June 2017

FAIR WORK AND THE RIGHT TO WORK

Gideon Rozner, Research Fellow

Institute of Public Affairs
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1943 - 2018

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About the author

Gideon Rozner is a Research Fellow at the Institute of Public Affairs. He was admitted to the Supreme Court of Victoria in 2011 and spent several years practicing as a lawyer at one of Australia's largest commercial law firms, as well as serving as interim general counsel to an ASX-200 company. Gideon has also worked as a policy adviser to ministers in the Abbott and Turnbull Governments. He has been published in the Herald Sun and The Spectator Australia, and has appeared on Sky News, 3AW and Network Ten's *The Project*.

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Contents

Executive summary

The Rudd Government's 2009 overhaul of Australia's industrial relations regime represented a substantial reversal of almost two decades of reform. Australia's trajectory towards decentralised wage-setting directly between employers and employees was arrested in favour of a system with government and trade unions at its core.

The reregulation of the labour market by the Fair Work regime ('Fair Work') has not only come at a cost to businesses and the economy as a whole, but to workers and, more importantly, the unemployed.

Fair Work has interfered with the right to work in three main ways:

1. *Reducing labour market flexibility* – The so-called 'award modernisation' process, purportedly aimed at consolidating the thousands of existing pre-Fair Work awards, has simply entrenched outdated conditions. The subsequent review process has allowed for a steady 'creep' of award conditions in response to union demands.

   Under previous workplace relations regimes, enterprise-level collective and statutory individual agreements allowed for the 'bargaining away' of award conditions in the interest of flexibility. However, while Fair Work technically allows for enterprise bargaining and individual flexibility agreements, the new 'better-off overall' test makes these an expensive and often pointless option.

   As a result, many businesses are effectively locked into inflexible award conditions, such as penalty rates and 'minimum engagement' periods, which act as barriers to employment.

2. *Imposing economic barriers to employment* – Fair Work removed the requirement to take into account the needs of the unemployed when setting the minimum wage. Also, the award modernisation and review process and new National Employment Standards have resulted in further 'creep' in pay and allowances that have led to unsustainable wage growth.

3. *Structural disincentives to hire* – The reinstatement of unfair dismissal laws for all businesses and expansive new 'general protections' provisions have resulted in an explosion of applications to the FWC for wrongful termination of employment. The time and expense involved in defending these often frivolous claims is likely to discourage businesses from hiring, making it more difficult for the unemployed to find work.

Because of the disproportionate powers given to trade unions under Fair Work, workplace flexibility will continue to deteriorate going forward as union demands escalate. Substantial reform of Fair Work is needed to prevent growing numbers of Australians being locked out of the labour market.

Introduction

In 2005, the trade union movement embarked on a sophisticated campaign against the industrial relations policies of the Howard Government. The 'Your Rights at Work' campaign led in part to the election of the Rudd Labor Government in 2007, which quickly overhauled Australia's workplace relations system.

The centrepiece of the new system was the Fair Work Act, which restored the role of centralised wage determination, collective bargaining and trade unions, reversing decades of bipartisan industrial relations reform that had increasingly favoured direct negotiation of pay and conditions between employers and employees.

Much of the discussion around the Fair Work regime has focused on its impact on employers and businesses, or on the economy as a whole. While these issues are important, less attention has been given to the significant barriers that Fair Work has imposed on those seeking work and even those already in employment.

This paper will examine the ways in which Fair Work has deprived many Australians of the dignity of work. In particular, it will critique the way in which Fair Work interfered with the right to work by:

1. reducing labour market flexibility and restricting the right to work;
2. imposing economic barriers that have effectively priced many Australians out of the labour market; and
3. creating structural disincentives for employers to hire.

For the purposes of this paper, the term 'Fair Work' refers to the Fair Work regime as a whole, including the Fair Work Act, administrative structures such as the Fair Work Commission (formerly Fair Work Australia) and processes such as so-called award modernisation.

Reduced labour market flexibility

By reversing decades of reform towards flexible workplace agreements between employers and employees, Fair Work has reduced the right of Australians to negotiate conditions that maximise their ability to contribute to the work force. This has both affected the right of people to make a greater contribution to their existing work and, in many cases, prevented people from working at all.

'Modern' awards and regulatory creep

One of the Rudd Government's first legislative acts was putting in place interim arrangements prior to the eventual overhaul of the industrial relations system.[1] As part of these arrangements, the government commissioned the Australian Industrial Relations Commission (AIRC) to consolidate the more than 4300 existing industrial awards into 122 'modern' awards.

