



BUSINESS SA Submission to the Productivity Commission

WORKPLACE RELATIONS FRAMEWORK

27 March 2015



BusinessSA

South Australia's Chamber of
Commerce and Industry

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Introduction

As South Australia's peak Chamber of Commerce and Industry, Business SA is South Australia's leading business membership organisation. We represent thousands of businesses through direct membership and affiliated industry associations. These businesses come from all industry sectors, ranging in size from micro-business to multi-national companies. Business SA advocates on behalf of business to propose legislative, regulatory and policy reforms and programs for sustainable economic growth in South Australia.

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Overview

Business SA is pleased to be providing a submission to the Productivity Commission's Workplace Relations Framework inquiry. Business SA is a member of the Australian Chamber of Commerce and Industry and we support the recommendations contained in their submission.

South Australia is a small business state with 97 per cent of local businesses classified as a small business. Our submission is focused upon the key issues that impact upon our members in their businesses.

Due to the relatively tight timeframe for providing submissions to the Productivity Commission we have kept our comments concise and focused on the changes that will positively improve the workplace relations framework in Australia and which will result in both economic and jobs growth.

Business SA would welcome the opportunity to meet with the Productivity Commission during on-going consultations to provide member feedback and case studies where appropriate.

The South Australian unemployment rate is currently the highest in the nation being 6.9 per cent. With structural changes in the State's economy, such as the forthcoming exit of automotive manufacturing, any impediments to businesses in South Australia growing and diversifying must be removed.

South Australian businesses need to be able to respond to economic conditions, to drive productivity growth and to be competitive if all South Australians are able to maintain and improve our living standards. In short, business needs to be able to adapt and change to the new environment so that all South Australians and their children have access to employment. Workplace relations reform has a very important role to play in ensuring that businesses can adapt, grow and thrive.

Unfortunately the current workplace relations framework does not suit the needs of modern workplaces or our economy and is stifling growth and job creation. The current workplace relations framework focuses on collective agreement making and doesn't offer genuine individual agreements that would provide for real flexibility and productivity for the employer and employee.

Issues Paper 2 – Safety Nets

Minimum Wage

The minimum wage has been a fundamental aspect of the safety net in Australia's workplace relations framework. The minimum wage is currently determined by the Fair Work Commission's Minimum Wage Panel.

The minimum wage however, must not increase the risk of unemployment for those that are the most vulnerable in the labour market. When setting the minimum wage one of the key priorities needs to be the protection of employment and ensuring that the unemployed are able to gain employment and not be locked out of the jobs market.

The anecdotal evidence from our member companies is that the increase awarded to minimum wages has usually been used as a "benchmark" by employees and their representatives in negotiating wage increases in workplace agreements. While it is very difficult to obtain empirical data on this negotiating tactic, it is nevertheless commonly used in bargaining negotiations. As agreements are assessed against relevant Modern Awards any increase to minimum wages therefore will affect renewal and renegotiation of current enterprise agreements and the level of wage increases in agreements.

The current Fair Work Commissions Minimum Wage Panel makes decisions largely based on a macro-economic assessment of the economy. The Australian Fair Pay Commission, that determined the minimum wage from 2006-2009 and chaired by Ian Harper, consulted directly with people that were affected by minimum wage decisions. This included the

unemployed and low paid workers and employers of lower paid workers¹. It is this broad based approach to consulting that Business SA believes should form a part of the minimum wage determinations.

National Employment Standards

The PC has found that there is little controversy with the National Employment Standards (NES), and is not proposing in this review to make holistic changes. Rather, their focus is whether there are any features of the NES that should be changed. Business SA would disagree, as the complexity of each of the standards has led to complex compliance issues for business, particularly small business.

