Productivity Commission Inquiry into the Workplace Relations Framework

Date Submitted: March 2015

Submitted by: Ian Blandthorn

National Assistant Secretary

SDA National Office

Level 6

53 Queen Street

MELBOURNE VIC 3000

Telephone: (03) 8611 7000

Submissions from the Shop, Distributive and Allied Employees' Association to the Productivity Commission Review into Workplace Relations Framework

Table of Contents

Introduction

The Shop, Distributive and Allied Employee's Association (SDA) is Australia's largest trade union with approximately 216,000 members. The majority of these members are young people and women. Registered in 1908, the SDA has coverage of areas including retail, fast food, warehouse, drug and cosmetic manufacturing and distribution, hairdressing, pharmacies and modelling.

The Australian workplace relations system has, since its inception and through its various iterations existed primarily to deliver workplace fairness and justice to both employers and employees. It is our view that whilst from time to time individual parties may not have been happy with particular decisions of the Commission it has nevertheless, when looked at holistically over the time period, delivered on its fundamental aims. That is not to say that particular things could not be improved upon.

This submission does not seek to address every matter the Commission has raised in its discussion papers. Where we do address matters not all are addressed, due to time constraints with the detailed thoroughness required.

The fundamental purpose of this submission is to indicate that broadly speaking the SDA believes the workplace relations system is functioning effectively but in certain areas improvements could be made.

PAPER 1 – Framework of the system

Objectives of the Act

The Workplace Relations system has a direct impact on millions of Australians and indirectly impacts many more. A fair, strong, robust and comprehensive system benefits all aspects of Australian society and meets Australian obligations under international law. It is therefore important to view the system not just from an economic point of view but also from a broader social perspective. To view it merely from an economic perspective is to ignore the immeasurable effect it has upon the lives of millions of working Australians and its ability to affect the social fabric of this country.

When considering workplace relations, it is important to recognise the balance of power relationships within the workplace. A fair system must address imbalance and correct it so that irrespective of a participant's gender, age, disability, employment status (casual, permanent, part-time or full-time, contract or labour hire), role (manager, employee, trainee, owner, director), or any other defining characteristic, each person or corporation within the system is offered a 'fair go'.

The majority of workers in Australia working within the lowest paid industries are predominantly female, young and employed on a casual or part-time basis. The ability of the low paid individuals is limited and recognised as such by the ILO convention to which Australia is a signatory.

Balancing the needs of workers and employers requires a fair and strong system, underpinned by supportive legislation. The key purpose of the Fair Work Act is to deliver such a system.

Whilst employer and employee representatives may have concerns with some aspects of the Act, it is our view that the Act and the Commission generally performs their functions of regulating the workplace relations system in a fair and equitable way.

The Act, states:

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…

(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. [1]

Whilst some of the Act's objectives reflect the myriad of competing interests and while recognising the fundamentals of inequality of bargaining power between employers and employees it is important to view the objectives of the Act holistically as if each aspect is stood alone and was to be achieved on its own. As evidenced from the objects of the FWA, the emphasis is primarily on a

[1] S3. The Fair Work Act 2009

fair system which aims to balance the needs of employees and employers and acknowledges that workplace relations is as much about the social, as it is about the economic.

Despite the benefits which have arisen from the Act, the SDA would assert that further change is necessary if the overall Object of the Act is to be fully realised.

In order for the Act to fulfil its Object, the SDA contends that several changes are required against the following objectives:

> "(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"

Taking into account Australia's international labour obligations, **the Act must be amended to;**

- **Strengthen anti-discrimination provisions for employees.** In order to also achieve true 'fairness' in the workplace,
- **Protect employees from disability discrimination,**
- **Ensure employee privacy protections,**
- **Ensure redundancy provisions are not misused to manage women returning from maternity leave out of the workplace,**
- **Abolish the discriminatory practice of applying 'junior' rates to young workers aged 18 to 20 years, doing the same work as adults.**

Ensuring that the workplace relations laws are fair also requires them to be readily accessed and easily understood. Removing several regulations and inserting them into the Act will ensure this objective is met.

> "(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"

The SDA strongly calls for the full and unequivocal reinstatement of the right to arbitration as the final step in dispute resolution for every employee. Only

when this is achieved will the Act truly be able to "guarantee" a safety net of fair, "enforceable" minimum terms.

The SDA recommends that the Act explicitly allow for the improvement of Modern Awards and the National Employment Standards ("NES"), and also calls for improvements to the NES to ensure that the safety net is truly "fair" and "relevant." The scope of the Better Off Overall Test should also be expanded.

> "(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"

The provision of effective end dates for agreements, Australian Workplace Agreements ("AWAs") and Individual Transitional Employment Agreements ("ITEAs") made prior to the Fair Work Act, is the only way to truly ensure that the "guaranteed safety net… can no longer be undermined by the making of statutory individual employment agreements of any kind."

> "(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements"

This '"balance" can only be truly achieved by **providing employees with the right to appeal an employer's refusal of their request for flexible working arrangements.** Without this, the right to request is a hollow entitlement. In order to have time workforce participation of women this must be addressed.

> "(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"

Furthermore, the Act must be amended to remove the limitations on an employee's ability to access Fair Work Australia to determine whether termination of employment was harsh, unjust or unreasonable.

> "(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"

The SDA asserts that the right to arbitration as a final step in dispute resolution is fundamental to ensuring that the Object of the Act is met.

The core function of a successful workplace relations system should be to provide a fair and balanced system for all stakeholders. Ultimately, a fair workplace relations system allows business to be successful, whilst also allowing employees to thrive. The majority of people in the workforce in Australia are employees. It is imperative that the system supports them through ensuring they receive fair and decent wages, secure employment and opportunities to develop their skills. Concurrently, the system must also ensure that business can succeed, in order to continue to employ the millions of people who rely upon such success to receive their wages and livelihood.

It is in the interests of all Australians to ensure that our workplace relations system is just, equitable and fair – for all.

Role of Unions

Unions are a fundamental part of the Australian industrial relations system.

It is pleasing to note that the Commission recognises that within workplaces, "power imbalance(s)" can be (and in the opinion of the SDA, are) present.

The main purpose for a union is to represent the voices of the often voiceless – employees who, by virtue of their status within the workplace, are not afforded the ability to ensure that their working conditions are fair and just.

The SDA does not intend to use this submission as an opportunity to revisit the history of unionism in Australia. Rather, we would point to recent international data to illustrate the importance of unions in ensuring that the rights of employees are improved, protected and enforced. As recently as February this year, a longitudinal survey of poverty in the United Kingdom was published, *Breadline Britain*[2]. The data is compelling, but quite disturbing. The

[2] S Lansley, J Mack. Breadline Britain: The Rise of Mass Poverty, 2015

situation in the UK is one of entrenched poverty and a proliferation of the working poor. It is one Australia would do well to avoid.

What is most interesting to note is the conclusion of the two authors of this study. They note that the solution to addressing this growing and deepening poverty is to two-fold. One is to increase the presence and power of unions and the second is to increase wages.

Employees who do not have a collective voice often suffer poorer outcomes than others within the same industry who have the benefit of representation by a union. Where a union is present, wages overall tend to be higher, along with access to leave and rostering protections.

The benefits are not only limited to wages or other direct terms and conditions. Through the SDA's own experience, through surveying its members, it was revealed that the incidence of sexual harassment amongst our members was comparably lower than the rate across the retail industry at the same point in time.

An analysis of non-union versus union agreements also illustrates the difference in the terms and conditions for employees in workplaces where a union is present and where it is not.

The very presence of union officials within the workplace not only serves as an avenue for employees to raise their concerns without fear of recrimination, it also acts as a check and balance of the employers' behaviour and workplace culture.

Unions are important in ensuring that the workplace relations system is as fair and balanced as possible.

Despite the claims of some, unions do not aspire to destroy business. In the industries the SDA covers, such as retail and fast food, the SDA has bargained fairly and pragmatically with companies which have demonstrated difficulties within a slowing economy, in order to ensure the viability of such companies and therefore the continued employment of its members and other employees. No one 'wins' when good businesses disintegrate and employees are left without an income; the union movement is only too aware of the repercussions of this. This is precisely why unions understand the importance of a level playing field within workplace relations, and act to ensure that no company has an unfair advantage over another, especially when that advantage is gained through the exploitation and unfair treatment of employees.

Australian employees today enjoy a strong safety net of terms and conditions, in large part due to the work of the union movement. Whilst union membership may not be at historical highs, the work of unions in representing the interests of their members and other employees cannot be ignored and should not be diminished, nor dismissed.

In answer to the Commission's question "about the best ways to represent employee interests, especially where a power imbalance is present", the SDA submits that the answer is quite simple. **Government should encourage unions to increase their presence in the workplace, not seek alternatives.**

Productivity

The Australian economy is growing. It has now been increasing for 23 consecutive quarters. The SDA accepts that continued productivity growth is critical.

Various factors influence productivity and productivity growth and there are various means of measuring productivity. In our view labour productivity is probably the most relevant measure, although it must be acknowledged that any form of productivity measure has its complications.

Despite continued growth we acknowledge that overall productivity in Australia has slowed in recent years. It should also be acknowledged that throughout history productivity growth has not been a straight line growth. Productivity growth occurs in cycles.

There are a range of factors which have led to the slow down in national productivity. It is unreasonable to suggest that a decline in labour productivity is the reason for Australia's overall productivity slowdown. The fall off in the mining boom, under investment by corporation in infrastructure, training and management in "good" times are key factors in the decline.

It is important to note a recent report by the Fair Work Commission which shows that labour productivity has remained steady or increased in the past year for 85% of enterprises. To the extent there have been wage increase sin this period they clearly have not impacted adversely on labour productivity.

