



Australian Government

Fair Work Act Review Background Paper

January 2012

This paper has been developed by the Fair Work Act Review and draws on information provided by the Australian Government Department of Education, Employment and Workplace Relations.

Fair Work Act Review- Terms of reference

The Minister for Employment and Workplace Relations, the Hon Bill Shorten MP, has appointed the Fair Work Act Review Panel (the Review Panel) to conduct the post implementation review (PIR) of the *Fair Work Act 2009* (Fair Work Act) (the Review). The Review Panel comprises Dr John Edwards, Professor Emeritus Ron McCallum AO and the Hon Michael Moore.

This is a review required by the Government's best practice regulation requirements, and must commence within two years after the full commencement of the legislation (by 1 January 2012).

Terms of reference have been established by the Minister to guide the conduct of the Review. The Review is to be an evidence based assessment of the operation of the Fair Work legislation¹ and the extent to which its effects have been consistent with the Object set out in Section 3 of the Fair Work Act.

Section 3 states that:

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

- (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
- (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
- (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
- (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
- (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
- (g) acknowledging the special circumstances of small and medium-sized businesses.

The Minister has also directed the Review to examine the extent to which the Fair Work legislation is operating as intended, including in the following seven areas:

1. the creation of a clear and stable framework of rights and obligations which is simple and straightforward to understand;
2. the emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and related powers of Fair Work Australia;
3. the promotion of fairness and representation at work;

¹ 'Fair Work legislation' refers to the *Fair Work Act 2009* and the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.

4. effective procedures to resolve grievances and disputes;
5. genuine unfair dismissal protection;
6. the creation of a new institutional framework and a single and accessible compliance regime;
and
7. any differential impacts across regions, industries, occupations and groups of workers including (but not limited to) women, young workers and people from non-English speaking backgrounds.

Finally, the Review is asked to examine and report on areas where the evidence indicates that the operation of the Fair Work legislation could be improved consistent with the objects of the legislation.

The Review will not examine those issues concerning the content of modern awards which will be addressed as part of Fair Work Australia's 2012 review of all modern awards.

By requiring examination of whether the effects of the legislation have been consistent with the Object set out in Section 3 of the Fair Work Act, the terms of reference encompass consideration of economic goals such as economic growth, productivity, and economic prosperity along with the range of other policy objectives set out in Section 3.

Consistent with guidance provided by the Office of Best Practice Regulation (OBPR), the Review can also ascertain the intended operation and policy objectives of the Fair Work Act by referring to other official materials, such as parliamentary materials (for example, the Explanatory Memorandum to the Fair Work Bill 2008), Government publications and ministers' statements.

The Review Panel will adhere to the terms of reference. As noted in those terms the OBPR will assess the report to ensure that it meets the requirements outlined in the *Best Practice Regulation Handbook*. The report will be submitted to the OBPR by the Department of Education, Employment and Workplace Relations (DEEWR) and following assessment by the OBPR will be forwarded to the Minister for Employment and Workplace Relations by 31 May 2012. The report will also be published on the OBPR's website.

Further information on the PIR process is available at the [OBPR's website](#).

The twin objectives of satisfying the terms of reference and meeting the reporting requirements of a PIR inform the material provided in this background paper, the range of issues on which responses are sought from stakeholders, and ultimately the content of the report to the Minister.

Procedure

The terms of reference require the Review to draw on a range of evidence, including from submissions made by stakeholders.

The Review Panel welcomes written submissions from interested people and organisations. Submissions should be concise and it is essential that contentions and propositions in the submissions are supported by evidence. The bare statement of a conclusion will be of little assistance to the Review Panel. If a submission wishes to argue that the legislation is not operating as intended or is not achieving its objectives, that argument should be supported by evidence which demonstrates (or at least tends to demonstrate) in a concrete way why this is so. An example of such evidence might be a case study of a business or businesses in a sector or industry or a case study concerning a particular class of employees which demonstrates in a real and practical way the effect of the legislation and illustrates the shortcomings alleged in the submission.

All submissions should be provided by 17 February 2012. Unless individuals or organisations making a submission seek confidentiality (for example, for commercially sensitive information in part of the submission) all submissions will be posted in their entirety on the [Review website](#) soon after receipt.

Submissions considered by the Review Panel to be vexatious, inappropriate, or not relevant to the Review will not be considered.

Participants also have until 2 March 2012 to provide any supplementary submissions they may wish to make, including comments on the submissions of other participants.

Submissions should be delivered in both Microsoft Word and PDF formats by email to fairworkactreview@deewr.gov.au.

Submissions should address the terms of reference for the Review and all or any of the three issues identified in those terms:

1. The operation of the Fair Work legislation and the extent to which its effects have been consistent with the Object set out in Section 3. This section is quoted above.
2. The extent to which the Fair Work Act is operating as intended, including in the seven areas listed above.
3. Areas where the operation of the Act could be improved consistent with the objects of the legislation.

As noted earlier, it is important that contentions and propositions in submissions are supported by evidence.

Selected background information and statistical measures which may assist participants in preparing submissions are provided at **Attachment A**.

The Review Panel has formulated some questions provided at **Attachment B** which seek to elicit responses on specific issues. The list of questions is not intended to be exhaustive and those making submissions should feel free to address other issues raised by the terms of reference.

Links to a variety of evidence sources which may also be useful is provided at **Attachment C**. The sources are not intended to be exhaustive and the Review Panel welcomes evidence drawn from other sources.

The terms of reference for the Review are provided at **Attachment D**.

Background information and statistics

Objects and intentions of the Fair Work legislative framework

The post implementation review process requires an examination of the Government's policy objectives in introducing the regulation and whether the regulation is meeting those objectives. The following section provides a brief overview of Government policy underlying the Fair Work legislation¹ and of the legislative process.

The Fair Work legislation implemented the Government's workplace relations policies outlined in its *Forward with Fairness* and *Forward with Fairness: Policy Implementation Plan* policy documents, which were released in the lead up to the 2007 federal election.

The development of the *Fair Work Act 2009* (Fair Work Act) was subject to stakeholder consultation over a 12 month period, including through existing stakeholder bodies and a number of groups formed specifically to consult on the development of the legislation. These bodies comprised employee and employer representatives and state and territory governments.

Following these consultation processes, the then Minister for Employment and Workplace Relations, the Hon Julia Gillard MP, provided further details about the proposed legislation and its policy objectives in speeches delivered on 17 September 2008 to the National Press Club (with additional guidance provided in a number of Fact Sheets) and to the Australian Labour Law Association's conference on 14 November 2008 (links to these documents are at Attachment C). The Minister indicated the policy intention of the Government's Fair Work legislation would be to create a new fair and balanced national workplace relations system which would:

1. provide a strong safety net for employees;
2. promote workplace flexibility;
3. deliver an enterprise-level collective bargaining system to drive productivity;
4. create good faith bargaining rules;
5. ensure tough sanctions against unprotected industrial action; and
6. provide strong but simple protections against unfair dismissal.

Implementation of the Government's reform package commenced with the enactment of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Transition to Forward with Fairness Act), which received Royal Assent on 20 March 2008. The Transition to Forward with Fairness Act amended the *Workplace Relations Act 1996* (Workplace Relations Act) to implement some key Government reforms including removing the ability to make individual Australian Workplace Agreements (AWAs), introducing a no-disadvantage test for new agreements and enabling the Australian Industrial Relations Commission (AIRC) to undertake the award modernisation process in the terms of a request made by the Minister. The Transition to Forward with Fairness Act also included

¹ 'Fair Work legislation' refers to the *Fair Work Act 2009* and the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.

provision for the making of Individual Transitional Employment Agreements (ITEAs) during the transition to the Fair Work Act.

The Fair Work Bill 2008 was passed by the Parliament on 20 March 2009 and received Royal Assent on 7 April 2009. The majority of the Fair Work Act commenced operation on 1 July 2009 and the new safety net, comprising the National Employment Standards and modern awards, commenced on 1 January 2010.

The final legislative elements of the Government's reform process included the enactment of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and the *Fair Work (State Referrals and Consequential and Other Amendments) Act 2009*, which were passed by the Parliament on 17 June 2009 and received Royal Assent on 25 June 2009. The *Fair Work Amendment (State Referrals and Other Measures) Act 2009* was passed by the Parliament on 2 December 2009 and received Royal Assent on 9 December 2009.

