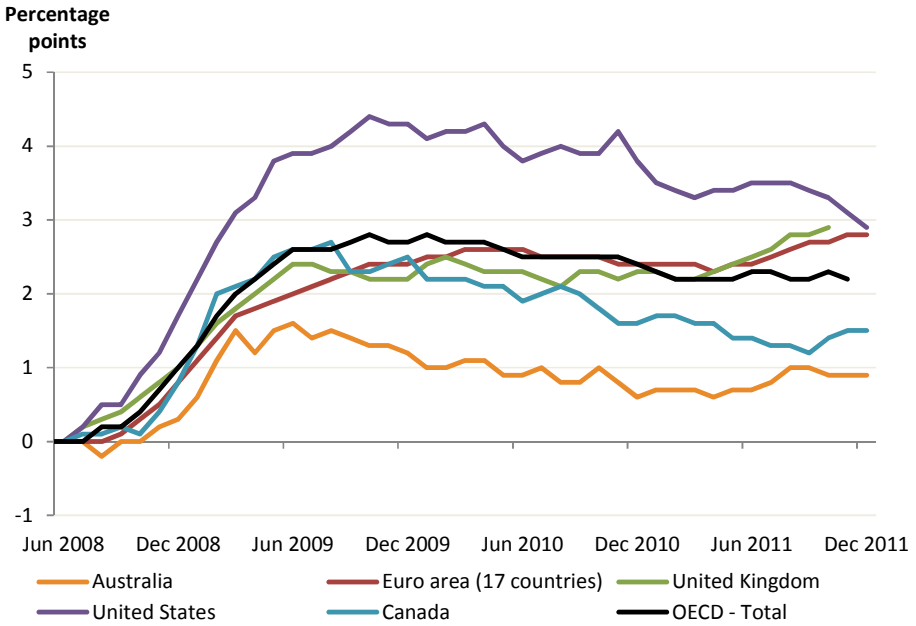
When the financial crisis began in 2008, Australia had a lower unemployment rate than most of the OECD. Unemployment then rose far less severely in Australia than elsewhere, stopped rising earlier than most other developed nations, and is closer to its pre-crisis level than is the case in the major advanced economies. Figure 6 shows the unemployment rates in selected OECD countries, as well as the Eurozone and the total OECD, from mid-2008 to December 2011. Figure 7 presents the same data, but the change in the unemployment rate since mid-2008 is shown, in percentage points.

Figure 6: Unemployment rates over time in the OECD



Source: OECD Stat, Harmonised Unemployment Rates. November and December 2011 data are unavailable for the United Kingdom; December 2011 data is unavailable for the total OECD.

Figure 7: Change in unemployment rates since June 2008 in the OECD



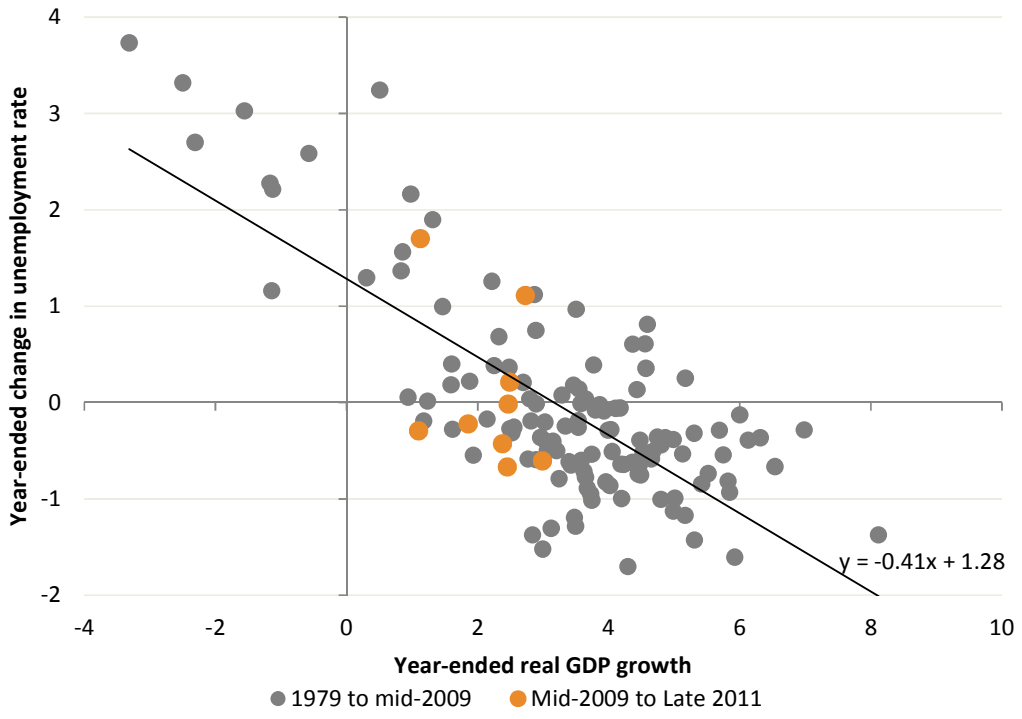
Source: ACTU calculations based on OECD Stat, Harmonised Unemployment Rates. November and December 2011 data are unavailable for the United Kingdom; December 2011 data is unavailable for the total OECD.

Australia's extremely strong labour market recovery from the global recession strongly suggests that the change in labour law has not affected the economy's ability to cope with and endure macroeconomic shocks. If anything, the relative resilience of Australia's labour market suggests that our approach to labour law has much to recommend it. The free-market approach, exemplified by the United States, holds as an article of faith that labour markets unfettered by regulation, minimum wages and strong unions will adapt to an economic shock by adjusting nominal wages and prices until markets clear. This has not occurred. Instead, more cooperative and fair labour relations regimes such as Germany have fared better in recent years.[14]

If the Act had undermined the efficiency of the Australian labour market, we would expect to see a change in the relationship between GDP growth and the unemployment rate. Instead, if anything, the unemployment rate has fallen further than would have been predicted based on the output growth Australia has experienced since mid-2009. The relationship between changes in real GDP and changes in the unemployment rate is known as 'Okun's Law'.

The Okun's Law relationship for Australia is shown in Figure 8. The figure depicts the relationship between year-ended output growth and changes in the unemployment rate over the period 1979 to 2011.[15]

Figure 8: Okun's law



Source: ACTU calculations based on ABS 6202.0 and ABS 5206.0, seasonally adjusted. This figure is a modified version of Figure 20 in Borland (2011).

[14] Burda, M.C. and Hunt, J. 2011, 'What Explains the German Labour Market Miracle in the Great Recession?', NBER Working Paper No. 17187, The National Bureau of Economic Research, Massachusetts.
[15] This period is chosen as the ABS Labour Force report only has a consistent quarterly series from 1978.

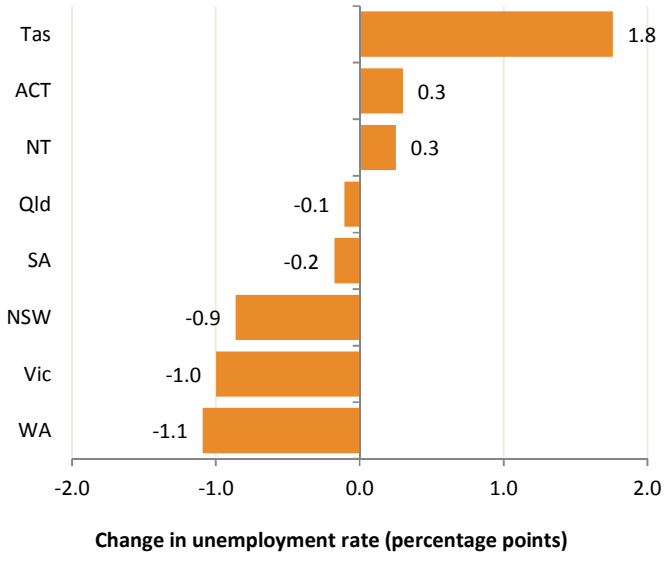
The trendline implied by a linear regression is included in the figure. It suggests that yearly GDP growth of around 3.1% is needed to stabilise the unemployment rate; growth slower than this would be expected to result in higher unemployment, while faster output growth should reduce the unemployment rate. Points that are below the trend line (to the left) suggest that the change in the unemployment rate has been more favourable than would be expected given the output growth over the period. As shown in Figure 8, most of the period since mid-2009 has been to the left of the trendline, suggesting an improvement in the growth-unemployment relationship. In other words, the unemployment rate has fallen by more than would be expected given the output growth over the period and the historical Okun's Law relationship in Australia.

Borland (2011) has examined this data and suggested that there may have been a favourable change in the nature of the growth-unemployment relationship in the 2000s. He tentatively suggests that the 'stabilisation rate of GDP growth decreased to 2.7 per cent in the 2000s'.[16] The leftward shift in the Okun curve therefore may predate the implementation of the Act, but there is no evidence to suggest that the Act's implementation has worsened the growth-unemployment relationship. The labour market's performance has been at least as strong as would have been expected given the level of output growth since the Act came into effect.

Employment by State

As outlined above, the Australian labour market's performance has been robust in the period since the Act came into effect. However, as is always the case, employment growth has not been evenly distributed among the States and Territories. Figure 9 shows the change in the unemployment rate for each State and Territory between June 2009 (the last month before the Act took effect) and December 2011.

Figure 9: Change in unemployment rates by State/Territory - June 2009 to December 2011



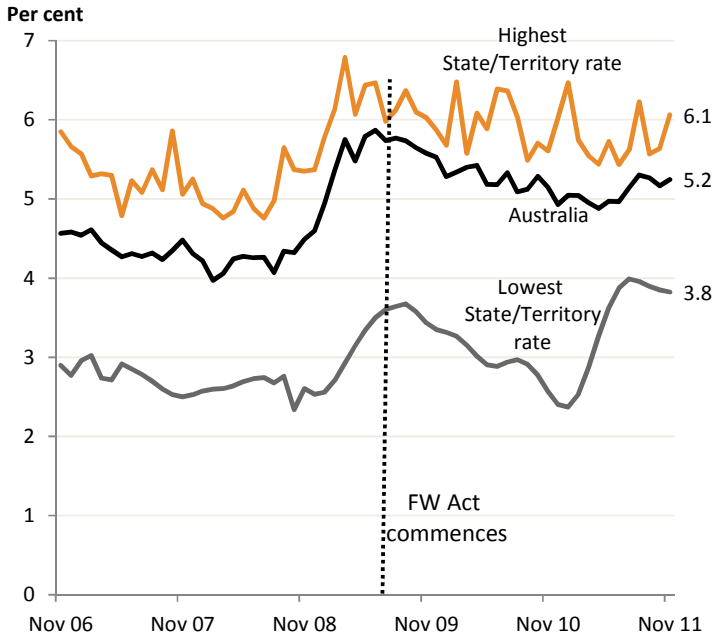
Source: ACTU calculations based on ABS 6202.0

[16] Borland, J. 2011, 'The Australian Labour Market in the 2000s: The Quiet Decade', in Gerard, H. and Kearns, J. (eds.), *The Australian Economy in the 2000s,* Reserve Bank of Australia.

The largest falls in unemployment rate have been experienced by WA (-1.1 percentage points), Victoria (-1.0 ppts) and New South Wales (-0.9 ppts). While there is considerable divergence between the changes in the unemployment rate by State during the Fair Work period, the differences are not consistent with an account which stresses the Act's supposed deleterious effects on any particular industry or cluster of industries. WA, with its mining-driven growth, has seen unemployment plunge, while Qld and NT (also endowed with considerable natural resources) have not. New South Wales and Victoria, sometimes characterised as the 'old economy' States, have seen significant falls in their unemployment rates, while South Australia has not.[17] The differences between State outcomes cannot credibly be ascribed to the Act.

In fact, somewhat surprisingly, the gap between the highest and the lowest unemployment rates for Australian States and Territories has narrowed somewhat in recent years. The period since the current Act came into effect has seen this trend continue, as shown in Figure 10 and Figure 11. Note that the rise in the lowest unemployment rate during 2011 is due to rising unemployment in the Northern Territory.

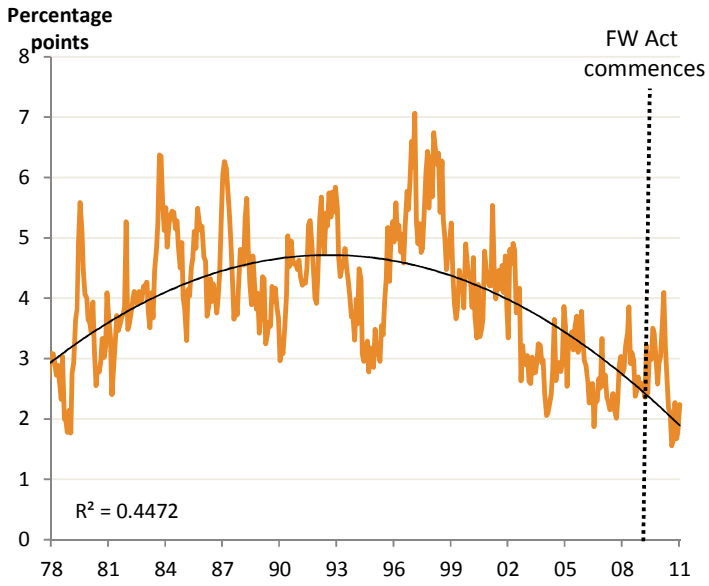
Figure 10: Highest and lowest unemployment rates in the Australian States and Territories



Source: ACTU calculations based on ABS 6202.0

[17] Tasmania is something of an outlier. It is relevant to note that the standard error for the Tasmanian unemployment rate in June 2009 was 0.5 percentage points, while the standard error for December 2011 was 0.6 ppts.

Figure 11: Gap between highest and lowest State & Territory unemployment rates



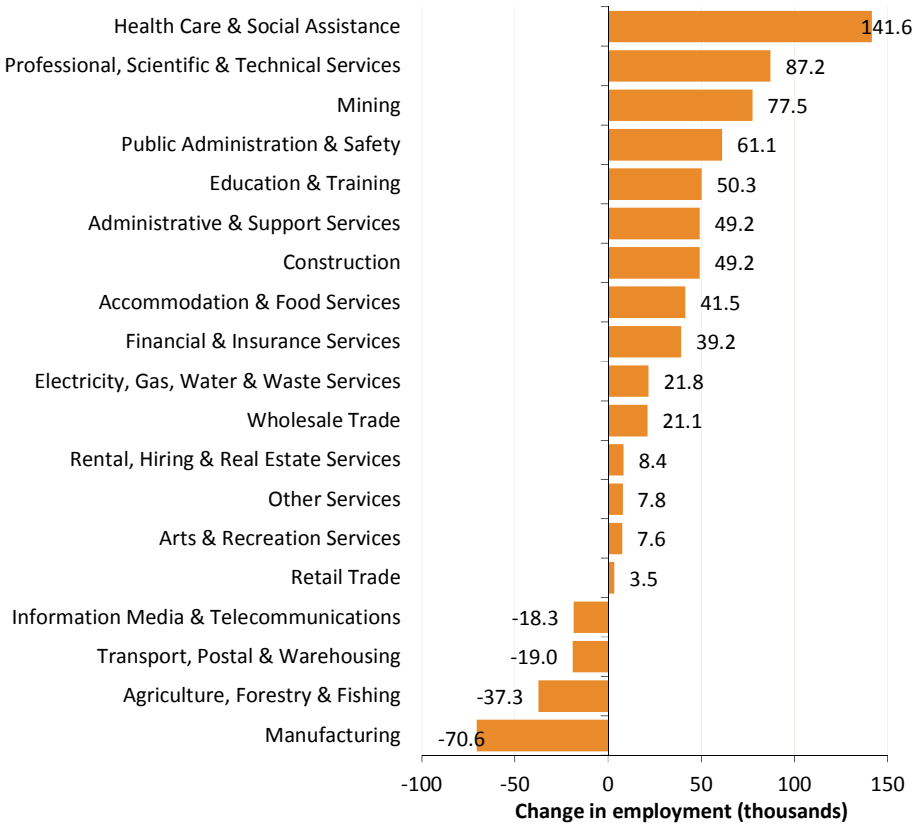
Source: ACTU calculations based on ABS 6202.0. The trend line is a second-order polynomial.