The then-minister, Julia Gillard, indicated that modernisation would do away with awards that were 'lengthy, prescriptive and unwieldy' and ensure that the new ones were 'simple to understand, easy to apply and reduce the regulatory burden on businesses'.[2]

In practice, the review of awards has simply consolidated and entrenched the archaic and outdated conditions that already existed. As employer groups have noted, Fair Work has allowed for 'rent seeking' behaviour by unions in the determination of the new awards:

> The extremely broad discretion conferred upon the [Fair Work Commission] under... the [Fair Work] Act allows this practice to flourish, resulting in a 'mish mash' of conditions which have artificially been raised and 'inflated' to be far and above what could reasonably or objectively be considered a safety net.[3]

Further, the subsequent four-yearly review of modern awards by the Fair Work Commission (FWC) has allowed for further increases via the 'back door':

> The award modernisation and review processes under the current system have again reinvigorated notional union test cases, which are being used as a means to expand national standards via the FWC, bypassing the regulatory impact assessment process that would now be expected to accompany proposals for legislated minimum standards.[4]

As a result, we have seen a steady creep in inflexible and uneconomic workplace standards across many industries, such as:

- 'minimum engagement' periods, which prohibit work shifts of less than three hours;[5]
- penalty rates for weeknight and weekend work; and
- the unsustainable expansion of 'allowances' on top of base pay, particularly in industries such as construction.[6]

1 See *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth).

2 The Hon Julia Gillard MP, Speech delivered at the Fair Work Australia Summit, 29 April 2008.

3 Victorian Employers' Chamber of Commerce and Industry, *Submission to the Productivity Commission: Review of the Workplace Relations Framework* (March 2015), accessed 2 May 2017, http://www.pc.gov.au/__data/assets/pdf_file/0012/187797/sub0079-workplace-relations.pdf, 28.

4 Australian Chamber of Commerce and Industry, *Submission to the Productivity Commission: Review of the Workplace Relations Framework* (March 2015), accessed 2 May 2017, http://www.pc.gov.au/__data/assets/pdf_file/0007/188197/sub0161-workplace-relations.pdf, 35.

5 See, for example, *Clerks – Private Sector Award 2010*, cl 11.5.

6 See, for example, *Building and Construction On-site Award 2010*, pt 4.

THE RIGHT TO WORK

Inflexible award conditions present a particular barrier to employment for younger people. Many high school students, for example, are unable to take an after school job for which the minimum shift is three hours. Employment on the weekend for students is also difficult because of penalty rates that apply in many awards, reducing employers' ability to offer weekend work.

Enterprise bargaining agreements not a genuine alternative

Labor's 2007 election policy championed collective bargaining at the enterprise level, consistent with the Hawke and Keating-era reforms, through 'the development of fair and flexible employment arrangements that are tailored to suit the needs of an individual business and the needs of employees'.[7] Enterprise bargaining agreements would 'be at the heart of Labor's industrial relations system'.[8]

In reality, trade unions were put at the heart of the new industrial relations regime, aided by Labor's new rules for enterprise bargaining agreements (EBAs) which gave them disproportionate bargaining power.

While EBAs theoretically offer an avenue for flexible workplace arrangements as an alternative to awards, Fair Work has created an environment in which, according to employer groups, businesses are 'forced into procedurally complex, costly and sometimes very public negotiations relating to bargaining agreements, once bargaining has been initiated'.[9] Navigating these processes invariably requires either internal human resources specialists or the engagement of external consultants and advisers. Because smaller businesses usually lack these resources, they are effectively forced to remain on the default awards.

As one employer group explains, with reference to the hospitality industry, the prescriptive and prohibitive process of enterprise bargaining under Fair Work borders on self-defeating:

> The rigid nature of applying for, and negotiating an Enterprise Agreement acts contrary to the very intention of workplace bargaining. The framework surrounding agreement making ought to encourage businesses of all sizes to negotiate an agreement of mutual beneficence, irrespective of business size. However, smaller operators are often put off by inflexible rules and technicalities.
>
> Failure to meet one of the specified periods (e.g. issuing of representational rights within 7 days of sighting intention to bargain, cannot institute a vote less than 21 days after the representational rights have been issued, adhering to the 7 day accessing rule) can lead to the entire agreement being rejected by the FWC. The inflexibility can be detrimental to small operators, who may not be practically able to follow such a rigid timeline... These timeframes ought not be a contributing factor in the legitimacy of an agreement, particularly in circumstances where both parties have come to a consensus on the terms of an agreement. Having to begin the process again can incur significant and materially destructive costs for small to medium sized enterprises.[10]

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7 Australian Labor Party, *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces* (April 2007), accessed 2 May 2017, http://pandora.nla.gov.au/pan/22093/20071022-1405/www.alp.org.au/download/now/forwardwithfairness.pdf, 13.

8 Ibid, 3.

9 Australian Chamber of Commerce and Industry, above n 4, 96

10 Restaurant and Catering Australia, *Submission to the Productivity Commission: Review of the Workplace Relations Framework* (March 2015), accessed 3 May 2017, http://www.pc.gov.au/__data/assets/pdf_file/0004/189868/sub0097-workplace-relations.pdf, 26.