The key features of the new workplace relations system established under the Fair Work legislation include:

- a new safety net comprising 10 National Employment Standards, supplemented by up to 10 minimum conditions contained in modern awards;
- a new bargaining system based on enterprise-level collective bargaining in good faith;
- extension of unfair dismissal protections to employees of companies with 100 or fewer employees, longer qualifying periods for employees working in small businesses and a more streamlined process for dealing with unfair dismissal claims;
- a new institutional framework made up of Fair Work Australia (FWA) and the Fair Work Ombudsman;
- strong compliance measures, including in relation to industrial action; and
- a national workplace relations system covering up to 96 per cent of private sector employees.

Fact sheets on the provisions of the Fair Work Act are available from [DEEWR's website](#).

The Explanatory Memoranda and Second Reading Speeches which accompanied the introduction of each of the Bills into the Parliament also present useful guidance as to the policy objectives of the regulation and the intended operation of particular provisions and Parts of the Acts. Links to the Parliamentary materials for the Fair Work Bill are available from the [Parliament's website](#).

Links to the suite of Fair Work legislation are provided at Attachment C.

Economic growth, productivity, economic prosperity and economic indicators

The Object of the Fair Work Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by the means set out in (a) – (g) of Section 3 of the Act. Depending on how it is applied in practice, such a framework has the capacity to influence economic performance in areas such as:

- national employment and participation;
- fairness and equity in the workplace;
- the level of industrial disputation and time lost;
- the consistency of overall remuneration outcomes with the level of consumer price inflation targeted by the central bank;
- the efficiency and clarity with which labour remuneration responds to market demands;
- the regulatory burden the framework imposes on employees and employers; and
- the extent to which the framework encourages the enhancement of productivity.

Respondents planning submissions partly or wholly on these issues should bear in mind the need to show a clear link between the economic outcome being discussed and the Fair Work legislation. Where improvements in the operation of the legislation are advocated, the proposed changes should be consistent with the objects of the legislation.

Fairness and equity and an assessment of the regulatory burden may require reference to more qualitative measures, but some relevant data on aspects of economic performance over the last two decades are shown below.

Employment and participation

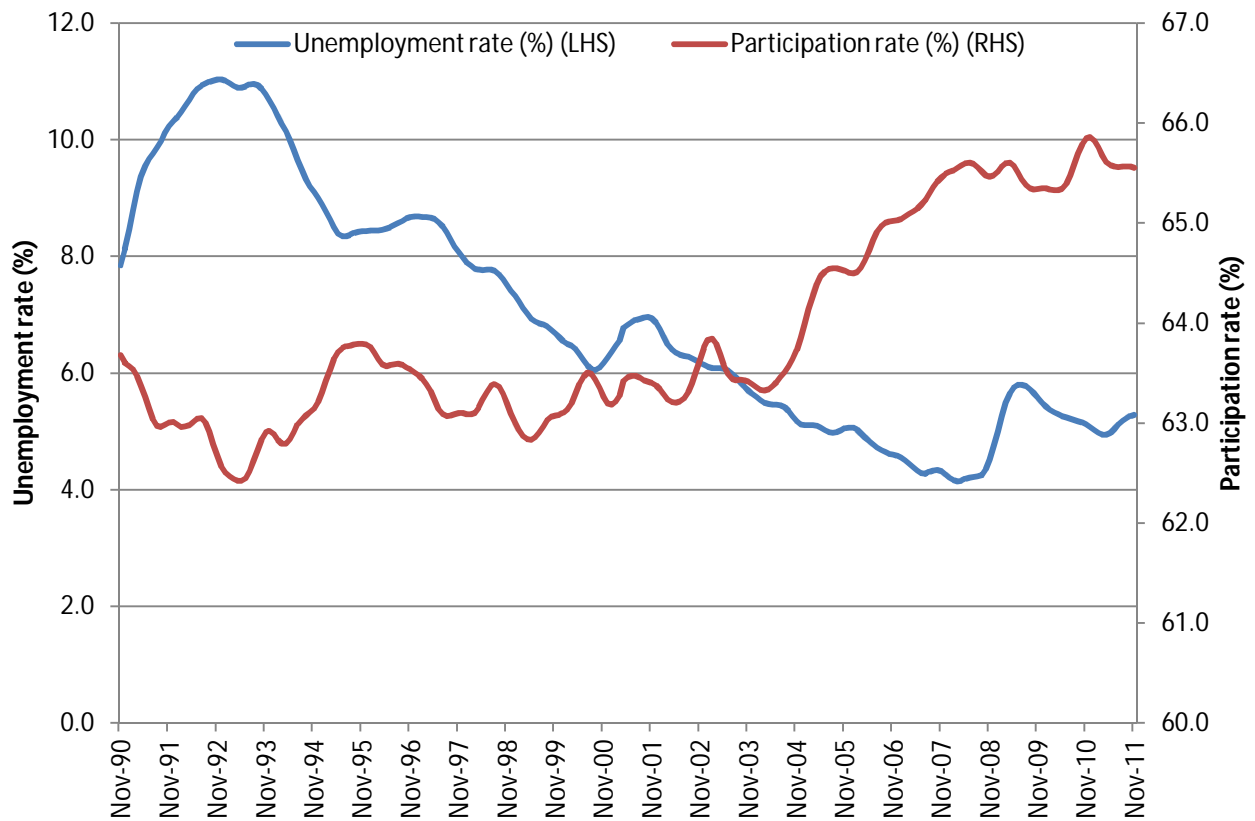
Over the five years to September 2008, economic and labour market conditions in Australia had been strong, with the unemployment rate reaching a low of 4.0 per cent in February 2008 and the participation rate rising to a near record high of 65.8 per cent in April 2008. Against the backdrop of the Global Financial Crisis (GFC), however, the Australian labour market deteriorated, with the unemployment rate peaking at 5.9 per cent in June 2009. Nevertheless, the Australian economy and labour market displayed remarkable resilience and fared much better than most advanced economies over 2010, with the unemployment rate falling to 5.0 per cent in December 2010 and the participation rate reaching a record high of 66.0 per cent in November 2010. During the 2011 calendar year, however, there was a clear slowdown in labour market conditions from the strong growth experienced in 2010, with the unemployment rate increasing to 5.3 per cent in November 2011 and the participation rate declining to 65.5 per cent.

Table 1: Labour Force Statistics as at November 2011 (seasonally adjusted)

Unemployment rate	5.3%
Participation rate	65.5%
Total employed	11 457 100
Full-time employed	8 026 300
Part-time employed	3 430 800

Source: ABS Labour Force, Australia - Spreadsheets (Cat. No. 6202.0).

Chart 1: Unemployment and participation rates (%), November 1990 to November 2011



Source: ABS Labour Force, Australia, November 2011 (Cat. No. 6202.0) trend data.

Note: Chart 1 uses trend data (which are less variable and therefore more suitable for charts), whereas the figures contained in the above paragraph are seasonally adjusted (the figures generally reported in the media), therefore these figures may not correspond exactly with Chart 1.

Nominal wages growth and Consumer Price Index

Chart 2 below shows the annual percentage growth in the Consumer Price Index (CPI) (seasonally adjusted) and Wage Price Index (WPI) (seasonally adjusted) since the September quarter 1998.²