The unemployment rate has fallen in most Australian States since the Act came into effect, including falls of around a percentage point in each of the most populous States. Other jurisdictions have not fared as well, but some divergence between the States is normal. This divergence should not be taken as an indication of a failure of labour law.

Employment by industry

Employment has increased in most industries since the current Act took effect. Manufacturing employment fell, following a longer term trend, as did employment in the highly cyclical Agriculture, Forestry and Fishing industry. There were small falls in employment in two other industries, while the balance of industries recorded employment growth between the May 2009 quarter (the last quarter before the Act's introduction) and the November 2011 quarter, as shown in Figure 12, overleaf.

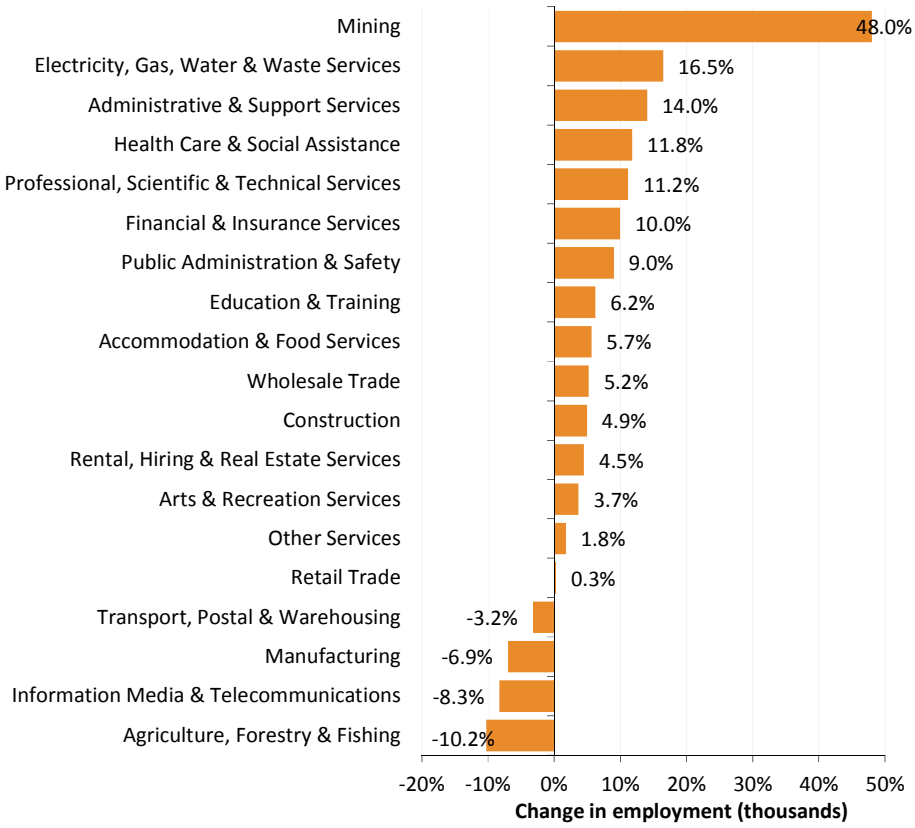
Figure 12: Change in employment by industry (thousands): May Q 2009 to November Q 2011



Source: ACTU calculations based on ABS 6291.0.55.003.

Figure 13, below, shows employment growth by industry over the same period, but presented as a percentage growth rate rather than the number of persons. It shows that the strongest proportional employment growth by far was recorded in Mining, which has increased its number of employed persons by 48% in the period since the Act came into effect. Strong growth, above the average for all industries, has also been recorded in three of the four most award-dependent industries – Administrative and Support Services (14%); Health Care and Social Assistance (11.8%); and Accommodation and Food Services (5.7%).

Figure 13: Change in employment by industry (per cent): May Q 2009 to November Q 2011



Source: ACTU calculations based on ABS 6291.0.55.003.

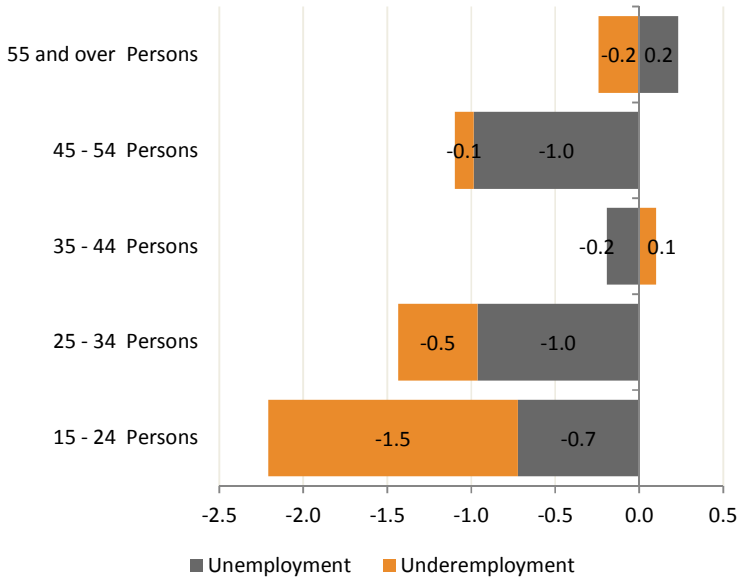
Unemployment by age

As shown in Figure 9, the unemployment rate has fallen in most Australian States since the Act was introduced. The unemployment rate has also fallen for all age groups other than persons 55 and over, for whom the unemployment rate has only changed by 0.2 percentage points. The underemployment rate has also fallen for all age groups other than 35-44 year old persons. Underemployed workers are employed people who want, and are available for, more hours than they current have; the underemployment rate is the number of underemployed workers as a proportion of the labour force.[18] Adding together the unemployment and underemployment rates gives the underutilisation rate – the proportion of the labour force who are either unemployed or underemployed.

Notably, the biggest falls in underutilisation since the Act came into effect have been recorded for the youngest age groups. The unemployment rate for persons aged 15-24 has fallen by 0.7 percentage points and the underemployment rate for the same age group has fallen by 1.5 points, giving a 2.2 ppts fall in underutilisation for the youngest group of workers. The change in labour underutilisation rates for each age group is shown in Figure 14, overleaf.

[18] ABS 6202.0, explanatory notes.

Figure 14: Change in unemployment and underemployment rates by age cohort – May Q 2009 to November Q 2011



Source: ACTU calculations based on ABS 6202.0

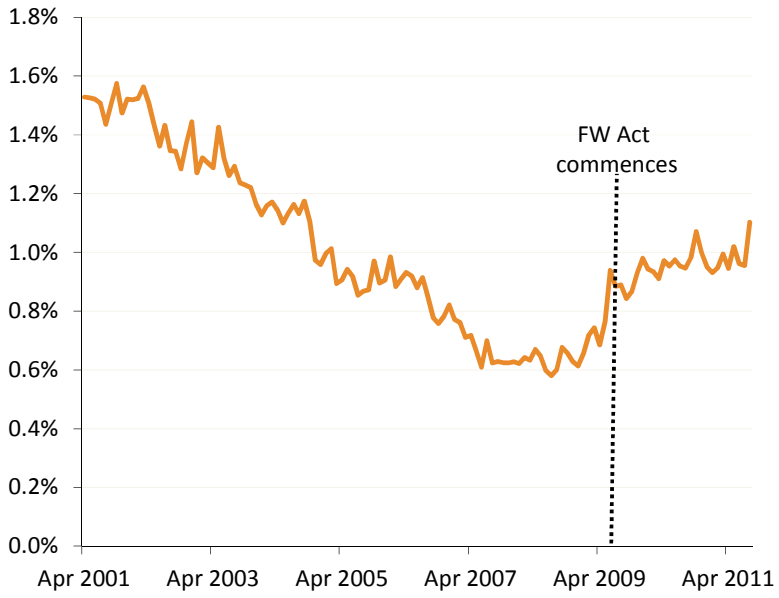
Younger workers are more likely to be dependent on minimum wages and awards than other workers.[19] If it were true that the Act and the modern awards had had the deleterious effects that are sometimes alleged, the data would be expected to show younger workers faring worse than other workers in the period since the Act came into effect. The opposite is the case.

Long-term unemployment

It is an unfortunate fact that economic downturns that cause increased unemployment tend to be followed by increases in long-term unemployment after a lag. People lose work, or enter the labour force and cannot find work, due to macroeconomic conditions; after a period of being unemployed they may become less attractive to employers and/or their skills may become less valuable. The economic downturn of 2008-09 followed this pattern. However, the increase in long-term unemployment has been modest and almost all of it occurred prior to the Act taking effect. This is shown in Figure 15, on the following page.

[19] ABS 6306.0, unpublished data. Employees under the age of 21 represent 9.1% of total employees, but 14.3% of award-only employees.

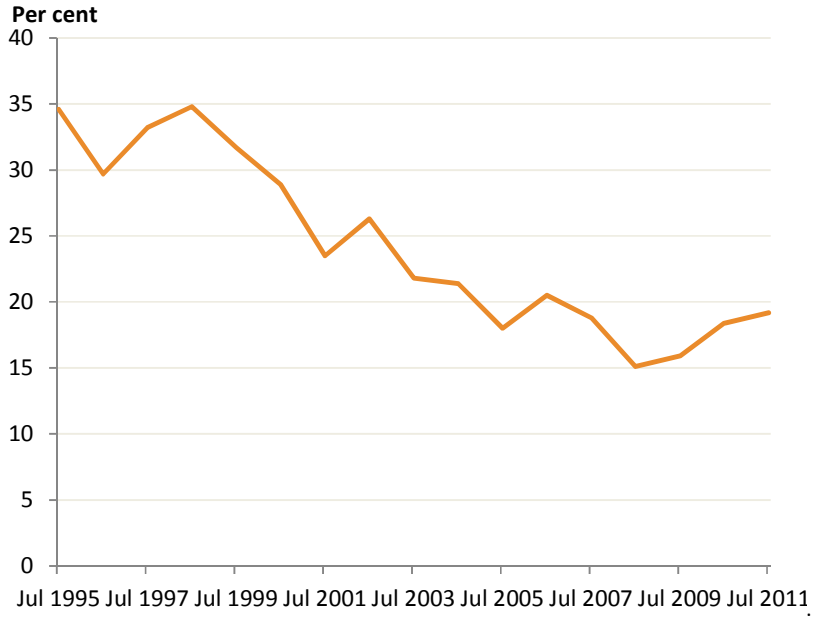
Figure 15: Long-term unemployment as a proportion of the labour force



Source: ACTU calculations based on ABS 6291.0.55.001

A consistent monthly series on the duration of unemployment is only available from April 2001, as shown in Figure 15. However, yearly ABS data from the *Job Search Experience* survey show that the rate of long-term unemployment is extremely modest relative to its past levels in Australia. This is shown in Figure 16.

Figure 16: Long-term unemployed persons as a proportion of all unemployed persons



Source: ABS 6222.0, various years. Long-term unemployed persons are those who have been unemployed for 12 months or more.

Figure 16 shows that long-term unemployment represents around the same proportion of total unemployment as it did in July 2007, the last *Job Search Experience* survey conducted during the Coalition Government. The 2007 level was close to a record low. The current rate of long-term unemployment is lower than the rates that were recorded for nearly every year that the *Workplace Relations Act 1996* was in effect.

While long-term unemployment is a tragedy for workers, their families and their communities, the current level of long-term unemployment remains extremely low relative to its historical levels. The slight uptick in the rate of long-term unemployment in the past few years is due to the macroeconomic shock experienced as a result of the global financial crisis, not due to the Act.

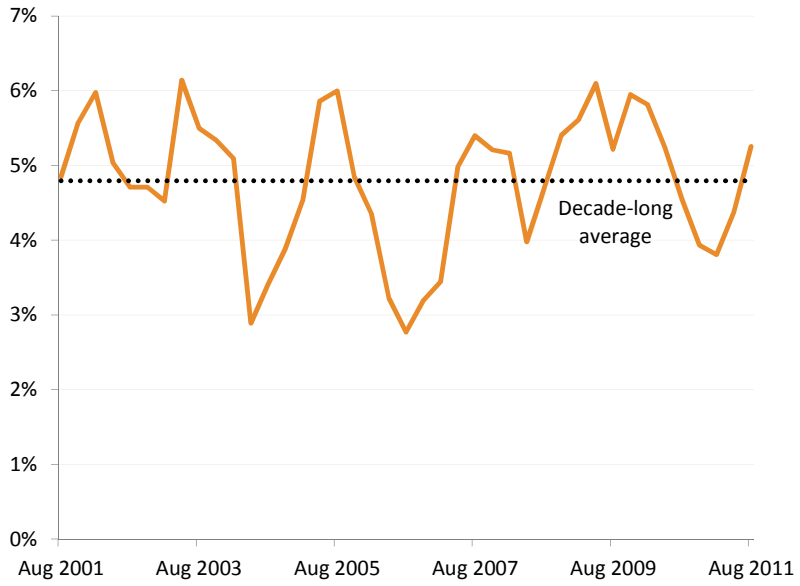
Wages

Wages growth has been solid, but sustainable, since the Act came into effect. Despite repeated alarmist warnings to the contrary, there has been no 'wages breakout' in recent years; core inflation is around the middle of the Reserve Bank's target band. Some industries and occupations have seen faster-than-average wages growth, but this is typical in a diverse and dynamic modern economy. In fact, the ratio between average earnings in the highest and lowest paid industries has grown in recent years, the opposite of the result that would have occurred if it were true that the current Act 're-centralised' wage fixation.

Average wages growth

Annual growth in average weekly ordinary time earnings for full-time adults (AWOTE) has fluctuated around its decade-long average in the period since the Act came into effect. This measure of wages growth was slower than average for a period during late 2010 and early 2011, before increasing slightly above average towards the end of 2011.

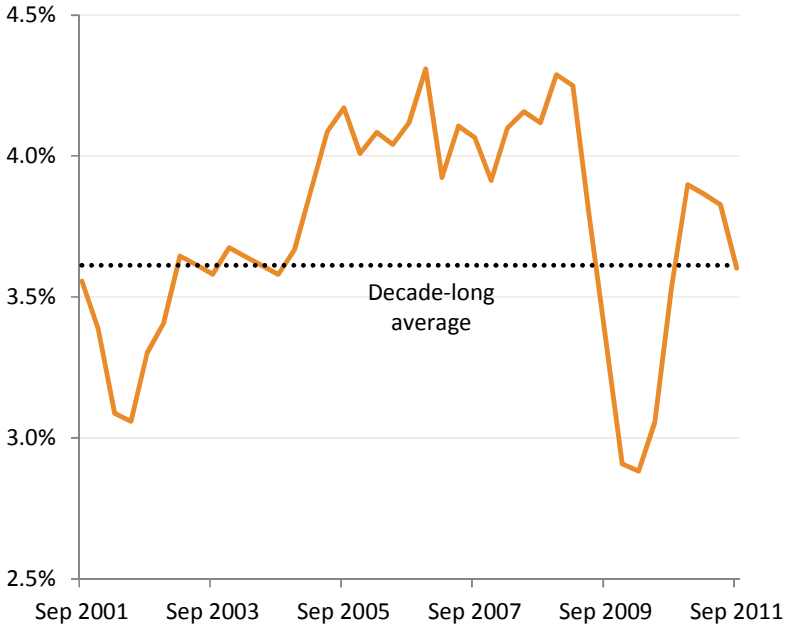
Figure 17: Year-ended AWOTE growth - 2001 to 2011



Source: ACTU calculations based on ABS 6302.0

AWOTE is a somewhat volatile measure of wages growth. As a simple average, it is affected by compositional change, such as increasing employment in industries such as mining. For this reason, the ABS has developed a measure of wages growth that controls for such compositional change in order to give a clearer picture of true wages growth. This measure, the Wage Price Index (WPI) charts changes in the total hourly rates of pay (excluding bonuses) for a fixed basket of labour – the methodology used for its construction is similar to the Consumer Price Index. Year-ended WPI growth is shown in Figure 18.

