ISSUEANALYSIS

Relics of a Byzantine IR System: Why Awards Should Be Abolished

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For almost a century, the award system was the basis of Australia's industrial relations system and the bedrock of the Aussie 'fair go.' It regulated working conditions for the Australian workforce and ensured that employees received a 'fair and decent wage.' But times have changed, and in today's modern economy, awards are the relics of a Byzantine industrial relations system. They are the remnants of a protectionist and interventionist policy firmly at odds with Australia's open, competitive market.

Over the past three decades, microeconomic reform has transformed Australia's inward-looking, protectionist economy into an open and competitive market. Markets have been deregulated, state-owned enterprises privatised, and tariffs reduced. These reforms have vastly improved living standards and created a more dynamic business environment.

While microeconomic reforms have generally been embraced by most Australians as beneficial for the health of the economy, the story is different in labour market reform. Despite more than two decades of reform and a shift from arbitration towards enterprise bargaining, the old award system still remains central.

Many Australians believe labour market reform is the antithesis of the 'fair go.' This view was exemplified by community reactions to *Work Choices*. But it is possible to substantially reform the industrial relations system and keep the fair go alive.

In today's competitive economy, the award system is an anachronism. Awards set industry-wide wages and conditions based on the principle of equal pay for equal work. This approach to determining wages and conditions ignores the particular circumstances of individual firms and their capacity to pay. Employers who cannot afford to pay these conditions must either sack workers or employ them 'off the books' at below award rates. Awards can also hamper productivity growth by preventing employers from restructuring remuneration arrangements to introduce performance-based pay.

Reforms have simplified the award system and reduced the number of awards. Unfortunately, Prime Minister Julia Gillard's commitment to leaving workers no worse off has meant a significant increase in award wages and conditions. This wage hike has raised costs for business and cut jobs because employers who cannot afford the additional costs lay off workers to cope.

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Outdated employment conditions such as penalty and overtime rates are increasingly out of step with the nature of business and employment in many industries, particularly retail and hospitality, where consumers expect round-the-clock service. Businesses that cater to the leisure needs of consumers find labour costs on weekends and public holidays prohibitively expensive, forcing them to close shop. Jobs go begging for many workers who would happily work at regular pay rates, and consumers are worse off because they cannot access the services they need.

The *Fair Work Act 2009* introduced a comprehensive set of statutory entitlements applicable to all workers. This safety net, which the award system builds upon, is one of the most generous safety nets among the world's richest countries. In 2011, Australia's minimum wage represented 54% of the median wage and ranked fifth highest among OECD nations. Annual leave and public holiday entitlements also compare well against those of other wealthy nations.

There is no longer a need for two safety nets. This report proposes abolishing the award system in favour of the existing federal minimum wage and statutory conditions. These changes will provide much-needed flexibility in the labour market, ease cost pressures for struggling small businesses, and create more jobs for the unemployed.

Introduction

The Byzantine Empire was known for its bureaucratic overkill, bloated public service, and stifling regulation. Australia's unique award system, established shortly after federation, similarly incorporated an incredible degree of regulation that hampered business activity and stifled job growth.

Awards have dominated our industrial relations system since the turn of the twentieth century, and despite several reforms towards a less regulated labour market, they still play a pivotal role. The problem is that awards represent a throwback to an era and an economy that no longer exists—an era defined by protectionism and paternalism.

Since the 1980s, microeconomic reform has fundamentally changed Australia's economy and society. Protectionism has given way to competition, and isolationism to globalisation. Removing tariffs, subsidies and restrictions has made Australian industry more flexible and adaptable to global pressures.

Although most parts of the Australian economy have been liberalised, the crucial labour market is still stuck in the past—and is a drag on the economy. Awards are the remnants of what Paul Kelly describes as the 'Australian Settlement.' They are the relics of a Byzantine industrial relations system characterised by complexity and paternalism. They need to be abolished to make way for a more flexible and productive labour market.

Award reform is a topic The Centre for Independent Studies is revisiting after almost a decade. This report builds upon the work of Kayoko Tsumori, particularly *Poor Laws (3)—How to Reform the Award System and Create More Jobs*.[1] Since the release of that report in 2003, there have been two major reforms to the labour market—the Howard government's *Work Choices* reforms and the Rudd government's *Fair Work Act*. Both reforms have had a significant impact on the industrial relations system and on the operation of the award system.

Awards represent a throwback to an era and an economy that no longer exists—an era defined by protectionism and paternalism.

Tsumori's recommendation of outlawing pattern bargaining has been implemented,[2] but not her other suggestions such as differential rates of pay for regional businesses and opportunities for employers to opt out of the award system.

Award reform did take place under the *Fair Work Act* but the results have proved a double-edged sword. Awards are now simpler and fewer but have raised costs for many businesses, and new transitional arrangements have added another layer of complexity and confusion.

The reform process that began in the late 1980s should be completed. To increase the employment opportunities of Australian workers and reduce the cost pressures of many businesses, particularly small businesses, the awards system should be abolished in favour of minimum statutory requirements applicable to all employees.