In short, labour productivity has largely sustained itself over the recent period. There is no evidence that any movement in wages has led to reduced labour productivity. If businesses are failing they should look beyond the issue of labour and labour productivity.

Productivity of enterprises is a key feature of enterprise negotiations of which the SDA is a part.

The SDA negotiates enterprise agreements with many companies. These employers range from some of the largest in Australia to small businesses. Rarely do negotiations take place without productivity being a central feature of those negotiations. In many cases negotiations commence with the relevant company briefing the union on the "state of the business". The SDA encourages employers to do this as it sets a framework for the negotiations.

Negotiations inevitably focus around issues raised by the union on behalf of the employees of the enterprise and the willingness and capacity of the employer to meet those concerns. Employers also raise issues of concern. Sometimes agreements mention the word productivity but to suggest that if the word is not encapsulated in the final document then productivity has not been a central feature of the negotiations is an overly simplistic and erroneous interpretation of the whole negotiating process.

Flexibility

The modern award system is an important part of the safety net within the workplace relations system. The safety net exists to ensure all workers receive a minimum but fair set of working conditions and fair wages.

Under WorkChoices the safety net was largely removed and many workers were forced to endure sub standard working conditions.

The safety net exists to ensure that does not happen again. It is integral to a fair and just workplace relations system.

The SDA is not opposed to flexibility in the system provided it does not undermine the safety net. Awards exist to ensure the safety net is maintained.

We recognise that awards do provide a certain level of red tape but that is the trade off for a fair system.

Enterprise agreements as an addition to the award system allow employers and employees through their unions to negotiate additional flexibilities to meet the needs of the business while maintaining a fair safety net. In the retail industry enterprise agreements have led to employers negotiating a wide range of flexibilities such as "buy outs" of certain penalty rates, shift and roster flexibilities, alternative means of exercising leave options and so forth. These are negotiated on the basis of meeting the needs of a particular business while safeguarding the fundamental rights and needs of employees. This is where and how additional flexibilities can and are introduced.

Flexibility in the workplace often means different things to employers than it does to employees. Flexibility to an employer often equates to a lack of work autonomy and control for an employee. When employers use the term flexibility they generally mean the stripping away of employment conditions to enable unfettered use of labour as they (the employer) see fit. However, to use flexibility to erode a fair safety net of wages and conditions fails to address the damage that occurs to not only workplace harmony and productivity but also the social fabric and prosperity of society. A prosperous workplace relations system can only be achieved when it is recognised that we live in a society of which the economy is but one aspect.

The SDA recognises the importance of the need to ensure that workers can fairly and effectively balance their work commitments and their family responsibilities. The SDA has particular regard to ensure that work time is effectively balanced by meaningful non-work time. Meaningful non-work time carries with it the very clear implication that it is not sufficient just to have time off work, but rather that there must be a sufficient number of consecutive days off work each week or each work cycle, so as to ensure that workers are able to carry out a full range of their family responsibilities. In particular, given that the retail industry is a 7 day a week industry, the SDA strives through its awards and enterprise agreements to ensure that workers are properly and fairly rostered to have a number of weekends off over a regular work cycle. This ensures that whilst employers are able to roster workers to work on weekends, workers are not going to be placed in a position where each and

every weekend is treated as ordinary hours of work, and workers never see their families on weekends.

For members of the SDA, the ability to access flexible working arrangements and family friendly conditions of employment, particularly when working in industries such as retail which operate across all days and most hours of the week, is essential in balancing work and family responsibilities.

Flexibility in the workplace is an important consideration for our workplace relations system but so also is social cohesion and economic prosperity for all. It is important to particularly note the impact 'flexibility' has on women's workforce participation and gender equity. There a number of important improvements which need to be made to the current workplace relations system which will better enable and encourage workforce participation and ensure a fair and reasonable safety net is available to all.

Flexibility for Parents with Caring Responsibilities.

Australia is in the midst of a major skills shortage.[3] Companies that focus on staff well-being are making as big a contribution to their bottom line as those that are looking at ways to increase sales or cut costs.[4] The results of the Kronos survey show that there is a clear opportunity for businesses to reassess their workforce management strategy to access a pool of talent that is ready, willing, and able to work.

Access to a flexible and family friendly work environment has a significant impact on the participation in the workforce of employees with family responsibilities, and in particular women.

Research has found a desire among many women to maintain a working pattern throughout motherhood. 96.7% of the women surveyed were keen to return to work after a career break such as parenthood, if their employer offered flexible working hours. [5]

---

[3] "Future Focus: 2013 National Workforce Development Strategy" Australian Workforce and Productivity Agency

[4] The Kronos Incorporated 'Hidden Workforce" study conducted in Australia in May 2013

[5] The Kronos Incorporated "Hidden Workforce" study was conducted in Australia in May 2013 among 500 business decision makers and 2,000 employees across a mix of labour

Only 54% of the surveyed business decision makers were willing to adapt to employee needs and offer them the flexibility they require. When asked what constraints would most likely prevent them from offering flexible work, half thought it would be too disruptive, just over a third thought it would be too complex and a third thought it would be too costly.[6] Greater protections are needed in the workplace to ensure the needs of pregnant employees and employees with caring responsibilities are met. This need was outlined in the recent Australian Human Rights Commission; "Supporting Working Parents: Pregnancy and Return to Work" National Review.

Australia does not rank highly compared to other OECD countries when it comes to offering family friendly workplaces for carers. The most common solution for carers is to find casual or part time work, resulting in Australia remaining in the lowest third of OECD countries in respect of workforce participation of mothers. [7]

The majority of families now have both parents in paid work and are dependent on two salaries to meet their costs of living.[8]

Parents need their workplaces to be structured in a way which allows them to truly take an active role in the life of their child or children, including taking responsibility for their care. Women's equal participation in the workforce is a critical part of achieving gender equality. It provides women with an equal opportunity to work and ensure lifetime economic security. Research has shown that women are an 'untapped productivity potential'.[9] Increasing women's participation in the workforce would lead to an estimated growth in Australia's GDP of $25 billion per year.[10]

It is vital to ensure that the Workplace Relations System supports the participation of employees with family responsibilities, and in particular women, in the workforce.

---

intensive industries including healthcare, retail and manufacturing. Report released Sept 2013.

[6] Ibid

[7] OECD Family database, Maternal Employment, November 2009

[8] ABS: Australian Social Trends Nov 2013 "Pregnancy and Work Transitions"

[9] Ernst & Young 'Untapped opportunity: The role of women in unlocking Australia's productivity potential'(2013)

[10] Grattan Institute 'Game-changers: Economic reform priorities for Australia'(2012)

In 2013 the Australian Human Rights Commission conducted a national review into the nature and prevalence of discrimination against pregnant employees, employees on parental leave and returning to work from parental leave. This was an extensive review and one of the only one if its kind in the world as it included a nation wide consultation and national prevalence survey. The review looked not only at discrimination against women but also men and its impact on women, families, workplaces and the national economy.

The review found that that there is indisputable evidence that pregnancy, parental leave and return to work discrimination is widespread and systemic; preventing the full participation of working parents, and in particular, women, in the workforce. The report also demonstrated that there has been little improvement since the last inquiry conducted 15 years ago.

The review found that one in two (49%) women in Australia reported experiencing discrimination in the workplace during their pregnancy (27%), while on parental leave (32%) or on return to work (35%)[11]. For members of the SDA, the statistics for the retail sector revealed that it had the highest incidence of discrimination during pregnancy at 35% and for almost half the discrimination was in relation to health and safety which can produce devastating consequences for both mother and baby.[12]

The report also showed that over a quarter of men (27%) experienced discrimination related to parental leave and when returning to work, despite the fact that 85% of them took less than 4 weeks leave.[13]

The review found that discrimination has an impact on the physical and mental health of individuals, their career and job opportunities, financial situations and their families. It also has consequences for workplaces and the national economy generally.

The outcomes provided in the Report clearly demonstrate that the Workplace Relations System in its current form does not provide sufficient protections to prevent discrimination or rights to appropriate flexibility for pregnant employees, employees on parental leave and returning to work from parental

[11] Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report (2014), p 26.*
[12] Ibid, p 43.
[13] Ibid, p 8.

leave. The report also demonstrates that this discrimination has a direct impact on the ability of women in particular to remain in the labour force. This discrimination not only has a significant impact on the individuals affected but also on businesses and the Australian economy.

It has been estimated that increasing women's workforce participation in Australia by 6% could increase the national GDP by $25 million[14].

Gaps in the Fair Work Act 2009

There are significant gaps in the current provisions of the Fair Work Act 2009 (FWA), which if addressed would greatly assist parents, and in particular women, wishing to maintain their employment and adequately care for their family.

S65 of the Fair Work Act 2009 provides the Right to Request Flexible working arrangements in certain circumstances, which include being parents of a child who is school age or younger, and being a carer (within the meaning of the Carer Recognition Act 2010). S65(1)(b) specifically allows an employee returning to work after taking parental leave in relation to the birth or adoption of a child, to request to work part time.

It is in the years proceeding a period of parental leave that employees need to access this provision most and therefore the inadequacy of the legislation directly impacts on women.

Employees returning to work after a period of parental leave will often need to make adjustments as they transition back to work and many parents wish to return to work after parental leave, on different arrangements than they had worked previously, for a variety of very valid reasons.

These flexible working arrangements can include changes to hours, location, and patterns of work. The employer must respond in writing within 21 days and can refuse the request on reasonable business grounds, but is not required to demonstrate the existence of these grounds. The employee has no right to appeal an unreasonable refusal of their request, as the Fair Work Act 2009 also

[14] Grattan Institute, Game-changers: Economic reform priorities for Australia (2012), p 39.

specifically excludes s65 from being a matter about which the Commission may arbitrate. The lack of appeal rights essentially renders s65 useless and devoid of any 'right' at all.