The Workplace Relations Amendment (Work Choices) Act 2005 introduced five minimum standards operating as the Australian Fair Pay and Conditions Standard (AFPCS). These were five statutory entitlements for employees, namely basic rates of pay and casual loadings, maximum ordinary hours of work, annual leave, personal leave (including carer's and compassionate leave) and parental leave.² Public holidays and the notice of termination were previously legislated employee entitlements that were amalgamated under the NES in the Fair Work Act 2009. It also introduced four new standards:

- requests for flexible working arrangements;
- community service leave;
- long service leave; and
- redundancy pay.³

The NES were further developed in the Fair Work Act 2009 to provide a minimum safety net for Australia's workforce. These standards underpin employment conditions for those employees who are not covered by an award. It is illegal to contract out of the NES or awards, and employers who do so risk significant penalties for non-compliance.

Business SA would support a set of minimum standards that are more refined, and easier to negotiate, particularly for small business where the level of regulation creates heavy burdens on the workplace. In addition to the current complexity, the national approach of the NES presents difficulties in the areas of long service leave and public holidays. Currently, the four yearly review of modern awards being conducted by the Fair Work Commission is dealing

¹ *Why would an economic liberal set minimum wages?* Ian Harper, *Policy*, Vol. 25 No.4 Summer 2009-10

² Workplace Relations Act 1996, s. 176 to 316.

³ Fair Work Act 2009, s. 2-2.

with public holidays as a common issue. The review will consider the appropriateness of current penalty rates and part-day public holidays, the latter being an issue of particular importance in South Australia.

In April 2012 the South Australian Parliament passed the Statutes Amendment (Shop Trading Holidays) Act 2012. This resulted in an amendment to the Holidays Act 1910 to include two additional part-day public holidays from 7.00pm to 12 midnight on 24 December (Christmas Eve) and 31 December (New Year's Eve). Part-day public holidays are not restricted to this state alone; South Australia continues to require resolution of the penalty rate issue each year. The complexity of the matter and the centralised decision making process to provide an interim solution leads to red tape constraints for business in South Australia. Placing public holidays in the national standards has created an added layer of complexity to process and decision-making that did not exist before the NES were in place.

Modern Awards

Modern awards came into effect in on 1 January 2010, with the Federal Government seeking to simplify and modernise the awards system that had been in place for over one hundred years. The then Minister for Employment and Workplace Relations, Ms Julia Gillard MP, committed that the award modernisation process would not disadvantage either employers or employees, as did Prime Minister Rudd in Parliament in March 2008.⁴ A decision by the Australian Industrial Relations Commission (AIRC) noted the competing interests of employers and employees in awards, and found that these objectives as related by the then Minister were not possible to achieve:

*'...it is clear that some award conditions will increase, leading to cost increases, and others will decrease, leading to potential disadvantage for employees, depending upon the current award coverage.'*⁵

Business SA does not believe that the objectives of the Rudd-Gillard-Rudd Labor Government in *Forward with Fairness* were met. Member feedback collated by Australian Chamber of Commerce and Industry (ACCI) in 2012 noted multiple examples of employers being disadvantaged by the award modernisation process – from penalty rates, casual

⁴ Transcript, 7.30 Report 1.09.2009: <http://www.abc.net.au/7.30/content/2009/s2673658.htm>; <http://www.openaustralia.org.au/debates/?id=2008-03-20.67.1>.

⁵ [2009] AIRCFB 800, paragraphs 4 to 5.

loadings, hours of work and many other areas of workplace relations.⁶ The Australian Human Resources Institute's (AHRI) submission to the Productivity Commission's Inquiry into the Workplace Relations Framework points out in their survey results that over 70% of their 800 respondents' required additional legal advice following the implementation of the Fair Work Act.⁷ Our own members' feedback reflected a deep-seated concern with the process undertaken in the modernisation of awards, and the lack of relevance to their own industries.