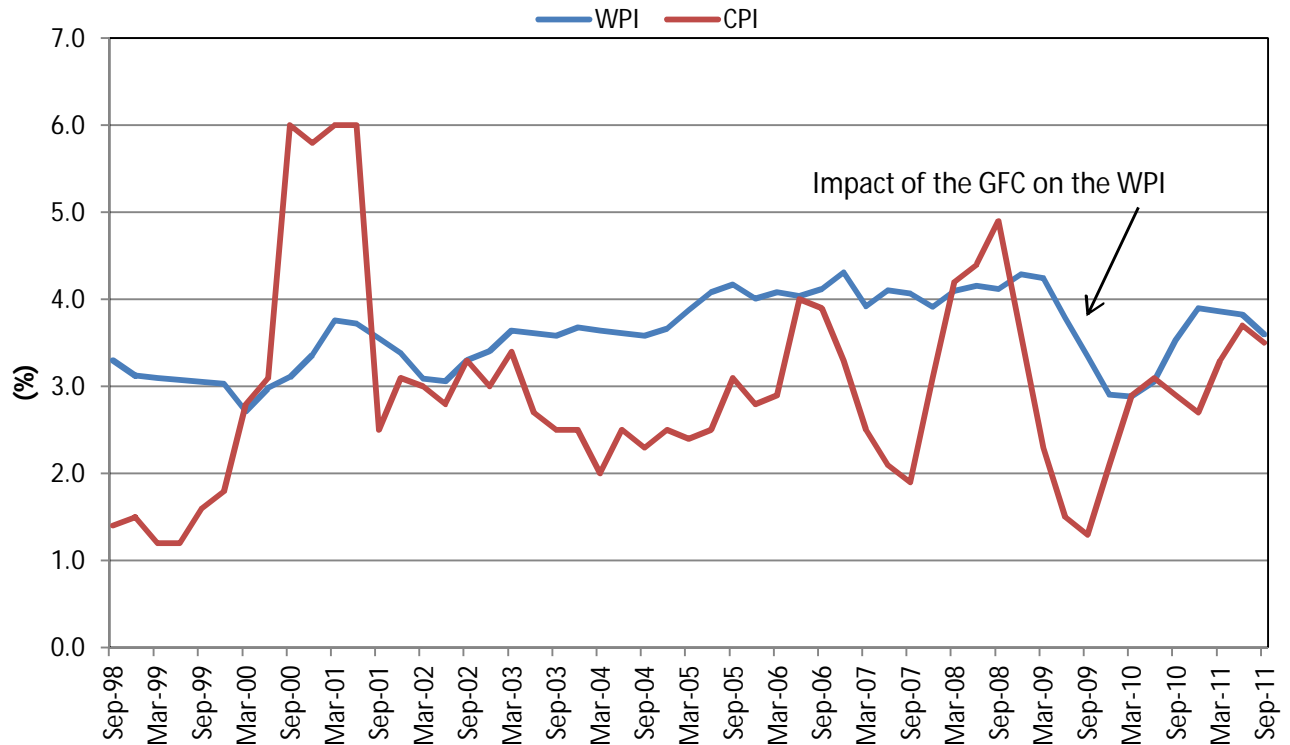
In particular, Chart 2 shows that between the September quarter 2006 and the March quarter 2009 annual wages growth, as measured by the WPI, hovered around 4.0 per cent. However, between the September quarter 2009 and the September quarter 2010 annual wages growth was impacted by the economic downturn and fell to 2.9 per cent in the December quarter 2009 and the March quarter of 2010. This was the second lowest annual increase since the WPI series began. Wages growth in annual terms has since recovered to its historic trend rate of growth. Wages growth was 3.6 per cent over the year to the September quarter 2011.

Chart 2 also shows the annual percentage growth of the CPI. Unlike the WPI, movements in the CPI have been volatile. In more recent times, the CPI grew by just 1.9 per cent over the year to the September quarter 2007 but thereafter grew steadily reaching a peak of 4.9 per cent over the year to the September quarter 2008. The CPI increased by just 1.3 per cent over the year to the September quarter

² Note data for the WPI in annual terms is only available from the September quarter 1998.

2009 but has been trending upwards. Over the year to the September quarter 2011 the CPI increased by 3.5 per cent.

Chart 2: Annual percentage growth in the Consumer Price Index (seasonally adjusted) and Wage Price Index (seasonally adjusted) since the September quarter 1998



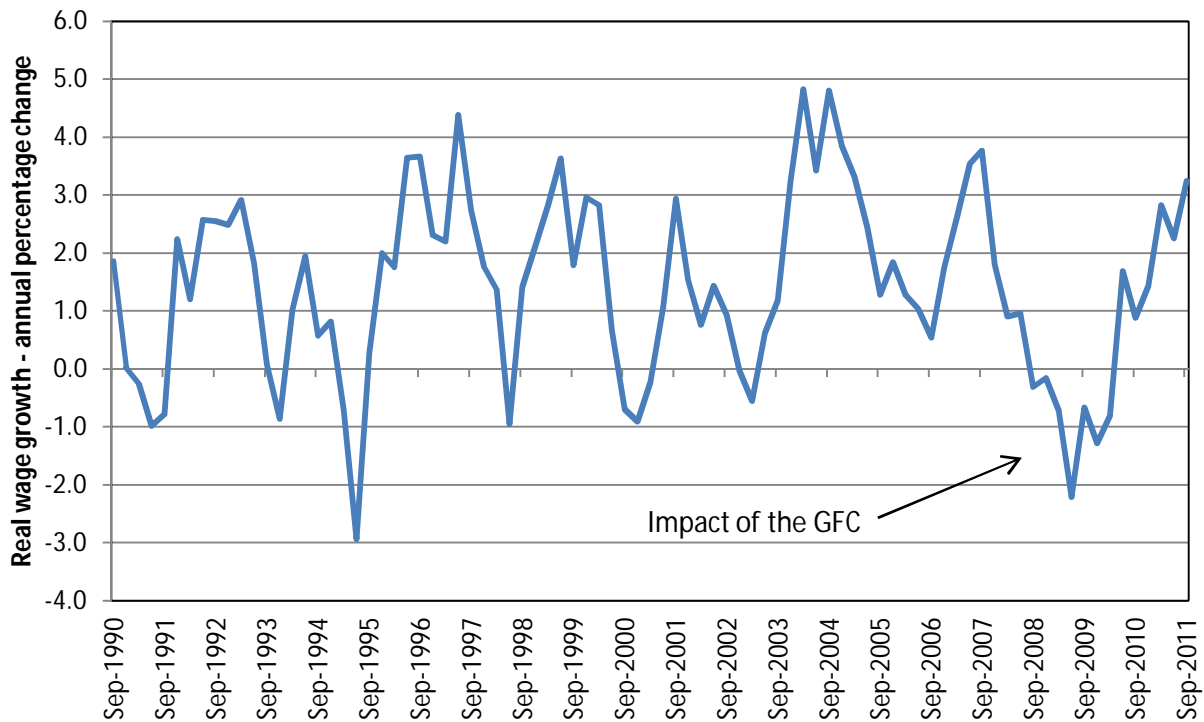
Source: ABS Labour Price Index publication (Cat. No. 6345.0), ABS Consumer Price Index publication (Cat. No. 6345.0).

Real wage outcomes

Chart 3 below illustrates the annual percentage growth in real wages (seasonally adjusted) since the September quarter of 1990. In particular, Chart 3 illustrates that between the September quarter 2008 and the March quarter 2010 real wages growth was negative. This was due to the impact of the economic downturn. Real wages have since recovered and increased by 3.2 per cent over the year to the September quarter 2011.

According to the latest figures, real wages increased by 1.0 per cent (seasonally adjusted) over the September quarter 2011, and rose by 3.2 per cent over the year to the September quarter 2011. The quarterly increase in real wages was due to nominal average non-farm compensation per employee increasing by 1.2 per cent in the September quarter 2011, while the derived implicit price deflator for household final consumption expenditure increased by 0.3 per cent in the September quarter 2011.

Chart 3: Annual percentage growth in real wages^(a) (seasonally adjusted) since the September quarter 1990



Source: ABS, *Australian National Accounts: National Income, Expenditure and Product*, (Cat. No. 5206.0), *Time Series Spreadsheet Table 1: Key National Accounts Aggregates, Australia*.

(a) As measured by average non-farm compensation per employee deflated by the implicit price deflator for final consumption expenditure – households from the ABS *Australian National Accounts: National Income, Expenditure and Product* publication (Cat. No. 5206.0) – AusStats spreadsheets 2, 3 and 20. The data are seasonally adjusted.