THE RIGHT TO WORK

The barriers to enterprise bargaining have deprived small businesses of the flexibility to pare back award conditions that prevent them from hiring additional workers, such as penalty rates. This particularly affects sectors such as retail and hospitality, which would otherwise be well-placed to offer employment to relatively disadvantaged job-seekers, such as people with little prior experience or education.

One particular flaw in Fair Work's enterprise bargaining rules is the better off overall test (BOOT), which must be satisfied before the FWC can approve an EBA. To meet the requirements of the BOOT, the FWC must be satisfied that each employee covered by the relevant award would be 'better off overall' under the proposed EBA.[11] While the BOOT superficially resembles the old no-disadvantage test (NDT) which has applied to EBAs prior to Fair Work, the BOOT represents a significant departure from the NDT insofar as it requires that the FWC be positively satisfied that all employees under the award will be better off under the proposed EBA. By contrast, the NDT simply prohibited the certification of agreements if it could be proven that employees would be put at a disadvantage relative to the award.[12] The Productivity Commission has acknowledged the way in which this standard limits the availability of EBAs:

> The scope for tradeoffs that assure that the BOOT is passed is limited in enterprise agreements that involve employees who are predominantly on the award. This restricts the desirable uptake of enterprise agreements.
>
> The BOOT requires the FWC to be positively satisfied that an agreement will make all employees better off than the relevant award. This provides a wider scope for the FWC to reject agreements at the approval stage when compared with a NDT, because it changes the onus of proof. Under an NDT, the FWC would need to identify how an agreement makes employees worse off overall in order to reach an agreement.[13]

It is little wonder that even larger, well-resourced businesses have concluded that 'the benefits of an enterprise agreement, with the BOOT in place, do not outweigh the difficulty in implementing them.'[14] In many cases, businesses have no practical choice but to continue to be hamstrung by the default award:

> The complex, multi-layered application of the [National Employment Standards] and awards produces a costly foundation for bargaining due to the way in which the Better off Overall Test (BOOT) is applied. Award content is to prescriptive and costly to bargain away and bargaining outcomes are not delivering innovative, productivity enhancing provisions.[15]

11 *Fair Work Act 2009* (Cth), sub-s 193(1).

12 Ibid, s 31.

13 Productivity Commission, *Review of the Workplace Relations Framework: Inquiry Report – Overview and recommendations* (November 2015), accessed 16 May 2017, http://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-overview.pdf, 35.

14 Restaurant and Catering Australia, above n 10, 25.

15 Australian Chamber of Commerce and Industry, above n 4, 33.

THE RIGHT TO WORK

As explained in the previous section, increasingly cumbersome awards unduly limit the ability of businesses to hire on terms that best meet the needs of both employer and employee. By imposing onerous restrictions on EBAs, Fair Work is effectively forcing many businesses to persist with the relevant award, locking many Australians out of the job market.

Even in cases in which an EBA is negotiated and approved, the disproportionate bargaining power given to trade unions under Fair Work further ensure that such agreements give businesses little by way of additional workplace flexibility. Union-friendly provisions of Fair Work relative to enterprise bargaining include:

- *'Good faith bargaining' laws* – Under Fair Work, where there appears to be majority support for bargaining in a workplace (proof of which may include ballots, petitions or evidence of union membership), the FWC may make an order requiring that employers and employees bargain in good faith.[16] The relevant union is the default 'bargaining representative' for employees during bargaining.[17] If no agreement is reached, one recourse for parties to negotiations is to apply to the FWC for mediation, conciliation or a determination.[18]

  Accordingly, Fair Work allows for businesses to effectively be railroaded into unfavourable EBAs by the FWC. However, employer groups have indicated that 'businesses may find themselves agreeing to terms that produce a "least worst case" outcome', giving in to union demands rather than face the hassle of conciliation or arbitration before the FWC.[19]
- *Greater scope of EBA content* – Prior to Fair Work, the content of EBAs was limited to pay and basic workplace conditions.[20] Terms affecting operational decisions of employers were prohibited, such as restrictions on the engagement of independent contractors.[21] The Fair Work Act not only removed these restrictions on content, but it expressly allowed for EBAs to deal with any 'matters pertaining to the relationship between and employer... and that employer's employees'.[22]
- *Greater scope for protected industrial action* – In expanding the range of matters that can be the subject of enterprise bargaining, Fair Work has also expanded the range of matters that can be the subject of industrial disputes. The Fair Work Act also softened requirements that must be met before a protected action order will be granted. As a result, there have been reports of unions using tactics, such as taking industrial action before bargaining has even commenced ('strike first, talk later') and engaging in aborted strikes that create administrative costs for employers with minimal, if any, effect on the pay of workers.[23]

16 *Fair Work Act,* pt 2-4.