The SDA does not assert that every request should be accommodated, but it does assert that the Commission must be given the power to deal with a dispute under this section and arbitrate the matter according to the facts and circumstances of each case.

The FWA should be amended as per the recommendations of the AHRC regarding the 'right to request' provisions under section 65 of the FWA by:

- **removing the qualification requirements in section 65(2)(a) of the FWA (ie the requirements for 12 months continuous service);**
- **introducing a positive duty on employers to reasonably accommodate a request for flexible working arrangements;**
- **establishing a procedural appeals process through the Fair Work Commission for decisions related to the right to request flexible working arrangements to ensure processes set out in the FWA have been complied with.**

Further, the SDA recommends that the Fair Work Act 2009 be amended to delete S65(2) and an obligation be inserted on employers to reasonably accommodate an employee's request for flexible work arrangements (as in the Victorian Equal Opportunity Act), outlining the considerations that must be given in determining whether a request is reasonable to refuse and allow employees to appeal an unreasonable refusal, not just an appeal regarding the process.

Under the entire Fair Work Act, there are only two sections an employee does not have the right to appeal – requests for flexible work arrangements and extensions to unpaid parental leave, which are important and necessary for seeking to utilise women's workforce participation. These changes would also support employees to maintain employment particularly in relation to women who return to work from parental leave and need to continue to breastfeed.

PAPER 2 – Safety Nets

Minimum Wage and interface with tax transfer system

As the Commission correctly points out minimum wages have been part of the Australian workplace relations system for more than a century. While a handful of people have from time to time been critical of the existence of a minimum wage system there has always been overwhelming support for the concept.

Minimum wages are a fundamental hallmark of a fair and equitable workplace relations system. They ensure that all working people have at least a minimum income based upon the number of hours they work.

Not only does a minimum age system provide a minimum income for working people but it also, by extension ensures all people have a minimum standard of living. The Harvester judgement of 1907 enshrined this core principle and it remains as relevant today as when Justice Higgins first delivered that judgement.

Minimum wages have the effect of reducing poverty. Indeed it could be argued that in the English speaking world the history of the minimum wage goes back at least as far as the Statute of Labourers of 1389, always having the purpose of reducing poverty and ensuring a minimum standard of living. The Commission correctly points out that statutory minimum wages are now common across developed economies. Across the OECD 26 of the 34 countries have a minimum wages system. Moreover the trend is towards establishing a universal minimum wages system. Germany will move to a universal minimum wage system this year.

The SDA rejects the textbook supply and demand argument that minimum wages reduces employment. There is very limited evidence to justify this position. In reality the economy does not operate on a pure textbook model. The Fair Work Commission has rules, as the Commission points out that small movements in the minimum wage have basically a zero sum impact on employment. The SDA endorses that position. In the retail industry, a low wage, labour intensive industry certain minimum staffing levels are required.

A business which does not staff appropriately will lose customers to those who do. Wages is a cost of doing business. Workers are entitled to a fair outcome.

It must be noted that only a small percentage of the total workforce receives the minimum wage. We do acknowledge that movements in the minimum wage do flow through the system but traditionally such movements have been modest.

Hence the SDA supports the proposition in the Issues Paper that reductions in the minimum wage are unlikely to have much effect on hours worked and employment.

There are no grounds to abolish or otherwise reduce or restrict the current minimum wages system.

The purpose of the workplace relations system is to ensure fair outcomes for all players. Without there being a minimum wage system in existence the full force of the market comes into unchallenged play. While this might be wonderful for economic theorists what it means in practice is that those with the economic power get their own way. Inevitably those workers with little economic power finish up on sub subsistence wages.

If one analyses the operation of the Australian workplace relations system and the decisions of the Fair Work Commission (and for that matter its predecessors) it could not be fairly argued that periodic increases in the minimum wage have significantly outstripped broader wage movements or community standards.

Indeed it could be argued that recent minimum wages movements have actually been less than average wage movements and as such have led to increasing levels of financial hardship for those on the minimum wage. Certainly there has not been any wages breakout across the Australian economy in recent times and certainly not at the minimum wage level.

The fact that some minimum wage workers do not live in low income households is not an argument against a minimum wage. In our view all workers are entitled to a fair minimum wage, regardless of location, gender, age or other factor.

The SDA has strongly argued that the minimum wage should be applied according to the work undertaken, in other words those performing the same job to the same standard should receive the same wage. This is a matter of fundamental equity.

There is no evidence that minimum wages have any impact on employers engaging in the training of young workers. Indeed enrolments in traineeships are highest in the retail, clerical and hospitality industries.

The Henry Tax Review did raise the issue of an EITC. This was not taken up by the then government.

The SDA does believe that a number of issues arise with the concept of an EITC which would need to be worked through before it could be considered for introduction. Some of these relate to the impact an EITC would have on low wage earners not entitled to an EITC and to the changed balance which would potentially occur between the wage and tax transfer system. Lower wages supplemented by an EITC potentially transfers costs from employers to taxpayers. It leaves an EITC at the mercy of the political process. Over a longer term it may have the impact of reducing overall living standards by reducing total income for low income earners.

The SDA does recognise that by itself a minimum wages system does not guarantee that people will not live below the poverty line. That is where the tax transfer system comes into play.

The SDA has always argued for a strong system of transfer payments to low income families in order to ensure that all people in all families have a basic standard of living.

In a paper presented to the 7th Australian Institute of Family Studies Conference on 26 July, 2000, NATSEM (The National Centre for Social and Economic Modelling) showed clearly that introducing and then increasing payments to low-income working families with children has been a resounding social policy success.[15]

[15] Social Policy Matters, The Changing Face of Child Poverty in Australia: 1982 to 1997-98, Anne Harding and Aggie Szukalska, NATSEM, University of Canberra.2000

NATSEM shows that government initiatives in regard to increasing family support payments and in improving access to education and health services for all members of the community during the 1980's significantly ameliorated the financial position of many low income families, especially for those with dependent children.

A tax transfer system should operate to ensure that no individual or family lives in poverty. It complements the wages system. It does not transfer the burden of sustaining employment onto the taxpayer (including business taxpayers) as would occur if minimum wages were reduced and then supplemented by a government funded work incentive payment. It supplements earnings to ensure a minimum standard of living.

NES

The SDA notes the Productivity Commission's statement that "the Commission does not propose to undertake the same holistic analysis of the NES, unless submissions present solid grounds for review" given that "…there appears to be little controversy over the NES as a whole" and welcomes this starting position from the Commission.

The SDA regards the NES as a fundamental part of a system whose purpose is to deliver fairness and equity. Nonetheless the NES is a "barebones" set of entitlements.

What, if any, particular features of the NES should be changed?

The SDA notes the Commission's concern that "…there is a risk that (the NES) could impose a cost on employers that might exceed the marginal benefits of hiring some employees, with adverse implications for employment". The SDA does not agree with this statement.

Most of the costs which employers *may* face, are minimal at best. The only certain cost contained within the NES i.e., annual leave, is not even universal, given it only has application to permanent employees. All other costs associated with the NES only apply to permanent employees and are only *potential* costs. That is, personal leave, compassionate leave and community service leave only apply when an employee takes such leave. There is currently no provision for these forms of leave to be paid out or transferred to the next employer.

The NES, combined with the minimum wage and the award system, provides a sound safety net for employees. This is not to say, however, that it needs no further improvement. There are several features of the NES of which the SDA has previously agitated for change and will continue to press in order for employees to enjoy truly fair working conditions.

The following are the key changes which the SDA has sought and continues to seek. The costs associated with the changes are minimal (or non-existent) for the employer, but significant for the employee;

- **the provision of the ability for arbitration in terms of the 'family friendly' provisions of the NES;**
- **the inclusion of the NES into all modern awards and enterprise agreements, unless the equivalent provisions in either instrument are higher than the NES.**
- **the entitlement to receive full pay when on personal leave, rather than the base rate of pay;**
- **the inclusion of blood and bone marrow donor leave as a community service;**
- **the inclusion of a provision which ensures that shift workers/weekend workers do not have a combination of work and community leave that exceeds the rostering and working hours limits;**
- **when considering reasonable additional hours, the requirement that an employer must ensure that an employee has safe transport home and takes into account any commitments an employee has in relation to education, community activities or social work.**

Awards

The Award System and Flexibility

The SDA unequivocally supports the award system.

The award system ensures fairness for all industrial parties. This long-standing feature of Australian workplace relations distinguishes Australia from many other industrialised nations. It creates a strong safety net of terms and conditions for millions of employees.

Awards not only provide this fundamental safety net for employees through containing their basic entitlements, they are also tailored to ensure that they 'fit' the industries to which they apply and assist employers in managing their workforce. The *General Retail Industry Award 2010* is an example of an award which acknowledges the expansion of retail trading hours and days, by allowing for a 24 hour, 7-day a week spread of hours (albeit with penalty and shift rates to compensate those working at unsociable hours). Conversely, the *Hair and Beauty Industry Award 2010*, whilst its spread of hours is generous, is not as broad as the retail award's, simply because it is not required in the hair and beauty industry.

The Commission has posed a series of questions in terms of awards to determine "whether there are arguments for further changes to awards".

The SDA would submit that there are such arguments for further changes, including broadening permissible award matters and including the NES where a higher entitlement does not apply, thereby creating all-encompassing awards which cover the gamut of the employer-employee relationship.

Despite it being a lengthy and voluminous task, the consolidation of awards and their nation-wide applicability through award modernisation has been worthwhile. Dealing in most cases with only one award per industry throughout the country has simplified workplace relations for all Australians. It is fair to presume that these standardised terms and conditions, now fully transitioned from the previous state instruments, have made the task of workplace relations and administration easier for companies which operate across state boundaries. This in itself is a productivity gain.