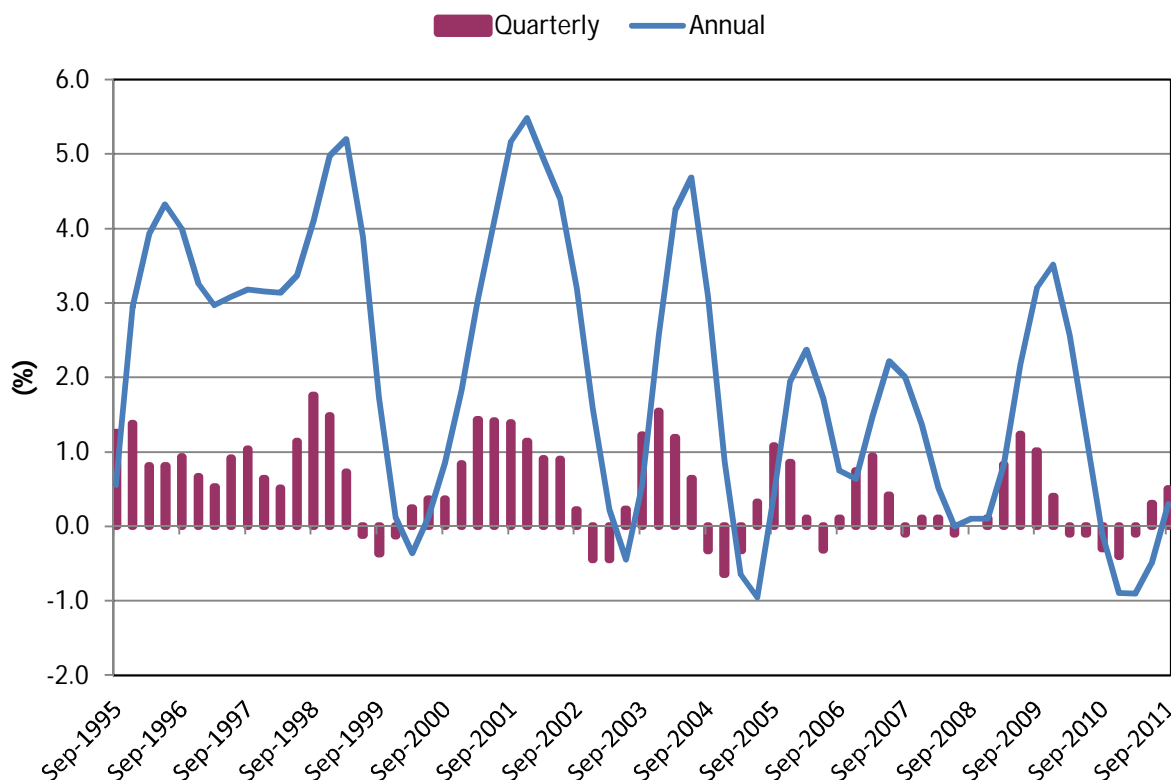
Productivity

Trend labour productivity in the market sector increased by 0.6 per cent in the September quarter 2011 and by 0.3 per cent over the year to the September quarter 2011 (see Chart 4 below).

For all sectors, trend labour productivity increased by 0.4 per cent in the September quarter 2011 and by 0.4 per cent over the year to the September quarter 2011.

These quarterly and annual rates should be interpreted with caution. They are prone to volatile and cyclical effects and are often revised in subsequent releases as more information becomes available.

Chart 4: Annual and quarterly percentage change in trend labour productivity in the market sector since the September quarter 1995 (earliest available data)



Source: ABS Australian National Accounts: National Income, Expenditure and Product, (Cat. No. 5206.0), Time Series Spreadsheet Table 1: Key National Accounts Aggregates, Australia.

Notes:

(a) With the introduction of ANZSIC 2006, quarterly data on labour productivity in the market sector now commence in the September quarter 1994. Therefore the first quarterly and annual increase values available are for the December quarter 1994 and the September quarter 1995 respectively.

With the introduction of ANZSIC 2006, the market sector is now defined by the ABS as Industry Divisions A-N, R and S; namely: Agriculture, Forestry and Fishing; Mining; Manufacturing; Electricity, Gas, Water and Waste Services; Construction; Wholesale Trade; Retail Trade; Accommodation and Food Services; Transport, Postal and Warehousing; Information Media and Telecommunications; Financial and Insurance Services; Rental, Hiring and Real Estate Services; Professional, Scientific and Technical Services; Administrative and Support Services; Arts and Recreation Services; and Other Services. In other words, it consists of all employing industries except Public Administration and Safety; Education and Training; and Health Care and Social Assistance (Divisions O, P and Q).

(b) Quarterly and annual rates of labour productivity are prone to volatile and cyclical effects and are often revised in subsequent releases as more information becomes available.

Productivity cycles

The most reliable estimates of productivity growth over an extended period are those based on productivity growth cycles.

Year to year changes in measured productivity may reflect changes that are conceptually distinct from the notion of productivity. By analysing averages of productivity statistics between growth cycle peaks, the effects of some of these temporary influences can be minimised, allowing better analysis of the drivers of productivity growth in different periods.

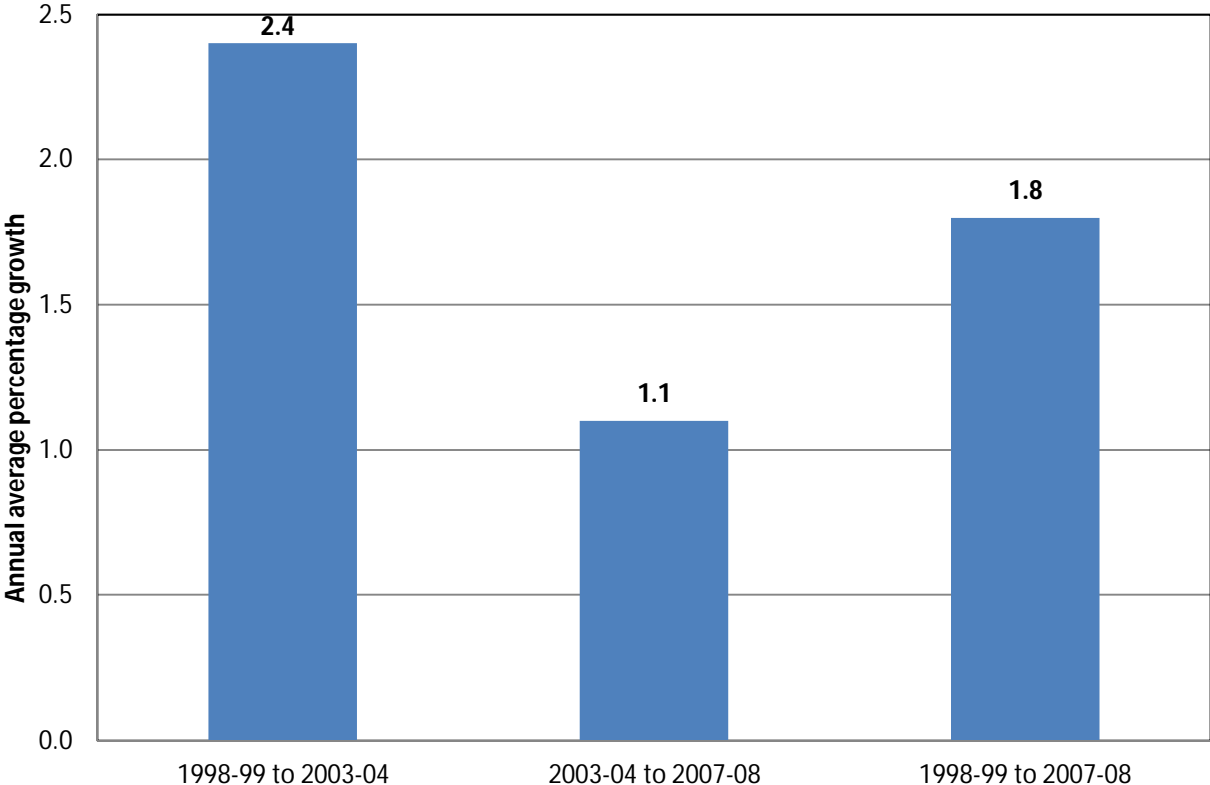
Productivity growth cycle peaks are determined by comparing the annual multi-factor productivity estimates with their corresponding long-term trend estimates. The peak deviations between these two series are the primary indicators of a growth-cycle peak, although general economic conditions at the time are also considered.

Chart 5 below shows that during the most recent growth cycle of 2003-04 to 2007-08, annual growth in labour productivity averaged 1.1 per cent per year (in the 'market sector').³

This is down on the average annual growth of 2.4 per cent recorded between 1998-99 to 2003-04, and is also below the long-term average growth rate of 1.8 per cent per year (1998-99 to 2007-08).

While there has been no completed productivity cycle since 2007-08, average annual growth in labour productivity from the June quarter 2008 to the September quarter 2011 was 1.0 per cent.⁴

Chart 5: Labour productivity growth per year for growth cycles, 1998-99 to 2007-08



Source: ABS Australian System of National Accounts, 2010-11 publication (Cat. No. 5204.0), table 23.

Safety net

Modern awards

The Transition to Forward with Fairness Act tasked the AIRC with replacing existing awards with new modern awards. Through this process, the AIRC reduced 3715 state and federal instruments to 122 modern awards, which commenced operation on 1 January 2010. Transitional provisions are provided for and are designed to address differences in conditions of employment rates of pay that may occur as

³ ABS Australian System of National Accounts (Cat. 5204.0). The market sector of the economy consists of the following industries: Agriculture, forestry & fishing, Mining, Manufacturing, Electricity, gas, water & waste services, Construction, Wholesale trade, Retail trade, Accommodation & food services, Transport, postal & warehousing, Information media and telecommunications, Finance & insurance services, Rental, hiring & real estate services, Professional, scientific & technical services, Administrative and recreation services, Arts and recreation services and Other services.

⁴ ABS Australian National Accounts: National Income, Expenditure and Product publication (Cat No. 5206.0), trend labour productivity (market sector).

a consequence of the award modernisation process. Specifically, transitional provisions provide for a five year period in order to phase in any changes, while employers and employees gradually move from their old state and federal awards to a modern award.