History of the award system

Awards are legally enforceable documents that set wages and working conditions for employees. They regulate minimum wages, overtime rates, penalty rates, working hours, break times, and many other work conditions; they also specify employee obligations such as the requirement to give notice of resignation.[3] Awards today apply on an industry-wide basis.

The award system has its origins in pre-federation Australia. During the 1890s, several large-scale industrial disputes brought key industries to a standstill with repeated strikes and lockouts. To address the problem, reformers created a system of compulsory conciliation and arbitration.

Tribunals settled disputes between employers and unions by making a determination and handing down an award. They moderated conflicting parties' claims, took into account the needs of the employers and employees, and decided on the 'fairest' outcome. The rationale behind tribunals was to displace the 'barbarous process of strike and lockout,' and spare the economy disruption and loss.[4]

From its humble beginnings in simple dispute resolution, awards came to dominate the labour market as a method of setting wages. Unions used awards to secure more generous conditions than would have been possible through direct bargaining. Awards coverage reached 87% by 1974.[5]

Typically, a union would serve a log of claims on the employer (or, as was often the case, several employers) outlining the pay rise and conditions the union desired. These claims were designed to be excessive to force a rejection from the employers.[6] The claims could be large wage increases, higher overtime rates, restrictions on hours, etc. It didn't really matter. Once the employer rejected the union's offer, a 'paper dispute' would arise and the relevant state (or federal) tribunal would be called in to conciliate and arbitrate.[7] Conciliation and arbitration were compulsory once a dispute had been lodged with the tribunal.

Once an award had been created, unions would periodically seek improvements to wages and conditions.[8] They would often use the opportunity to 'rope in' new employers and expand the application of the award by serving a log of claims on new employers. This feature promoted standardised wages and conditions over several employers, and often throughout entire industries. But it didn't stop there. Common rule awards within state jurisdictions also allowed the wage conditions of one workplace to be extended to other workplaces not part of the original dispute.[9]

Another aspect of Australia's pre-reform awards system was the practice of having national wage cases. Each year a union, or a group of unions, would apply to the tribunal for a general pay rise. These national hearings became test cases for all other federal awards, such that a pay rise granted to the unions would filter through to all other federal awards.[10] Typically, decisions would grant a pay rise to compensate for inflation or productivity improvements generated in one or more sectors.

Firms could become more efficient and productive by tailoring wages and conditions to the needs of the enterprise.

The proliferation of awards gave the Australian labour market several distinctive characteristics. First, the awards system empowered unions, since even the smallest union could force an employer to appear before an industrial tribunal and have an award determined.[11] This contributed to a high level of unionisation among the workforce—46% in 1986.[12] By comparison, union members comprised 18% of the workforce in 2011.[13] Second, wages and conditions tended to be standardised across entire industries and occupations.

The award system today

For the past two decades, Australia's labour market has been transitioning from a centralised and interventionist wage-fixing regime to a decentralised model based on bargaining. Governments have sought to decrease the role of the tribunal in regulating employment relationships, leaving employers and employees/unions free to sort out their own affairs. Governments realised that the rigidity of the industrial relations system was inhibiting flexibility and adaptability within firms.[14] To this end, management and workers/unions were to be given more scope to effect change within the workplace to improve productivity in Australian businesses. Firms could become more efficient and productive by tailoring wages and conditions to the needs of the enterprise.

In 1990, roughly 50% of employees in Australia were paid the exact award wage.[15] Since enterprise bargaining was introduced, award-reliance has gradually declined to 15% in 2010.[16] Most workers have their pay set by collective or individual agreements—43% and 37%, respectively. Table 1 shows the gradual reduction in award reliance since 2000.

Table 1: Proportion of employees paid the exact award wage (2000–10)

Awards (% of workforce)	2000	2002	2004	2006	2008	2010
Males	16.8	15.1	15.7	14.7	13.3	12.6
Females	29.9	26.1	24.4	23.4	19.9	17.8
Total	23.2	20.5	20	19	16.5	15.2

Source: ABS (Australian Bureau of Statistics), *Employee Earnings and Hours*, Cat. No. 6306 (Canberra: ABS, May 2010).

Awards are also not spread evenly across the economy. Some industries and occupations are more award-reliant than others. On average, award-reliant employees tend to be low skilled, and hence, low paid. Most skilled occupations, such as management and professionals, tend to be regulated by individual or collective agreements and are rarely paid just the award wage. On the other hand, labourers, sales workers, and community service workers tend to be the most award-reliant. Table 2 breaks down the methods for setting pay according to occupation.