Further to this, awards were rationalised rather than arbitrated at the time of modernisation, which led to many of the historical provisions in awards remaining, at times without reference to the market in which they operated. The Productivity Commission itself noted:

*In selecting appropriate wage levels and other conditions in modern awards, the AIRC's approach was to select new benchmarks based on the most prevalent conditions existing in the range of pre-modern awards.*⁸

The 4 yearly review of modern awards, currently underway with the Fair Work Commission, is now in its second year. The review has been allocated into two streams: common issues that range across all 122 modern awards, and an awards stage, which will review each individual award. The Fair Work Act requires:

(1) The FWC must conduct a 4 yearly review of modern awards starting as soon as practicable after each 4th anniversary of the commencement of this Part.

And:

(2) In a 4 yearly review of modern awards, the FWC:

(a) must review all modern awards; and

(b) may make:

(i) one or more determinations varying modern awards; and

(ii) one or more modern awards; and

(iii) one or more determinations revoking modern awards; and

⁶ ACCI, *Inquiry into the Fair Work Act 2009*, Australian Government Discussion Paper, February 2012, pages 81-87.

⁷ AHRI submission to Workplace Relations Inquiry, 10 March 2015, page 10.

⁸ Ibid, page 74.

*(c) must not review, or make a determination to vary, a default fund term of a modern award.*⁹

Due to the volume of awards in the pre-modernised era and the above mentioned alignment of benchmarks based on the prevalent conditions in those awards, the 4 yearly review's scope is wide-ranging and time-consuming. The FWC's ability to conduct a nimble review is hampered by the breadth of the review required, aligned with the fact that the FWC's intent to better align the awards with the MAO has resulted in another rewriting of the modern awards to make them simpler to understand. These Exposure Drafts are currently under review in four separate groups, with the first group well advanced, and group 2 awards now commencing. This process appears to have a considerable investment of time ahead for the FWC and employer and employee representatives.

From Business SA's perspective, anecdotal feedback from our members is in regards to the difficulty with some modern awards and their coverage. The Part 10A process reduced 3,175 state and federal instruments, and at times the amalgamation of coverage was misaligned. One example of this is where Drafters were aligned with the Manufacturing and Associated Industries and Occupations Award 2010. The alignment of two disparate industries with the same employment terms and conditions remains an anomaly.

In other awards, industries that were not award covered prior to the Part 10A process now find themselves with terms and conditions beyond the NES that hamper their business and impede flexibility. For example, chiropractors are required to abide by a convoluted span of hours requirements. This has a flow on impact of applicable penalty rates that may well not have been a cost to these employers prior to the making of the modern award.

Further examples of inflexibilities for the workplace exist in the modern award system, such as the minimum engagement terms of a number of modern awards, Individual Flexibility Agreements (IFAs) and dispute resolution clauses. Efforts in the current review to create common standards for all workplaces could place further constraints on flexibility in the workplace, and hamper productivity measures undertaken at the enterprise level. Business SA would strongly support a modern award system with the ability to bargain at the enterprise level, with flexibilities and productivity measures that are of mutual benefit to both employers and employees. A successful industrial relations system relies on the framework to be suitably adaptable to the enterprise level, and the centralised focus of the Fair Work

⁹ Fair Work Act 2009, s. 156.

Act 2009 hampers employers' ability to manage their own workplace with its own particular requirements.

Penalty Rates

The Fair Work Act 2009 prescribes that modern awards are required to provide additional remuneration for those employees working unsocial, irregular and unpredictable hours, weekend, public holidays, overtime and shifts.¹⁰

Penalty rates evidenced in most modern awards are a reflection of the historical view of an industry. The majority of penalty rates were determined when the Australian society worked in a 9 to 5, 5 day week environment and not our current 24/7 environment. In addition, Business SA argues that the nature of the economy has changed significantly in recent years, with exponential change in the time since the modern awards came into existence due to advances in technology. Unfortunately, the award modernisation process did not take into account the present conditions of industries, and penalty rates are out of tune with the reality of the workplace environment.

Small business is significantly impacted by penalty rates. The cost of opening a restaurant or cafe on a Sunday or a public holiday can be so prohibitive to some small businesses that they do not open their doors, preferring to remain closed. The demand, however, to access restaurants and cafes does not decrease on a weekend day.