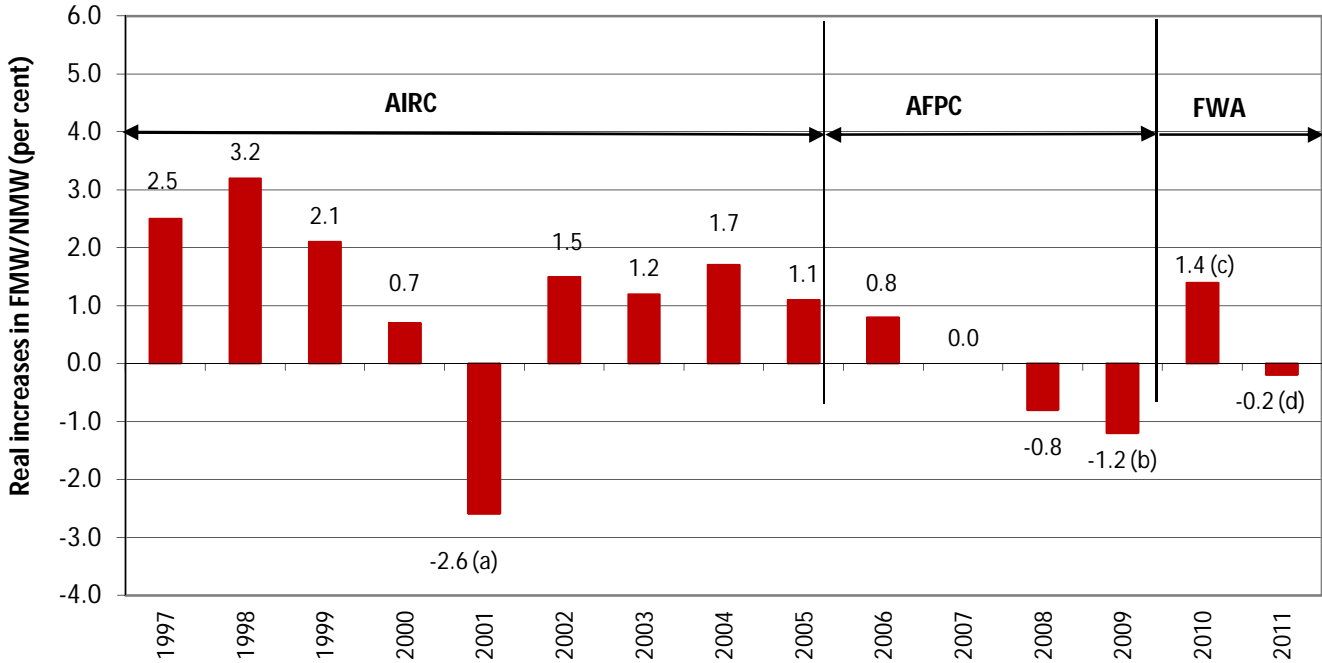
Take-home pay orders

During the 2009-10 financial year, FWA received 30 take-home pay order applications and determined three. Two class actions were lodged, one by the Australian Nursing Federation on behalf of nurses in residential aged care in New South Wales and Queensland, and the other by the Australian Municipal, Administrative, Clerical and Services Union on behalf of social and community services employees in New South Wales (both were subsequently withdrawn). All other applications involved individuals. A further 57 applications were made in the 2010-11 financial year, with seven applications determined. Of those determined, three orders were granted and four were refused. A further 54 applications were withdrawn.⁵

Minimum wage

The first two Annual Wage Review decisions by FWA’s Minimum Wage Panel have increased the National Minimum Wage (NMW) by 8.4 per cent in nominal terms, or by 1.2 per cent in real terms (that is, an increase above the level of the relevant CPI). Further detail on real increases in the Federal Minimum Wage (FMW) and the NMW can be found in Chart 6 below.

Chart 6: Real increases in the FMW/NMW since 1997



Source: AIRC, AFPC, FWA data, various years, and ABS Consumer Price Index (Cat. No. 6401.0).
 (a) Prior to the establishment of the Australian Fair Pay Commission, increases in the FMW generally occurred on an annual basis. With the Australian Fair Pay Commission’s first two decisions the periods between increases were 18 months and 10 months respectively. Accordingly, for comparability, the decisions have been presented in annualised terms.
 (b) Assumes a date of effect of 1 October 2009 had the AFPC awarded an increase in its 2009 decision.
 (c) Real increase since the last minimum wage rise in 2008.

⁵ Annual Report of Fair Work Australia 1 July 2009 – 30 June 2010, FWA, 2010, p.16. Annual Report of Fair Work Australia 1 July 2010 – 30 June 2011, FWA, 2011, p.17.

(d) The 2011 real increase is based on actual CPI data for the June quarter 2010 and the June quarter 2011. The small decrease in the NMW in real terms over 2010-11 was due in part to the higher than expected Consumer Price Index outcome over the year to the June quarter 2011 as a result of natural disasters in Queensland in late 2010 and early 2011.

Enterprise agreements

Coverage

DEEWR's latest Trends in Federal Enterprise Bargaining report for the June quarter 2011 reveals that there were 23 403 enterprise agreements current, covering almost 2.6 million employees as at 30 June 2011. The record level of 25 226 current agreements was reached at the end of the December quarter 2010.

In July 2009 at the commencement of the Fair Work Act there were 22 371 current agreements covering 2.05 million employees.⁶

Types of agreements

The vast majority of enterprise agreements are being made between a single employer and their employees (12 311 as at 30 June 2011). There have been 69 multi-enterprise agreements and 798 greenfields agreements made. There have also been 44 single-interest employer authorisations, which allow two or more employers to bargain as single-interest employers.⁷

As noted in Table 2, ABS data reveals that the number of employees covered by collective agreements has increased since the introduction of the Fair Work Act, from 39.8 per cent in August 2008 to 43.4 per cent in May 2010.⁸

Table 2: Employees by methods of setting pay in Australia in percentage terms

	2008	2010
Award or pay scale only	16.5	15.2
Collective Agreement (registered and unregistered)	39.8	43.4
Individual Arrangement (registered and unregistered)	38.7	37.3
Owner manager of incorporated enterprise	5.0	4.1
All methods of setting pay	100.0	100.0

Source: ABS Employee Earnings and Hours (Cat. No. 6306.0) August 2008, May 2010.

Termination of individual statutory agreements

Between 1 July 2009 and 30 June 2011, there were 19 892 applications to terminate by consent AWAs and ITEAs that had reached their nominal expiry date. An additional 2617 applications were lodged for unilateral termination during the corresponding period.⁹

⁶ Data on collective agreements is derived from DEEWR's Workplace Agreements Database.

⁷ Data on collective agreements is derived from DEEWR's Workplace Agreements Database.

⁸ ABS Employee Earnings and Hours publication (Cat. No. 6306.0) August 2008, May 2010.

⁹ Annual Report of Fair Work Australia 1 July 2009 – 30 June 2010, FWA, 2010, p.73-74. Annual Report of Fair Work Australia 1 July 2010 – 30 June 2011, FWA, 2011, p.83.

In addition, ABS data reveals that the proportion of non-managerial employees whose pay was set by a federally registered individual agreement (AWA or ITEA) reduced from 3.1 per cent (228 800) in May 2006 to 2.2 per cent (174 300) by August 2008 (six months after the Fair Work laws prevented the making of new AWAs).¹⁰ The May 2010 ABS Employee Earnings and Hours publication only provided information on registered and unregistered individual arrangements. Nevertheless, it is expected that the number of federally registered individual agreements would be extremely small due to laws preventing the creation of new agreements.

Individual flexibility terms

Analysis from DEEWR's Workplace Agreements Database reveals that 59.4 per cent of Fair Work Act enterprise agreements approved up to 30 June 2011 covering 59.1 per cent of employees covered by enterprise agreements contain the model flexibility term or a term that allows individual flexibility arrangements about any matter in the workplace agreement. Further, 42.0 per cent of Fair Work Act agreements contain specific flexibility terms agreed by the employer and employees.¹¹

Enterprise agreement processing times

Table 3 outlines the processing time for the various types of agreements lodged with FWA.

Table 3: Enterprise agreements processing time – lodgement to finalisation¹²

Agreement type	Median number of days 2009-10	Median number of days 2010-11
Single enterprise (s.185)	35	22
Greenfields (s.185)	24	15
Multi-enterprise (s.185)	57	27
Extension or variation or pre-reform certified agreements ¹³	35	N/a

Orders by FWA to facilitate bargaining

Table 4 outlines the number of applications to FWA for bargaining related orders and the number of orders/decisions made since the commencement of the Fair Work Act.