17 Ibid.

18 Ibid.

19 Australian Chamber of Commerce and Industry, above n 4, 94.

20 See *Workplace Relations Act 1996* (Cth), s 356, as repealed by *Fair Work Act 2009* (Cth).

21 *Workplace Relations Regulations 2006* (Cth), sub-reg 8.5(h).

22 *Fair Work Act,* sub-s 172(1)(a).

23 See, for example, Minerals Council of Australia, *Submission to the Productivity Commission: Review of the Workplace Relations Framework* (March 2015), accessed 16 May 2017, http://www.pc.gov.au/__data/assets/pdf_file/0009/187938/sub0129-workplace-relations.pdf, 30; Victorian Employers' Chamber of Commerce and Industry, above n 3, 63.

THE RIGHT TO WORK

Fair Work has allowed trade unions to force businesses into 'good faith' negotiations, engage in aggressive industrial actions to maximise leverage and railroad businesses into EBAs which potentially leave them hamstrung in relation to a wide range of operational and management decisions.

One relevant matter about which unions can now dictate employer decisions is the use of independent contractors and labour hire companies. The Productivity Commission has acknowledged the prevalence of '"jump-up" clauses that require businesses to engage subcontractors on the same terms as employees, or that limit the employment and labour hire employees', which 'come at a cost to independent contractors, labour hire and casual workers, who may miss out on jobs'.[24]

Fair Work has therefore allowed trade unions to impose 'closed shop' dynamics in many industries, depriving many potential employees of the dignity of work.

Meaningless individual flexibility provisions

The Rudd Government introduced the Fair Work Act promising to 'assist employees to balance their work and family responsibilities by providing for flexible arrangements'.[25] To that end, modern awards were required to 'include a flexibility term to enable employers and employees to negotiate an individual flexibility arrangement to meet their needs that may the application of specified award terms'.[26] Allowances for individual flexibility were also required to be included in EBAs.[27]

Given the unworkability of awards and EBAs under Fair Work, one would expect individual arrangements (IFAs) widely used to ensure workplace flexibility. The total proportion of the Australian workforce on IFAs – including both workers who would otherwise be covered by an award and those whose workplace is covered by an EBA – is just 1.6 per cent.[28]

There are two main reasons for the low take-up rate of IFAs:

- IFAs, like EBAs, are subject to the BOOT and therefore too expensive to be of much use to employers;[29] and
- the majority of awards and EBAs limit the matters that can be altered by an IFA to a handful of conditions, such as work hours.[30] Many EBAs limit the matters that can be altered by an IFA to just one 'token' condition, in order to satisfy the Fair Work Act's requirement that flexibility terms be included.[31]

Accordingly, the mechanisms intended to temper Fair Work's considerable impact on workplace flexibility do little to offset the regime's impact on the right to work.

24 Productivity Commission, *Review of the Workplace Relations Framework: Inquiry Report – Volume 2* (November 2015), accessed 16 May 2017, http://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume2.pdf, 818.

25 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 11189-97 (Julia Gillard), 11190.

26 Ibid, 11191.

27 *Fair Work Act,* s 202.

28 Productivity Commission, above n 13, 5.

29 *Fair Work Act,* sub-s 144(4)(c).

30 See, for example, *Cleaning Services Award 2010,* cl 7.

31 *Fair Work Act,* s 202.

Economic barriers to employment

The concept of the minimum wage existed in Australia for over a century before Fair Work.[32] While the minimum wage is generally accepted by the community, setting it at too high a level effectively discourages employment by creating an economic barrier for the unemployed to find work. Higher minimum wages disproportionately affect people with fewer skills and less experience, effectively pricing them out of the labour market.

Fair Work has tipped the balance towards higher wages and allowances for people already in employment, at the expense of those looking to enjoy the dignity of work.

The minimum wage: A shift in priorities

Prior to Fair Work, wage reviews were conducted by the Australian Fair Pay Commission (AFPC). The minimum wage was determined partly with a view to maximising the possibility of getting unemployed Australians into jobs, with the AFPC expressly required to consider 'the capacity for the unemployed and low paid to obtain and remain in employment' and 'competitiveness across the economy'.[33]

Under the new regime, the minimum wage is set by the FWC. While the criteria to be taken into account are somewhat similar to those used by the AFPC, they disclose a shift in priorities away from the unemployed. Unlike the AFPC criteria, Fair Work requires the FWC to consider 'relative living standards and the needs of the low paid' and the one reference to the unemployed is significantly less direct, requiring the consideration of 'promoting social inclusion through increased workforce participation'.[34]

To be sure, the difference between the two sets of criteria appear not to have led to unusually high increases to the national minimum wage by the FWC.[35] However, given that the Fair Work Act also requires the FWC to consider 'the performance and competitiveness of the national economy',[36] we may attribute the mildness of minimum wage increases in part to the fact that the commencement of Fair Work coincided with the Global Financial Crisis and, subsequently, a somewhat sluggish Australian economy.