Businesses need to be able to look at their operating costs in light of the market conditions, and the workplace relations legislation which has in it entrenched penalty rates is a significant deterrent to productivity and profitability for most business operators. The workplace relations system should follow suit with other changes in the regulator environment, including the deregulated trading hours in most states.

¹⁰ Fair Work Act 2009, s134(1)(da)

Issues Paper 3 – The Bargaining Framework

Individual Agreements

Australian Workplace Agreements (AWAs) were part of Australia's workplace relations system from 1996 to 2006 without angst and provided a great deal of flexibility to employers and employees.

It was only in 2006/2007 when the 'no disadvantage test' was removed and AWAs became 'embroiled' in the campaign against the WorkChoices reforms that AWAs became 'a no go zone' for both major political parties.

The Fair Work Act returned Australia's industrial relations framework to centralised decision making with collective bargaining being one of the central tenets of the Act, the other being modern awards. Both of these remove agreement making from the workplace and place it in the hands of external decision makers.

Despite the current centralised model of the Fair Work Act, both major political parties support the concept of an agreement reached between individual workers and their employer. This current form of agreement under the Act is an Individual Flexibility Arrangement (IFA.) Whilst IFAs appeared to promise so much in reality, due to restrictions, they have not proved to be a meaningful replacement for the flexibility provided by AWAs and are rarely entered into. The Productivity Commission's Workplace Relations Framework Issue Paper 3 notes that less than 10 per cent of employers have IFAs in place in their workplace and this likely due to the fact that they do not meet the needs of the modern workplace.

Some of the restrictions in the Fair Work Act include; preventing employers from offering IFAs as a condition of employment, employees are able to cancel them by the giving of thirteen weeks' notice and IFAs only allow the award to be varied in five (5) areas, not the whole award.

Few employers are prepared to make an IFA with an employee and pay a wage increase in return for certain flexibilities, when the employee can give thirteen weeks' notice and cancel the agreement.

Allowing individual agreement to be a condition of employment would mean that employers could be upfront with potential employees about the individual agreement and their benefits

and not leave these discussions until after a person has commenced employment. As Richard Blandy¹¹ noted of the move towards more individual agreements:

The legislation's main intent is to grant greater freedom to enterprises and employees to develop their own workplace arrangements, including wages and conditions of work, and to restrict further the right of third parties, such as the Arbitration Commission or unions, to intervene in the employment relationship between an enterprise and its employees.

I believe these are good objectives. If they are achieved, they will not only increase the economy's flexibility and productivity in dealing with a number of major challenges--globalisation, ageing and sustainability, for example--but will better meet our objectives of liberty, equality and fraternity.¹²

Business SA notes that there is currently a Bill before Parliament that proposes amendments to IFAs, including taking into account non-monetary benefits when assessing the BOOT, as intended by the legislation¹³. However, Business SA believes that there must be further significant changes for the IFAs to be truly flexible and suitable for today's workplace.

Individual agreements are necessary in the Australian workplace environment as Collective bargaining is not practical for small business. These businesses are characterised by their informal nature and the close relationship between owners and employees. Often small businesses seek to simplify their industrial arrangements and provide working conditions that cater for the needs of their individual employees and their business. The use of external bargaining agents often goes against the culture of a small business, where employer and employee relations are established and maintained on personal interaction.

Further to this, collective bargaining is cost-inhibitive to small businesses, and our members tell us that they see entering into a collective agreement as unnecessary and more geared towards larger organisations that can find efficiencies in agreement making on a larger scale.

It is important that individual workers and their employer are able to reach agreements, departing from the relevant award or enterprise agreements, subject to the worker not being disadvantaged.

Accordingly, the Act should be amended to enable both individual workplace agreements (IWAs) and to create a more effective framework for IFAs. Both forms of agreement should be subject to a type of 'no disadvantage' or 'better off overall' test (which can include non monetary benefits) and should be

¹¹ Adjunct Professor, School of Management, University of South Australia

¹² Richard Blandy, Australian Labour Market Reform – What Needs to be Done? In Australian Bulletin of Labour, Volume 32, Issue 1 (2006), page 7.