Table 4: FWA orders to facilitate bargaining (1 July 2009 – 30 September 2011)¹⁴

	Applications	Orders/Decisions
Bargaining orders (s.230)	242	33
Serious breach declarations (s.235)	0	0
Majority support determinations (s.237)	220	67

¹⁰ ABS Employee Earnings and Hours (Cat. No. 6306.0) May 2006, August 2008 unpublished data.

¹¹ Please note, some agreements contain more than one flexibility term (e.g. they may contain the model term as well as a specific term covering other provisions in the agreement), hence these figures are not mutually exclusive.

¹² Annual Report of Fair Work Australia 1 July 2010 – 30 June 2011, FWA, 2011, p12 and Annual Report of Fair Work Australia 1 July 2009 – 30 June 2010, FWA, 2010, p12.

¹³ Under cl.2A(1)(a) and (b), Sch. 7 to the Workplace Relations Act, as continued under Item 13, Schedule 3 to the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009.

¹⁴ Annual Report of Fair Work Australia 1 July 2010 – 30 June 2011, FWA, 2011, p75. Annual Report of Fair Work Australia 1 July 2009 – 30 June 2010, FWA, 2010, p80. FWA Quarterly Reports July-September 2010, October-December 2010, January-March 2011, April-June 2011 and July-September 2011. Data provided to DEEWR by FWA.

Scope orders (s.238)	90	10
Decision to deal with a bargaining dispute (s.240)	811	231

Low-paid bargaining

Two applications for a low-paid bargaining authorisation have been made since the commencement of the Fair Work Act. The first application was made in May 2010 in relation to the aged care sector. FWA made the low-paid authorisation on 29 July 2011 in relation to 175 employers. The authorisation requires these employers to bargain with certain employees covered by the Aged Care Award 2010 (in Western Australia, South Australia, South East Queensland, the Australian Capital Territory and the Northern Territory) and student and enrolled nurses covered by the Nurses Award 2010 in Western Australia. Parties are currently engaged in bargaining negotiations.

The second application was submitted in November 2011. The Australian Nursing Federation is seeking a low-paid authorisation for nurses whose employment is within the classifications at Schedule B of the Nurses Award 2010, employed in private sector general practice clinics and medical centres. FWA will hear the application, which names over 880 employers, in June 2012.

Transfer of business

The Fair Work Act provides scope for flexibility in relation to the transfer of instruments between old and new employers. FWA can tailor the operation of instruments transferring from an old employer, before or after the transfer of business. FWA can order that an instrument does not apply to the new employer at all, or can vary an instrument so that it better aligns with the new employer's business circumstances. In making such orders FWA must consider factors such as the impact of the instrument on the employer's business and any disadvantage to employees. FWA also has broad powers to change the coverage of transferable instruments and a new employer's existing instrument.

Table 5: Application to FWA for a transfer of business order (1 July 2009 – 30 June 2011)¹⁵

	2009-10	2010-11
s.318 Application for an order relating to instruments covering a new employer and transferring employees	79	61
s.319 Application for an order relating to instruments covering new employer and non-transferring employees	19	9
s.320 Application to vary a transferable instrument	3	8

General protections

Contraventions

In the first year of the Fair Work Act's operation, most of the general protections applications that were dealt with by FWA were general protections contraventions involving a dismissal. General protections

¹⁵ *Annual Report of Fair Work Australia 1 July 2010 – 30 June 2011*, FWA, 2011, p75-76. *Annual Report of Fair Work Australia 1 July 2009 – 30 June 2010*, FWA, 2010, p80

applications under section 365, which involve dismissal, increased from 1188 in 2009–10 to 1871 in the 2010–2011 reporting period.¹⁶ General protections applications under section 372 of the Fair Work Act, which do not involve dismissal, increased from 254 in 2009–10 to 504 in 2010–11.¹⁷

Unfair dismissal

Applications for a remedy

There were 11 116 applications for a remedy for unfair dismissal in the 2009–10 financial year, with 8897 of those applications settled at or prior to conciliation.¹⁸ This represents an increase from the 7994 applications for a remedy for termination of employment under the Workplace Relations Act in the 2008–2009 financial year.¹⁹

In the 2010–11 financial year, 12 840 applications for a remedy for unfair dismissal were lodged, with 9869 applications settled at or prior to conciliation.²⁰ In the first quarter of the 2011–12 financial year, 3417 applications were lodged and 2805 settled at or prior to conciliation.²¹

An increase in unfair dismissal applications since the introduction of the new unfair dismissal laws on 1 July 2009 was to be expected for two main reasons:

- The abolition of the 100 employee exemption under the Fair Work Act markedly increased the number of employees with access to unfair dismissal remedies. In the Regulatory Analysis of the Fair Work Bill, it was estimated that 3.7 million employees (or 44 per cent of employees) were eligible for unfair dismissal protection prior to the implementation of the Fair Work Act, while the projected figure post implementation was estimated as being 6.7 million employees (or 80 per cent of employees).²²
- In addition, the Fair Work Act itself now applies to more employees (96 per cent of the private sector) due to referrals of powers over workplace relations matters to the Commonwealth from all states except Western Australia. This has resulted in a further expansion in coverage of federal unfair dismissal protection.

¹⁶ *Annual Report of Fair Work Australia 1 July 2010 – 30 June 2011*, FWA, 2011, p11.

¹⁷ *Annual Report of Fair Work Australia 1 July 2010 – 30 June 2011*, FWA, 2011, p76. *Annual Report of Fair Work Australia 1 July 2009 – 30 June 2010*, FWA, 2010, p80

¹⁸ *Annual Report of Fair Work Australia 1 July 2009 – 30 June 2010*, FWA, 2010, p.76, 13.

¹⁹ Of the 7994 applications lodged, 3234 (41%) alleged the termination was harsh, unjust or unreasonable (i.e. unfair), 1687 (21%) alleged the termination of employment was unlawful and 3073 (38%) alleged the termination of employment was both unfair and unlawful. (*Annual Report of the President of the Australian Industrial Relations Commission and Annual Report of the Australian Industrial Registry 1 July 2008 to 30 June 2009*).

²⁰ *Annual Report of Fair Work Australia 1 July 2010 – 30 June 2011*, FWA, 2011, p.81, 12.

²¹ FWA Quarterly Reports July–September 2010, October–December, January–March 2011, April – June 2011 and July–September 2011.

²² Taking into account more recent ABS labour force data for November 2011, revised estimates show that around 4.2 million employees (or 48 per cent of employees) would be eligible for unfair dismissal protection under pre-Fair Work Act legislation, if was still in effect. By comparison, under the Fair Work Act, around 7.0 million employees (or 79 per cent of employees) are eligible for unfair dismissal protection.

Outcomes

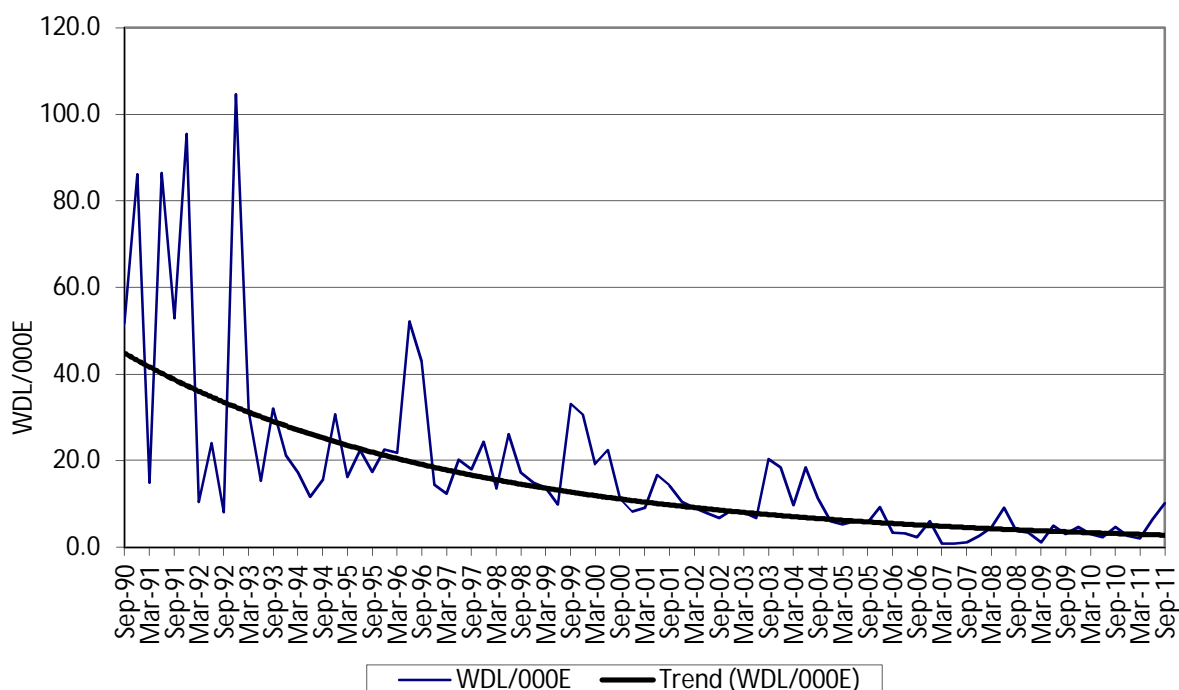
FWA data shows that the conciliation settlement rate for unfair dismissal claims for 2009-2010 was 81 per cent and that less than 1 per cent of cases reached arbitration.²³