The creation of one set of terms and conditions for each industry or award on key areas such as; wages, penalties, casual loading, annual leave, personal leave and employment classifications to name a few only be praised. The existence of one national award underpinning an agreement has made the task

of creating national enterprise agreements considerably easier for all parties to negotiate.

The SDA does not believe that the awards need to be reduced further. 122 awards, compared with 3715 is not an unwieldy number to contend with. A further round of award consolation is unnecessary.

The SDA's response to the Commission's question regarding further simplification is that the exact opposite is desirable. Further simplification of awards will reduce these instruments to their bare bones, strip entitlements away from employees and cause more confusion in the workplace, rather than increase productivity or satisfaction. Awards have been subjected to various rounds of 'simplification' over the past decades and the result has inevitably been that terms and conditions of employees have been chiselled away through each process. 'Simple' is not necessarily better. Sometimes it is simply 'poor'.

Further simplification is not the answer. Rather, expanding the terms to be included in a modern award and including the NES (or improved standards of the NES) is the best way to ensure clarity and understanding of workplace conditions for all stakeholders.

Multiple instruments applying to the one employee and employer are hardly conducive to improving productivity. If an employee or employer needs to refer to an award and the Act to ascertain their day-to-day working entitlements, confusion will reign and the result will be increased disputes and time spent dealing with these. One award which covers all working terms and conditions by incorporating the NES (unless a higher term applies) is much more conducive to employers and employees knowing and understanding the terms and conditions of their employment.

Changes to the processes for the determination of awards by the FWC

The SDA is of the opinion that the processes for determining award matters is fundamentally sound, however it could be improved upon with the introduction of simple measures to ensure that neither the FWC's, nor the participating parties' time is wasted.

Currently, any party may bring an application to change an award with no requirement to demonstrate that *prima facie*, they have a meritorious claim with evidence (where applicable) that is likely to succeed. Therefore, the

process of submissions, reply submissions, further submissions and hearings may all take place when there is little case to be argued and no prospect of success. This process can take place over the course of two to three months, or longer, and drains the time and resources of the FWC and opposing party. It is especially counter-productive when this process takes place several times for similar applications which have no evidence to demonstrate that the changes are necessary.

The solution to such applications is to **empower the opposing party to seek a 'strike out' of the application where the party seeking the change cannot demonstrate *prima facie* that they have a case worthy of being heard.**

This would ensure that only cases which have a prospect of success will be heard by the FWC and all others will be dismissed at the first stage, ensuring that the time and resources of all participants are not wasted.

Currently the major vehicle for award variations is the four year award review process.

It would be fair to presume that almost each and every participant in this four yearly review process is fatigued by the sheer volume of the task at hand. Coupled with the 2012 Interim Award Review, it could be easily argued that the four yearly review has been a significant drain on the resources and time of unions, employer organisations and the FWC itself.

Since Award Modernisation began in 2008, there has been little reprieve for any of the industrial parties from participating in matters concerning the making, amending and reviewing of awards.

Those involved in modern awards could be forgiven for thinking they were in a scene from Groundhog Day – stuck in a perpetual, rolling review of awards. This continuous cycle of award review, which is now entering its eighth year, is simply unproductive and leads to instability.

The SDA submits that the four yearly review should be changed. If there are changes which are necessary to ensure an award meets the Modern Awards Objective, then an application may be brought at any time.

Nothing would preclude that from occurring. Overall, the award system works and it works well to ensure that employees have a strong safety net to protect them from exploitation and provide for a decent standard of working conditions. No further simplification should occur within awards, as it would risk such employees losing out on fundamental working entitlements.

Penalty Rates

Penalty rates are an integral part of the wages system. The SDA is totally opposed to any reduction in penalty rates.

The Victorian government has calculated that a retail worker could lose up to $300 a week, an effective pay cut of 24.5% if their penalty rates were removed.

Penalty rates for working unsociable hours and weekends have formed part of Australian workplace regulation for almost 100 years. In a contemporary context, the central rationale for payment of penalty rates for work performed in unsociable hours such as on evenings, nights and weekends is to compensate employees for the disabilities to which workers who work such hours are subject. [16] At the most general level, those disabilities concern the way in which the performance of work at such times interferes with the personal, social and family life of workers.

The proposition that adverse effects on employees from working on weekends and nights have been eliminated or diminished by the deregulation in retail trading hours which has occurred gradually since the 1990s is incorrect. This proposition is inherently flawed as a matter of logic. The fact that an increasing number of employees in one industry may be required to work in evenings and weekends says nothing about the extent and nature of the impact on them of such work. Given the compensatory purpose served by penalty rates, the relevant issue and inquiry is the effect of such hours of work on employees, not the extent to which employers trade at such times. The AIRC and other State tribunals have consistently rejected arguments that the deregulation of trading hours of itself somehow justifies the elimination or diminution of penalty rates.

In advancing these arguments, the employers attribute primacy to the existence of deregulated and extended trading hours as being determinative of penalty rates. This proposition is the cornerstone upon which many of the employer arguments are based.

The primacy attributed to trading hours by the employer is, however, directly contrary to a previous decision of the Full Bench of the AIRC dealing with

[16] See SDA v $2 and Under (2003) 135 IR 1 at [91] per Watson SDP and Raffaelli C.

penalty rates for work on weekends and evenings. In award modernisation proceedings dealing with the restaurant and catering industry,[17] a Full Bench considered arguments in relation to the determination of penalty rates for weekend and evening work. After identifying that the employer argument was "directed at substantially reducing or eliminating penalty payments provided for in existing instruments applying to the restaurant industry during times when restaurants are open", the Full Bench stated: [18]

… That approach ignores the inconvenience and disability associated with work at nights and on weekends – which are the basis for the prevailing provisions in pre-reform awards and NAPSAs. Nor does the R&CA approach take into account the significance of penalty payments in the take-home pay of employees in the restaurant industry. A modern restaurant award based on the penalty rates proposed by the R&CA would give the operational requirements of the restaurant and catering industry primacy over all of the other considerations which the Commission is required to take into account, including the needs of the low paid and the weight of regulation. A more balanced approach is required.

The employer arguments amount to a narrow approach which attributes primacy to employer trading hours and which substantially ignore the inconvenience and disability associated with work on weekends and nights.

The fact that the existing penalty rates were set in the context of deregulated trading hours is overlooked.

Penalty rates in Modern Awards are not the product of out-dated principles such as deterring work at certain times or the concept of the "working man with a family."[19] Rates that were set in the award modernisation process in which the Full Bench of the AIRC stated, as set out above, that their rationale was to compensate for "the inconvenience and disability associated with work at nights and on weekends". [20]

[17] [2009] AIRCFB 865.
[18] Ibid, at [232] (emphasis added).
[19] See submissions of the AIG in relation to the FFIA dated 13 August 2012, para 8.9.
[20] [2009] AIRCFB 865 at [232].

The SDA takes issue with the claims made that employees do not need additional compensation for working weekends or evenings.[21] The claim advanced assumes that, because an employee agrees to work on a weekend or an evening without payment of a penalty or payment of a lower penalty, the performance of that work does not bring with it disabilities and adverse effects for the employee. The reality for many workers is that they will take what work they can get. The determination of a fair and relevant safety net is not to be undertaken by reference to whether an employer can locate an employee to work for $10.00 an hour on a Sunday afternoon.

The SDA had to again run an argument over penalty rates in the retail awards as the employers yet again pursued applications to reduce penalty rates as part of the 'Interim Award Review ' proceedings of 2012 before the FWA (now FWC) . As part of that review FWA considered s.134(1) of the Act, where FWA must ensure that modern awards, together with the NES, provide a "fair and relevant" minimum safety net of terms and conditions.

The SDA adduced evidence in those proceeding which established that the retention of existing modern award provisions in relation to penalty rates remains not only fair in compensating employees for the disadvantages of work during evenings, nights and weekends, but highly relevant and essential today. That evidence is summarised below.

<u>Evidence of Associate Professor Lyn Craig</u>

Associate Professor Lyn Craig is the Australian Research Council Queen Elizabeth II Fellow at the Social Policy Research Centre at the University of New South Wales. She is an internationally recognised leading scholar in the area of work-family and gender issues. Her research is widely published and highly cited. Over a period of 10 years her research has concerned the intra-household effects of social and workplace policy, the gendered division of labour, work-family balance, parenthood and gender equity and intersections between the family and the economy.

In her report dated 12 September 2012 (the first report), Associate Professor Craig considers whether existing research supports a conclusion that the

[21] See for example submissions of the AIG dated 13 August 2012, para 8.16.

performance of work by employees on weekday evenings and nights, or on Saturdays and on Sundays has adverse effects on employees, their families and the community. In considering this question, Associate Professor Craig reviewed an extensive range of international and Australian research. She concluded that the research identified the following adverse effects of working on weekday evenings or nights, Saturdays and Sundays:

(a) For employees, the adverse effects include physical and mental health problems, psychological distress, job dissatisfaction, poor work-life balance and work-family strain.

(b) For families, the adverse effects include higher marital discord and marital dissolution, more parenting stress, poorer education and social outcomes for children, higher adolescent depression and anxiety and more time without the worker's participation in family activities.

(c) For the community, the adverse effects include less well-functioning families, less effective parenting, lower participation in volunteering and civil activities, lower social productivity and loss of social consistency and cohesion.

The major cause of these adverse outcomes and effects identified by Associate Professor Craig is that employees who work on weekday evenings and nights, on Saturdays or on Sundays have schedules which limit their ability to participate fully in family, social and community activities and to foster their relationships and cement their bonds with others.

Associate Professor Craig also considered the extent to which the adverse effects described above depended upon whether the work was performed on weekday evenings or nights, on Saturdays or on Sundays. She concluded that the adverse effects did vary in the following ways:

(a) That night work was particularly associated with poor physical health, sleep problems and fatigue.

(b) That evening work was particularly associated with less couple time and supervision of children and with high time commitment and stress.