Figure 18: Year-ended WPI growth - 2001 to 2011

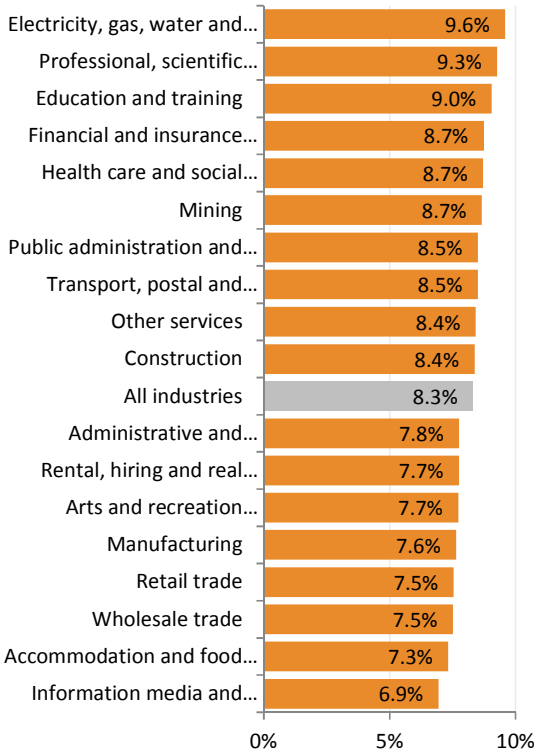


Source: ACTU calculations based on ABS 6345.0.

As can be seen in Figure 18, WPI growth is around its decade-long average. At no stage since the Act came into effect has year-ended WPI growth exceeded 4 per cent. There is no evidence for the proposition that wages growth during the Fair Work period has been unsustainable.

The wages data show considerable divergence between growth rates across industries. Some industries that have enjoyed robust conditions, such as Mining, have seen solid increases in wages. Others facing more challenging conditions have seen wages grow more slowly. This is the result that would be expected from a decentralised bargaining system. Allegations that wage rises in strong sectors are being 'flowed through' across the economy are not supported by the data. Figure 19 shows the total increase in the WPI for each industry over the period the Act has been in place.

Figure 19: Total WPI growth by industry - May Q 2009 to August Q 2011



Source: ACTU calculations based on ABS 6345.0.

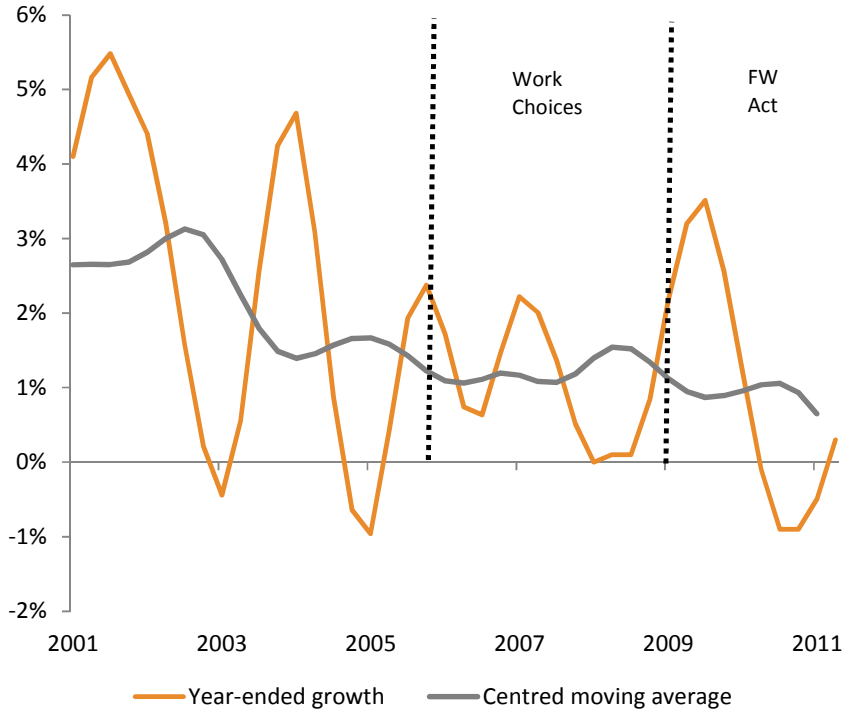
Productivity growth

The ACTU has recently published a paper debunking many of the myths, misconceptions and deliberate misrepresentations used in the debate around productivity. The paper, 'Working by Numbers: Separating Rhetoric and Reality on Australia's Productivity', appears at vol 2, item3, of this submission, and we draw the Panel's attention to it.

Australia's rate of productivity growth has slowed down over the past decade. Productivity growth peaked in the mid-1990s and has been slowing ever since. This cannot be ascribed to the Act, an Act which has been in operation for only two years.

As can be seen in Figure 20, overleaf, the rate of productivity growth had slowed prior to the introduction of the Work Choices legislation in March 2006, and the enactment of that legislation did not lead to a resurgence in growth.

Figure 20: Year-ended growth in GDP per hour worked in the market sector (trend)



Source: ACTU calculations based on ABS 5206.0

The productivity slowdown has been apparent in the data since at least 2002. The current Act came into place in mid-2009, with substantial elements (including the new system of modern awards) not taking effect until January 2010. It is difficult to comprehend how a statute that has been on the books for barely two years can be to blame for a decade-long slump in productivity growth.

An analysis of the data led Justice Giudice, President of Fair Work Australia to conclude:

> *During the decade between 1996 and 2006, when the* [industrial relations] *legislation was virtually unchanged, productivity grew for the first 5 or 6 years and then started to decline quite rapidly. The advent of Work Choices does not seem to have had any direct effect and it is to be assumed that other influences have been more important.*[20]

A correlation between the implementation of changes to industrial relations legislation and changes in the rate of productivity growth is not apparent in the data. Australia experienced some of its strongest productivity growth in the 1970s, when the industrial relations environment was more centralised and there was a high rate of industrial disputation. The 1990s productivity surge occurred under a decentralised system of bargaining. The Work Choices legislation, which featured many elements that employer groups wish to see returned, did not make any apparent difference to the rate of productivity growth.

[20] G Giudice, Speech to the Australian Labour and Employment Relations Association National Conference, Fremantle, Western Australia (7 Oct 2011).

Saul Eslake has noted:

> *[T]he workplace relations reforms introduced by the Howard Government under the title 'Workchoices' in its last term in office were not, primarily, 'productivity-enhancing'.*[21]

The enactment of the Act has not yet had a discernible impact on productivity growth one way or the other. Eslake and Walsh suggest that:

> *It is too early to ascertain what impact, if any, those changes [the* Act*] have had on the flexibility and adaptability of workplaces to changing economic circumstances.*[22]

It is much too early to assess the rate of productivity growth since the current legislation came into effect; doing so requires a complete productivity cycle. Even when data for a complete cycle are available, quantifying the extent to which industrial relations legislation has affected growth is an exceedingly difficult task. However, the quarterly data have seemingly given some support to those who claim that the Act has harmed productivity. GDP per hour worked fell in both the March and June quarters of 2011, but this is the result of the natural disasters that had a significant effect on Australia's economy during this period.

Labour productivity measures output (real GDP) per hour worked in the economy. If output were to temporarily fall, while hours worked kept increasing at the usual rate, then the level of productivity would fall. That is exactly what happened in March 2011 as a result of the floods and other natural disasters. Net exports detracted 2.4 percentage points from GDP in the March quarter, largely as a result of flooded coal mines in Queensland and other disruptions to production. GDP declined by 0.9% in the quarter, the largest fall since the early-1990s recession. Meanwhile, the number of hours worked in the economy grew by 0.2% in the quarter.

The fact that output fell, while hours worked did not, necessarily implies that measured productivity would fall in the quarter. GDP per hour worked fell further in the June quarter, though it contracted at a slower rate. However, these are near-meaningless statistical artefacts of a temporary economic shock. Productivity growth is best assessed over the long-run, as a trend level over the course of a cycle. Data from a short period, heavily affected by natural disasters, cannot be used to draw any robust conclusions about the productivity growth performance of the Australian economy, let alone to draw an inference about the causes of that performance. Productivity growth was positive in the September 2011 quarter.

All credible analyses show that the rate of productivity growth peaked in the 1990s and has fallen ever since. Suggestions that changes to labour laws which took effect in 2009 are to blame for this slowdown do not have any foundation in fact.

The relationship between collective bargaining and productivity improvements is also complex. Clearly, employers always have an incentive to seek higher levels of labour productivity; employees only have an incentive to agree where real wage increases are offered. However, not every employer offers such increases. Even where wage increases are offered, in many cases the corresponding productivity offset is not visible in the text of the agreement. In some cases the

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[21] S Eslake, 'Productivity: The Lost Decade', in Gerard, H. and Kearns, J. (eds.), *The Australian Economy in the 2000s* (2011) Reserve Bank of Australia.

[22] Eslake, S. and Walsh, M. 2011, 'Australia's Productivity Challenge', Grattan Institute Report No. 2011-1, February.

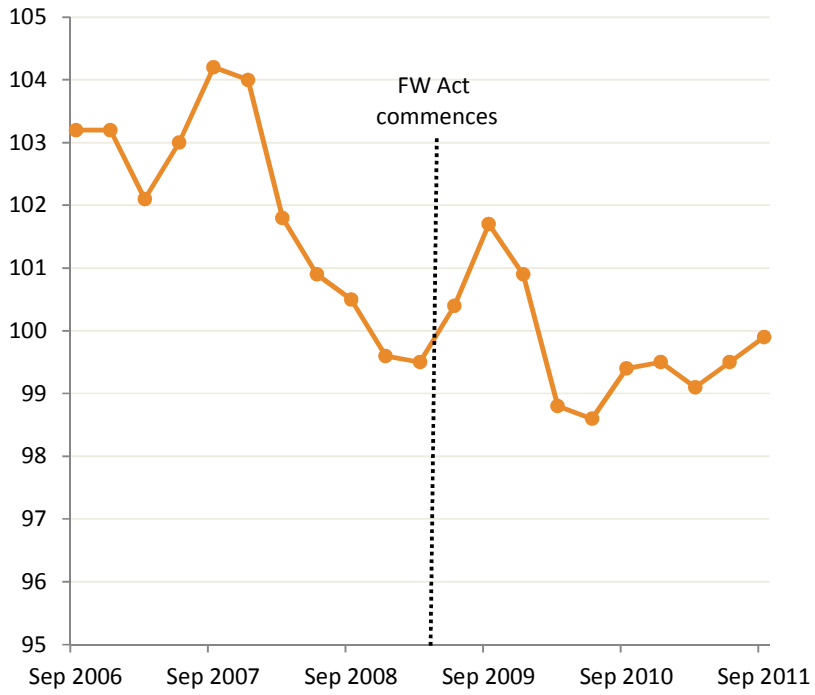
productivity improvement flows from the agreement facilitating working hours that better match the needs of the business and its customers. In other cases, the productivity improvements derive from the greater levels of trust and co-operation between employees, management and the union which the agreement signifies, but does not create. This 'trust effect' is extremely important, and the government should commission further research to demonstrate its impact.

Real unit labour costs

Real unit labour costs (RULCs) provide a means to assess changes in wages, after inflation, relative to productivity growth. If real wages grow at the same pace as productivity growth, RULCs will remain stable. Falling RULCs implies that real wages have failed to keep pace with productivity growth.

In the period since the Act came into effect, RULCs have fallen by around 1.5%, as shown in Figure 21.

Figure 21: Real unit labour costs (index)



Source: ABS 5206.0

Although productivity growth has been somewhat sluggish (following the trend for much of the past decade), real wages have still failed to keep pace with productivity growth. RULCs have fallen.

The Reserve Bank has noted the following:

> *When assessing inflationary pressures from labour costs, the most relevant concept is unit labour costs (ULCs) – that is, total labour costs (or the wage bill) per unit of output produced.*[23]

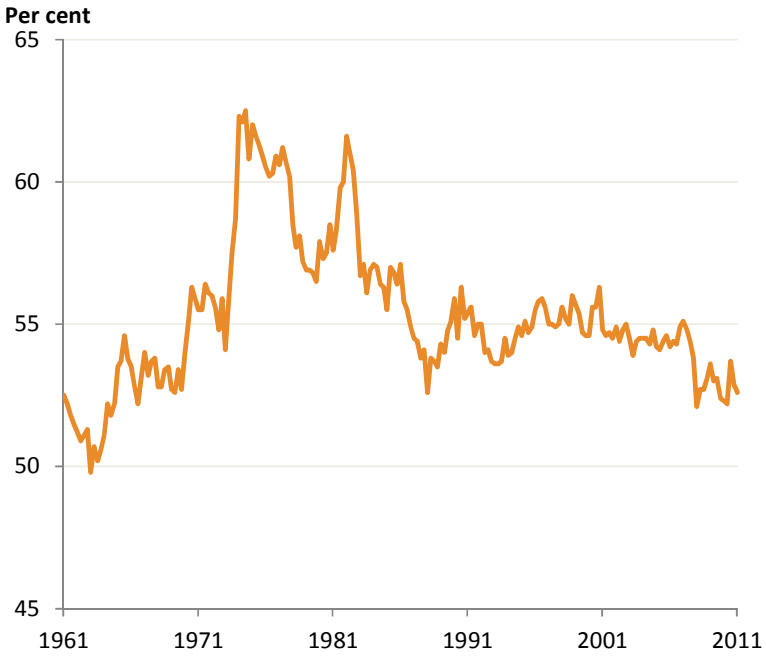
[23] RBA 2006, Statement on Monetary Policy, February 2006, 64. Available online: <www.rba.gov.au/publications/smp/boxes/2006/feb/d.pdf> [Accessed 9 February 2012].

Real ULCs have fallen since the Act came into effect. It is clear that the Act has not led to inflationary pressures arising from unsustainable wage increases.

Factor shares of income

A corollary of falling real unit labour costs is a falling wages share of national income. In the last quarter before the Act took effect, June 2009, the wages share of total factor income was 53.1 per cent. It is now 52.6%. This is close to the lowest level that the wages share has reached since the 1960s.

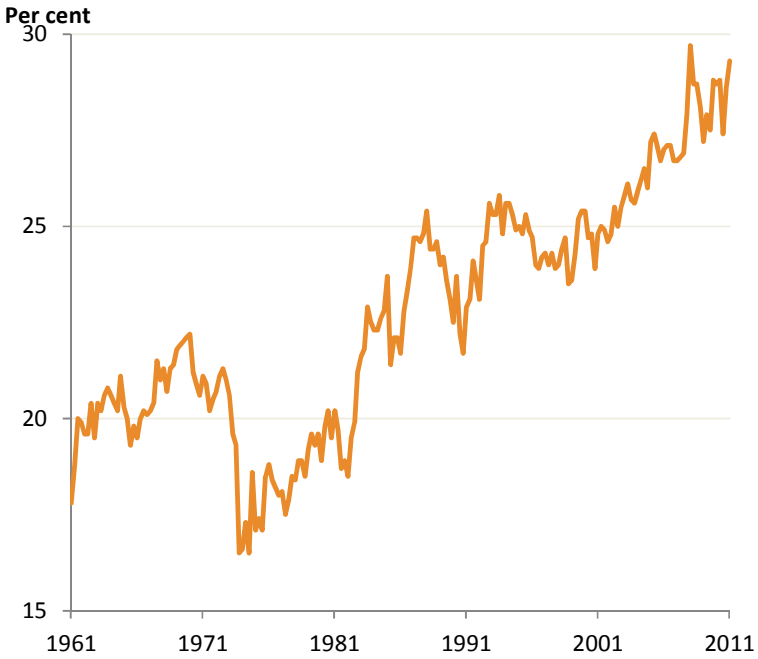
Figure 22: Wages share of total factor income



Source: ABS 5206.0

It does not necessarily follow that a falling wages share implies a rising profits share. However, the profits share of national income has risen strongly in recent years, including in the period since the Act came into effect. It is now close to the all-time record high recorded prior to the financial crisis, as can be seen in Figure 23. The profits share was 28.1 per cent in the June 2009 quarter; it had risen to 29.3 per cent in September 2011.