Table 2: Methods of setting pay by occupation (2010)

	Award only	Collective agreement	Individual	Working proprietors of companies	Total
Managers	2.2	25.5	55.0	17.3	100
Professionals	3.3	57.4	35.4	3.9	100
Technicians and trades workers	19.5	30.5	44.3	5.7	100
Community and personal service	31.1	51.8	16.7	0.4	100
Clerical and administrative workers	9.3	39.1	48.3	3.3	100
Sales workers	23.5	43.3	31.4	1.8	100
Machinery operators and drivers	11.6	45.9	39.9	2.5	100
Labourers	27.9	42.8	28.5	0.9	100
All occupations	15.2	43.4	37.3	4.1	100

Source: ABS (Australian Bureau of Statistics), *Employee Earnings and Hours*, Cat. No. 6306 (Canberra: ABS, May 2010).

Despite a marked move towards agreements, the award system still wields considerable influence.

The shift towards bargaining also meant awards were to serve a different purpose in the labour market. Rather than a means of setting wages, the award system now serves as a safety net of minimum wages and conditions. As such, the yearly wage cases are now called safety net reviews, and focus on the needs of the low-paid rather than the entire workforce.

Awards still influential

Despite a marked move towards agreements, the award system still wields considerable influence. This happens in several ways.

First, awards underpin collective agreements. The wages and conditions of collective agreements (also called enterprise agreements) must satisfy a 'better-off overall' test. To be registered, the agreement must provide wages and conditions that leave each worker better off overall than they would have been compared to the relevant award. Employers and employees can make tradeoffs, such as alterations to regular hours or changes to payment structures. But the conditions cannot go below the overall level mandated by the award, otherwise the agreement will not be registered.

Second, individual agreements, which are not registered, must comply with the relevant award. Specifically, each condition of the agreement must comply with the conditions in the award, unlike collective agreements, which can incorporate tradeoffs. Individual agreements can provide for over-award wages and conditions but cannot go below, making them less flexible than collective agreements.

As awards underpin collective and individual agreements, when changes such as wage increases in the annual safety net reviews are made to awards, the effects of those changes flow on to collective and individual agreements.

Third, many collective agreements are not comprehensive, but instead need to be read in conjunction with awards. This was the case almost a decade ago when Tsumori proposed reforms to the award system in 2003.[17] In such cases, as Tsumori points out, often the pay structure is set by the agreement while the award regulates employment conditions. Studies of award coverage in 1999 and 2000 found that the proportion of the workforce whose wages and conditions were wholly regulated by awards was as high as 35%.[18] In addition, many agreements provide that any pay increase determined by the Fair Work Commission at the annual Safety Net Review will trigger a proportionate rise in pay level.

Fourth, the individual agreements column in Table 1 not only includes workers whose pay and conditions are set by a common law contract, but also workers who are regulated by the award and receive over-award payments.[19] These employees are to a significant extent still award-reliant as they receive the full array of benefits offered under the award. But this underestimates the coverage of awards. Unfortunately, because these agreements are not registered, data on the degree of comprehensiveness in the agreements are hard to determine.

The award system has significant reach, regulating the pay and conditions of the vast majority of employees.

So awards directly set pay and conditions for 15% of the workforce; they also indirectly affect the pay and conditions of those on collective agreements (43%) and an unknown proportion of those on individual agreements (up to 37%).

These factors imply that the award system has significant reach, regulating directly or indirectly the pay and conditions of the vast majority of employees.

Award modernisation

Awards had been restructured and simplified several times throughout the late 1980s and 1990s. Most notably, the number of employment conditions awards could deal with (allowable matters) was reduced to 20 with the passage of the Howard government's *Workplace Relations Act 1996*.

Howard's *Work Choices* reforms proposed further simplification by reducing the number of awards to a few dozen,[20] and allowable matters to 13.[21] This reform, however, soon died because of the unpopularity of the *Work Choices* legislation. Instead, it was shelved until after the 2007 election.

Award reform instead took place under the Rudd/Gillard governments. As part of Labor's *Forward with Fairness* policy, 3,715 state and federal awards were simplified and merged to 122 modern awards.[22] They are now less complex and regulate less of the employment contract. In addition, modern awards contain terms to permit increased flexibility (Individual Flexibility Arrangements) as an alternative to the Howard government's individual Australian Workplace Agreements.

But then Deputy Prime Minister Julia Gillard formed two commitments—one to employers and one to employees—to minimise political backlash to the reforms. In her letter to Justice Geoffrey Giudice, then president of the Australian Industrial Relations Commission (now the Fair Work Commission), Gillard noted that the creation of modern awards was not intended to disadvantage employees or increase costs for employers.[23] These are conflicting objectives because when two or more awards are combined to produce a new modern award, each with its own wages and conditions, the resulting award is a compromise. When compared to the conditions of the old awards, some employees will benefit and others won't, and the costs of

running a business will increase for some and decrease for others. Winners and losers are unavoidable. The award modernisation process has brought about a general factoring up of employment conditions, and the transition from old to new awards has become more complex and harder for employers to navigate. Wage rates have increased, as have conditions such as overtime and penalty rates, significantly raising costs for employers, particularly small businesses.[24] To alleviate the abruptness of cost hikes, transitional arrangements have been included in modern awards. These arrangements phase in hikes to wages and conditions across a four-year period at 20% increments starting from July 2010.[25] Modern awards can deal with the following matters:[26]

- base rates of pay, including piecework rates
- types of employment (e.g. full-time, part-time, casual)
- overtime and penalty rates
- work arrangements (e.g. rosters, variations to working hours)
- annualised wage or salary arrangements
- allowances (e.g. travel allowances)
- leave, leave loading, and taking leave
- superannuation
- procedures for consultation, representation and dispute settlement
- outworkers
- an industry-specific redundancy scheme.