(c) That weekend work caused emotional exhaustion, job dissatisfaction, work-family strain, stress, burn out and the most interference between work and non-work activities, with the effects particularly pronounced for Sundays.

(d) That Sunday was the least usual and the least popular day on which to work and that it retained a special status and is regarded as particularly important for family. She concluded that Sunday work is associated with the most significant losses and disruption to specific participation in family leisure time and that workers are unable to make up for foregone activities or social contact during the week.

The conclusions reached by Associate Professor Craig from her examination of the Australian and international research were confirmed in a further report prepared by her dated 28 September 2012 (the second report). In that report, Associate Professor Craig considered the conclusion she reached in her first report by reference to available Australian data.[22]

As explained in the second report, non-work activities may be grouped into the following categories which in turn can be disaggregated:

(a) personal care;

(b) education;

(c) domestic activities;

(d) child care;

(e) voluntary work and care;

(f) social and community interaction; and

(g) recreation and leisure.

[22] The analysis was undertaken by reference to the Australian Bureau of Statistics Time Use Survey 2006, being the most recently available data set. As explained in paragraph 10 of the second report, the survey gathers information on the time allocation of all members of sampled households over the age of 15 via the recording in a time diary of all activities undertaken over two 24 hour time periods to a detail level of 5 minutes. The Time Use Surveys record the days of the week on which activities occur and all activities that respondents undertake each day including employment-related and non-work activities.

Associate Professor Craig's analysis of the ABS Time Use Data revealed that more time is spent in non-work activities on a weekend than on a weekday and that average time in domestic activities, personal care and sleep, recreation and leisure and social and community interaction are all higher on the weekend than on a weekday. Further, personal care and recreation and leisure are higher on Sundays than on Saturdays.

The data also indicated that more people participate in domestic activities, unpaid housework, shopping and home maintenance on the weekend than on weekdays. More people also participate in personal care, leisure and social and community interaction over the course of a weekend day than over a weekday, particularly between weekdays and Sundays.

The data also revealed that participation in childcare activities is higher on a weekend day than on a weekday. The data indicated that more mothers and fathers performed childcare on weekend days and in the evenings than during week days between 9am and 5pm and that in the case of fathers, childcare most often occurs on weekends and more so on a Sunday than on a Saturday. On a Sunday, participation in play with children and physical care of children is especially higher for fathers.

In the second report, Associate Professor Craig was asked to identify, by reference to her examination of the Time Use Data and the research referred to in her first report, the consequences for employees, families and the community when work is performed at times when non-work activities are generally undertaken. She identified the following consequences:

(a) The performance of work at times when non-work activities are generally undertaken means that workers spend less time than others do in non-work activities and miss out on opportunities that others have for rest, recuperation, exercise, household management, family and social activities and civic participation.

(b) All non-work activities are significantly lower for weekend and evening workers than for those who work standard hours, save only in relation to time spent in education activities in the case of Sunday workers.

(c) Workers who work non-standard hours lose substantial time in domestic activities and also have less time than others in personal care, with these losses of time being highest for Sunday workers.

(d) The performance of work at times when non-work activities are generally undertaken puts employees out of sync with their family, friends and community, limiting opportunities for coordinating activities and spending time with others. This occurs because many of the activities which are foregone by those who work non-standard hours are activities which involve and require social contact.

(e) Weekend workers and those who work in the evening spend substantially more and statistically significantly more time alone and less time in social interaction and leisure with friends and family than workers who work standard hours. Differences in spouse time, time with children, time with older family and with friends are most for Sunday workers, confirming that Sunday work was associated with the most disruption to family time.

(f) Weekend workers are unable to make up for non-work activity time lost and that, in some instances (most notably in relation to childcare for Sunday workers) there is further time lost during the week. The same conclusion was identified in relation to lost social and community interaction and leisure/recreation time with others.

(g) Time spent by Sunday workers with others is even more negatively affected by those hours than Saturday workers. Compared to weekday workers, Sunday workers spend significantly more time alone and have less social interaction and leisure/recreation time with their spouse. She concluded that this underlined that:

> "Sunday is important not only because of what is done on the day, but who it is done with. Opportunities for sharing time with others, including leisure, recreation and social interaction with friends and family are diminished by all types of non-standard work, but most especially by Sunday work." [23]

[23] Second report, para 28.

In summary, Associate Professor Craig concluded[24] that an examination of the most recent nationally representative Australian Time Use data identified the same patterns of time use as indicated in the research referred to in the first report. Namely that the performance of work on weekday evenings or nights or on Saturdays and Sundays has detrimental effects on the employees concerned, their families and the community. The major cause of those adverse outcomes is that employees who work outside standard hours have schedules which limit their ability to participate fully in family, social and community activities and to foster their relationships and cement their bonds with others. She confirmed that her examination of the Time Use Data indicated that work performed at times when non-work activities are generally undertaken had the adverse consequences identified in the first report.

Associate Professor Lyndall Strazdins

Associate Professor Lyndall Strazdins is the Future Fellow at the National Centre for Epidemiology and Population Health at the Australian National University. She is a highly regarded and widely cited academic whose research interests include contemporary predicaments and health consequences of work and care, linkages between the quality and conditions of work to adult and child health and time scarcity as a risk factor for inequalities in health and family wellbeing.

Associate Professor Strazdins prepared a report dated 4 September 2012. That report was prepared by reference to Australian and international research dealing with the health consequences of the circumstances and conditions in which parents perform work. Associate Professor Strazdins' conclusions were as follows:

> (a) That there is evidence that the performance of work by workers on evenings and nights or on weekends has mental and physical health impacts on those workers, particularly in relation to night and evening work. In relation to weekend work, the major impacts will be social and will flow from disruptions to family, social and community engagements.

[24] Second report, para 29.

(b) That there was a reasonable body of evidence which showed associations to poorer cognitive outcomes and poorer mental health in children when their parents performed work on weekends, evenings or nights.

(c) The research identifies that low socioeconomic resources are a factor that may amplify negative associations between children's health and work on weekends, evenings and or nights. She identified that those resources include income and that one way to support families when parents work non-standard times and to avert possible health impacts, is to increase family resources, including income.

Associate Professor Sara Charlesworth

Associate Professor Sara Charlesworth is the Principal Research Fellow at the Centre for Work + Life at the University of South Australia. She has significant experience as a researcher in the areas of employment regulation and gender equality.

Associate Professor Charlesworth prepared a report concerning the results of two large scale surveys of employees which have sought to measure different dimensions of work-life interaction experienced by employees. That interaction is measured and compared though the "Australian Work and Life Index" (AWALI) which measures perceptions by employees of work-life interaction by reference to the following five dimensions:

(a) "general interference", being the frequency with which work interferes with responsibilities or activities outside work;

(b) "time strain", being the frequency with which work restricts time with family or friends;

(c) "work-to-community interaction", being the frequency with which work affects workers' ability to develop or maintain connections and friendships in their local community;

(d) satisfaction with overall work-life "balance"; and

(e) frequency of feeling "rushed or pressed for time".

The AWALI measure brings together the above five dimensions of work-life interaction to produce an overall work-life index scaled from 0 (best work-life interaction) to 100 (worst work-life interaction).

The AWALI measure has been utilised in two surveys considered by Associate Professor Charlesworth in her report.

(a) The AWALI 2008 (the AWALI survey) survey being a nationally representative survey of 2831 employed persons conducted in 2008.

(b) The Victorian Work and Life Survey (the VicWAL) being a survey conducted in 2009 and by reference to 3007 employees in Victoria.

Associate Professor Charlesworth states that both the AWALI and VicWAL surveys are generally representative of the relevant Australian and Victorian populations at the time those surveys were conducted.[25] As outlined below, the data collected from those surveys does enable retail industry employees to be identified. Associate Professor Charlesworth notes however, that the surveys were not designed to be specifically representative of retail industry employees, but because the VicWAL survey included a larger sample of retail industry employees,[26] the results of that survey are likely to be more representative in relation to retail employees. [27]

In her report, Associate Professor Sara Charlesworth outlines the analysis of both the AWALI and VicWAL surveys in relation to employees generally and in relation to retail industry employees specifically. Her examination of the survey results is summarised below.

All employees

An examination of both the AWALI and VicWAL surveys indicated that there was a statistically highly significant difference in the AWALI scores between employees who often or almost always worked weekends and those who do not.[28]

---

[25] Para 19.
[26] 322 employees as against 118 employees in the AWALI survey.
[27] Para 19.
[28] In the AWALI survey, employees who often or almost always worked weekends had an average AWALI score of 49.09 compared to a score of 36.01 for those who do not. The

Both surveys also produced a statistically highly significant difference in AWALI scores for employees who often or almost always worked evenings after 9pm and those who did not.[29]

In the case of those who work on weekends, these results [30] mean that those who often or almost always work weekends are significantly more likely than those who never, rarely or sometimes work weekends to say:

(a) that their work almost always, or often, interferes with their responsibilities or activities outside work;

(b) that their work almost always, or often, keeps them from spending the amount of time they would like with family or friends;

(c) that their work almost always, or often, interferes with their ability to develop or maintain connections and friendships in their community;

(d) that, thinking about their life in general, 60% said they almost always, or often, feel rushed and pressured for time compared to 22% of those who never, rarely or sometimes work weekends; and

(e) that, thinking about their work, 22% said they are not very, or not at all satisfied with the balance between their work and the rest of their life compared to 15% who never, rarely or sometimes work weekends.

Similar outcomes are described in relation to the VicWAL survey.[31]

Retail industry employees

As noted above, the analysis of retail employees from the VicWAL survey is likely to be more representative than the analysis of that group of employees from the AWALI survey.

---

equivalent AWALI scores for the same classes of employees in the VicWAL survey was 46.58 and 38.37 respectively.