Figure 23: Profits share of total factor income

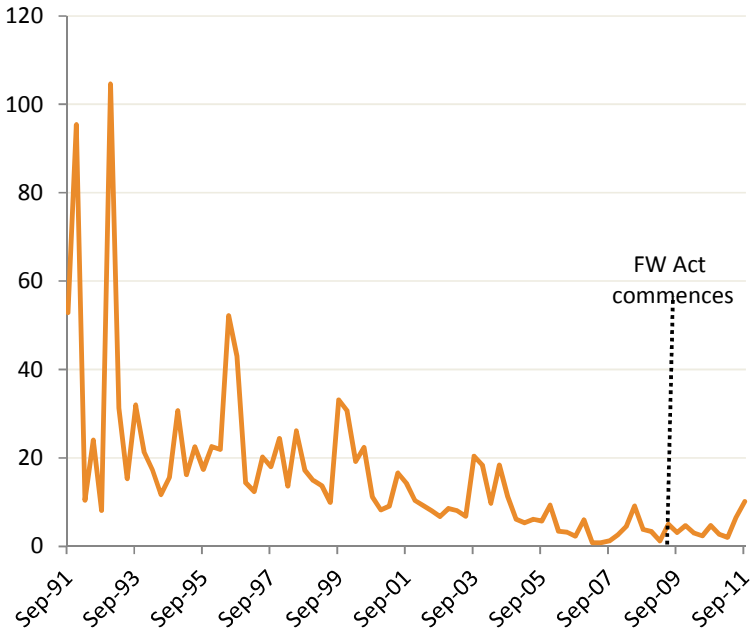


Source: ABS 5206.0

Industrial disputes

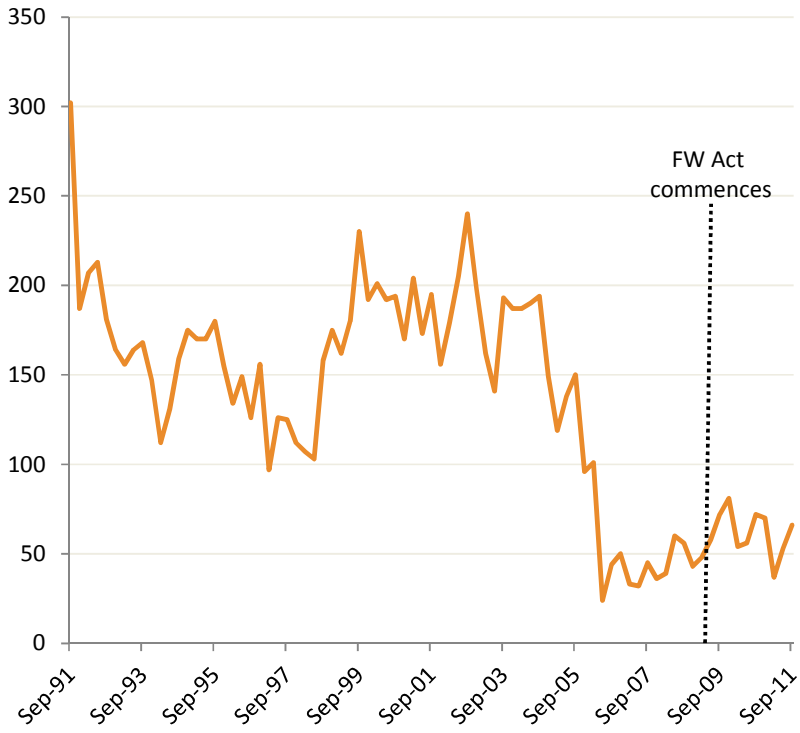
The number of working days lost to industrial disputes remains near record lows, as does the total number of industrial disputes per quarter. These two measures are shown in Figure 24 and Figure 25, respectively. It should be noted that industrial disputes include employer lockouts.

Figure 24: Working days lost per 1000 employees



Source: ABS 6321.0.55.001

Figure 25: Total number of disputes per quarter



Source: ABS 6321.0.55.001

There was a slight increase in industrial disputes in the September quarter. Almost all of the increase in days lost to disputes happened in NSW. Working days lost in NSW spiked from 2300 in the June quarter to 52 900 in the September quarter. Other states stayed roughly constant or fell in the quarter. The combined Education and training and Health care and social assistance industries accounted for 49,200 (49%) of the total number of working days lost in the September quarter 2011.

The facts above suggest that the public sector rally in NSW on September 8 may have played a significant role in the increase in days lost to disputes**.** The RBA concurs, suggesting in its February *Statement on Monetary Policy* that the slight increase in disputes 'partly reflect[s] a large public sector dispute'.[24] This is an important point, as NSW public sector workers are not covered by the Act. The Bank observed that 'the number of disputes and level of working days lost remains low relative to history'.[25]

Figure 26: Working days lost per 1000 employees by State/Territory

	NSW	Vic.	QLD	SA	WA	Tas.	NT	ACT	Australia
Jun 11	2.3	26.0	29.3	-	-	-	0.0	0.0	66.2
Sep 11	52.9	27.3	16.5	0.5	1.9	0.0	0.0	2.0	101.3

Source: ABS 6321.0.55.001. A dash indicates that the ABS has not provided a figure.

It is also important to note that these figures relate to disputes due to all causes, not just to bargaining-related disputes. According to the ABS, only 140 bargaining-related disputes led to

[24] Reserve Bank of Australia 2012, *Statement on Monetary Policy,* February, p.62.
[25] RBA, ibid.

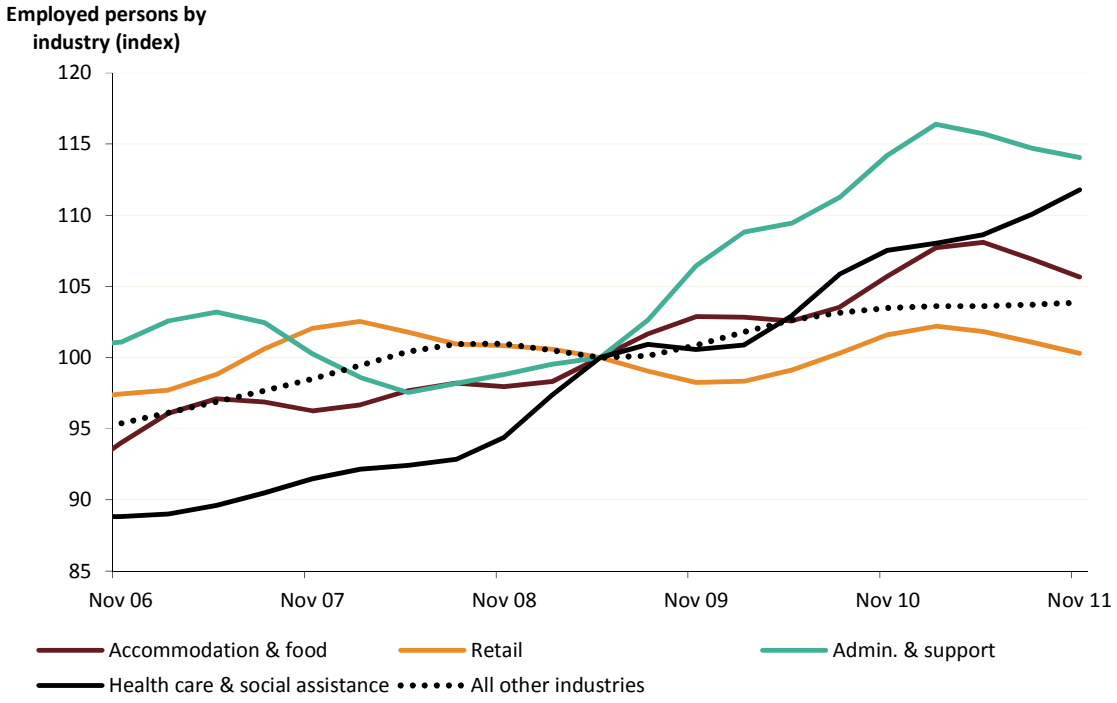
industrial action being taken in 2010/11.[26] In the same year, 15,300 enterprise agreements were made under the Act.[27] Even assuming that all of the disputes involving industrial action took place in businesses that covered by the Act, these figures suggest that over 99% of collective bargaining disputes are resolved without industrial action being taken.

Impact on award-dependent businesses

In our submission to the FWA Annual Wage Review each year, we focus on the economic performance of the award-reliant parts of the economy. These tend to be small businesses, particularly in the retail, hospitality, administrative services and healthcare sectors. In last year's submission, we undertook a comprehensive analysis of the impact of the Act on these sectors, and showed that no adverse impact was discernible in relation to key indicators of business health, such as revenue, profits, productivity or employment.

We have updated one aspect of this analysis relating to employment by industry. Figure 27 shows the change in total employment in each of the four most award-reliant industries, as well as in all other industries combined. Employment is shown as an index, set to equal 100 in the May 2009 quarter, the last quarter before the Act took effect. It shows that total employment in three of the four most award-reliant industries has grown more rapidly than employment in all the less award-reliant industries.

Figure 27: Employed persons by industry (Index; May 2009 = 100)



Source: ACTU calculations based on ABS 6291.0.55.003, Trend.

[26] ABS cat 6321.0.55.001 (Sep 11).
[27] FWA, *Annual Report 2010-11* (2011) 10.

Since the Act came into effect, total employment in Administrative and Support Services has increased by 14%; in Health Care and Social Assistance, employment is up by nearly 12%; and employment in the Accommodation and Food Services industry has grown by 5.6%. Employment in all the industries other than these four has grown by 3.8% (in trend terms). Given that employment growth in three of the four most award-reliant industries has outpaced growth in the less award-reliant sectors, the evidence does not support the proposition that the Act and the creation of modern awards has inhibited employment growth in award-reliant sectors.

While employment in Retail Trade has been less rapid than in other industries, it should be noted that restrained growth in this sector predates the Act. Employment in the industry was lower in August 2009, the quarter in which the Act took effect, than in February 2008. Slower growth in retail employment can be ascribed to a broad range of factors including technological change, the elevated exchange rate, productivity growth in the industry that exceeds the economy-wide average, and consumer deleveraging and increased saving.

We also undertook a very detailed examination of the performance of the retail sector as part of our submission to the Productivity Commission's recent inquiry on that topic. We were pleased that the Commission accepted our key submissions, particularly that:

- Retail wages are low compared to other Australian workers, and are 'significantly lower than [retail wages in] many developed countries (for example the United Kingdom and several European countries), when expressed in … purchasing power adjusted terms';[28]
- Labour productivity growth in the retail sector is 'similar, on average, to that of the rest of the Australian economy';[29]
- Improvements in productivity will principally come from technological improvements, capital investment, better customer service as well as 'better management' practices[30] — not from reducing workers' wages and conditions. Indeed, the Commission found that '[c]utting the pay and conditions of retail workers could potentially have *detrimental* impacts on productivity' (emphasis added).[31]

We refer the Panel to our original submission to the inquiry (attached to this submission at vol 2, item 4) and particularly to our more detailed second submission, made in reply to the Commission's draft report (vol 2, item 5).

Conclusion

The economic data presented in this chapter shows that the regulation provided by the Act is entirely consistent with strong economic performance, provided appropriate macroeconomic conditions prevail. Conversely, there is no evidence that the Act is having an adverse effect on any important macroeconomic variable. While the retail sector has experienced some difficulties (for reasons that pre-date the introduction of the Act, and for which industrial regulation is not to blame), other Award-dependent industries have continued to enjoy strong jobs growth following the introduction of the Act.

[28] Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry* (2011) 328.
[29] Ibid, xix.
[30] Ibid, 363.
[31] Ibid, 329.

Ensuring a guaranteed safety net

The Act guarantees a strong safety net of wages and conditions (consisting of the NES and awards) which cannot be undercut by individual agreements.[32]

This is in contrast to *Work Choices*, where agreements could disadvantage workers compared to the award, where 89% of AWAs were used to remove supposedly 'protected' conditions, such as penalty rates and overtime pay, and where awards were to be gradually phased out and replaced by five statutory conditions.[33]

In this section, we consider employer criticism of the level of minimum wages (including penalty rates and minimum shift lengths); the role of IFAs; and the problem of insecure work.

Wages

Some employers complain that Australia's award wages are too high, particularly in sectors such as retail and hospitality. It is important for the Panel to examine these claims and reject them.

The minimum award wage for the least skilled workers is around $16 per hour for adults (and as little as $7 per hour for young workers, trainees and apprentices). This is significantly below average wages[34] which are around $35 per hour in all industries, and approximately $25 per hour in the retail sector. Australia's system of minimum wages has always been an important part of our social safety net. These wages are modest, sustainable and fair.

In any event, only 15% of workers have their pay set by awards. As such, it can be seen that while awards play a socially desirable role in supporting the wages of the least-paid employees, they are unlikely to interfere in wage-setting decisions for the remaining 85% of employees, and do not apply at all to an additional 1 million contractors.

Looking at wages overall, it can be seen that Australian wage levels are appropriate given our level of economic development, and are internationally competitive. Indeed, as the Productivity Commission has found, if one looks at average labour costs in the retail sector, Australian costs are 31% lower than in the USA, and almost 50% lower than in some European countries (on a PPP adjusted basis). This is shown in Figure 28, overleaf.

[32] Act, s 3(b)-(c).
[33] Julia Gillard, 'AWA Data the Liberals Claimed never Existed', Media Release, 20 February 2008.
[34] Adult full-time AWOTE wages: ABS cat 6306.0 (May 2010).

Figure 28: Total hourly labour costs for retail trade, 2007-08

	Local currency	$AUD[c]	$US PPP[d]
Based on Eurostat data:			
France	21.80	35.74	24.57
Germany	19.90	32.63	24.48
Italy	18.79	30.81	23.86
United Kingdom	14.63	32.66	22.88
Netherlands	18.74	30.73	22.16
Finland	20.24	33.19	22.01
Austria	18.32	30.04	21.50
Ireland	17.61	28.87	18.54
Spain	12.43	20.38	17.28
Greece	11.61	19.04	16.56
Based on National Statistical Agency data:			
United States[e]	16.47	18.36	16.47
Australia[f]	18.47	18.47	12.49

Source: Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry inquiry* (2011), C.7.

Award wages have also been relatively stable over time. They have generally risen in line with inflation. Indeed, the real value of the wage for the lowest-classified award employee (at the C14 level) has only increased by 1% since 2005.[35] Employers complain that award modernisation significantly increased wages. This cannot be maintained as a general claim. As part of consolidating more than 5,000 old awards into 122 modern awards, some wage rates went up slightly, and some went down. The approach of the AIRC was generally to use the 'old' State or federal award that applied to the largest group of workers as the template for the modern award, thereby minimising changes. Unfortunately, in many cases the net result was a reduction in wage rates. For example, the modern retail award contains wage rates that are 0.86% lower for permanent staff, and 2.12% lower for casuals, compared to pre-existing awards.[36]

Wage-related entitlements

In Australia, penalty rates form an important component of employees' total take-home pay. Penalty rates, which date back more than 100 years, are designed to compensate employees for working at unsocial hours, such as evenings, nights and weekends, when employees would otherwise be spending time with friends and family. Some employers have recently criticised their relevance, and complained about their cost (quoting erroneous figures). The truth is that unsocial shifts are generally offered to casual workers, and casual workers receive very modest penalty rates. For example, in the retail sector, a casual worker receives nothing extra for working during the evenings or at night, only 8% extra for working on Saturdays, and 60% extra for working on Sundays, and double time for working on public holidays. In contrast, in many OECD countries, weekend work in the retail sector is banned or restricted (especially for young workers), or else attracts loadings of up to 100% of the normal salary.[37] Australian employers have nothing to complain about.

[35] ACTU submission to Fair Work Australia Annual Wage Review (2011) 137.
[36] See vol 2, item, 5, 10.
[37] Loadings (expressed as an additional salary increment) are as follows: Japan (25-50%), Mexico (25%; 200% for children); Hungary (50%), Israel (50%), South Korea (50%), USA (KY, MA, RI) (50%), Iceland (80%); Finland

Another wage-related issue that employers appear vexed about are minimum shift length rules. These rules ensure that employees earn enough to make coming to work worthwhile, taking into account travelling times and transport costs. Historically, most awards provided for a 3 hour minimum shift, but with some variation: for example, in the retail sector, the minimum shift was 4 hours in Tasmania, but 2 hours in Victoria. When it made the modern retail award, the AIRC selected the most prevalent standard, 3 hours. This led to the need for adjustments to rostering patterns in Victoria. However, employer groups (and not just those in Victoria) have used these difficulties to argue for a reduction of minimum shift lengths for all workers, and they were recently successful in having the modern retail award varied to permit schoolchildren to work 1.5 hour shifts in the afternoon, where a longer shift is not possible.