In any event, other elements of Fair Work have had the effect of increasing wages, in practical terms, to well above the national minimum wage.

32 See *Ex parte H.V. McKay* (1907) 2 CAR 1 ('The Harvester Case').

33 *Workplace Relations Act,* sub-ss 23(a)-(b).

34 *Fair Work Act,* sub-s 284(1).

35 See Fair Work Commission, 'The Australian minimum wage, 1906-2013'. Accessed 5 May 2017, https://www.fwc.gov.au/waltzing-matilda-and-the-sunshine-harvester-factory/historical-material/the-australian-minimum-wage; Workplace Info, 'History of national increases'. Accessed 5 May 2017, http://workplaceinfo.com.au/payroll/wages-and-salaries/history-of-national-increases.

36 *Fair Work Act,* sub-s 284(1)(a).

National Employment Standards

While the minimum wage has grown relatively mildly despite changes to the way in which it is determined, Fair Work has substantially increased other allowances and benefits via the National Employment Standards.[37]

Figure 1 Legislative minimum standards pre- and post-Fair Work.

Australian Fair Pay and Conditions Standard (pre-Fair Work)	National Employment Standards (post-Fair Work)
• Basic rates of pay and casual loadings • Maximum ordinary hours of work • Annual leave • Personal leave • Parental leave and related entitlements	• Maximum weekly hours • Requests for flexible working arrangements • Parental leave and related entitlements • Annual leave • Personal/carer's leave and compassionate leave • Community service leave • Long service leave • Public holidays • Notice of termination and redundancy pay • Provision of a Fair Work Information Statement

Sources: Workplace Relations Act 1996 *(Cth), s 171;* Fair Work Act 2009 *(Cth), s 61.*

As a result, the Australian labour market is one of the most generous in the developed world. Workers in Australia, at a minimum, are entitled to 20 days per year of annual leave, 10 days of paid personal or carer's leave and two days of compassionate leave.[38] Workers are also entitled to up to 13 public holidays (depending on the state jurisdiction), up to 16 weeks of redundancy pay.[39]

Awards and the 'shadow minimum wage'

While Fair Work's increases to statutory minimum conditions are significant, they are being rendered increasingly meaningless by 'creep' in pay and conditions contained in awards (as discussed in the previous section).

The 122 'modern' awards created under Fair Work almost all contain pay above that set by the FWC. As a result, the award system creates a 'shadow minimum wage', as demonstrated across a range of low-paid and low-skilled jobs in figure 2. Of the 2.3 million Australians on awards, 92 per cent receive pay in excess of the statutory minimum.[40]

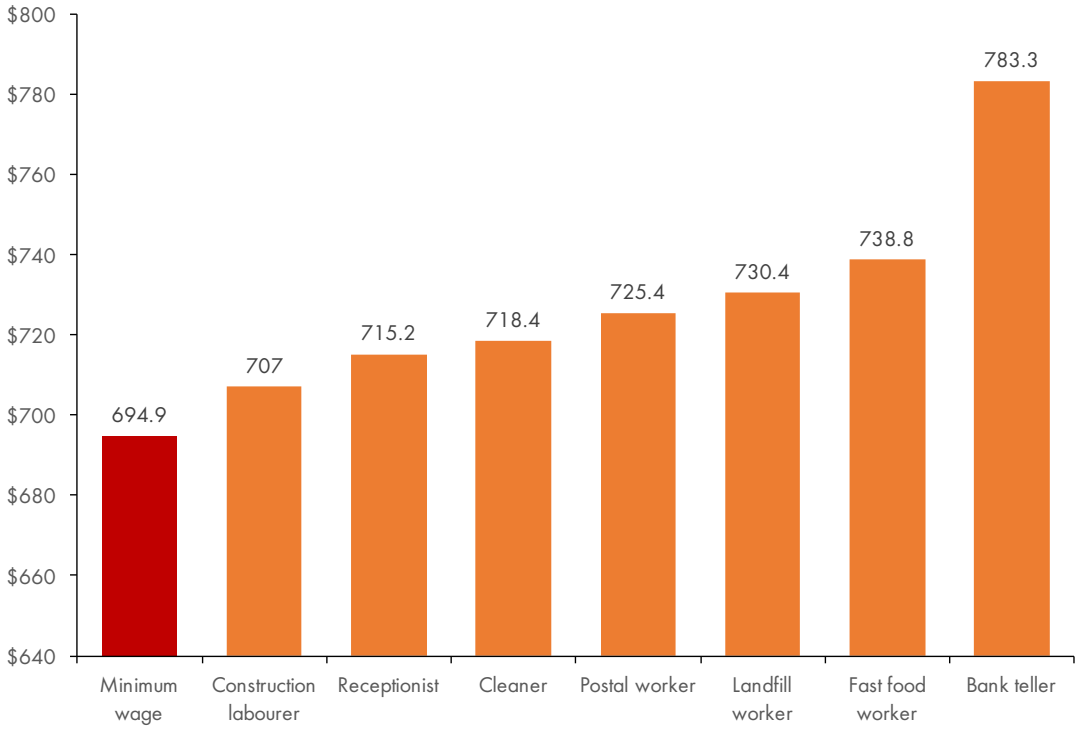
37 Ibid, pt 2-2.