A minimum wage ought to be catered to the most vulnerable or weakest firm that we want to survive.

Although modern awards regulate a limited number of conditions, many of these conditions increase labour costs for business, which in turn hinders business activity and employment. In addition to industry-specific minimum wage rates, the most obvious cost hurdles are penalty and overtime rates. Other conditions—minimum hours of work and restrictions on roster changes—hinder an employer's ability to organise the workforce according to the firm's needs.

Many of the elements contained in modern awards create inflexibility in the labour market, but by far the most damaging are the tiers of minimum wages, penalty and overtime rates, the effects on productivity, and the overall complexity of the system.

Award wages

Australia's award system is supposed to set minimum wages for the low paid, but it goes much further. Industries and occupations not considered low paid have awards with several levels of minimum wages. For example, the architect's award in 2010 set eight pay classifications. Graduate entry level pays a minimum of $43,000 per year while a registered architect must earn at least $49,739. Aircraft pilots are regulated under the air pilots award 2010, with 14 classifications and associated minimum wages for the captain and first officer depending upon the type and size of engine in the plane. A captain's annual salary ranges from $36,734 for a 'single engine UTBNI 1360 kg' to $63,140 for a 'Dash 8 400–28998 kg MTOW.' There are eight more classifications and minimum wages for larger aircraft: $101,631 for a 'Fokker 28' to $149,516 for a 'wide body aircraft (double deck).' This complex system of minimum wages has little to do with the needs of low paid workers, and much more to do with the remnants of centralised wage fixing—a wage structure both Labor and the Coalition have legislated away in the past two decades.

The main problem with the award system is its one-size-fits-all nature. Two cafes in different shopping strips, of different sizes, and with different customer traffic and revenue levels ought to be able to pay different wages if that is what suits their needs. Similarly, workers employed in a shop in Adelaide do not require the same wages as their Sydney counterparts, given the differences in the cost of living. A minimum

wage ought to cater to the most vulnerable or weakest firm that we want to survive. Above that minimum, wages ought to be a matter of market forces and negotiation between employers and employees/unions. If a worker improves their productivity, those additional skills will command a higher wage in negotiations with the employer, or other prospective employers.

The principle of 'equal pay for equal work' applied throughout the award system does not take into account differences in local economic conditions or the employer's capacity to pay. This may not pose a problem for businesses with the capacity to comply with award wages and conditions, but for those that cannot the additional costs erode their competitiveness. Employers unable to pass on increased costs to consumers via higher prices must reduce labour costs in other ways—by reducing worker hours and/or firing workers.

The award system primarily comprises an elaborate set of minimum wages assigned to different groups in different industries and occupations. Hence, the effect upon employment (or rather, the level of unemployment resulting from the award wage) depends upon whether these minimum wages are above the level that would clear the market. Thus, determining the effect of the award system is not quite as simple as, for example, the effects on employment of an increase in the federal minimum wage. But that has not prevented some analyses on the effects of safety net review cases.

'Equal pay for equal work' does not take into account differences in local economic conditions or the employer's capacity to pay.

Don and Glenys Harding documented the effects of award wage increases on labour demand for small- and medium-sized businesses after the annual safety net review in May 2003. The results showed that in the short term, the safety net adjustment cost roughly 14,000 jobs.[27] The report also estimated a long-run counterfactual: 245,000 jobs would be created if the safety net review were to guarantee no adjustment for five years.[28]

These results add to the conclusions of a vast literature documenting the negative effects of minimum wages on unemployment, particularly in the United States and Europe. David Neumark and William Wascher provide a useful review of the recent literature on the employment effects of minimum wages, documenting a sizeable majority of studies confirming basic economic theory that minimum wages reduce employment.[29]

Awards and productivity

The award system also has the potential to reduce productivity. This argument was put forth in the early 1990s as part of the rationale for introducing enterprise bargaining.[30] It was argued that awards led to the proliferation of restrictive work practices that dampened the incentives for productivity growth. Having industry-wide or occupation-wide award structures were said to lead to:

- task and function demarcation
- seniority-based rewards rather than performance-based advancement
- flat age-earning profiles that served as a disincentive to training and long-term employment
- less trust between employers and employees/unions.[31]

Australia's productivity performance throughout the 1990s seemed to confirm a positive relationship between decentralised bargaining structures and productivity performance. Productivity surged above trend levels, rising 15% higher than if the economy had followed its historical trend.[32]