Unions oppose this decision (which is being appealed), particularly because of the concern that employers will substitute schoolchildren (earning junior rates) for adults working afternoon shifts, leading to loss of shifts and income, particularly for women workers. The system needs to ensure that short shifts cannot be offered to one group of workers at the expense of others. These matters are best dealt with through collective bargaining, not through creating a two-tiered award system that discriminates between different groups of workers.

Individual Flexibility Arrangements

Unions did not support the creation of IFAs. In our view, there was already ample scope under awards (and contracts of employment) for employers to roster work in a flexible and efficient manner. For example, the modern retail award allows an employer to:

- **Implement long shifts:** employees can be rostered to work for up to 11 hours on any day of the week (except Sunday), *without overtime rates applying*. They can require employees to work 'reasonable' additional overtime, provided overtime payments are made;

- **Trade on weekday evenings:** permanent workers can be rostered to work until 6pm without penalty rates, and with a 25% penalty rate thereafter, until 9pm (or 11pm, for late night trading). Casuals can be rostered at these times with *no penalty rates applying*.

- **Trade on weekends:** permanent workers can be rostered to work between 7am (or 9am on Sundays) and 6pm on weekends, with a 25% penalty rate applying. As we saw above, casual workers can be rostered to work for an 8% penalty rate on Saturdays, and a penalty 60% rate on Sundays;

- **Change rosters**. an employer can make permanent changes to rosters (provided notice is given); they can cancel an employee's shift before it starts, *without paying compensation* (provided the employee agrees);

- **Provide hours flexibility to employees**: they can allow an employee to come in or leave work early or late, at any time, without penalty rates applying (provided it is within the permitted span of hours); and

- **Provide pay incentives**: they can offer commission or incentive-based payment (provided the minimum wage is earned each week).

(100%), Luxembourg (100%); France (100%); Slovakia (rate to be negotiated with union); Ireland (rate to be 'reasonable').

If the genuine operational requirements of the business truly require even greater 'flexibility' (such as 24 hour rotating shifts), this is something that should be negotiated collectively with the workforce and their union, to ensure that workers' interests are properly accommodated.

Indeed, we saw with AWAs why it is so dangerous to leave 'flexibility' (ie opting out of award protections) to individual bargaining between employers and workers. Many employers simply made it a condition of getting the job that employees 'agree' to work whenever, wherever and however the employer desired, at a flat hourly rate. Many of these AWAs left workers much worse off (particularly before the Fairness Test was introduced), and locked in to those arrangements for up to five years.

We acknowledge that the Act contains many safeguards to prevent IFAs being used like AWAs. However, we have had many reports of employers (unlawfully) making entry into an IFA a condition of employment, or else they include an IFA in the bundle of documents to be signed at the commencement of employment (such as the contract and Tax File Number Declaration), without explaining to the employee that they are not obliged to sign the IFA.

We have also had many reports of IFAs that clearly do not meet the BOOT test. In 2011, United Voice sued the Spotless Group over two suspect IFAs.[38] Under one of the arrangements, employees agreed that if other workers were absent on sick leave, Spotless could contact them and direct them to work the shift, waiving their rights to the usual 7 days' notice and overtime rates of pay. They received no compensation, except 'the opportunity to earn a higher income'. This clearly does not pass the BOOT. Yet we continue to receive reports that many employers consider that arrangements that provide 'the opportunity to earn extra income' or that 'meet employee needs' can be used to offset the loss of entitlements.

Finally, it appears that many IFAs, like AWAs, are 'template' documents that are developed by workplace relations consultants, law firms or employer organisations.[39] Even if they are not, it is usual for a common IFA to be offered to groups of staff within a single enterprise. This belies employer claims that IFAs are used to tailor unique employment conditions that accommodate the needs and wants of individual employees, or that they are initiated at the request of employees. IFAs tend to be 'pattern' agreements, for better or for worse.

Insecure Work

The major problem with the safety net is that it is not universal. Out of the 10.3 million workers in Australia:

- 3.5 million people work in small business, and so have fewer dismissal rights, and no entitlement to severance pay in the event of redundancy;
- 2.2 million employees are classified as casual, and so either are denied rights to sick leave, annual leave, long service leave, etc, or (in the case of 'casuals' who have ongoing jobs, and predictable rosters) erroneously[40] think they do not have these rights, and are wrongly denied them;

[38] Workplace Express, 'Spotless taking adverse action with IFAs: United Voice' (31 March 2011).
[39] See, eg, the IFA available from the Clubs Tasmania website: <http://clubstas.com.au>.
[40] See *Williams v MacMahon Mining Services Pty Ltd* [2009] FMCA 511.

- 1.1 million workers are contractors, and so either have no protections or (in the case of the perhaps 450,000 'sham' contractors) think they have no protections and are wrongly denied them;

- Between 200,000 to 500,000 workers[41] are outworkers, and either have no legal protections, or else rely on State and Territory laws for basic protections;

- 275,000 employees have fixed-term contracts, and so have no protection from a capricious or unfair decision not to renew their contract;

- 131,400 employees are labour hire workers, and have no guarantee that they will not be unfairly dismissed (by being removed from a placement, at the host employer's insistence).

Overall, we estimate that up to 40% of the workforce faces insecurity at work, because of the lack of a 'guaranteed' safety net that applies to all workers, equally.

Australia is almost unique amongst developed countries in terms of the extent of the problem. In particular, most other systems do not have the concept of a 'casual', that is to say a person who is a formal employee, recognised by the law, yet who is denied the normal range of employment protections, and who is therefore treated as a 'second-class' worker by the law.

In 2011, the ACTU launched the Secure Jobs campaign to tackle the problem of insecure work. We established an independent inquiry chaired by the Hon Brian Howe AO to investigate the issues and formulate solutions. It is due to publicly release its findings in April 2012. The ACTU Congress in May 2012 will consider its recommendations. After that time, we will be in a position to provide further input to government as to measures needed to promote secure jobs in Australia. However, extending more of the safety net to more workers will clearly be part of the solution.

Conclusion

The Act provides a much more comprehensive, stable and effective safety net than *Work Choices*. However, abuses of IFAs and employer attacks on the award system (including those which have been foreshadowed for the 2012 award of review) threaten the integrity of the safety net, and should be resisted. The crisis of insecure work is also a major policy problem, which the government — and society more broadly — will need to confront in the immediate future.

[41] TCFUA submission to the Senate EEWR Committee's Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (2012).

An emphasis on collective bargaining

The Act intends to promote productivity and fairness through collective bargaining, conducted in 'good faith'.[42]Bargaining is to occur primarily at the enterprise level, although low-paid bargaining, 'single interest' multi-employer bargaining and voluntary multi-employer bargaining are also facilitated.

This contrasts with the bargaining regime under *Work Choices.* Under that system, individual bargaining (through AWAs) was preferred over collective bargaining; employers could avoid genuine bargaining with unions by using AWAs, employee collective agreements or employer greenfield 'agreements'; employers could refuse to bargain with staff, or bargain in bad faith; and many job-related bargaining claims were banned as 'prohibited content'.

The new regime has been largely successful. Under *Work Choices*, approximately 8,000 collective agreements were registered each year, on average.[43] Agreement-making has increased markedly since *Work Choices* ended: 24,053 agreements were made in in 2009-10,[44] and 15,300 were made last financial year.[45] As a result, registered agreement coverage has also increased significantly, from 39.2% of all employees in August 2008 to 43.4% of all employees in May 2010 (the most recent year for which data is available).[46] Major companies that previously refused to bargain, like Telstra and the Commonwealth Bank, have successfully concluded enterprise agreements.

Collective agreements – at least those negotiated with unions – provide fairness to workers, because they provide above-average wages and above-average wage increases,[47] a transparent classification structure and career path, ongoing union representation at the workplace, and a genuine dispute resolution mechanism.

The collective bargaining regime provided by the Act suffers from a number of actual and potential flaws; the key ones are set out below.

Good faith bargaining

The reach of the new good faith bargaining provisions are still being worked out through FWA and court decisions. The legitimacy of a range or practices — such as 'surface bargaining', using replacement labour during strikes, unilateral employer offers, and employer direct-dealing with staff (without the knowledge of their bargaining representatives) — are yet to be decided conclusively. We will continue to monitor the evolution of the good faith bargaining provisions; however, should they fail to protect workers against unfair bargaining conduct, amendments will clearly be needed.

Restrictions on agreement parties

The Act provides an 'emphasis' on enterprise-level collective bargaining; that is, bargaining between the employees and their direct legal employer. The structure of our economy means that there will need to be greater capacity for multi-employer bargaining and agreements. This is especially so for

[42] Act, s 3(f).
[43] DEEWR, *Agreement making in Australia under the Workplace Relations Act 2007-09* (2010) 75
[44] This figure includes 'extension' agreements under the *Transition to Forward with Fairness* legislation.
[45] FWA, *Annual Report 2010-11* (2011) 10.
[46] ABS cat 6306.0 (May 10).
[47] DEEWR, above n 43, 39.

categories or classes of workers who have different employers but work together as part of a single process or project. For example, the work of labour-hire casuals and permanent employees at a warehouse is inextricably linked, and artificial limitations on bargaining based on the legal identity of the employer are counterproductive. In the labour hire context, the legal employer of the workers is really just an intermediary between the worker and the 'host' employer, who exercises control over the work, including the wages and conditions paid. Labour hire workers should be able to bargain directly with the host employer.

In the transition from centralised wage fixation to collective bargaining, too much emphasis has been placed on the individual employer. This has had unfortunate consequences. The system is designed around, and arguably works best for, a very particular model of the workplace that is far from the norm. We have created a bargaining system that is predicated on the existence of employers who enjoy at least a measure of economic autonomy, and who engage a relatively stable and secure workforce.

There are any number of examples of enterprises where pure 'enterprise' bargaining is impossible because the locus of economic power is elsewhere. Employers in an industry or sector characterised, for example, by high net labour costs, low barriers to market entry and intense competition are, in many cases, not genuinely free to bargain. It is no accident that many of the worst examples of AWAs — those which reduced or removed penalty rates and other conditions — were to be found in industries answering this description). Employers who are 'price takers', or part of a mass of inextricably linked but nominally independent entities in a contracting chain or project are in a similar position. In a system where the NES and awards are a safety net only, access to arbitration is curtailed and multi-employer bargaining requires (in almost all circumstances) active employer consent, this is highly problematic. In many circumstances, to limit the exercise of workers' rights to organise and to collectively bargain to the level of their individual employer is to remove those rights in all but name. This is recognised by the ILO, which considers that the parties should be free to choose the level at which collective bargaining occurs.[48]

Similarly, the fact that agreements only apply to the direct legal employer of the employee encourages avoidance of the agreement. An employer bound by an agreement can simply outsource the work to a third party (which may be a subsidiary or related party), make its workforce redundant, and then insource the work from the third party. Provided the third party does not hire any employees from the first employer within 3 months (or is based overseas) they will not be bound by the collective agreement.

For example, in 2009, Qantas outsourced its trans-Tasman flying to a wholly-owned subsidiary, Jetconnect, based in New Zealand. Jetconnect was contracted to provide trans-Tasman flying, on behalf of Qantas and under the Qantas brand, on a 'cost plus' arrangement. Jetconnect's major cost advantage is that is pays its workers 30-50% less than Qantas. As a result of these manoeuvres, Qantas was able to keep flying the same route but at a much lower cost — despite one FWA Member finding that the arrangement was a sham: a 'smoke and mirrors' trick.[49]

In the public and government funded sectors, a similar dynamic emerges. Government wages policies leave agencies and unions struggling with micro issues without the capacity to change the fiscal settings that determine key outcomes. In the government-funded sector, as the ASU pay

[48] ILO, *General Survey on Freedom of Association and Collective Bargaining* (1994) [249].
[49] *Australian and International Pilots Association v Qantas Airways Ltd* [2011] FWAFB 3706 [121].

equity case in social and community services demonstrates, the effect is even more egregious, with underfunded services paying discriminatory wages to workers who provide services in the place of government. In these sorts of cases, economic power is not located at the 'enterprise' - the department, agency or service – and to require bargaining at this level will in some circumstances mean sending workers and management on a fool's errand.

The labour market has changed, and in ways that also mitigate against an exclusive enterprise focus on bargaining. The continued growth in contingent employment (be it casual, contract, temporary or agency hire) means that, far from being stable and secure, work is more precarious for more people for a longer part of their working life. The manifestations of this transfer of 'risk' from employer to employee includes underemployment, overwork and unpaid overtime, and effects on skills, training and safety. Critically, for a discussion in relation to enterprise bargaining, it also risks eliminating or reducing the quantum of common interests which otherwise exist amongst workers and between them and their employer (or their employer's client in the case of labour hire workers). To take but one example, a permanent employee will likely (and rationally so) view a labour hire casual with the same skills and a lower wage rate as a mortal threat to her job security. And yet, our system, in contrast to many overseas bargaining regimes, does not adequately take account of insecurity and its effects. OH&S considerations aside, 'host' employers have limited legal obligations to the labour hire workers who perform their work, often in their premises, and often for extended periods.

The ACTU submits that the rules about the parties to a collective agreement need to be modified. Workers should be able to bargain directly with any entity that sets or influences their wages in practice; and employers should not be able to outsource/insource work in order to avoid wage commitments they have made.

Restrictions on agreement content

Under contract law which governs commercial negotiations, there are no restrictions on what parties can agree to, save that the courts will not normally enforce a contract to perform an illegal act. This principle of 'freedom of contract' allows the parties to come to mutually beneficial arrangements which are economically efficient. The same principle does not apply under the Act: there are two key restrictions on what the parties can bargain about.

First of all, the parties can only have an enforceable agreement made on matters that 'pertain' to the employment relationship, or union-employer relations. This quaint term has unfortunately been interpreted by the courts (many decades ago) to exclude workers' interests in ensuring that the employer does not outsource their jobs to contractors or labour hire workers; does not send their jobs overseas; continues to invest in Australia; and is a responsible corporate and citizen. There is no justification for this restriction, particularly when many of these commitments are, in practice, often volunteered by the employer, or put in a 'side-deed' to the agreement. Enterprise agreements should be able to contain the full range of matters that are negotiated and agreed to by the parties.

Secondly, while the Act rightly prevents agreements being made that purport to authorise the parties to do unlawful acts (such as coerce or discriminate against workers), it also does not allow the employer to agree to confer certain benefits on workers, such as better unfair dismissal rights, or better access to their union officials in their workplace – even though such rights could be (and often are) conferred by the employer either unilaterally or in a side-deed. There is absolutely no logical

justification for these restrictions. If the parties agree to it, why shouldn't it be allowed to form part of their enterprise agreement?

The ACTU submits that the rules for agreement content should be changed, so that all legitimate employee interests can be dealt with in agreements.

Restrictions on taking protected industrial action

The UN and ILO recognise the freedom to strike as a fundamental human right. It is particularly important in the context of collective bargaining. However, Australia continues to unduly restrict the right of employees to take industrial action in support of bargaining claims.

First, as discussed above, certain work-related claims are prohibited by the law. Second, the law prohibits industrial action in support of 'pattern' claims, even though a key aspiration of workers and unions, in the interests of fairness, is to secure equal pay for equal work within a single industry or occupations. Third, while unions generally support the concept that industrial action should only be taken if a majority of affected union members support it, the law continues to allow employers to interfere in the ballot of members, despite this being a matter between the union and its members. Fourth, the detailed and bureaucratic procedures around the conduct of the ballot operate in practice to frustrate the speedy taking of protected action (and are exploited by employers for this reason). Fifth, the imposition of a quorum for voting (when no such quorum applies when employees approve the making of an enterprise agreement) is also used to frustrate the taking of industrial action, especially in businesses with employees working at remote sites, or who do not speak English well.