38 *Fair Work Act,* sub-ss 87(1)(a), 96(1), 104(1)-(2).

39 *Fair Work Act,* ss 114, 119.

40 See Commonwealth, *Parliamentary Debates,* Senate Education and Employment Legislation Committee, 29 May 2017, 105 (James Paterson, Alison Morehead).

Figure 2 Minimum pay per week (lowest classification, excluding trainee rates) under various awards, compared with statutory minimum wage.



Sources: Annual Wage Review 2015-16 *[2016] FWCFB 3500;* Restaurant Industry Award 2010; Building and Construction General On-site Award 2010; Clerks – Private Sector Award 2010; Cleaning Services Award 2010; Australia Post Enterprise Award 2015; Waste Management Award 2010; Fast Food Industry Award 2010; Banking, Finance and Insurance Industry Award 2010.

Award wages are even higher once various loadings are taken into account, such as penalty rates. Figure 3 shows the various rates of hourly pay that may apply to an entry-level fast food worker.

Figure 3 Hourly pay rates of an entry-level fast food worker after award loadings.

Condition	Entitlement	Adjusted hourly rate
Base wage	$738.80 per week (per 38-hour week)	$19.40
Penalty rate – Weeknight (between 9:00pm and midnight)	10 per cent loading	$21.34
Penalty rate – Weeknight (after midnight)	15 per cent loading	$22.31
Penalty rate – Saturday	Time and a quarter	$24.25
Penalty rate – Sunday	Time and a half	$29.41
Overtime (First two hours, except on Sundays and public holidays)	Time and a half	$29.41
Overtime (After first two hours, except on Sundays and public holidays)	Double time	$38.80
Overtime (Sunday)	Double time	$38.80
Overtime (Public holidays)	Double time and a half	$48.50

Source: Fast Food Industry Award 2010.

THE RIGHT TO WORK

By allowing for unsustainable wage growth, Fair Work has made it significantly more expensive for businesses to hire. This particularly affects workers in low-skilled jobs, demand for whom is relatively elastic.

As a result, unemployment in Australia has remained relatively high since Fair Work was introduced, hovering at – or exceeding – Global Financial Crisis levels.[41]

We can expect that more and more Australians will be deprived of the dignity of work going forward, as wages continue to increase under Fair Work.

41 Australian Bureau of Statistics, 2017, *Labour Force, Australia,* cat.no. 6202.0, accessed 9 May 2015, http://www.abs.gov.au/ausstats/abs@.nsf/mf/6202.0.

Structural disincentives for employers

In addition to regulatory and economic barriers, Fair Work imposes a number of 'soft' impediments to employment by forcing businesses to navigate a complex, costly and unpredictable industrial relations regime. By substantially reregulating the labour market, Fair Work has created a number of structural disincentives for businesses to hire.

Unfair dismissal

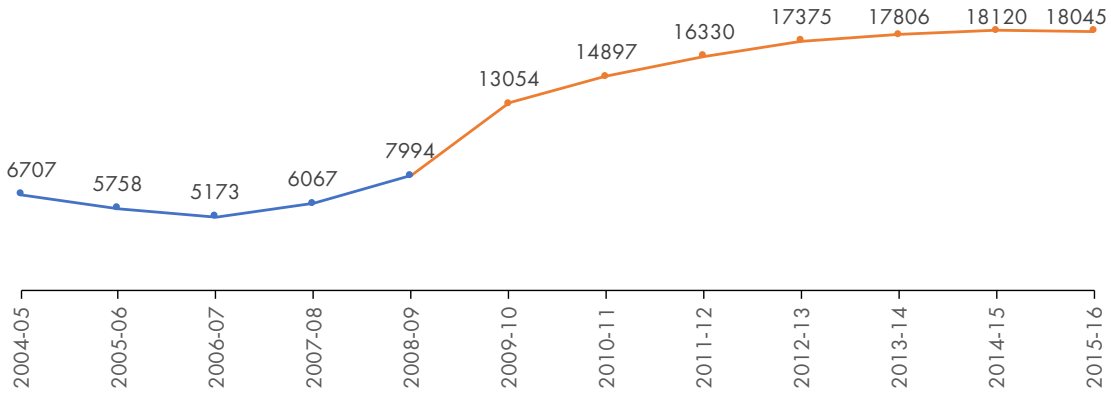
The restoration of unfair dismissal laws was another contentious issue at the 2007 election, with Labor promising to 'restore balance and a "fair go"' and 'establish a simpler unfair dismissal system... and to ensure a faster, less costly and less complex process for all'.[42] Unfortunately, Fair Work has achieved the opposite.