That enterprise bargaining was the driver of the productivity surge in the 1990s is still disputed.[33] The 1990s saw significant advances in information technology and telecommunications, transport, electricity, and water supply, and it is difficult to isolate the effects of enterprise bargaining.[34]

More recently, some retailers have highlighted that amid the heightened competition in the sector, the need to improve labour productivity is essential to stay competitive. In particular, Westfield's submission to the Productivity Commission's review of the retail sector highlighted that the award system's high wages and penalty rates 'preclude[d] retailers from rewarding the most productive staff.'[35] Many retailers would like to introduce performance-based pay to improve productivity, but it is difficult to offer incentives when the award minimums are already high, and when the employer must ensure that no employee is made worse off. Incentive pay necessarily rewards some employees over others, but may only be affordable if the base wage is reduced. But employers cannot offer these incentives when they are also obliged to pay all workers (regardless of their productivity) the same wages and penalty rates.

Penalty rates and overtime

The biggest single industry concern in relation to the retail award modernisation process was the impact of penalty rates on business costs, and the consequences on flexible trading hours.[36] This should come as no surprise since the retail industry caters to their customers' leisure needs, as do the hospitality, tourism and accommodation sectors. Table 3 outlines the penalty rates in the general retail industry award.

Table 3: Penalty rates in the general retail industry award

	Full-time penalty rate	Casual penalty rate
Monday to Friday evening work	25	0% (25% casual loading)
Saturday	25	10% (25% casual loading)
Sunday	100	100% (no casual loading)
Public holidays	150 (or leave in lieu equivalent)	150% (25% casual loading) (or leave in lieu equivalent)

Source: Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Inquiry Report 56 (November 2011), 338.

For many retailers, operating on Sundays and public holidays is not profitable despite those times being periods of high demand by their customers.

A level 1 retail employee draws a base weekly wage of $666.10, or $17.53 per hour, for a 38-hour work week. The same employee will earn $21.91 per hour on weeknights and Saturdays, $35.06 per hour on Sundays, and $43.82 per hour on public holidays. Casual workers, who dominate low-skilled industries such as retail, receive an additional $4.38 per hour (except on Saturdays). For a top-level retail assistant, minimum wages are significantly higher. A level 8 retail employee receives $21.45 per hour on weekdays, $26.81 per hour on weeknights and Saturdays, $42.89 per hour on Sundays, and $53.62 per hour on public holidays.

For businesses in many states (but not all), the standardisation of penalty rates in the new awards has made the system simpler but more expensive. The Productivity Commission's report notes that before award modernisation, Sunday penalty rates were 50% in the ACT and NSW, and 60% in South Australia.[37] Saturday penalty rates used to be zero per cent in South Australia and 21% in Western Australia. Victorian and NT businesses have been least affected, and in some cases gained. Victorian penalty rates were 100% on Sundays, and between 25% and 36% on Saturdays, while the Northern Territory had a 100% penalty for Sundays and approximately 35% on Saturdays (25% before noon).[38]

For many retailers, particularly small ones, operating on Sundays and public holidays is not profitable despite those times being periods of high demand by their customers.[39] For businesses that shut down or operate below their potential employing capacity, opportunities go begging for workers and the employer. The retail industry has been the most vocal about the imposition and hike of penalty rates since award modernisation, but they are not the only sector worried about rates. The small

business sector more generally views penalty rates as a significant impediment to business activity.[40]

The current rationale given for penalty rates, and indeed overtime rates, is that employees who work on weekends or outside the normal hours deserve compensation for the inconvenience associated with working 'unsociable hours.'[41] Unsociable hours are after 5.30pm and weekends because they occupy times of the day important to personal and family well-being.[42]

Another assertion is that without the additional incentive, many workers would prefer not to work at the times they consider 'unsociable' or inconvenient.[43] Some proponents go further and say without these conditions, employers would struggle to find employees to work during these hours.

Penalty rates were introduced in 1947 by the Commonwealth Arbitration Court (now the Fair Work Commission). As the name implies, penalty rates were introduced to penalise employers who hired workers outside standard 9-to-5 hours. They were designed to be a disincentive to hire workers during hours the government had reserved for family and leisure.[44] They were not meant to compensate those who did work, as the decision to work was their choice. But the nature of work has changed in Australia. Many businesses regularly operate and even depend upon work in non-standard hours. Work beyond the 9-to-5 bounds is also necessary because of modern consumer demand and the abundant online shopping avenues that bricks-and-mortar stores must compete with.

Penalty rates were introduced to penalise employers who hired workers outside standard 9-to-5 hours.