Finally, and importantly, the Act continues the *Work Choices* era rules which permit protected industrial action to be suspended or terminated almost at the election of the employer. First, an employer can ask the Minister to terminate protected action; although this has never happened, it is too oppressive a power for the Minister to have in the first place. Second, a large employer can take action to deliberately harm the economy, or endanger lives; FWA is then compelled to stop workers' action. This was seen most recently in the Qantas dispute. Finally, FWA must suspend protected action that is causing significant harm to the employer's customers or suppliers; this provision can almost always be invoked by large businesses.

These limitations on the right to strike in support of legitimate bargaining claims cannot be justified. They contravene international law and ILO rules and violate the fundamental human rights of workers to strike. As such, they are inconsistent with section 3(a) of the Act, which expresses an intention to comply with international law. They should be significantly modified or removed.

Conclusion

Unions welcome the introduction of good faith bargaining (including the low paid bargaining stream) as one way to bring the benefits of bargaining to a wider group of workers. However, more needs to be done to free bargaining from the restrictions of the past, including restrictions on who workers and their unions can bargain with, what they can bargain about, and how they bargain (including by taking industrial action). This will help unlock more of the mutually beneficial gains that can flow from successful collective bargaining.

Enabling representation at work

The Act is intended to enable representation at work, by recognising freedom of association and the right to be represented.[50] The Act provides employees with rights to be represented by a union and participate in union activity, and protection from 'adverse action' if they do so. It allows employees to access union help from union officials at the workplace, whether to enforce their workplace rights, be represented in disciplinary proceedings, or discuss issues of concern. Employees also have a right to be represented by unions in consultations over major workplace change.

This contrasts with *Work Choices* and the WR Act regime. Employees had a bare right to join a union, but that was of limited value, since unions had no right to bargain with the employer, represent members in discussions with the employer, or seek AIRC intervention to resolve disputes. Worse, employees in workplaces that were covered by AWAs, non-union collective agreements or employer greenfield 'agreements' had no right to get help from a union official attending at their workplace.

Although the Act does much to enable representation at work, two key reforms are needed to ensure the policy objective is met.

First, employers often frustrate attempts by workers to meet with unions at work. They prevent the announcement of the arrival of the union official. They direct the official to meet workers at some far-off place (which cannot be reached during the lunch break); they stagger breaks so that there is never a time that all workers are on a common lunch break; or they direct the official to meet with workers in the room next to the manager's office, so that the employer can observe who attends. Unions have a right to challenge some of these decisions in FWA, but it is often difficult to prove the employer's bad motive, even though the effect of the employer's conduct on union–employee communication is clear.[51] The Act should simply provide that employers must take reasonable steps to facilitate meetings between workers and union officials, in a place that is proximate and private. The default position should be that workers are entitled to meet with unions in the places where they normally congregate (such as a lunchroom).

Second, employers often frustrate attempts by union delegates at the workplace to do their jobs. They are told they cannot put up union notices on the noticeboard, send union emails on the company system, or talk about union business with colleagues during work time. They are told that these activities breach company policy, or their contracts of employment, or other employees' 'right not to join a union'. Although the full Federal Court has ruled that the General Protections provisions protect delegates from being victimised because they perform these representative activities,[52] the lack of a clear positive statement of duties has had a chilling effect on the willingness of ordinary workers to take on the important role of workplace delegate, for fear of disciplinary action. We think it is important for the Act to provide a positive statement of the reasonable activities that union delegates are empowered to undertake at the workplace.

In conclusion, while the Act is to be welcomed for making representation at work a key objective, and in going a long way to achieving that end, further reforms are needed to close loopholes that are exploited by employers in order to avoid a clear objective of the Act.

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[50] Act, s 3(e)
[51] Act, s 492(2).
[52] *Barclay v Bendigo Regional Institute of TAFE* [2010] [2011] FCAFC 14. Note the employers are challenging this decision in the High Court.

Resolving grievances and disputes

The Act is intended to provide accessible and effective procedures to resolve grievances and disputes.[53] Here, we consider three main types of collective disputes that are dealt with under the Act.

Award-dependent enterprises

First, there are collective disputes between workers and employers in enterprises in which awards operate, not involving bargaining-type claims for better wages. An example is a dispute about an employer's change to roster patterns. Until *Work Choices*, this dispute could have been conciliated by the AIRC (with attendance mandatory) and ultimately arbitrated (with an enterprise-specific variation to the award, which operated on a prospective basis). Under *Work Choices*, the AIRC could conciliate (without compulsion to attend) but not arbitrate. Workers could not strike in support of their claim. In these circumstances, the employer would almost always prevail.

Under the FW Act, FWA can only have a role in this dispute if it is characterised as a dispute about a matter 'arising under the award' (rather than, say, a dispute about the unfair exercise of managerial prerogative, or about contractual rights and obligations).[54] If the dispute satisfies this description, FWA may conciliate (with participation compulsory) but cannot arbitrate. Workers cannot take protected industrial action. As a result, the employer is likely to prevail.

Alternatively, if the employer's action can be characterised as a breach of the award, then the workers could seek court orders. However, this is an expensive and time-consuming proposition, so it is rarely taken by workers.

Accordingly, we submit that the Act still does not provide 'accessible and effective' dispute resolution options for award-dependent workplaces. FWA should be empowered to arbitrate these types of disputes, as a last resort. FWA need not consider whether the parties were legally 'within their rights' while in dispute (indeed, only a court can make binding findings on these questions), but would consider whether it is necessary to lay down rules for the future conduct of the parties in order to avoid further disputation. For example, it might order the employer to take into account worker's family responsibilities when selecting which employees to roster on weekends. If FWA made such an order, it would be legislative in nature (like an award). It could operate for a nominated time, or indefinitely. Such orders would be available under the corporations power in the *Constitution*, as they are directed at avoiding disputes affecting companies and their workforce.

Agreement-covered workplaces

The second kind of dispute is one between workers and their employer in an enterprise covered by an agreement. Before *Work Choices*, workers had a range of ways of ventilating disputes that arose during the life of an agreement. In order to avoid this result, most employers made agreements under which the parties agreed not to take industrial action, but instead to submit their dispute to the AIRC for conciliation and arbitration. However, *Work Choices* made it unlawful to strike during the life of an agreement under any circumstance, removing the incentive for employers to agree to submit disputes to arbitration. As a result, many *Work Choices* agreements referred disputes to the

[53] Act, s 3(e).
[54] Act, s 146(a).

AIRC for conciliation but not arbitration (which was the model clause provided by the statute); other agreements simply stated that the CEO's decision was final.[55]

Under the FW Act, agreements must contain a term that allows FWA (or an independent 3rd party) to 'settle' disputes about matters arising under the agreement The new model clause provides for disputes to be referred to FWA for conciliation and arbitration. Although approximately two-thirds of agreements use the model clause,[56] the ACTU remains concerned that up to one-third of agreements may not provide workers with access to independent arbitration of workplace disputes. Neither may they take lawful industrial action. This is not consistent with the statutory objective of 'resolving disputes', nor is it consistent with international law. We recommend that the Act make it compulsory for agreements to contain a clause that allows an independent party to 'settle, by arbitration' any dispute about the application of an agreement.

Resolving bargaining disputes

The final kind of collective dispute is a bargaining dispute, where the parties have been engaged in good faith bargaining. There are problems for workers in strong bargaining positions, as well as those in weak bargaining positions.

For those in strong bargaining positions, who are unionised and can take effective protected industrial action, the problem (as set out above) is that the rules for stopping industrial action often save the employer from having to make concessions and agree to terms. The law intervenes too strongly on the side of employers.

On the other hand ,for vulnerable workers with little bargaining power who are engaged in enterprise-level bargaining, the employer can either refuse to ever make concessions and bargaining continues indefinitely (as in the *Cochlear* dispute), or else they can put their own terms direct to workers for a vote, which — if approved — successfully ends bargaining for up to 4 years. In these cases, the law does nothing to assist the workers (although we acknowledge the role that the low-paid bargaining stream might play in these cases).

We submit that the government should look to a more balanced role for intervention by the law in bargaining disputes. More should be done to assist vulnerable workers, and less to interfere in the right to strike. FWA should only be empowered to stop protected industrial action on grounds consistent with international law (such as saving lives or the national economy). However, FWA should also be empowered to make workplace determinations in situations where industrial action is not occurring, but where arbitration is appropriate: for example, where negotiations are protracted and there is no reasonable prospect of reaching agreement; where a negotiating party participates in bargaining but without a real intention to reach agreement; or where an agreement is being made for the first time and negotiations fail.

Additional powers for FWA should be considered as a means to increase the take-up of bargaining in those workplaces and/or industry sectors which currently do not have enterprise agreements or have low levels of bargaining.

[55] See House of Representatives (Cth), Fair Work Bill 2008 Explanatory Memorandum [783].
[56] Information provided to ACTU by DEEWR.

Conclusion

The Act is to be welcomed for sensibly expanding the role of FWA in conciliating workplace disputes. However, further reform is needed to better balance the role of FWA in resolving disputes through arbitration. The tribunal needs to be given clearer powers to arbitrate disputes under awards and agreements, and to arbitrate bargaining disputes involving vulnerable workers or where surface bargaining is occurring. A 'first agreement' arbitral jurisdiction would assist the spread of collective bargaining. On the other hand, the provisions forcing FWA to act, on the application of employers, to stop lawful and legitimate industrial action need to be reviewed, in light of their unfairness and inconsistency with international law.

Protection against unfair treatment

One objective of the Act is to protect employees against unfair treatment,[57] including unfair dismissal, unlawful dismissal and sham contracting.

Unfair dismissal

The Act has restored unfair dismissal rights to millions of Australians. If *Work Choices* were still on foot, we estimate that only around 2 million workers would be protected against unfair dismissal. Under the FW Act, we estimate that more than 6.5 million people (or around 80% of employees in the federal industrial relations system) are protected.[58]

Given that the size of the jurisdiction has more than tripled, one might have expected claims to have more than tripled; however, they have not even doubled. Claims rose from 7,994 in 2008-09 (the last full financial year before the end of *Work Choices*) to 12,840 in 2010-11. This is also lower than the number of claims made in 1995-6, before the WR Act took effect.[59]

Moreover, given that each year about a million employees are dismissed,[60] 12,840 unfair dismissal applications represents an employee complaint rate of about 1%. Also, based on the fact that only about 300 claims end in judgment against the employer each year, there is only about a 1 in 20,000 chance of an employer being *successfully* sued for unfair dismissal in a given year. This is a miniscule risk.

The vast majority of unfair dismissal applications are settled, mostly for no money or a small sum of money. For example, of the 12,301 applications finalised by FWA in 2010-11:[61]

- 11,784 (96%) were settled. Of the settlements observed in conciliation in 2010, 25% settled for no money, perhaps only with an apology. Of those that were settled with a money payment, 28% settled for less than $2,000 (two weeks' wages, on average) and a further 30% settled for between $2,000-$4,000 (2 to 4 weeks' wages).[62] Employers assert that all monetary payments represent 'go away money'. However, there is no evidence for this. They may well represent payment of employee entitlements, or compensation for acknowledged wrongdoing by the employer.

- 193(1.6%) were dismissed at a preliminary hearing for not being within the scope of the Act. Only 8 were dismissed on the grounds that they were 'frivolous or vexatious'.

- 324 (2.6%) were substantively arbitrated. The employer was successful 53% of the time; employees won compensation in 38% of cases, and won reinstatement in 8% of cases.[63] Based on an ACTU analysis of decisions from 2011, in those cases where compensation was ordered by FWA, 29% of payments were less than $4,000; a further 23% were between

[57] Act, s 3(e).
[58] Calculations from ABS and other government publications, available upon request.
[59] In 1995-6 there were 13,643 unfair dismissal applications: AIRC, *Annual Report 1995-96* (1996).
[60] ABS cat 6209.0 (Feb 2010).
[61] FWA, *Annual Report 2010-11* (2011) 13-14.
[62] Ms O'Neill (Director, FWA), Evidence to Senate EEWR Committee, Supplementary Budget Estimates, *Hansard* (20 October 2010) 84.
[63] These figures do not sum to 100 due to rounding and the exclusion of 4 cases where the employee won the case but no remedy was ordered.

$4,000 and $8,000; and a further 13% were for $8,000 to $15,000. The maximum amount (6 months' wages) was only ordered in fewer than 2% of cases. Once again, these amounts can include payment of unpaid wages and entitlements as well as compensation.[64]

Note that the levels of compensation for proven unfair dismissal is low in Australia, by international comparison. Of the 28 OECD countries for which we have information:[65]

- Compensation is unlimited in 15 countries;[66]
- Ten countries impose a *minimum* compensation payment, with an average amount of 6 months' wages, with higher minimums imposed in some countries when long-serving employees are dismissed;[67] and
- Of the 14 countries that impose a cap on compensation, the average level of the cap is 15 months' wages, not including any higher cap which applies to long-serving employees.[68]

In other words, Australia's unfair dismissal laws are so weak that they are unlikely to act as a deterrent to hiring, as employers often claim.

Apart from policy considerations, there are a number of practical problems with the current unfair dismissal regime. First, the 14 day deadline for filing claims is too short; many employees with valid claims miss the deadline and unfairly lose their cause of action. On the other hand, other employees are effectively forced to apply without an opportunity to obtain adequate legal advice beforehand, in order to avoid the possibility of losing what is likely to be the lowest-cost cause of action they have. The deadline should be extended to 60 days (to match the deadline for filing unlawful dismissal claims), or 21 days at least – bearing in mind that the deadline for most other civil claims is six years.

Second, FWA only offers 60 minutes of telephone conciliation with administrative staff. In many cases, an additional face-to-face conciliation session with a Member of FWA would be of great assistance, particularly where the parties are represented and there is a reasonable prospect of reaching a settlement. However, this is no longer offered, presumably due to resourcing concerns. We support FWA receiving additional funds in order to provide this service, where it is appropriate to do so.

Unlawful dismissal

The Act has made some small but important improvements to the former provisions protecting workers against unfair treatment on discriminatory grounds, or in breach of freedom of association rights.

[64] Senate EEWR Committee, Additional Estimates (February 2011), FWA Answer to Question on Notice EW0749_11.
[65] Source: vol 2, item 3, 21.
[66] Austria, Belgium, Canada, Czech republic, Estonia, France, Israel, Italy, Luxembourg, Mexico, Netherlands, New Zealand, Poland, United Kingdom, United States.
[67] Estonia, Finland, France, Greece, Hungary, Italy , Luxembourg, Mexico, Spain, Sweden.
[68] Chile, Denmark, France, Finland, Germany, Greece, Hungary, Italy, Ireland, Luxembourg, Slovenia, Spain, Sweden, Switzerland

First, under *Work Choices*, there was no remedy for en employee who had been mistreated on discriminatory grounds short of dismissal (for example, by failure to promote). The FW Act has now provided a remedy.

Second, under *Work Choices*, an employer was only liable for unlawful dismissal if the improper motive was the 'sole or dominant' reason for the decision to dismiss; this made is almost impossible to win a vase where the employer had mixed motives for acting.

Third, the WR Act prohibited employers from 'coercing' workers to exercise, or not exercise, workplace rights. However, coercion is a very high bar, and was rarely triggered. The new Act lowers the bar, and makers it unlawful for employers to exert 'undue influence or pressure' on employees, or to misrepresent employee obligations, in relation to their workplace rights.

Despite these changes, and contrary to misleading media reports, there has not been an outbreak of claims under the FW Act. In 2010-11 there were 2,045 applications to FWA for relief for unlawful dismissal – less than half as many claims as made in 2008-09, when 4,760 cases were lodged.

Sham contracting

The Act has retained the weak WR Act provisions dealing with sham contracting. These are failing to deal with the growing problem of sham contracting.

The legislative provisions only make it unlawful to *knowingly* misrepresent an employment relationship as a contracting arrangement; however, the common law test for what constitutes an 'employment' relationship is so vague that most employers can successfully plead that they made an honest mistake, or claim that they relied on legal or consulting advice to avoid liability (no matter how questionable the content of the advice).