Prior to Fair Work, businesses with 100 employees or less were exempt from unfair dismissal laws.[43] Where unfair dismissal laws did apply, workers could only make a claim after working for a period of six months or longer and proceedings could be dismissed if it could be shown that an employee was dismissed for 'genuine operational reasons'.[44]

Fair Work extended unfair dismissal laws to all businesses (though for those with 15 employees or less, the qualifying work period was extended to 12 months) and removed operational reasons as a defence to claims.[45]

Predictably, the removal of exemptions for smaller businesses has resulted in a dramatic rise in the number of claims for unfair dismissal. As shown in figure 4, the number of applications being made to the industrial regulator for reasons related to termination of employment has more than tripled in the last decade. Most of these applications have been made under unfair dismissal laws.

Figure 4 Applications made to the AIRC (shown in blue) and FWC (shown in orange) for reasons related to termination of employment.



Sources: Australian Industrial Relations Commission, Annual Report 2008-09*; Fair Work Australia,* Annual Report 2009-10*; Fair Work Australia,* Annual Report 2010-11*; Fair Work Australia,* Annual Report 2011-12*; Fair Work Commission,* Annual Report 2012-13*; Fair Work Commission,* Annual Report 2013-14*; Fair Work Commission,* Annual Report 2014-15*; Fair Work Commission,* Annual Report 2015-16.

42 Australian Labor Party, above n 7, 19.

43 *Workplace Relations Act,* s 643.

44 Ibid, ss 643, 649.

45 *Fair Work Act,* part 3-2.

Employer groups report a number of consequences of this explosion in unfair dismissal claims:

- *Expensive and time-consuming processes* – One employer group, in assisting members with the conciliation process, reported spending an average of 11 hours per claim.[46] For matters reaching arbitration, the average was 52 hours.[47] Figures from the FWC suggest that the median time from lodgement of an unfair dismissal claim to determination is almost one and a half months.[48]

  In addition, anecdotal evidence suggests that because costs awards by the FWC are extremely rare, claims with little merit are common, as they can be pursued with no consequences to the employee but significant legal costs for businesses.[49]

- *'Go away' money* – The FWC also reports that over 70 per cent of unfair dismissal applications are resolved at, or prior to, conciliation – that is, without a formal hearing.[50] Of the matters settled at conciliation, over 80 per cent of cases involved a monetary payment.[51] Over a third of monetary payments in 2015-16 involve sums greater than $15,000.[52] Employer groups report that there is a tendency among businesses to settle early to avoid the hassle of a hearing:

  > 'Go away money' is an entrenched part of the system... 80 per cent of employers are influenced by the desire to avoid the cost, time, inconvenience or stress of further legal proceedings in choosing to settle rather than proceeding to an arbitrated outcome. Employers make commercial decisions to dispense with applications rather than incur further expenditure defending a claim.[53]

- *Unpredictable and perverse outcomes* – Reports of unpredictable and often contradictory decisions by the FWC are common. For example, in the space of just two years, the FWC issued a decision that dismissal by text was fair, a decision that dismissal by text was unfair, a decision that dismissal for breach of safety conditions was fair, a decision that dismissal for breach of safety conditions was unfair, a decision that dismissal for social media-related reasons was fair, a decision that dismissal for social media-related reasons was unfair, a decision upholding a dismissal despite procedural flaws and a decision making a finding of unfair dismissal because of procedural flaws.[54]
- *Procedural absurdity* – Employer groups report that FWC processes 'can be frustratingly complex, convoluted and confused'.[55] The Productivity Commission has acknowledged that as a result, 'an employee who has clearly breached the normal expectations of appropriate work behaviour may nevertheless be deemed to have been unfairly dismissed because of procedural lapses by the employer'.[56]

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46 Victorian Employers Chamber of Commerce and Industry, above n 3, 68.

47 Ibid.

48 Fair Work Commission, *Annual Report 2015-16*, accessed 16 May 2017, https://www.fwc.gov.au/documents/documents/annual_reports/ar2016/fwc-annual-report-2015-16.pdf, 46.

49 Victorian Employers Chamber of Commerce and Industry, above n 3.

50 Fair Work Commission, above n 47, 152.

51 Ibid, 39.

52 Ibid, 40.

53 Australian Chamber of Commerce and Industry, above n 4, 109.

54 Ibid, 117.

55 Victorian Employers' Chamber of Commerce and Industry, above n 3, 70.

56 Productivity Commission, above n 13, 30.

General protections and adverse action

One of the most significant differences between the Fair Work Act and its predecessors is its overhaul of laws concerning freedom of association and unlawful termination. Introducing the Fair Work Act, the then-minister claimed that:

> [T]he [Fair Work] bill incorporates the current provisions [of the Workplace Relations Act] relating to freedom of association, unlawful termination and other miscellaneous protections into a streamlined and easy-to-follow part... In doing so, the bill provides more comprehensive protections for workers in some situations.[57]