Many workers prefer to work outside the 9-to-5 working hours—school or university students, workers engaged in other jobs during the week, or people who simply prefer flexible hours—and do not need additional incentives to work on weeknights or weekends. Students particularly prefer working after hours and on weekends because their studies occupy regular hours. As the Australian National Retail Association (ANRA) pointed out in its submission to the Productivity Commission's review, it is not difficult to find volunteers to fill shifts on public holidays and weekends, with many employees welcoming the flexible hours the retail industry provides. For example, Easter holidays bear no significance to non-Christian workers willing to work extra hours.[45]

In fact, for many workers, the higher penalty and overtime rates are an incentive to work during 'unsociable' hours. Without overtime and penalty rates, only those employees willing to work at 'unsociable' times would do so. Employers would have greater flexibility to hire workers at these times so there would be more opportunity for workers to find additional hours. And if employers are genuinely unable to attract employees for overtime or weekend work, they will have a strong incentive to offer additional payments on their own accord.

Complexity and compliance

One of the chief problems of the award system, particularly before the reform process began in the 1990s, was its complexity. The myriad wages and conditions compiled in awards and the varying occupations covered by workers in businesses meant employers often either did not know which award applied to which workers, or were unaware of their obligations under their award. This was particularly so for small businesses who did not have the luxury of a human resources department.[46] Small businesses still find awards to be lengthy and legalistic. Others, who do not have the capacity to comply with award wages and conditions, simply ignore them.[47] Award non-compliance is much more prevalent in the small business sector[48] because of the complexity and cost burden of award conditions, and because it is easier to get away with non-compliance. Unions used to be the principal enforcers of the awards, but unions often did not have the capacity (or neglected) to enforce awards in smaller organisations. This was partly because of the sheer scale of the task, and partly because smaller businesses often had few

union members and were thus given lower priority.[49] Rather perversely, many small businesses, who would normally be most inconvenienced by award wages and conditions, were less inconvenienced by them.

Although there are fewer awards regulating less of the employment contract today, the factoring up of employment conditions in the new awards and new transitional arrangements has introduced unique complexities and additional costs into the system. Moreover, the award system is now more rigorously enforced by the Fair Work Ombudsman. While greater compliance is laudable and should be pursued, employers will find no relief from onerous wages and conditions.

Small businesses comprise 90% of all employing businesses in Australia,[50] employ a third of all employees, and account for a third of total operating profits before tax.[51] More importantly, small businesses tend to experience higher entry and exit rates than large businesses, as well as lower survival rates.[52] In other words, though small businesses play a large role in the employment of Australian workers and in the makeup of the national economy, they are in a more precarious financial environment than their larger counterparts, and more susceptible to the costs and distortions of labour market regulations.

We need a simple and straightforward set of rules that apply to all employees and provide an adequate base wage and conditions for workers without being onerous on employers, hindering employment, or being ignored altogether. We need a simple statutory safety net and a minimum wage.

A statutory safety net instead?

We need a simple and straightforward set of rules that apply to all employees.

Since the *Conciliation and Arbitration Act 1904*, awards have been the sole form of labour market regulation in Australia. Employers either struck an agreement with their employees as a regular contract under common law, or initiated a dispute that would lead to an award. Microeconomic reform since the 1980s changed this approach. First at state level, then at federal level, governments began legislating statutory minimum conditions and formalised bargaining. A safety net of minimum conditions was extended to all workers, paving the way for enterprise-individual bargaining.

Today statutory minimum conditions apply to all employees at the national level. The *Fair Work Act* sets out 10 National Employment Standards (NES) with which all awards (and hence all individual and collective agreements) must comply. Where there is no award to cover a particular job, the 10 NES apply, along with a minimum wage. The 10 NES are:[53]

1. **Fair Work Information Statement**—employers have to give the statement to all new employees
2. **Maximum weekly hours of work**—38 hours, plus reasonable additional hours
3. **Requests for flexible working arrangements**—parents and carers can ask for flexible working arrangements to care for children under school age or under 18 with a disability
4. **Parental leave and related entitlements**—up to 12 months unpaid leave, the right to ask for an extra 12 months unpaid leave, and other types of maternity, paternity and adoption leave
5. **Annual leave**—4 weeks paid leave per year, plus an extra week for some shift workers
6. **Personal/carer's leave and compassionate leave**—10 days paid personal (sick)/carer's leave, 2 days unpaid carer's leave, and 2 days compassionate leave (unpaid for casuals) as needed
7. **Community service leave**—up to 10 days paid leave for jury service (unpaid leave after 10 days) and unpaid leave for voluntary emergency work
8. **Long service leave**—entitlements are carried over from pre-modern awards or from state legislation (see the Long Service Leave and the NES fact sheet)

9. **Public holidays**—paid leave on public holidays unless reasonable to ask employee to work
10. **Notice of termination and redundancy pay**—up to 4 weeks notice of termination (5 weeks if the employee is over 45 years and has been in the job for at least 2 years) and up to 16 weeks of redundancy pay.