As a result, sham contracting is getting out of control. The ABS reports that there are 1.1 million contractors, yet 40% of them admit that they have 'no control' over their own work, which amounts to an admission that they are probably, at law, employees. Many jobs (that are clearly 'employment' rather than 'contract' jobs) are now openly advertised in newspapers and on websites as 'ABN required'. Many consultancies sell off-the-shelf kits to employers, instructing them how to convert their workers from employees to contractors, and thereby purporting to avoid labour law and superannuation obligations. In a recent audit of the cleaning, hair/beauty and call centre sectors, the FWO found that 23% of employers had misclassified employees of contractors, with at least a third of those having done so deliberately.[69]

Sham contracting is also driving tax evasion. Many sham contractors, released from the PAYG income reporting system, deliberately hide income from the ATO. Last year, fewer than 100,000 contractors declared contracting income to the ATO. In recent years, when the ATO has audited 'contractors' (a category which probably includes many sham contractors), it found that 73% of them were failing to declare income, with an average unpaid tax bill of almost $20,000 per person.

The government needs to overhaul the sham contracting laws and increase penalties. The high incidence of sham arrangements in certain industries suggests that a targeted approach to regulation and compliance that does not disturb legitimate arrangements is appropriate.

[69] FWO, 'Sham contracting and the misclassification of workers in the cleaning services, hair and beauty and call centre industries' (Nov 11) 14.

Conclusion

One of the most obvious and significant areas where the Act has made great improvements is in providing greater protection for workers against unfair treatment, particularly unfair dismissal and discrimination on the grounds of their personal attributes. However, the sham contracting provisions remain weak; this is driving avoidance of labour law as well as tax. These matters should be addressed as a priority.

The institutional framework

The Act intends to provide an integrated institutional framework, with a focus on 'effective compliance'.[70] The Act establishes FWA, FWO and the Fair Work divisions of State and federal courts for this purpose.

Fair Work Australia

FWA is doing an excellent job in administering the Act. Last year it dealt with 37,262 cases, up from 17,658 cases in 2008-09. The increase in workload is explained by the increased footprint of the federal system, and the restoration of rights of access to the tribunal, and the increase in agreement-making. Cases are dealt with impartially, professionally and expeditiously. There remains a high degree of confidence in the tribunal on the part of union stakeholders.

Fair Work Ombudsman

The FWO is also busy enforcing the Act. Last year, it provided advice to 825,000 callers to the Fair Work Infoline, investigated almost 23,000 complaints and conducted almost 7,000 audits, recovering more than $30 million in unpaid worker entitlements.

Unfortunately, the FWO continues to detect high levels of non-compliance with the Act amongst employers, particularly small ones. When conducting audits as part of industry campaigns, it found that 23-37% of employers in a range of award-reliant industries (retail, horticulture, insulation installation and cleaning) were non-compliant with the Act, usually in relation to payment of wages. The government should consider increasing fines for underpayment, in order to better deter these breaches.

We have a number of reservations about the role of the FWO. First, the advice that the FWO gives is sometimes based on a black-letter reading of the law, which conflicts with longstanding industrial understanding and practice. We would encourage FWO to ensure that its advice is consistent with the views of the industrial parties, particularly in relation to award content.

Second, instead of devoting more resources to assisting un-unionised employees to enforce their workplace rights, the FWO wastes significant time and resources in investigating whether workers (and unions) have taken industrial action contrary to the Act. We are strongly of the view that these complex industrial matters are best left to FWA or the courts to resolve, rather than distracting the FWO from its core task of assisting vulnerable workers to enforce their rights.

Third, we are told that the FWO does not enforce superannuation obligations; it regards superannuation as an ATO matter, even though all awards make payment of superannuation an obligation under the Act. This appears to be a serious dereliction of the FWO's duties, particularly given that the ATO is notoriously poor at pursuing unpaid superannuation amounts.

Fair Work Divisions of the courts

The industrial workload of the Federal Court (excluding appeals) has been steady over the past few years, at around 150 cases per annum.[71] The industrial caseload of the Federal Magistrates' Court

[70] Section 3(e), 577, 682, Part 4-2.
[71] Federal Court of Australia, *Annual Report 2010-11* (2011) 142.

has increased, from 255 cases in 2008-09 to 561 cases last year.[72] Once again, this is largely due to the expanded footprint of the Act, better industrial rights, and more vigorous use of the courts by the FWO.

However, given that FWO statistics show that around a quarter of employers in some sectors are non-compliant with the Act,[73] the very low number of court cases against employers shows the difficulty that workers have in enforcing their workplace rights. Proceedings are costly (if lawyers are used), time-consuming, and fines (which the plaintiff can ask to receive) are low. More importantly, workers in ongoing employment almost never enforce their rights against their current employer, for fear of retaliation.

This demonstrates that legal rights are unlikely to be asserted unless workers have assistance at the workplace, from unions, to confront their employer. This underscores, again, the need for the law to accommodate the important role of unions and union delegates at the workplace.

Conclusion

One of the most important contributions made by the Act is restoring the role of the independent umpire, now known as FWA. However, the FWO could do more to promote 'effective compliance' of employer obligations by targeting its resources appropriately. The ATO should be tasked with co-operating more effectively with the FWO so that worker's superannuation rights can be properly enforced.

[72] Federal Magistrates' Court, *Annual Report 2010-11* (2011) 39.
[73] See FWO audit data: <www.fairwork.gov.au/about-us/audits-and-campaigns/pages/default.aspx>.

Impact on women workers

The Act is intended to assist women workers by better protecting them from discrimination; guaranteeing them equal pay; helping them balance work and family responsibilities; and providing some protection from low pay and insecure work.

Balancing work and family responsibilities

Section 3(d) indicates that the Act is intended to 'assist' all workers balance work and family responsibilities; this particularly assists women, who perform the lion's share of family care in our society. The main mechanism the Act provides is a 'right to request' flexible working arrangements, for working parents of children who are either below school-age or else who are under 16 years of age and who have a disability.

Unfortunately, this provision does little to help balance work and family life, for two main reasons. First, it excludes workers who care for school-aged children; those caring for adult dependents with a disability; and those caring for elderly parents — despite the fact that these workers constituting a significant proportion of those employees with caring responsibilities. Secondly, the 'right' is not enforceable, as employers are not obliged to demonstrate that they have properly considered a request, and employees make only appeal an employer's unreasonable refusal to grant the request if the employee is covered by an enterprise agreement which provides such an appeal right

Consequently, the provision, as currently drafted, does not meet a range of the Act's objects, including providing 'guaranteed' minimum terms, providing 'effective' grievance procedures, and 'assisting' employees to balance work and family commitments.

We submit that all workers who care for or support (or expect to care for or support) a person who reasonably relies on them for care or support should have the right to request flexible work arrangements. The employer should have a duty to consider the request and reasonably accommodate the employee's needs in a bona fide way. There should be a right for all employees to review the employer's decision in FWA, regardless of the industrial instrument that covers them.

Finally, we note that the lack of an enforceable right to request flexible full-time work for women returning from maternity leave forces many women into insecure work, or part-time work, with limited career opportunities. This is unfair to the women concerned and deprives economy of experienced, skilled and qualified workers.

Protection from discrimination

We have already set out how the Act provides better protection from discrimination, by making it easier to prove discrimination where the employer has mixed motives for acting. The Act also protects workers against discrimination because of their family or caring responsibilities, for the first time. We make three minor suggestions for improvement, to better meet the statutory objectives.

First, the Australian Law Reform Commission has recommended that this Review consider supporting amendments to the Act, to help victims of family violence.[74] These workers need protection against discrimination on the ground that they have experienced family violence, and also

[74] ALRC, *Commonwealth Laws and Family Violence* (2012) 389, 411.

a right to request flexible work arrangements so that they can deal with a family violence situation. We support these amendments, and ask that the Panel endorse them.

Second, we are concerned that some parties argue that section 351(2) means that unless a particular form of discriminatory conduct is specifically banned by State or federal anti-discrimination laws, a claim cannot be brought under the General Protections provisions of the Act. We think the better interpretation is that the Act provides a remedy for all discriminatory conduct in the workplace, *unless* a State law specifically authorises the conduct (eg laws explicitly allowing religious institutions to discriminate). The government should clarify that the second interpretation is the correct one.

Finally, we note that it is still the case that many women who have been discriminated against settle their claims, subject to confidentiality agreements, and the public never learns of the employer's conduct. We think that FWA should publish de-identified case summaries of claims (and identify outcomes) so that the public can get a better idea of how widespread discrimination is in our workplaces. In addition, the FWO and the Australian Human Rights Commission should have standing to lodge discrimination claims on behalf of complainants, and to litigate those cases to finality where this in the public interest.

Equal remuneration

The Act has made a small but important modification to the equal remuneration jurisdiction. Under the WR Act, workers had rights to equal pay for work 'of equal value'; the AIRC interpreted this to require claimants to show that there was discrimination in pay-setting within firms and industries. The Act now provides a right to equal remuneration for work of 'equal or comparable value', and the explanatory memorandum makes clear that this does not depend on showing that discrimination exists.

The result of this small change has been the historic victory in the social and community sector equal remuneration case.[75] This will deliver equal pay to some 150,000 workers in the community sector, and shows that equal remuneration provisions are now working properly.

Low pay and insecure work

Statistics show that women disproportionately work in low-paid jobs, and in insecure forms of work. The Act attempts to lift workers out of low-paying jobs by encouraging enterprise bargaining, and by providing the low-paid bargaining stream. However, as set out above, enterprise bargaining does little for vulnerable workers with low bargaining power, and the low-paid bargaining stream (to date) has done little for workers who are covered by workplace agreements but who remain low-paid, despite that.

Without adequate additional legislative protections, women will remain trapped in casual, temporary or part-time and low-paid work, in cases when they would prefer a full-time job with some flexibility of working hours. Tackling insecure work is a major challenge for the future, and one which will play a key role in addressing women's disadvantage in employment and society.

[75] *Re ASU; Application for Equal Remuneration Order* [2012] FWAFB 1000.

Conclusion

The Act is to be applauded for taking additional steps to help women workers in their battle for equal pay, decent incomes, and in the challenge of balancing work, family and caring commitments. However, the Act would better meet its objectives if the 'right' to request flexible work were extended to more workers, and made enforceable; if it supported family violence victims; and if it did more to tackle the problem of insecure work.

Appendix 1 – Further reforms

Set out below are some of the more significant policy reforms which are needed if the Act is to fully meet its objectives of providing fair and enforceable workplace rights, and a collective bargaining system that addresses the reality of business structures in the twenty-first century.

Issue	Proposal
Promoting collective bargaining	
There are barriers to multi-employer bargaining.	The Act should allow access to multi-employer bargaining (including access to the low-paid bargaining stream) based on a simple 'public interest' test
Given the abandonment of the conciliation and arbitration power, there is no basis for retention of the 'matters pertaining' restriction on agreement content, particularly in the light of the observations of the ILO Committee on FOA regarding such restrictions.	The Act should permit agreements to be made on all matters affecting employees' working lives, including job security (cf 'matters pertaining') The Act should allow agreements on social and economic matters which have a direct impact on workers in general (as permitted by ILO)
The Act prevents bargaining representatives from agreeing on right of entry and termination of employment procedures that might be more appropriate, convenient or desirable for the enterprise and its employees.	The Act should permit agreements to improve on statutory right of entry and statutory unfair dismissal provisions
Deadlocks in bargaining are arising including where the enterprise has not previously engaged in bargaining.	For vulnerable workers, or where the parties are bargaining for their first agreement, or where there is no reasonable prospect of reaching agreement because of 'surface bargaining'), FWA should have a discretion to arbitrate a workplace determination (which would also include any agreed terms).
The Act imposes a requirement to facilitate Individual Flexibility Arrangements on bargaining representatives.	IFA clauses should not be mandatory
Protected industrial action	
Protected action ballot provisions lead to complexity and delay and do not achieve their stated object of establishing 'a fair, simple and democratic process'.'	Applications for a protected action ballot should be made ex-parte. Employers should not have standing to object to an application for a ballot.
The Act applies differential treatment to employers and employees giving notice of protected industrial action.	Employers should be required to give 3 days' notice of a lockout
The effectiveness of protected industrial action can be reduced by the engagement of replacement labour.	Consistent with ILO recommendations and guidance material produced by the International Confederation of Private Employment Agencies, the Act should clarify that the use of replacement labour during a bargaining dispute constitutes bad faith conduct.

'Start-up' labour can be used to lock down conditions in enterprise.	If the number or identity of workers covered by the agreement changes significantly from the time the agreement was approved, the workers should be able to terminate the agreement by majority and initiate bargaining for a new agreement.
Resolution of disputes	
Workers do not necessarily have access to independent arbitration of disputes about the operation of awards and agreements	Ensure that all employees and employers have equal access to assistance from the independent umpire to resolve disputes. Specifically: • The Act should require enterprise agreements to provide for arbitration as the final stage of dispute resolution, where the dispute cannot be resolved through discussion, conciliation or mediation; • Workers in award-dependent workplaces should have access to arbitration of disputes about the operation of the safety net (awards or NES).
Unprotected industrial action is treated as unlawful in certain circumstances without resort to Fair Work Australia.	If unprotected industrial action occurs, employers should be required to obtain a stop order from FWA before seeking injunctions from the courts.
Protection against unfair treatment	
Workers should have uniform protection against unfair dismissal.	Remove special rules for small business (extended probation period; Code)
Workplace Representative / Delegates' rights: The Act contains objects regarding representation at work but it lacks any clear expression of the content of those rights.	While the General Protections function to protect employees from discrimination, the Act does not create the positive rights needed for workplace representatives to perform their role. The status and minimum rights of workplace representatives (in relation to representing workers training, time, resources etc) should be codified.
Increase social inclusion and secure employment.	The right to request flexible work should be extended to parents of adult children with a disability, workers aged over 55, and ultimately to all carers
Workers in the building and construction industry are subject to different laws, including greater penalties and restrictions on the taking of industrial action.	No special laws for workers in the building & construction industry. Repeal Building & Construction Industry Improvement Act 2005. Note legislation before Parliament.
Right of entry	
Employers routinely frustrate opportunities for workers to meet with their unions.	The location of discussions with workers needs to be consistent with the objective of given workers the opportunity to meet with their union – in practice this means where the workers are located.

Appendix 2 — Technical Issues

Issue	Proposed Solution	References
APPLICATION OF ACT		
Use of corporate personalities to avoid industrial regulation in the aviation industry: See split decision in [2011] FWAFB 3706	The Act should apply to employees on aircraft flying to/from Australia that are flown by foreign subsidiaries of Australian airlines.	Option 1: As per *Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011* Option 2: Amendments to s.13 and 14 that interact with international airline licence provisions in the *Air Navigation Act* 1920 and Air Operations Certificate Provisions in the *Civil Aviation Act* 1988 and associated arrangements for the grant of AOC's with ANZA privileges.
Uncertainty and intractable bargaining matters involving the public sector (eg nurse-patient ratios, public service redundancy, etc)	The States should be encouraged to refer power to overcome *Re AEU* limitations.	Schedule for WRMC discussion.
Poor compliance and difficult enforcement concerning outworkers in the TCF Industry.	More effective and user friendly investigation and enforcement/recovery of underpayments and further cultural change in the industry is required.	As per *Fair Work Amendment (Textile, Clothing & Footwear Industry) Bill* 2011
NATIONAL EMPLOYMENT STANDARDS		
Uncertainty regarding what constitutes 'casual' employment for the purposes of the Act.	The Act should clarify that a 'casual' worker refers to a 'true' casual (engaged on a temporary or irregular basis) (*Williams v McMahon*)	Add a definition to s.12
There is a lack of clarity about the interaction between unpaid parental leave and the paid parental leave scheme.	The unpaid parental leave provisions need to be made consistent with *Paid Parental Leave Act*	Division 5 of Part 2-2 needs to be amended.
The Act contains discriminatory provisions.	The concept of 'family' (for compassionate leave, carer's leave) should include indigenous and non-traditional family arrangements	Amendments to section 97, 102, 104 & 105.
Pre-payment of leave entitlements undermines intent of Act and creates incentive to not utilise leave.	The pre-payment of paid leave should be banned (overturning *Warren v Hull-Moody Finishes*) in favour of payment of leave at the time leave is taken or in the last pay period before that leave is taken.	Amendments to section 90.
Confusion and disputes regarding entitlements to Public Holidays.	The government should develop a National public holiday standard: 12 holidays per year (+ additional days when Xmas/Boxing Day/New Years' on weekend)	Revision of Division 10 of Part 2-2.
Inconsistency in NES regarding the averaging of hours over a period can result in agreement covered employees being worse off.	An enterprise agreement should not provide for the averaging of hours for employees over a period long than the period (if any) provided by the modern award that covers the relevant employee.	Amend section 63.