¹³ General Manager's report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements 2009-2012, November 2012, page 15

able to vary part or all of a modern award. In addition, individual agreement should be able to be a condition of employment and made for a period of up to four (4) years.

Enterprise Bargaining

The Rudd-Gillard-Rudd Government introduced the Fair Work Act to Parliament with the assurance that it would promote productivity in the Australian workplace whilst balancing employee entitlements:

*The Fair Work Bill 2008 (the Bill) creates a national workplace relations system that is fair to working people, flexible for business and promotes productivity and economic growth.*¹⁴

This was done through enterprise agreements:

- ‘that are tailored to suit the needs of businesses and the needs of employees,*
- providing employees and employers with the right to appoint persons of their choice to represent them in negotiations for a proposed agreement;*
- enabling FWA to facilitate good faith bargaining and the making of agreements, including through making bargaining orders and dealing with bargaining disputes where the parties request assistance; and*
- ensuring that employees covered by an agreement are better off overall against the new safety net.*¹⁵

The Fair Work Act returned to the tenets of a centralised industrial relations framework, where all means by which to make an enterprise agreement were removed from the workplace and put into the hands of an outside entity. This bargaining framework, however, is flawed as it does not reflect the reality of businesses operating in Australia. There is no longer a collective approach in most businesses. The majority of employers negotiate on the terms of agreements with employees on an individual basis, and the use of third party agents is not a reality for their business.

¹⁴ *Fair Work Bill 2008 Explanatory Memorandum*, Outline.

¹⁵ *Ibid.*

Ministers of the Rudd-Gillard-Rudd Government lauded the Fair Work Act's success in bringing flexibility and productivity to the industrial relations environment. The Minister for Tertiary Education, Skills, Jobs and Workplace Relations sought to emphasise this success in three areas when announcing the review of the Fair Work Act in 2011:

- the large number of enterprise agreements made under the Fair Work Act;
- the relatively low level of industrial action; and
- the relatively modest growth in wages.

Commentators noted at the time that the number of enterprise agreements may well have risen in the immediate period following the enactment of the legislation, but this could have been more to do with expiration of agreements under the previous statute and the increase in collective agreements to the detriment of individual agreements under the new Act. The measure could have focused more on the quality of these agreements, particularly in the area of productivity gains. Industrial action continued to be an issue at the time, and wages growth was detrimentally affected by the growing unit labour cost.¹⁶ At the time, the Government had found itself in the position of lacking evidence of real productivity gains since the implementation of the Fair Work Act.

The experience of New Zealand's industrial relations changes in 2000 provides an interesting case study for Australia. The Employment Relations Act 2000 (ERA 2000) includes both collective bargaining and individual employment agreements, where the terms and conditions are not restricted as in the Fair Work Act. Individual agreements pertain to:

- (a) The operational environment of the employee and employer; and
- (b) the resources available to the employee and employer.¹⁷

There are mandatory clauses that need to be included in individual employment agreements: party names, employment position, duties, place of work, working hours, types of pay, public holidays, rights in contracting out situation, restructuring due to transfer, negotiations with a new employer, redundancy provisions and resolving disputes. Individual employment agreements give employers and employees in New Zealand the opportunity to negotiate at the workplace level, and this decentralisation is geared towards improving productivity.

¹⁶ Judith Sloan, The review of the Fair Work Act, 19 September 2011: <http://www.abc.net.au/news/2011-09-19/sloan-the-review-of-the-fair-work-act/2905816>

¹⁷ Employment Relations Act 2000, s60A.