[29] In the AWALI survey, employees who often or almost always worked evenings after 9pm had an average AWALI score of 53.21 compared to a score of 37.49 for those who do not. The equivalent AWALI scores in the VicWAL survey (but in relation to employees who work between 7pm and 7am) was 47.85 and 37.83 respectively.

[30] In the case of the AWALI 2008 survey.

[31] See para 33.

Associate Professor Charlesworth's analysis of the VicWAL data for retail employees indicated the following:[32]

(a) Retail employees who usually work weekends have an average AWALI score of 40.42, compared to 34.82 for those who do not. That difference is statistically significant.

(b) Retail employees who usually work between 7pm and 7am have an average AWALI score of 44.18 compared to 35.18 for those who do not. The difference is statistically highly significant.

Associate Professor Charlesworth also compared the impact of working weekends and work between 7pm and 7am on work-life interference as between retail employees and employees in other industries. She concluded as follows: [33]

(a) When hours worked are controlled for, work on weekends was significantly associated with higher AWALI scores. Work in the retail industry had no significant effect on average AWALI scores when compared to those working in other industries, such that the influence of working weekends on work-life interference was not affected by whether or not employees worked in the retail sector.

(b) When controlling for hours worked, work performed between 7pm and 7am was significantly associated with higher AWALI scores and that work in the retail industry had no significant effect on average AWALI scores compared to working in other industries. As such, the influence of work between 7pm to 7am on work-life interference was not affected by whether or not employees worked in the retail sector.

In summary, the evidence of Associate Professor Charlesworth is of significance because it confirms, through the AWALI measure, the conclusions reached by Associate Professor Craig, Associate Professor Strazdins and Dr Woodman that work performed on weekday evenings and weekends has adverse consequences and disadvantages on employees, their families and the wider community. It also confirms that the level of interference with work-life

[32] Para 35.
[33] Para 37 and 38.

balance caused by evening and weekend work does not vary as between workers in the retail industry and workers in other industries. This undercuts the suggestion that the nature of work in the retail industry and in particular the deregulation of trading hours justifies the elimination or reduction of penalty rates for work performed in those hours.

Dr Dan Woodman

Dr Woodman is the TR Ashworth lecturer in Sociology in the School of Social and Political Sciences at the University of Melbourne. His principal area of expertise is as a youth researcher. His research is widely recognised and cited both in Australia and internationally. He has prepared a report dated 21 September 2012 which the SDA relies on in this proceeding.

Dr Woodman's evidence is based upon research he has conducted over the past 7 years in which he and other researchers have tracked the lives of young Australians after the end of secondary school. As part of that research, in 2008 Dr Woodman conducted 50 interviews with young people aged 18-20. Those interviewees were sampled from 1294 participants who had been recruited through secondary schools in Victoria, New South Wales, Tasmania and the ACT and included a balance of young people according to gender, whether they were studying or not and their place of residence (urban versus regional areas).

In his report, Dr Woodman has referred to six case studies of young people interviewed as part of the above research. Those case studies were selected from those interviewees who had worked in the retail or hospitality industries and who had raised in their interviews issues about the impact of work patterns on their relationships.

Dr Woodman states in his report [34] that the interview excerpts he refers to are not intended to be representative in the framework of probalistic sampling. As he notes, the focus of his report is primarily qualitative. The interviews referred to in his report are used "to highlight the different mechanisms by

[34] Para 18.

which weekend and evening work appeared to impact on the participants' lives outside work". [35]

On the basis of the excerpts from the six interviews referred to in his report, Dr Woodman reached the following conclusions:

(a) The extension of the working week for young people over seven days and into the evening adds a new challenge to scheduling regular periods of time with a collective of others – organising leisure time activities so that others could attend and to themselves attend, becomes more difficult for young people.

(b) Although weekend and evening work likely held some benefits for some young workers in helping then coordinate earning money with engaging in education, those benefits did not flow in relation to those young people working those hours who were not students.

(c) Although working on the weekend and evenings is a common experience for the participants in the study, this did not mean that Sunday was just like any other day or that evening employment is the same as daytime employment. None of the participants spoke about weekend and evening work in of itself in positive terms. [36]

(d) Although some workers may prefer to work weekend or evening work because of study commitments and because they can earn relatively higher wages, the interview suggested that if pay rates were equal and if study timetables could be controlled and weekday work available, participants would prefer to have evenings and weekends free to spend with others.

(e) He concurred with previous research that the growing pattern of spreading the work week across seven days and into the evening does not mean that Sunday or the evenings are now just like any other time. The experiences identified in the interviews he conducted suggest that weekend and evening work continue to have an effect on peoples' time with significant others and hence can still be said to be unsociable.

[35] Para 17.
[36] Para 39.

(f) He concluded that the "stretch" of potential working hours and associated variability in working hours means "that it is more difficult to organise collective time together among friends and other significant others". This suggested limits to which the impact of work times on evenings or weekends on relationships and collective activity can be compensated by non-work time at other periods such as weekdays.

Dr Woodman's report contradicts the simplistic claims advanced by employers in this proceeding that because some young people seek to work at non-standard times, such as on weekends, there is no justification for the existing penalty payments. His evidence highlights that, even in the case of young people who seek to work on weekends because, for example, of their study commitments, it does not follow that such work does not bring with it adverse consequences or effects of the type identified by Associate Professor Craig. Dr Woodman's evidence is of significance because it highlights how the lack of synchronisation between the time available for non-work activities for young people who work on weekends and evenings and the time for such activities with family, friends and community is equally applicable in the context of young people. The nature of these impacts may be different but they are of the same character, namely: the difficulty generated by such work in enabling workers to synchronise their social and family time with significant others.

Retail in Australia has never been based on a 9 am to 5 pm, Monday to Friday working week. The retail industry always had industrial awards that permitted (or required) work to be performed on Saturdays. Seventy years ago, a working week for a full time retail worker was from Monday to Saturday lunchtime. Thus, the working week was five and a half days for full timers during a period when all other workers enjoyed a five day working week. The standard week for other industries, including manufacturing, metals etc., over that period was five days, Monday to Friday. This anomaly continued until the 1970's. It was a "requirement" that employers wanted and needed to ensure that stores opened on Saturday mornings, Saturday was an important trading day.

In 1972, in Victoria and New South Wales, and in later years in other states, a late night of trading was legislated, accompanied by a five day working week in the relevant retail State awards. Employers were still able to roster workers across Monday to Saturday but only as a five day week. This was the first time

retail workers were entitled to two full days off a week. With the longer extended trading hours, awards were adjusted to have ordinary and penalty rates in lieu of overtime provisions. Exactly the same things happened when Saturday afternoon trading was legislated in the 1980's and Sunday trading started in the 1990's. The idea that retail awards reflect 9 am to 5 pm, Monday to Friday is simply nonsense, and is not supported by history.

The modern General Retail Award provides for ordinary hours on all days of the week. The Retail Award has a span of Monday to Friday, 7am to 9pm (11pm for those employers who open beyond 9pm Monday to Friday, or 6pm on Saturday or Sunday), Saturday 7am to 6pm and Sunday 9am to 6pm. Further the modern Retail award has a night shiftwork provision.

The Modern Retail Award arose from the process of modernising the award system, as part of the Federal Government's move to a fairer and simpler system. The modernisation process in retail was long and complicated, given the fact there was no National Retail Award. Awards applied on a State or Territory basis. Various occupations in each State or Territory other than the shop assistant such as bakers or butchers also had awards applying in State or Territories.

This meant that in the past a large supermarket in Western Australia would have applied the following awards:

- Meat Industry (State) NAPSA - 2003 (WA) [AN160350]
- Bakers (Country) NAPSA (WA) [AN160022] or Bakers (Metropolitan) NAPSA (WA) [AN160023]
- Pastrycooks NAPSA (WA) [AN160242]
- Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977
- Clerks' (Wholesale and Retail Establishments) Award No.38 of 1947 (AN160080)

In Victoria a large supermarket would have applied the following awards:

- SDA - Victorian Shops Interim Award 2000 [AT796250]

- Bread Trade (Victoria) Award 1999 [AT769688]
- Pastrycooks (Victoria) Award 1999 [AT792620]
- Clerical and Administrative Employees (Victoria) Award 1999 [AP773032CRV]
- Federal Meat Industry (Retail and Wholesale) Award 2000 [AP805114]

And a similar story was true for the rest of the States and Territories.

Each of the awards was different in terms of language, style etc. but also in conditions that applied and what was allowed eg rest breaks, start times, penalties etc.

In developing the Modern Retail Award, a full consultation process was undertaken by the Australian Industrial Relations Commission (AIRC). The Award was not developed in a void, isolated from the industry employers. A simple look at the number of submissions made in the retail industry modernisation process shows the sheer volume of submissions and the range of interested parties. Small retailers, large retailers, big and small employer organisations and unions all made repeated submissions arguing various points.

Many employer submissions were made seeking lower penalties and lower casual loadings than those that were eventually placed in the award. The AIRC was required to examine submissions, examine the then current awards that operated and determine, based on this, what conditions would apply. In most cases of penalty rates and loadings, the AIRC simply adopted the middle position or the most common position contained in the various pre-existing State retail awards. Employers were not satisfied with the considerations and findings of the AIRC and have attempted to rehash their former prima-facie claims in a different forums including other Productivity Commission Reviews, Senate Inquiries and FWC proceedings.

The retail industry during the modernisation process received the most submissions. The retail industry also had the longest hearings. In fact the retail industry always required extra time and extra submissions over the modernisation process. Even when the Award was made in December 2008, a

further round of applications was made by parties seeking changes. Multiple applications were made by various employer organisations to reduce penalties.