Issue	Proposed Solution	References
MODERN AWARDS		
During Award modernisation, award terms that supplemented the NES that were either generally prevalent or prevalent in particular industries were not incorporated on the basis that: • Doing so would be inconsistent with the NES; or • Doing so would undermine the NES; • Doing so would exclude a provision of the NES. The Act and the Award Modernisation Request both permitted terms in modern awards to supplement the NES.	The Act should clarify that awards can supplement the NES, and require FWA when considering variations and award reviews to consider (without otherwise limiting its discretion) the need to ensure a fair safety net of employees having regard to historical award provisions in the industry.	Amend Part 2-3 with respect to reviews of Modern Awards and variations to Modern Awards.
FWAs time has been taken up unnecessarily with numerous award variation applications which were clearly speculative and without foundation. FWA heard these applications to completion and determined them.	The Act should clarify that FWA has the power to strike out award variation applications, with or without hearing evidence, on conventional grounds adopted by the courts.	Insert new provisions in Division 5 of Part 2-3.
There is little guidance in the *Fair Work (Transitional Provisions and Consequential Amendment) Act* for the retention of enterprise awards through the enterprise instrument modernisation process.	The Act should provide more relevant matters for the Tribunal to take into account when deciding whether to modernise an enterprise award. These could include the prevalence of enterprise instruments in the industry and the size enterprise that the instrument covers.	Amendments to Item 4 of Division 2 Part 2of Schedule 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act*.
Inconsistency regarding the public nature of statutory instruments; lack of transparency over IFAs	The Act should require Individual Flexibility Arrangements to be lodged with FWA and made public (with relevant identifying information removed).	Amendments to Division 5 of Part 2-4, amendments/additions to sections 144-145(or thereabouts)
The NES Long Service Leave provision was intended to be transitional and is complex.	The Act should permit awards to deal with LSL, pending the development of a national statutory scheme	Amend/remove section 155.
Equal remuneration not a criterion in 4-yearly review of awards.	The Act should require FWA to take into account pay equity when conducting 4-yearly reviews of awards	Amendments to Part 2-7 and Division 4 of Part 2-3.

Issue	Proposed Solution	References
ENTERPRISE AGREEMENTS		
Good faith bargaining process		
The making of enterprise agreements with workers on 456 & 457 visas who are unrepresented defeats the purpose of the market salary rate controls.	If more than 1/3rd of workers to be covered by an agreement are foreign residents, the employer must facilitate contact between the foreign workers and unions as soon as bargaining begins.	Amend section 188.
Have been challenges to the rights of union officials to act as bargaining representatives in their own right, where only one union in workplace	The regulations requiring 'independence' of bargaining representatives need amendment.	Amendments to regulation 2.06 of Division 3 of part 2-4 of the *Fair Work Regulations* (or thereabouts).
Difficulty bargaining with other employee bargaining representatives when their identity is unknown.	The employer should be obliged to inform all bargaining representatives of who the bargaining representatives for the proposed enterprise agreement are (to the extent they are aware of this)	Amend Division 3 of Part 2-4.
There needs to be greater support for the bargaining process at workplace level.	The Act should clarify that the GFB rules permit employees to meet and discuss bargaining claims on work time (including with the involvement of a union delegate or official)	Amendments to section 228.
There needs to be clarification regarding when unilateral offers are inconsistent with the good faith bargaining requirements.	The Act should prohibit an employer from putting a proposed agreement to a vote unless FWA is satisfied that bargaining has reached an impasse.	Amendments to section 228 and/or 188.
Employers are asking employees to tell them who is their representative in bargaining. In many instances this results in union members being identified as such.	Prohibit such requests and clarify that the provision of such information is not required to meet the good faith bargaining requirements.	(1) Amend s. 228(1)(b) to clarify that there is no requirement for a person to disclose whether they are a member of a union; and (2) Add a specific prohibition on employers requiring a person do disclose their membership status (eg add the end of Division 5 of Part 3-1). (3) Amend Fair Work Information Statement to ensure employees are aware of (2) above.
The definition of 'commercially sensitive' information is too vague and open to abuse	The Act should explicitly permit such information to be disclosed to particular persons in exchange for any undertakings that Fair Work Australia is satisfied are necessary and sufficient to protect the commercial sensitivity identified.	Amend GFB provisions
Employees covered by individual instruments (e.g. ITEAs, AWAs) which have passed their nominal expiry date are entitled to vote on a collective agreement, even though the collective	Ensure that employees on individual instruments are not permitted to vote on collective instruments unless they have first executed a conditional termination of their individual instrument.	Amend *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009: Schedule 13, Item 2; Schedule 3, Items 18 & 30 and any other

Issue	Proposed Solution	References
agreement will not apply to them.		consequential amendments.
Scope		
The wishes of the collective bargaining unit are not given any elevated priority in the determination of scope orders.	The level at which collective bargaining occurs should be reflect the choice of the employees constituting it, except the group proposed is not fairly chosen or where it would impede the fair and efficient conduct of bargaining.	Amend section 238.
Industrial action (& arbitration)		
If a protected action ballot is granted 30 days before the nominal expiry date of an existing agreement (s. 438) and the ballot supports the taking of protected action, the giving of notice of action (and taking any other actions necessary to plan for the action) remains unlawful (s.417) until after the nominal expiry date has passed, even where the action is not due to take place until after the nominal expiry date.	Permit the organising of any industrial action that is authorised by a protected action ballot.	Amend section 459.
There is uncertainty concerning the proper interaction of sections 409(1)(b)(ii), 437(3)(a),437(5),443(3).	The Act should clarify that members who join the union after the ballot is ordered should be able to take protected action.	Amend Division 8 of Part 3-3.
When satisfied that unprotected action is happening, or that is threatened or impending or probable, or that it is being organised, FWA has no role other than to order that that action stop, not occur or not be organised.	FWA should have a discretion as to whether to make orders in response to unprotected action or to recommend other courses of action that might encourage a resolution of any underlying dispute.	Amend section 418 (including so as to enliven the powers in s. 595).
Where applications are made to suspend or terminate protected industrial action, the only orders that FWA can make are to suspend all protected action or terminate all protected action. This creates incentives for tactics that are inconsistent with good faith bargaining and genuinely trying to reach agreement [eg *NTEU v. AHEIA* Print S7058]	If there are grounds for terminating/suspending *protected* action (threat to economy, etc), FWA should have full discretion as to what to do to address that risk (ie no mandatory orders). This might involve making orders to suspend or terminate some or all protected action, with or without making other directions or recommendations that could facilitate the bargaining process.	Amendments to Division 6 of Part 3-3 (including so as to enliven the powers in s. 595).
Employers are permitted to evict workers from their accommodation during periods of protected industrial action (cf [2011] FMCA 802)	The provision of accommodation should not constitute a 'payment' for the purposes of Division 9 of Part 3-3.	Amend Division 9 of Part 3-3.
The inclusion of one or more employees who are covered by an unexpired collective agreement in the scope for proposed enterprise agreement has the result that the entirety of the group to	Protected action ballots and protected action should be available in respect of all those employees proposed to be covered by the agreement who are not by the unexpired instrument.	Repeal I17 of Schedule 13 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act* while retaining I4 of that Schedule.

Issue	Proposed Solution	References
be covered by the proposed agreement is unable to take protected industrial action: I17 of Schedule 13 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act* (cf [2011] FWAFB 1327).		
Protected action ballot orders must be revoked and remade in order to alter the timetable for voting.	Option 1: Protected action ballots should be able to be varied on the application of the applicant, including to specify a timetable for the conduct of the ballot; OR Option 2: Require the timetable for the ballot to be prescribed in the Order.	Amend section 447 Amend 443 ,447 & other consequential amendments.
Protected action ballot orders seem to adopt a 'one size fits all' approach with the close of voting being 20 days after the issuing of the order. In many cases this is not suitable and unduly restricts the ability of unions to organise their activities.	Require ballots to be concluded expeditiously.	Amend section 443.
The Australian Electoral Commission has a strong preference for postal ballots over attendance ballots.	Option 1: Require Australia Electoral Commission to give greater weight to applicant's preference; OR Option 2: Require the Order to specify the method of voting	Administrative Action. Amend sections 443 &447, other consequential amendments.
The Act does not permit electronic protected action ballots. This creates inconvenience and difficulty voting for workers in remote locations.	The Act should allow FWA or the AEC to approve electronic ballots.	Amend Division 8 Part 3-3 and make any consequential amendments to Regulations etc.
Section 459(1)(d) provides an incentive to escalate industrial action.	Abolish the '30 day rule'.	Repeal section 459(1)(d)
Agreement content		
The integrity of Enterprise Agreements is undermined by the capacity to opt out of them. The approval process where agreements permit opting out is not democratic.	The Act should prohibit opt-out agreements (cf *Newlands Coal*)	Amend section 194.
The Act imposes a strict 'no extra claims' regime during the period of operation of the agreement. In that context access to arbitration of agreement disputes is required to ensure effective and enduring settlement of workplace disputes.	The Act should require agreements to contain a clause which permits a party to refer disputes about the operation of the agreement to FWA (or independent 3rd party) for arbitration.	Amend section 186(6) of the Act and Schedule 6.1 to the *Fair Work Regulations* 2009.

Issue	Proposed Solution	References
Agreement operation & coverage		
Corporate forms and labour supply arrangements are used to undermine enterprise agreements and collective bargaining.	An agreement should bind the nominated employer as well as any subsidiary or agent of the employer (including contractors and labour hire firms) in respect of the type of work covered by the agreement.	Amend section 53.
'Start-up' labour can be used to lock down conditions in enterprise.	If the number or identity of workers covered by the agreement changes significantly from the time the agreement was approved, the workers should be able to terminate the agreement by majority and initiate bargaining for a new agreement.	Inert new provisions before Division 8 of Part 2-4.
UNFAIR DISMISSAL		
Time limits for unfair dismissal claims are oppressively short, and there is a lack of uniformity in time limits applicable to termination of employment disputes.	The deadline for claims should be extended to 60 days (like general protections)	Amend section 394.
There is overly rigid insistence on telephone conciliation and the issuing of standard orders for the preparation of matters for arbitration.	More flexibility around scheduling of conciliation and hearings	Administrative action.
The minimum employment period should not prejudice employees where there has been a change to the ownership of the enterprise.	The minimum employment period should be assessed having regard to the period during which a transferring employee has performed transferring work (as defined in section 311).	Amend section 383.
GENERAL PROTECTIONS		
Adverse action		
There is no jurisdiction to consider general protections (and unlawful termination applications) in so far as the claim as pleaded in Court adds further grounds than those identified in the application to Fair Work Australia (cf [2011] FMCA 535).	Once an application has been lodged Fair Work Australia under s. 365 or 773 and a certificate granted, the claim should be able to proceed in the Court even if the grounds pleaded are more expansive than was evident from the claim as filed in Fair Work Australia.	Amend sections 371 and 779.
Section 351(2)(a) is ambiguous, and does not clearly confine the defence to discriminatory conduct which is expressly authorised under an exception to State or federal laws	The Act should confine the defence to cases where there is a specific exemption for the discriminatory conduct.	Amend s 351(2)(a).
If a General Protections dispute does not involve a dismissal, there is no requirement for the respondent to attend a conference at Fair Work Australia, yet they most likely will be obliged to attend a Court ordered mediation after thousands of dollars have been spent.	Require parties to attend conferences in Fair Work Australia for all General Protections disputes.	Amend section 374.

Issue	Proposed Solution	References
RIGHT OF ENTRY		
Entry rights provide little more than a statutory license to *enter premises* without the occupier's consent. There are few barriers to employer conduct that prevents or impedes *access to workers*.	Employers should be obliged to take reasonable steps to facilitate contact between permit holders and workers (for example, inform workers that the permit holders are on the premises, allow permit holders to use transport offered to employees in remote locations).	Insert new Subdivision 'Requirements for employers and occupiers' after Subdivision C of Division 2 in Part 3-4.
There is no positive obligation to ensure that the locations in which permit holders meet with workers are private and not observed by management. This leads to a catch 22 requirement of unions needing to initiate proceedings in Fair Work Australia in which they could only succeed by calling direct evidence from the workers who are discouraged or feel intimidated by being observed to have associated with the union, and subjecting those workers to cross examination by their employer.	The venue for meetings must be strictly private, without the capacity for management to observe who attends.	Amend section 492.
A permit holder's right to enter premises to investigate a suspected contravention in relation to a member is extinguished if the employer terminates the employment of that member.	Unions should be able to enter the premises where there members have been employed to exercise investigate rights and access their records.	Amend section 481(1)(b)
The requirement for permit holders to give 24 hours' notice to enter to inspect employee records in connection with State Health and Safety laws adds complexity with no justification.	Remove the requirement.	Division 3 of Part 3-4
There is no policy justification for the 'residential premises' exemption where the entry requirements are already conditioned by the necessity for work to be performed on the relevant premises.	Remove the residential premises requirement.	Repeal s. 493.
No clear policy objective in prohibiting extended notice of entry.	Permit holders should be permitted to enter premises 24 hours after serving an entry notice (as is the case now), but should not lose the right to enter should they wish to give the notice more than 14 days in advance.	Amend section 487(3)/
REPRESENTATION ORDERS		
Section 137A orders regarding 'workplace groups' are highly unlikely to be granted (cf. [2012] FWAFB 461) and most practical circumstances can be deal with under s. 230(3)(ii) in any event.	Workplace group orders to be abolished	Repeal Part 3 of Chapter 4 of the *Fair Work (Registered Organisations) Act*.

Issue	Proposed Solution	References
ADMINISTRATION & ENFORCEMENT		
Inspectorate		
The Fair Work Ombudsman is permitted to duplicate enforcement action taken by another party (cf [2011] FCA 816).	The Act should prohibit the Fair Work Ombudsman (or an Inspector) from commencing or continuing proceedings in relation to a matter where the Fair Work Ombudsman is satisfied that proceedings have been commenced by another person in relation to that matter.	Insert amendments after Subdivision C of Division 3 of Part 6-1.
Courts		
When orders are made in proceedings commenced in the Small Claims division of the Federal Magistrates Court, written reasons for decision are not provided.	Decisions in the small claims jurisdiction should be published, or at least litigants should have a right to written reasons.	Amend the FMC Act, or the FW Act.
Court fees provide a disincentive to enforce rights.	Court fees should be abolished for applicants in small claims matters	Amend Fees Regulations for Federal Court and Federal Magistrates Court.
MISCELLANEOUS		
There is no obligation for the employer to identify on payslips the instrument under which employees are being paid.	This should be such a requirement.	Amend regulation 3.46

Glossary

AIRC	Australian Industrial Relations Commission
ABN	Australian Business Number
ABS	Australian Bureau of Statistics
Act	*Fair Work Act 2009* (Cth)
ACTU	Australian Council of Trade Unions
AFPCS	Australian Fair Pay and Conditions Standard
APCS	Australian Pay and Classification Scale
ATO	Australian Taxation Office
AWA	Australian Workplace Agreement
AWIRS	Australian Workplace Industrial Relations Survey
AWOTE	Average weekly ordinary time earnings for full-time adults
BOOT	Better Off Overall Test
C14	Classification C14 under the Manufacturing modern award
CPI	Consumer Price Index
DEEWR	Department of Employment, Education and Workplace Relations (Cth)
FMW	Federal Minimum Wage
FWA	Fair Work Australia
FWO	Fair Work Ombudsman
IFAs	Individual Flexibility Arrangements
ILO	International Labour Organisation
LSL	Long service leave
NES	National Employment Standards
OECD	Organisation for Economic Co-operation and Development
OH&S	Occupational health and safety
PIR	Post Implementation Review
RULCs	Real unit labour costs
UN	United Nations
Work Choices	*Workplace Relations Act 1996* (Cth), as it stood after 26 March 2006
WPI	Wage Price Index
WR Act	*Workplace Relations Act 1996* (Cth)