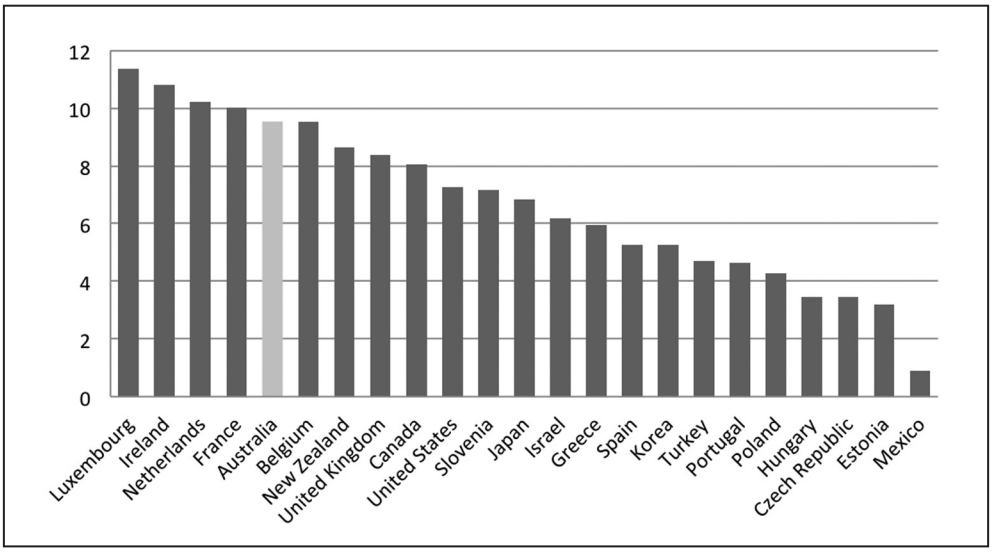
Without a statutory safety net of minimum conditions, the award system provided the only form of minimum wages or conditions. Now that statutory conditions apply to all workers, the relevant question is whether these statutory minimums provide an adequate safety net.

How does Australia's safety net compare?

The Organisation for Economic Co-operation and Development (OECD) compiles comparative statistics on minimum wages, annual leave, and other conditions that form the work-related entitlements of the safety net. Relative to other developed countries, Australia has a high minimum wage and generous work entitlements. The federal minimum wage (currently $15.96 per hour) represents 54% of the median wage.[54] In 2011, Australia's real minimum wage in purchasing power parity (PPP) terms ranked fifth highest among 23 of the world's richest countries.[55] The award system builds further minimum wages upon this already high standard. Figure 1 illustrates how Australia's minimum wage compares to other OECD countries.

Australia's real minimum wage ranked fifth highest among 23 of the world's richest countries.

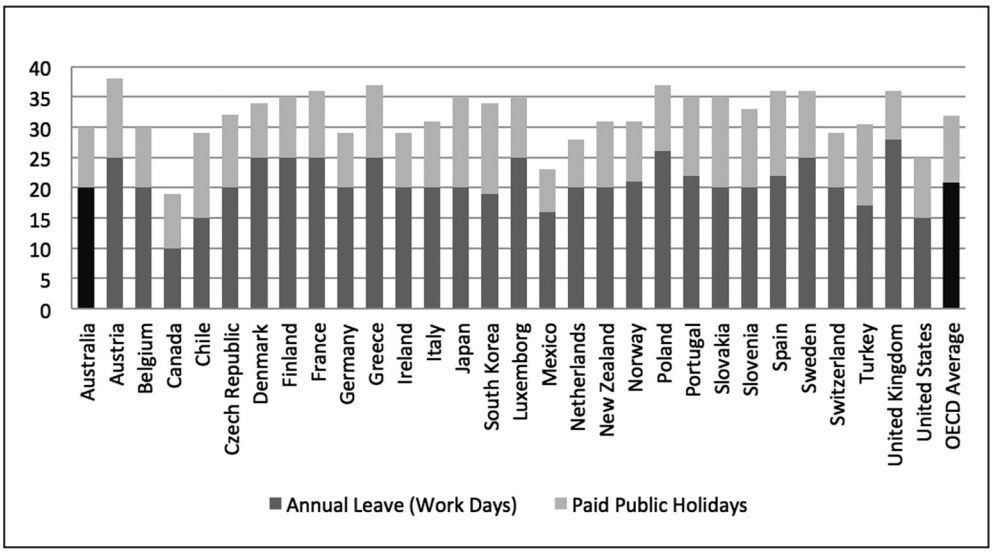
Figure 1: Real hourly minimum wage of OECD countries (US$PPP) (2011)



Source: OECD (Organisation for Economic Co-operation and Development), 'Real Hourly Minimum Wages' (2011).

A comparison of leave entitlements was compiled in 2011 by Mercer that measuredminimums for paid annual leave and paid public holidays in a number of countries. This study showed that Australia's safety net conditions are comparatively generous. Australian employees receive 20 work days of paid annual leave plus 10 days of paid public holidays. These entitlements compare favourably against several OECD countries, such as against the United States and Canada, which have fewer annual leave entitlements. Other European countries like the United Kingdom and Austria enjoy more annual leave days than Australia. Figure 2 shows all the OECD countries included in the Mercer study. The average among these countries is 21.5 annual leave days and 10.6 paid public holidays, which places Australia's leave entitlements slightly below the OECD average.