A Full Bench of Fair Work Australia determined these applications. An extract of the decision is as follows:

> *Sunday penalties*
>
> *The NRA, CCIWA, RTAWA and the Australian Retailers Association (ARA) seek to reduce the Sunday penalty rates for full time employees from 100% to 50% and for casual employees from 125% to 50%. The rates sought are reflected in NAPSAs applying in New South Wales and to Queensland exempt shops but are not generally reflected in other pre-reform awards and NAPSAs. The modern award rate of 100% for full time employees is in line with the existing rate in Victoria, the Australian Capital Territory, Queensland non-exempt shops, Western Australia and Tasmania. In our view the critical mass supports the retention of this provision.*
>
> ([2010]FWAFB 305, 29th January 2010)

The modern retail award that is now in place radically overhauled the structures that previously applied through the multitude of awards. The retail industry, unlike many other industries, never had a national award. Having one single award apply nationally is a productivity gain that needs to be recognised.

The modern retail award provides for 24 hours, 7 days a week operation without overtime. This is the first time such a provision has applied. Under the numerous previous awards there were limitations on when and how ordinary hours could be worked, i.e. nightfill could only occur when the store was closed, “fill” ended at midnight, only one late night (evening) of work in a week could be rostered. A 24-hour trading store would have needed to use overtime rates to staff the store for substantial periods of the night and early morning.

The modern retail award now allows and caters for 24 hour operations. This is a major productivity gain for employers that the modern award has provided.

Much has been made of employers complaining about increased penalties. Any penalty increase took five years to fully implement. However, many retail employees lost in an instant a substantial component of their regular wage due to the fact overtime was not a “penalty” and therefore was not phased in or

out. It was simply removed. To illustrate this, in many states work between 6pm to 9pm, Monday to Thursday, was overtime. Retail workers regularly worked this time, e.g. supermarkets open to 8 pm. Employees working between 6 pm and 8 pm were paid a 50% overtime penalty. With the new award span of hours allowing work after 6 pm with a penalty of 25%, a "transition" was to occur. This transition however, was from 0% to 25% over five years as the overtime penalty was not saved. FWA and FWO both agreed this was correct, so employers could freely trade to 8pm, no longer paid the overtime penalty, did not have to pay the full 25% penalty, but enjoyed a five year phase-in of the transition from 0 to 25%.

The modern award does not contain "restrictions" that prevent labour being employed. It does provide a balance between the employer's and employee's needs. For example, there are maximum shift lengths of 11 hours, but someone could work 12 hours. Paying appropriate penalties or observing minimum standards are not a "restriction" prohibiting employment at certain times. If the employers' argument was correct that the award was "restrictive" then awards should not exist, as any provision or condition is a restriction. Industrial relations is about the balance to protect employees from employers' absolute power. Any look at the minimalist Work Choices contracts demonstrates clearly the power employers can exercise, when there are no or very few minimums in place.

The examination of penalty rates had a live experiment during Work Choices. Many employers in the retail industry, especially in small operations, took up the option under Work Choices of removing employee entitlements. Any look at individual contracts made clearly show that retail employers made bare minimum agreements. They did not include trade offs.

Given that the option of individual contracts was available, employers simply reduced entitlements – removed penalty rates, took away tea breaks, reduced overtime rates to ordinary rates and increased the working week, to name a few. Furthermore, the payment made to workers was the award rate or a little more – but clearly insufficient to compensate for lost entitlements and insufficient to pass a 'no disadvantage' or boot test.

There have been studies conducted regarding the effects of Work Choices.

One such study which specifically examined the Retail and Hospitality Industry was conducted by the Workplace Research Centre of the University of Sydney. The study's findings were reported in "'Lowering the standards': From Awards to Work Choices in Retail and Hospitality Collective Agreements." This report is attached at Appendix 7. The report contained the following overview:

"The findings of this study can be simply stated:

- In the first round of bargaining, under the best macro-economic conditions in a generation, agreements rarely raised employee's work standards and usually lowered them. As such, it reveals that the shift from award to statutory based enforceable rights has profound implications in sectors where workers have limited choices.
- The changes achieved through agreements were often derived from template contracts. They usually had nothing to do with customising employment arrangements to the unique needs of the enterprise.
- A quarter (24 percent) of the agreements studied had been based around a template devised by one consultant working both the retail and hospitality industries.
- Where agreements differed, it was due to union influence and the fact that employers were larger and had bargaining experience.
- 90 percent of union agreements preserved nearly all protected Award matters, whereas 50 percent of non-union ones abolished five or more
- The scope of issues covered in agreements was extremely narrow. They generally dealt with working time rights and rarely anything else
- Less than a third dealt with skills issues and less than one in six addressed childcare and work and family balance issues.
- Most left out the majority of 'non-protected' award matters like redundancy and severance pay (which where lost or reduced in 77 percent of agreements)

- The interaction of the new entitlements with common rostering arrangements will generally lead to falls in earnings. In retail these falls are in the range of 12 percent to 1 percent and in hospitality in the range 6 to 10 percent (although for union agreements increases of 3 percent are possible).
- In particular sectors, workers on particular rosters will be up to 30 percent worse off. Cafés and Restaurants offer consistently poor prospects for casual and part-time workers.
- The best that the 'Fairness Test' can deliver is partial compensation for a limited range of award losses.
- Employees have lost up to 10 – 30 percent in earnings, more when allowances, paid breaks and annual leave loading and overtime are factored in.
- No modelling has been done for losses concerning redundancy and severance pay.
- No amount of money can compensate for losses like the right to notice, rights to recovery time and basic protection for part-timers which are now purely optional for employers." [37]

Clearly, most retailers using individual contracts and others using agreements under the Work Choices legislation took away basic entitlements to pay and penalties. Employees were not in a position to "bargain" and obtain a better result in a "free market." The power imbalance between employer and employee continues.

[37] Lowering the standards': From Awards to Work Choices in Retail and Hospitality Collective Agreements Evesson et al Pg vii

PAPER 3 – Bargaining

Aims of the system

The SDA supports the broad parameters of the enterprise bargaining system.

The SDA submits that the bargaining arrangements under the current workplace relations framework certainly allow for employees and employers to craft arrangements which genuinely suit them. As such, the bargaining system functions to benefit all parties.

An examination of the agreements to which the SDA is a party is evidence of the flexibility provided by the Act for employees and employers to tailor the terms and conditions to their needs. Of course, this tailoring must ensure that employees are better off overall as compared with the relevant award, but this requirement does not preclude the ability for agreements to suit the individual workplaces

The SDA is concerned that some employers may seek to use this review to argue that the current framework does not allow for enough flexibilities in their workplace agreements. The SDA would argue that this is simply not the case and strongly cautions against any further widening of the flexibility arrangements, as an unfettered framework allowing for more employer-sought flexibility could reduce the fair entitlements of employees.

For example, we are concerned that often, what employers call 'flexibility' is the ability to treat all employees as casuals – reducing hours at will and regularly altering rosters to suit their business needs. What employees call 'flexibility' is the ability to tailor their working hours to adapt to their own personal needs, be it caring responsibilities, medical requirements, religious obligations and study commitments.

The current system aims to balance the employers' and employees' desired flexibilities and the SDA believes that it is achieving this well enough.

We recognise there are a number of issues being raised in regard to the system of bargaining.

Pattern bargaining

The SDA is concerned that the term "pattern bargaining" is being used in a pejorative sense by many commentators.

In our view so called "pattern bargaining" often works to the advantage and benefit of both employers and employees.

Therefore, the SDA does not believe that pattern bargaining is sitting "uneasily with the goal of the WR system to develop agreements that reflect the particular circumstances of the enterprises and employees." as stated in issue paper 3.

Pattern bargaining as it currently sits in the FW Act caters for a particular group of employers, namely small to medium employers. This is not noted or countered in the issue paper.

The SDA has and continues to deal with small to medium employers who do not have sophisticated and limitless resources to dedicate to bargaining. For these employers having a template or a guide to begin with aids and assists the bargaining process.

The SDA has bargained as an example with many small independent supermarket operators. They do not have the resources of their major competitors who have been accessing the bargaining stream. These independent supermarkets do seek to have an agreement apply to their workplace/workforce. By being able to use a template as a starting point, the employer focus is about conditions for the workplace, not on some of the more legalistic parameters that need to apply.

Restrictions on agreement-making

Since the commencement of the Act, some previously prohibited terms are now permissible, but not all are. The reintroduction of permissible terms into enterprise agreements has been by consensus between the bargaining parties. Indeed, this capacity has enhanced bargaining, because parties are now better able to negotiate and include issues without fear of falling foul of a regimented prescription focused on finding and punishing offenders.

An example of the benefits of including previously prohibited terms is the inclusion of safety training.

With this in mind, **the SDA advocates that all matters which an employer is willing to include in an agreement should be permissible.**

Often, as an outcome of enterprise negotiations in the retail industry, matters which are not permissible within an agreement but are nevertheless legal, may be contained within a Memorandum of Understanding between the SDA and the employer. This in itself demonstrates that employers are not concerned about having such arrangements with the Union.

However, the problem with such arrangements is that a Memorandum of Understanding is another document containing matters relating to the workplace and this can create confusion for those attempting to ascertain the terms and conditions which apply within their workplace. For clarity and ease of locating all terms and conditions applying to employees, such matters should be incorporated into one instrument - the enterprise agreement.

The Better Off Overall Test – The 'BOOT'

The introduction of the BOOT was to ensure that a minimum standard existed for all employees. This was a major step towards achieving fairness in the workplace relations system. However, certain refinements are necessary.

The concern which the SDA has with the Better Off Overall Test ("BOOT") is that its application to an agreement occurs only once at the time of lodgement. S.193(4) of the Act requires that the BOOT be applied at the time of the test, which is defined in s.193(6) as being the time the application for approval of the agreement by Fair Work Australia was made. This means the BOOT is a static test that is applied once and once only, and only at the time the original agreement is lodged.