The most problematic aspect of the new 'streamlined' laws was the vague prohibition against 'adverse action' either in response to, or to prevent, the exercise of a 'workplace right', defined as any 'benefit of, or role or responsibility under, a workplace law, workplace instrument or order made under an industrial body'.[58] As with previous freedom of association provisions, this section was ostensibly intended to prevent discrimination and unfair treatment on the basis of things like union membership. However, the new definition introduced by the Fair Work Act has substantially widened the scope for action by employees in the FWC. As the Productivity Commission has conceded:

> The General Protections are broad and sometimes ambiguous. Unlike the specific unfair dismissal provisions, they provide uncapped compensation, which provides incentives to use them as a more lucrative avenue for compensation for dismissals. Moreover, an employee dismissed for underperformance or breaching workplace codes of conduct has strong incentives to claim that some other non-permitted reason was the true basis for the dismissal (for example, because they had complained about some aspect of management), even if this claim was confected. These factors may have been one of the accelerants for the very rapid growth of dismissal cases under the General Protections. (Dismissal cases account for nearly 80 per cent of total General Protection cases).[59]

Unsurprisingly, applications to the FWC under the general protections continue to increase. While the majority of applications to the FWC in relation to termination of employment are for unfair dismissal, general protections cases have almost tripled, rising from 1,176 in the first year of Fair Work to 3,200 in 2015-16.[60]

57 Julia Gillard, above n 25, 11194.

58 *Fair Work Act,* ss 340, 341.

59 Productivity Commission, above n 13, 32.

60 Fair Work Commission, above n 47, 49; Fair Work Australia, *Annual Report 2009-10,* accessed 16 May 2017, https://www.fwc.gov.au/documents/documents/annual_reports/ar2010/fwa_annual_report_2009-10.pdf, 13.

THE RIGHT TO WORK

Evidence suggests that the costs and administrative burden of workplace laws like unfair dismissal have a substantial impact on the hiring behaviour of businesses.

A 2002 study from the University of Melbourne, for example, concluded that unfair dismissal laws 'impose a significant burden on small and medium sized businesses' and that as a result almost 70 per cent of businesses reported that unfair dismissal laws had at least some influence on their recruitment and staff management procedures.[61] Changes to recruitment practices included:

» longer probationary periods (26.6 per cent of businesses);

» employment of more casuals and fewer permanent staff (21.3 per cent);

» greater employment of family and friends (20.7 per cent); and

» greater use of fixed-term contracts (11.6 per cent).[62]

Businesses also reported that unfair dismissal laws meant that they were less likely to hire 'certain types' of job applicant, including:

» people who had changed jobs several times (35.1 per cent of businesses);

» people who had been unemployed for more than two years (30.3 per cent);

» people who had been unemployed for more than one year (27.4 per cent); and

» unemployed people in general (15.1 per cent).[63]

As with many other aspects of our industrial relations system, laws such as unfair dismissal purport to protect the rights of working people. Even if we accept that they do, we must acknowledge the cost paid by people less likely to secure permanent and stable work, or indeed any work at all.

61 Don Harding, *The effect of unfair dismissal laws on small and medium sized businesses* (Melbourne Institute of Applied Economic and Social Research, University of Melbourne: 2002), accessed 16 May 2017, https://mpra.ub.uni-muenchen.de/43/1/MPRA_paper_43.pdf, iii.

62 Ibid, iv.

63 Ibid.

Conclusion

It has been alleged that advocates for workplace flexibility have had difficulty articulating the way in which Fair Work has substantially and uniquely hindered the right to work. Superficially at least, the institutions created by Fair Work were not new; all had been part of Australia's industrial regime at some point – for example, awards, the minimum wage, collective bargaining at an enterprise level and unfair dismissal laws.

What makes Fair Work so regressive is the way in which these constituent parts interact with each other. The minimum wage has not risen noticeably post-Fair Work, but the continual process of award modernisation and review has resulted in a series of 'shadow' minimum wages that continue to creep upwards. Ballooning award wages are more problematic post-Fair Work because of the new BOOT which makes it harder to bargain them away for greater flexibility. The consequences of unfair dismissal laws are made worse for employers by the procedurally onerous vagaries of the FWC.

Above all, Fair Work has reinstated the role of trade unions at the heart of Australia's industrial relations system. The unions have, in turn, been the juice in the machine that has made Fair Work so insidiously bad for the right to work: Driving pay and conditions of awards up via the modernisation and review process, holding businesses to ransom through enterprise bargaining laws, dragging employers to the FWC over frivolous unfair dismissal claims for which the union bares no cost and, therefore, no risk.

The worst excesses of Fair Work are therefore, arguably, yet to come. Unless Fair Work is substantially reformed, we can expect many more Australians to be denied the right to the dignity of work.

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