Under the ER Act, collective agreements are negotiated with the unions and are binding on those employees who are union members. Parties are required to bargain in good faith, and the Employment Relations Authority can order compensation, cancel or vary the agreement or issue any order it thinks fit in the circumstances. Additional conditions agreed on between the employer and employee in an individual employment agreement cannot be less than those in the collective agreement.¹⁸ If there is no collective agreement then the minimum employment rights apply.¹⁹

There continues to be a steady representation of collective agreements in New Zealand within traditional industries and the public sector. They have not, however, increased their coverage since the ER Act came into legislation in 2000, and individual employment agreements have steadily risen in that time.²⁰

The current amendment before Parliament is seeking to moderate some of the lost ground under the Fair Work Act. The Fair Work Amendment (Bargaining Processes) Bill 2014 makes productivity a requirement of the bargaining process in proposed subsection 187(1A), 'that, during bargaining for the agreement, improvements to productivity at the workplace were discussed'. The Explanatory Memorandum (EM) outlines that examples of productivity improvements may include the elimination of restrictive or inefficient work practices; initiatives that provide employees with greater responsibilities or additional skills directly translated to improved productivity outcomes; and improved policies and procedures in the workplace which produce efficiencies and effectiveness.

Under the amendment, the FWC needs to be satisfied that productivity was a part of the discussion during bargaining, but does not require that productivity itself is a term of the agreement. The FWC's consideration of discussions would not include an assessment of the merits of those discussions or whether terms would be reasonable to include. Business SA is supportive of the Bill, but it does not go far enough to give workplaces the ability to manage their business as effectively and productively as possible.

A form of individual agreements that met the appropriate needs of employer and employee was the Individual Transitional Employment Agreement (ITEA), a transitional statutory individual agreement that could be utilised during the phase in of the new workplace relations system in 2009. It was an individual written agreement between employer and

¹⁸ <http://www.dol.govt.nz/infozone/businessessentials/employ/employment-agreements/>; ERA 2000, Section 6.

¹⁹ <http://www.dol.govt.nz/er/minimumrights/index.asp>

²⁰ Department of Labour, *The Effect of the Employment Relations Act 2000 on Collective Bargaining*, 2009, page 18.

employee, based on the five standards of the Australian Fair Pay and Conditions Standard (AFPCS): basic rates of pay and guaranteed casual loadings; hours of work; annual leave; personal leave; and unpaid parental leave. ITEAs included a fairness test which was conducted by a separate body. These transitional arrangements gave the employer and employee the opportunity to negotiate terms and conditions at the business level.

Business SA is supportive of a fairness test, along the lines of the current Better Off Overall Test. A separate body from the Commission should be the main review panel by which agreements are assessed against the BOOT. In this way enterprise agreements can overcome their current failure to allow for flexibility and productivity to be governed at the workplace. What enterprise agreements have achieved is an increased employee benefit, as most enterprise agreements do not contain a productivity measure, but do include regular pay increases not tied to the profitability of the business.

Greenfields Agreements

Greenfield Agreements have the potential to provide new businesses and, in some circumstances, expanding businesses certainty in a new business venture or undertaking. Poorly constructed Greenfield provisions have the ability to prevent or delay new business ventures that are vital to the Australian economy.

Greenfield agreements are crucial to new enterprises and undertakings as they allow for certainty about employment conditions and ensure that protected industrial action will not be available to employees when work starts. In project based work contractors may be required to demonstrate a secure and stable employment environment and therefore a Greenfields agreement can be the difference between a successful and unsuccessful tender.

Under the Fair Work Act 2009 employers are forced to “negotiate” Greenfield Agreements with the relevant Union. Businesses are forced into a “take it or leave it” situation where negotiation does not exist. As Greenfield Agreements require the approval of the relevant Union, the Unions are able to cause delays as a negotiation tool.

Unlike enterprise agreements under the Fair Work Act 2009, there is no requirement for good faith bargaining under the Act. When negotiating collectively with employees (and Unions), parties are expected to bargain in good faith including communicating openly and giving genuine consideration to the proposals of the other party. As such, Unions have the ability to cause considerable delays with no ability to resolve stalemates or force a party to act in a fair and reasonable manner.