Figure 2: Annual leave days and public holidays of OECD countries (2011)



Source: Mercer, 'Worldwide Benefit and Employment Guidelines' (2011).[56]

These statistics compare only a few selected variables. There are of course additional entitlements in the full suite of statutory minimum conditions, as there are in other industrial relations systems. Nevertheless, the facts support the case that the statutory minimum conditions in Australia are sufficient enough to cater to the needs of the low paid. It is also important to note that award wages build higher and higher wages on top of this already high standard. Then there is the vast array of award conditions and allowances workers receive in addition to the statutory requirements. If the safety net is sufficient, there is no need for an additional minimum wages and conditions. Wages and conditions above the federal minimum wage and NES ought to be a matter of negotiation between the employer and the employees/unions. This way additional conditions will apply where the employer can afford it, or where the industry and business needs require it. But in instances where the industry does not require it, or where an employer must sacrifice jobs to pay award entitlements, these firms will no longer have to make that trade-off. Employers can instead employ more workers and increase output.

The statutory minimum conditions in Australia are sufficient enough to cater to the needs of the low paid.

So long as wages are above the federal minimum wage determined by the Fair Work Commission, employers ought to have the ability to set wages according to their capacity to pay and prevailing market pressures. Similarly, if employers are complying with the minimum employment conditions contained in the NES, they ought to be able to set the rest of their workplace arrangements according to the needs of the business. Should employees require better conditions, they have the ability to shop around for more favourable terms or solicit representation from a union.

A system without awards

Under the current system, the federal minimum wage and statutory minimum conditions set the standard for all employment arrangements. Above this layer of employment regulation sit modern awards, followed by individual and collective agreements. Doing away with the award system will remove the middle tier of the three levels of employment regulation. This has implications for the collective and individual agreements currently underpinned by awards.

First and foremost, any additional award wages, conditions or restrictions would no longer be mandated in individual or collective agreements. Individual/collective agreements could still retain award terms and employment conditions, but this would be negotiated between the employer and employee. Award terms not contained in the NES would no longer be required by law and would become a matter of negotiation.

There would also be no need for a no-disadvantage test since none of the NES conditions can be traded off.

The government could still require the registration of formal enterprise agreements as it does now, to keep data on enterprise agreements for the public record. But registering collective agreements would no longer be essential as the primary purpose for registering an agreement was to ensure that the terms satisfied the no-disadvantage test.

For most award-reliant employees, the abolition of the award system would likely mean they would end up being covered by an individual agreement. This is because award-reliant employees often tend to be small business employees, who are characterised by low levels of union membership.

The intention is to eliminate restrictive work practices from agreements where those conditions do not suit the organisation. Regulations mandating penalty rates would likely decline, as would minimum shift requirements and other restrictions on rostering and the management of a firm's workforce. The removal of restrictive practices and additional costs would provide employers with the flexibility needed to drive workplace change, whether it be changes to remuneration structures or changes to work patterns, and boost employment opportunities.

Conclusion

The award system is outdated and redundant, and ought to be abolished in favour of the existing federal minimum wage and statutory conditions.

A century ago, Australians embraced protectionism economically and socially. Arbitration and the award system were Australia's unique take on protecting the worker. Since the 1980s, the Australian economy and society have changed significantly—and for the better. Protection has given way to competition, and with this change has come significant improvements in the standard of living.

Only in the labour market does the spectre of protectionism still remain. The award system has been reformed several times, and enterprise bargaining is now the stated focus of the industrial relations system. The award system and its flaws still persist, exerting direct and indirect influence on the wages and employment conditions of a large part of the workforce.

The award system today is a secondary safety net of wages and conditions building upon an already generous set of statutory protections that rank high among the world's wealthiest countries.

While it is important to ensure working Australians are guaranteed socially acceptable minimum standards, it is also important to ensure this safety net is not too onerous, particularly for small businesses which have a limited capacity to pay. An onerous safety net, with excessive minimum wages and employment conditions, erodes competitiveness and destroys jobs. The award system today, particularly after the award modernisation process, is a significant cost burden to businesses.

In particular, the rationale for penalty rates and overtime are out of place in the makeup of the modern Australian business. Large parts of the services sector—such as retail, hospitality and services—conduct their greatest volume trade outside standard hours. These are convenient times for consumers and if businesses are to be competitive, particularly against growing online competition, they need to be able to cater to these demands. Penalty and overtime rates increase labour costs during operating hours and impede the ability of employers to remain profitable or provide work to employees.

An efficient and fair labour market regime should provide minimum standards and leave the rest to employers and employees/unions to negotiate. This ensures that wages and employment conditions are tailored to the needs of the business, which can, in turn, provide bigger opportunities to more workers and customers.

The award system today is outdated and redundant, and ought to be abolished in favour of the existing federal minimum wage and statutory conditions.

Endnotes

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