Industrial action

Industrial dispute rate

The industrial dispute rate in quarterly terms over the past 21 years (September quarter 1990 to the September quarter 2011) has trended downwards and currently stands at 10.1 working days lost per thousand employees (WDL/000E) for the September quarter 2011 (Chart 7). The increase in the quarterly rate of industrial disputes in the September quarter 2011 could be caused by an increased number of expiring agreements in the June quarter 2011 where 2318 agreements expired and were not replaced or terminated (compared with an average of 1694 expiring agreements each quarter over the last three years).

Chart 7: Working days lost per thousand employees (WDL/000E) in quarterly terms from the September quarter 1990 to the September quarter 2011



Source: ABS Industrial Disputes, Australia (Cat. No. 6321.0.55.001).

²³ Annual Report of Fair Work Australia 1 July 2010 – 30 June 2011, FWA, p.13.

Questions participants may wish to consider when preparing their submissions

General

1. Has the Fair Work Act created a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians? If so, how? If not, why not?
2. Can the Fair Work Act provide flexibility for businesses and is this being achieved? If so, how? If not, why not?
3. Does the Fair Work Act adequately take account of Australia's international labour obligations?
4. Has the Fair Work Act facilitated flexible working arrangements to assist employees to balance their work and family responsibilities?
5. Has the Fair Work Act's focus on enterprise level collective bargaining helped to achieve improved productivity and fairness?
6. What has been the impact, if any, of the Fair Work Act on labour productivity?
7. What has been the impact of the creation of a national workplace relations system for the private sector? What has been the impact of the system being constitutionally underpinned by referrals of subject matters/powers from the states as well as the corporations power of the Constitution?

Safety net

8. Is the safety net established under the Fair Work Act fair and relevant?
9. Is the safety net simpler, more streamlined and easier to read and apply than the previous arrangements?
10. What are the advantages and disadvantages of the Fair Work Act providing a safety net of employment conditions on a national basis through the National Employment Standards and modern awards rather than a state by state basis?
11. Does the Fair Work Act allow for safety net terms and conditions of employment to be set in a way that is appropriately industry or occupationally specific? If not, why not?
12. Are employees responsible for the care of young children using the right to request provisions under the National Employment Standards to negotiate flexible working arrangements or request additional unpaid parental leave in order to care for children? If not, why not?
13. Do Individual Flexibility Arrangements, as provided for in modern awards, allow employers and employees to individually tailor modern award conditions to meet their genuine personal needs? If so, how? If not, why not?
14. Are employees appropriately protected when making Individual Flexibility Arrangements? Is the safety net of minimum employment conditions appropriately guaranteed and protected from being undermined?
15. How could the operation of the safety net be improved, consistent with the objects of the Fair Work Act and the Government's policy objective to provide a fair and enforceable set of minimum entitlements?

16. Do the criteria for Fair Work Australia's (FWA) setting of minimum wages fairly balance social and economic factors?
17. What has been the impact of requiring FWA to implement minimum wage adjustments from 1 July each year, rather than at a time of the tribunal's choosing?
18. Without examining particular content in modern awards (which is a matter to be dealt with in FWA's review of modern awards), what has been the impact on employers, employees and regulators of consolidating the large number of state and federal awards and transitional instruments that applied before the Fair Work Act and replacing them with significantly fewer modern awards made on a national basis?
19. What has been the impact of providing an award system which includes modern awards that cannot be varied (except in limited circumstances) other than during four-yearly reviews by FWA, or in the initial FWA interim review in 2012?

Bargaining and agreement-making

20. Does the bargaining framework promote discussion and uptake of measures to improve workplace productivity?
21. How have employers pursued productivity improvements during bargaining for a new enterprise agreement? Are there any obstacles to achieving productivity improvements in bargaining in the legislation? How do these obstacles differ from the situation that existed prior to the Fair Work Act?
22. Have enterprise agreements helped employees to better balance work and family responsibilities?
23. What has been the impact of allowing a wider range of matters to be included in enterprise agreements by removing the list of "prohibited content" provided under the Workplace Relations Act? What has been the impact on bargaining and productivity? What has been the impact on employees' capacity to be represented in the workplace?
24. Did Individual Transitional Employment Agreements help to provide greater certainty of wage costs for employers using Australian Workplace Agreements and assist in the transition to a system focussed on enterprise level collective bargaining?
25. Are Individual Flexibility Arrangements allowed for under the flexibility terms of enterprise agreements providing employers and employees with the flexibility to tailor working arrangements to meet their genuine needs? If so, how? If not, why not?
26. Are employees appropriately protected when making Individual Flexibility Arrangements?
27. Did the replacement of the fairness test with the no-disadvantage test and then the better off overall test improve protection of employment conditions in the agreement-making process?
28. Has the new approval process under the Fair Work Act expedited the approval of agreements and provided greater certainty for employers and employees compared to the approval process under the previous legislation? If so, how? If not, why not? What has been the impact on employers, employees and their representatives of the changes to the agreement approval processes?
29. How have the good faith bargaining requirements affected enterprise agreement negotiations?
 - a. Are there ways in which the good faith bargaining requirements could be improved to better facilitate bargaining?
 - b. Are the powers possessed by FWA adequate to remedy breaches of the good faith bargaining requirements?

30. Have majority support determinations and scope orders encouraged enterprise bargaining? If so how? If not, why not?
31. Has the low-paid bargaining stream encouraged bargaining in workplaces and/or industries that have not historically engaged in enterprise bargaining?

Equal remuneration

32. What has been the impact of the changes to the test for the making of an equal remuneration order?
33. Have FWA's powers in relation to equal remuneration helped to ensure equal remuneration between men and women workers for work of equal or comparable value?

Transfer of business

34. Does the new broader definition of transfer of business help to clarify when a transfer of business occurs?
35. What has been the effect of the new transfer of business provisions on corporate restructuring activities, such as in-sourcing and outsourcing?
36. Do the range of matters which FWA must consider when making an order in relation to a transfer of business strike the right balance between protecting employee and employer interests?

General protections

37. Do the general protections provisions provide adequate protection of employees' workplace rights, including the right to freedom of association and against workplace discrimination?
38. Do the provisions provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of the general protections?
39. Should dismissed employees be able to invoke the general protection provisions to challenge their termination without any time limit on making an application? If so, why, and if not, why not?
40. Has the consolidation and streamlining of workplace protections into the general protections provisions made it easier for employers and employees to understand their rights and obligations? What impact has this had?
41. Section 351 of the Fair Work Act proscribes discrimination "because of the person's" race, sex, etc. This provision appears in Part 3-1 Division 5. This Division is headed "Other Protections". Would section 351 and any related provisions be better placed in a Division dealing solely with discrimination?

Unfair dismissal

42. Do the unfair dismissal provisions balance the needs of business and employees' right to protection from unfair dismissal?
43. Consistent with the Government policy objectives, does the Fair Work Act provide genuine unfair dismissal protection? If so, how, if not, why not?

44. Are the procedures for dealing with unfair dismissal quick, flexible and informal and do they meet the needs of employers and employees? What is the impact of the changed processes upon the costs incurred by employers and employees?
45. Has the ability of FWA to deal with unfair dismissal claims in a more informal manner improved the experience for participants?
46. What has been the impact of the introduction of qualifying employment periods before an employee is eligible to make a claim for unfair dismissal? Has the 12 month (small businesses) and 6 month (larger businesses) qualifying period provided clearer guidance to employers and sufficient time for employers to assess the suitability of an employee for a role?
47. Is FWA's emphasis on telephone conciliation in unfair dismissal matters desirable? If so, why, if not, why not?
48. Are the remedies available in the case of an unfair dismissal appropriate?
49. Is the Small Business Fair Dismissal Code an effective tool in helping small business to understand their obligations and fairly dismiss employees?
50. What has been the impact of removing the genuine operational reasons defence to an unfair dismissal claim and replacing it with the requirements for genuine redundancy?
51. Have the unfair dismissal provisions under the Fair Work Act had an impact on the ability and willingness of business to take on new employees?