In August 2012, the former federal government's Fair Work Act Review Panel released *'Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation'*. The report found that the current system is open to Unions frustrating the making of an appropriate Greenfields Agreement at all or at least in a timely way.²¹

The Panel recommended the Fair Work Act be amended to apply the good faith bargaining obligations be extended to Greenfields Agreements and allow parties to apply to the Fair Work Commission to deal with disputes.

In a time when Australia is experiencing significant decline in manufacturing, resource and construction, Business SA recommends changes to the Fair Work Act to allow organisations the freedom to establish Greenfield Agreements without impediments. Business SA submits the following changes are implemented to increase the productivity of new enterprises:

- Ability to establish Greenfield Agreements with a term of 12 months without Union involvement
- Ability to establish Greenfield Agreements for greater than 12 months with Union involvement
- Where Unions are involved, the requirement for parties to abide by good faith bargaining provisions of the Fair Work Act.
- Ability for employers to apply to Fair Work Commission for approval if genuine negotiations have not resulted in agreement within 3 months from commencement of negotiations
- If an employer applies to the Fair Work Commission after 3 months, the FWC is required to approve Greenfield Agreements on the basis the agreement passes the 'Better Off Overall Test' (BOOT) against the relevant award and National Employment Standards (NES).

²¹ Australian Government, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, June 2012 p.82

Issues Paper 4 – Employee Protections

Unfair dismissal

The Fair Work Act established the Small Business Fair Dismissal Code, which is an outline of a process for small business to follow when dismissing an employee. A dismissal is not unfair where Fair Work Australia is satisfied that the small business employer has complied with the Code. This Code is designed for business with fewer than 15 employees.

Business SA recommends the removal of the Small Business Fair Dismissal Code as due to its opt-in nature many small businesses are not aware of its provisions and requirements. Business SA recommends that based on headcount, not full time equivalent employees, unfair dismissal provisions should apply to businesses with twenty employees or more. This delineation matches the Australian Bureau of Statistics of a small business, which is a business of 1-19 employees.

This change would still give a large number of employees access to unfair dismissal provisions. Directly prior to the Fair Work Act approximately 48 per cent of employees had access to unfair dismissal laws (when it did not include businesses with fewer than 100 employees) and with the commencement of the Fair Work Act the proportion of employees with access to unfair dismissal laws increased to 79 per cent.²²

Anti Bullying Laws

The anti-bullying laws that form a part of the Fair Work Commission should be removed. Prior to the introduction of these laws there already existed a regulatory environment for bullying in the workplace, through Work Health Safety legislation at State and Federal levels.

The new powers of the Fair Work Commission with regards to anti-bullying do nothing to reduce or prevent workplace bullying and rather than simplifying existing processes and assist employers in preventing, investigating and resolving workplace bullying, the these laws simply add another unnecessary level of regulation.

There has been 530 applications in the first nine months of operations, well below projections, which highlights that other processes were already adequately dealing with bullying in the workplace. This extra layer of regulation is not necessary and the Fair Work Commission's resources should be directed elsewhere.

²² ²² *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, Australian Government, June 2012, Table G.1—Estimates of unfair dismissal laws coverage

Issues Paper 5 – Other Workplace Relations Issues

Fair Work Commission and Fair Work Ombudsman

The Fair Work Ombudsman (FWO) functions include: ‘promoting and monitoring compliance with this Act, and providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations.’²³ Business SA supports their role as educator and compliance monitor, but has concerns regarding the increasing initiatives by the FWO to provide interpretation on industrial relations matters. Blurring the lines of the educator and interpreter can lead to confusion for employers and employees alike. Interpretation by the staff of FWO, where some matters are subject to hearings or cases within the Fair Work Commission, has led to confusion for our members in a number of areas. This includes areas such as leave loading paid on termination, coverage of awards and pay-related issues.

Further to this, Business SA is concerned about the role of the FWO in providing services traditionally of employer organisations.