Industrial action

52. Is the process for applying for and conducting protected action ballots simpler under the new system? If so, why, and if not, why not?
53. What effect has the obligation for the Australian Government to fund the full cost of conducting a protected action ballot had on the propensity of employee bargaining representatives to make an application for a protected action ballot order?
54. Should applications for protected action ballots be permitted where no majority support determination has been made by FWA, and where the employer has not agreed to engage in collective bargaining? If so, why, and if not, why not?
55. Are the powers and procedures possessed by FWA to suspend or to terminate protected industrial action adequate to resolve intractable disputes? If not, why not, and if so, why?
56. Should compulsory conciliation play a more prominent role, either generally, in the enterprise bargaining regime, in settling disputes over the application of enterprise agreements or more especially in the machinery which governs the settlement of intractable disputes?
57. Are employees able to resort to protected industrial action more easily or quickly since the passage of the Fair Work Act? If so, which provisions of the Act facilitate this?
58. Is the taking of industrial action in support of pattern bargaining effectively prohibited by the Fair Work Act?
59. What has been the effect of the removal of the mandatory four hour minimum deduction of pay for protected employee industrial action?
60. What has been the effect of allowing for a proportion of an employee's pay to be withheld in the case of a partial work ban?
61. What has been the effect of removing the reverse onus of proof for employees taking industrial action out of a legitimate concern for his or her health or safety?

Right of entry

62. What has been the impact of union right of entry being linked to the right of a union to represent the industrial interests of an employee, rather than coverage by a type of instrument?
63. Do the right of entry provisions balance the right of unions to enter workplaces to meet with employees and investigate breaches of legislation and the right of employers to go about their business without undue inconvenience?

Institutional framework

64. Are the processes and procedures set out in the Fair Work Act that apply to FWA, the Federal Magistrates Court of Australia and to the Federal Court of Australia appropriate having regard to the matters coming before it? What changes, if any, would you suggest?
65. Does the consolidation of workplace relations institutions provide more easily accessible services and information to users of the national workplace relations system?
66. Does the requirement for FWA to conduct and publish research relevant to minimum wages help to better inform parties who make submissions to the Minimum Wage Panel?
67. Do the enhanced powers of Fair Work Ombudsman (FWO) inspectors assist in the expeditious resolution of matters under investigation?
68. In comparison to the previous arrangements, does the increased educative role for the FWO help employers and employees to better understand their rights and obligations under the Fair Work Act?
69. What has been the impact of the new ability for the FWO to accept enforceable undertakings as an alternative to prosecution?

Links to evidence sources

Data

- [Fair Work Australia's Annual Reports](http://www.fwa.gov.au/index.cfm?pagename=aboutannual)
http://www.fwa.gov.au/index.cfm?pagename=aboutannual
- [Fair Work Australia's Quarterly Data Reports](http://www.fwa.gov.au/index.cfm?pagename=aboutquarterlyreports)
http://www.fwa.gov.au/index.cfm?pagename=aboutquarterlyreports
- [Trends in Federal Enterprise Bargaining](http://www.deewr.gov.au/WorkplaceRelations/Pages/Reports.aspx)
http://www.deewr.gov.au/WorkplaceRelations/Pages/Reports.aspx
- ABS publications:
 - Industrial Disputes, Cat. No. 6321.0.55.001. Available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6321.0.55.001>
 - Labour Price Index, Cat. No. 6345.0. Available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6345.0>
 - Australian National Accounts, Cat. No. 5206. Available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/5206.0>
 - Australian Systems of National Accounts, Cat. No. 5204.0. Available at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/MF/5204.0>
 - Average Weekly Earnings, Cat. No. 6302.0. Available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6302.0>
 - Labour Force, Cat. No. 6291.0.55.00. Available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6291.0.55.001>
 - Employee Earnings and Hours, Cat. No. 6306.0. Available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6306.0/>
 - Consumer Price Index, Cat. No. 6401.0. Available at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6401.0>

Legislation and policy

- [Workplace Relations Act 1996](http://www.comlaw.gov.au/Details/C2007C00436)
http://www.comlaw.gov.au/Details/C2007C00436
- [Workplace Relations Amendment \(Transition to Forward with Fairness\) Act 2008](http://www.comlaw.gov.au/Details/C2008A00008)
http://www.comlaw.gov.au/Details/C2008A00008
- [Fair Work Act 2009](http://www.comlaw.gov.au/Details/C2011C00580)
http://www.comlaw.gov.au/Details/C2011C00580
- [Fair Work Bill 2008 Explanatory Memorandum](http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4016_ems_929eaf6c-f4aa-44dc-b9e1-e0a6786a7cff/upload_pdf/321247.pdf;fileType%3Dapplication%2Fpdf)
http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4016_ems_929eaf6c-f4aa-44dc-b9e1-e0a6786a7cff/upload_pdf/321247.pdf;fileType%3Dapplication%2Fpdf

- [Fair Work \(Transitional Provisions and Consequential Amendments\) Act 2009](http://www.comlaw.gov.au/Details/C2009A00055)
http://www.comlaw.gov.au/Details/C2009A00055
- [Fair Work \(State Referrals and Consequential and Other Amendments\) Act 2009](http://www.comlaw.gov.au/Details/C2011C00168)
http://www.comlaw.gov.au/Details/C2011C00168
- [Fair Work \(State Referrals and Other Measures\) Act 2009](http://www.comlaw.gov.au/Details/C2009A00124)
http://www.comlaw.gov.au/Details/C2009A00124
- [Fair Work Factsheets](http://www.deewr.gov.au/WorkplaceRelations/NewWorkplaceRelations/Documents/FactSheets/WRFairWorkBillFactSheetsCOMBINED.pdf)
http://www.deewr.gov.au/WorkplaceRelations/NewWorkplaceRelations/Documents/FactSheets/WRFairWorkBillFactSheetsCOMBINED.pdf
- [House of Representatives, Second Reading Speech for the Fair Work Bill 2008](http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2008-11-25/0005/hansard_frag.pdf;fileType=application%2Fpdf)
http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2008-11-25/0005/hansard_frag.pdf;fileType=application%2Fpdf
- [Chronology of Fair Work: background, events and related legislation](http://www.aph.gov.au/library/pubs/bn/eco/Chron_FWAct.pdf)
http://www.aph.gov.au/library/pubs/bn/eco/Chron_FWAct.pdf
- [The Hon Julia Gillard MP - Address to the National Press Club, 17 Sep 2008](http://ministers.deewr.gov.au/gillard/introducing-australias-new-workplace-relations-system)
http://ministers.deewr.gov.au/gillard/introducing-australias-new-workplace-relations-system
- [The Hon Julia Gillard MP - Address to the Australian Labour Law Association, 14 Nov 2008](http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/AddressstotheAustralianLabourLawAssociation.htm)
http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/AddressstotheAustralianLabourLawAssociation.htm

OBPR requirements

- [About the OBPR](http://www.finance.gov.au/obpr/about/)
http://www.finance.gov.au/obpr/about/
- [Best Practice Regulation Handbook June 2010](http://www.finance.gov.au/obpr/proposal/gov-requirements.html#handbook)
http://www.finance.gov.au/obpr/proposal/gov-requirements.html#handbook

Terms of Reference for the Fair Work Act Review

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

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

The review will examine and report on:

1. The extent to which the Fair Work legislation is operating as intended including:
 - the creation of a clear and stable framework of rights and obligations which is simple and straightforward to understand;
 - the emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and related powers of Fair Work Australia;
 - the promotion of fairness and representation at work;
 - effective procedures to resolve grievances and disputes;
 - genuine unfair dismissal protection;
 - the creation of a new institutional framework and a single and accessible compliance regime; and
 - any differential impacts across regions, industries occupations and groups of workers including (but not limited to) women, young workers and people from non-English speaking backgrounds; and
2. Areas where the evidence indicates that the operation of the Fair Work legislation could be improved consistent with the objects of the legislation.

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

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

Evidence

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

- the release of a background paper on the Fair Work legislation inviting stakeholders to make a submission to the review;

- meetings with key stakeholders/roundtable discussions to outline their experiences with the Fair Work legislation; and
- the commissioning of any additional quantitative and qualitative data that may be required.

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

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

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

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