Long Service Leave

Long service leave (LSL) became a part of the NES under the Fair Work Act. Business SA is concerned that a national approach to LSL will be ineffective, particularly as the establishment of a national standard could lead to increased costs to employers. The disparity between the states will inevitably leave some states worse off than others. Similar attempts to create national standards, such as the Workplace Health Safety (WHS) legislation, have not succeeded in its attempt for a uniform, national approach. In the case of the WHS legislation, two states are still yet to sign up, and all other states have made variations to the standard. Complexity remains for national employers in this area.

LSL is unique to Australia and New Zealand, and it was originally established to provide civil servants with extended leave to return to the United Kingdom after ten years of service. As is noted by many commentators, today’s current working environment is very different to when this leave was originally implemented. In addition moves to make LSL portable goes against the original intent of the leave, and is an unjustified additional business cost that does not counterbalance the impacts of standardisation. Further, employees are less likely to stay

²³ Fair Work Act 2009, S 679.

with an employer for that length of time. In effect, the idea of LSL is less likely to have the intended impact it once did. Business SA would question the veracity of nationalising legislation that is becoming less relevant to Australia's workforce.

Union Right of Entry

Business SA has significant concern that current right of entry laws contained in the Fair Work Act 2009 provide Unions with excessive rights to enter a workplace and the ability to cause disruption to the workplace, resulting in productivity losses. Business SA is not arguing Unions should be prevented from entering a workplace for legitimate reasons but that reforms to restore balance are overdue.

There have been many examples of unions using health and safety issues to unjustifiably enter workplaces for the purpose of being disruptive, for example *Laing O'Rourke Australia Pty Ltd v CFMEU*.²⁴

If a Union can demonstrate agreement cannot be reached with an employer about a suitable room for holding discussions, access to the lunchroom is permitted. Prior to amendments in 2013, permit holders were able to conduct interviews or hold discussions in particular rooms or areas of premises as deemed reasonable by employer. If agreement cannot be made, employers or occupiers are able to apply to the Fair Work Commission in relation to disputes regarding the exercise of a right of entry permit. Business SA is of the view that whilst the Union must demonstrate that an agreement cannot be reached about a suitable room, Unions are able to refute an employers

Importantly, section 492 of the *Fair Work Act* does not simply give unions access to lunch rooms by default. What must be demonstrated for permit holders to access the lunch room is that an agreement cannot be reached with the employer about a suitable room for holding discussions.

In relation to the union right of entry provisions in Part 3-4 of the Fair Work Act, the Review Panel recommended that²⁵:

- the FWC be given greater power to resolve disputes about the frequency of visits to a workplace by a right of entry permit-holder (based on concerns that union officials were making excessive use of these rights in some instances);

²⁴ [2013] FCA 133

²⁵ Australian Government, *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation*, June 2012 pp 189-200 (including recommendations 35-37)

- the tribunal also be given greater discretion to determine a reasonable location at the workplace for permit-holders to conduct meetings and interviews with employees (following a significant number of cases in which the reasonableness or otherwise of locations determined by employers had been contested);
- the ability of a permit-holder to enter premises to investigate suspected breaches of the Fair Work Act (or awards, agreements, etc) apply not only in relation to existing employees, but also former employees who are members of the permit-holder's union.
- Excessive right of entry - the Pluto LNG joint venture project had 200 right-of-entry visits from unions in just three months, more than two a day. BHP's Worsley Alumina plant had 676 visits in 12 months. It is difficult to see how it can be argued that such excessive right of entry contributes to productivity. Excessive right of entry prevents workers from doing their jobs and reduces the efficiency of the workplace.

Conclusion

Business SA's submission has focused on proposing changes to the workplace relations framework that would reduce the regulatory burden and hence barriers to employment and growth. Business SA has long supported the need for a safety net for employees but the workplace relations framework also needs to be responsive to the structural shifts to the national economy.

Business SA looks forward to on-going engagement with the Productivity Commission and the reports final recommendations.