Expired Agreements

The danger for employees covered by an agreement is that over the duration of the agreement, they may actually fall below the award and no longer be better off overall.

The only guarantee for an employee covered by an agreement is that their base rate of pay cannot fall below the minimum rate in the underpinning award, but all other entitlements, both monetary and otherwise, are not adjusted to ensure that an employee is not worse off than an award-reliant employee over the life of an agreement. This is a serious deficiency in the legislation concerning the BOOT and must be rectified.

It is a poor outcome for employees when a long-term agreement is deemed to be acceptable at the time of testing, but a year later (and for the remainder of the life of the agreement) renders the employee worse off overall due to the failure of the agreement to maintain its position as better than the award.

For example, an agreement which has a 'loaded' rate which incorporates the minimum wage and penalties in an award and pays a higher base rate, can be better off at the time of approval. After the next minimum wage increase, however, this loaded rate may erode, especially where there is little or no increase of the rate over the duration of the agreement. Whilst the rate is higher than the award rate, once casual loading, penalty and public holiday rates are accounted for, the loaded agreement rate falls below what an employee working the same hours would have received if the award were applied. There are real issues surrounding the notion of a BOOT which is applied only once at the time of lodgement.

BOOT Test over Life of Agreement

To remedy this situation, the SDA submits that a reapplication of the BOOT should occur over the life of each agreement (including those which have nominally expired) on 1 July every year, to coincide with the application of the minimum wage increase. Therefore, any changes to an award's terms and conditions will be taken into consideration once a year for each agreement currently operating.

This will ensure that no employee falls below the standard set in their relevant award and makes for a fairer and more transparent system.

Every agreement must, at all times during its operation, meet the minimum wages set by Fair Work Australia.

However, there is no guarantee within the legislation that the component of the wage which reflects the buyout of loadings and penalties is maintained at its proper relative value. If the agreement does not contain specific provisions ensuring that the bought out component for loadings and penalties is regularly reviewed and maintained, then over the life of an agreement, the value of the wage will fall below the value set by the BOOT.

An effective BOOT should not be applied as a one off static test at the time of the agreement being made, but should be an ongoing test which has to be met at regular intervals. Given annual wage movements around 1 July, it would be appropriate for the BOOT to be applied at this time of the year.

This guarantees that an enterprise agreement has an effective value which always meets the BOOT, rather than meeting the BOOT once and then progressively falling below the BOOT over the life of the agreement.

At the very least BOOT must be assessed within 6 months of when agreement expires.

Should the BOOT be met for all employees subject to an agreement, or should the test focus on collective welfare improvement for employees?

The BOOT should be met for each individual employee covered by an agreement. Failing to do so will inevitably render many employees worse off than their award-reliant counterparts and not provide a fair system for such employees, nor the employers who pay by the award.

Most award-reliant employers are small to medium businesses with limited human/employee resources and most agreement-covered businesses are large companies. Allowing an organisation covered by an agreement to provide staff with lower terms and conditions overall than employees covered by an award, provides an unfair commercial advantage to such employers and is undesirable for this reason alone.

There should be no provision which would allow for employees to be paid at lower rates than their award-reliant counterparts, as this would effectively provide agreement-covered enterprises with an advantage over award-reliant businesses. This effectively creates a two-tier system of employees and employers and is patently unfair for all involved.

The SDA is unaware of any evidence which demonstrates that the BOOT prevents working arrangements that are mutually beneficial to employers and employees or limit worthwhile flexibility in workplace arrangements.

The SDA's experience is to the contrary. **The BOOT does not preclude flexibility within agreements, but does ensure that no employee at the time of applying the BOOT is worse off than others covered by the relevant award.**

Once again, the SDA does note the deficiency of the 'once only' test of the BOOT and seeks that this is addressed.

Passing agreements which do not pass the BOOT

S.189 of the Act permits an enterprise agreement to be approved, even where it fails the BOOT, if the FWC determines that approval of the agreement "would not be contrary to the public interest." The provision should be changed so that rather than having a test of approval where it is not contrary to the public interest, an applicant seeking approval should be required to positively establish that approval is in the public interest. This is a slightly more onerous test.

However, increasing the hurdle that an employer has to jump in relation to a Public Interest Test should be consistent with maintaining the notion that approval of such agreements is not to be the norm.

The SDA notes and approves the approach that agreements made under s.189 have a nominal expiry date no later than two years after the date upon which the agreement is approved. A difficulty with this is that the expiry date is nominal, not actual. Where an agreement is approved under the provisions of s.189, there should be a corresponding provision in the termination provisions of the Act which determines that, on reaching the nominal expiry date, the agreement is automatically terminated.

A provision which provides that there is an automatic termination of the agreement made under s.189 would encourage employers to address the problem which led to them seeking approval of an agreement under the Public Interest Test.

Another issue relating to Public Interest Test agreements is that there appears to be no mechanism for such agreements to be varied. S.207(5) operates as a barrier to any variation to an agreement that was approved in the public interest under s.189. The difficulty with this barrier is that it has the effect of condemning employees to be employed under the terms of an agreement which has failed the BOOT without the possibility of the employees or the employer varying the agreement during its life, so that it may meet the BOOT or improve employees' conditions. Rather than a bar on the variation of public interest approved agreements, it would be preferable to permit public interest approved agreements to be varied, but only under a specific circumstance of improving employees' conditions.

The ability to vary a Public Interest Test approved agreement is required because these agreements are initially made to overcome a short term crisis or to assist in the revival of a business. Both employers and employees may be cautious with respect to the terms and conditions of employment in the enterprise agreement. However, once approved, it may become apparent that terms and conditions of employment which are lower than the BOOT are not necessary for the full duration of the agreement.

Once again, it is undesirable and not in the public interest for a company to gain an unfair advantage over others by being allowed to apply inferior terms and conditions once its crisis has passed. Therefore, ongoing assessment of the company's situation and the discrepancy between the terms and conditions within the agreement and the relevant award(s) should be requisite. As soon as a company is past the crisis which rendered it eligible for its agreement to pass which did not meet the BOOT, it should be compelled to improve the terms and conditions to ensure that its employees do suffer for any longer than is necessary.

S.189 should be changed from a test of approval where it is not contrary to the public interest to a requirement to positively establish that approval is in the public interest for agreements that do not pass the BOOT.

Where an agreement is approved under the provisions of s.189, there should be a corresponding provision in the termination provisions of the Act which

determines that on reaching the nominal expiry date, the agreement is actually terminated.

Individual Flexibility Arrangements

It must be noted that the Act specifically states at s.3(c) that in order to achieve its object, it will do so by "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." The SDA fails to see how this can be achieved when an Individual Flexibility term is compulsory in an award or agreement. An Individual Flexibility Arrangement (IFA) is in stark contrast to s.3(c), thus the SDA maintains it has no place in a fair and just workplace relations system.

In theory, an IFA must not permit an employee to be worse off when compared to the terms of their relevant award, whilst allowing employers to alter certain terms to better suit their business. In practice, it is difficult to envisage how IFAs can be beneficial and ultimately, fair.

The workplace relations system already addresses this through allowing enterprise agreements to create tailored terms and conditions which suit the particular workplace.

Individual Flexibility Agreements (IFAs) are not required to be recorded and publically available. They are not required to be scrutinised or analysed by either FWA or the FWO, nor can other interested parties, such as unions, gain access to them to measure their fairness. Short of an employee complaining to the Ombudsman, IFAs can exist, without the knowledge of anyone apart from the employees and employers involved. The SDA believes that IFAs undermine the essential fairness and transparency of the system and does not account for the inherent inequality of bargaining power between the employer and employee.

The danger of these IFAs is that they cannot adequately address the inequality in bargaining power which exists in the employment relationship. Save for the very few in the upper echelons of their industry who are highly sought after

and can command their own terms and conditions, the vast majority of employees do not have the power to truly determine agreements which are beneficial for them and do not render them worse off than those who do not enter into such agreements.

The only way to truly ensure that individually-tailored agreements are not deleterious is to either eradicate them completely or subject each agreement to the scrutiny and assessment of the FWC to ensure they do not fall below the BOOT.

It is important to note that the SDA's experience of IFAs is that they have been anything but 'bespoke'. Indeed, many have been mass-produced and distributed to all employees upon engagement to undermine their workplace rights and entitlements. The very same situation occurred with Australian Workplace Agreements which were dolled out to all employees on a 'take it or leave it' basis. The repercussions of AWAs were overwhelmingly negative for employees, especially those whose bargaining power is limited, such as women, people with English as a second language and young workers.[38]

From an employee's perspective, there are few or no benefits which flow from IFA's. Employees generally do not receive improved wages and conditions of employment under IFAs. Awards contain arbitrated or legislated terms and conditions and enterprise agreements contain provisions voted upon and then approved by the industrial umpire.

IFAs are not public and are not subject to any proper public scrutiny. They are open to abuse and misuse.

It is telling that the SDA, the largest union in Australia, cannot provide evidence to the Commission on the matter of how widespread IFA's are. It indicates the shadiness of IFAs. The fact that there is an unknown quantity of such individual arrangements indicates that this is an unregulated and uncontrolled aspect of workplace relations. This must be remedied.

There are is a range of maters which are varied by IFAs, but most are limited to the model clause or are even more constrained so that they only deal with a single matter in an agreement.

[38] Demonstrated by Sara Ch. Study - impact

This is as a result of bargaining with employers, some of whom have openly expressed in negotiations that they do not want IFAs in their agreements, but due to legislative requirements are compelled to include such terms. These employers see IFAs as problematic and unwieldy and are concerned that they may be used incorrectly by their management and open them to future claims from employees who realise at a later date that their conditions were undercut.

Unfortunately, there are no enforcement arrangements unless if a complaint is made, then a complainant must go through the stress of following through with a complaint against their employer, current or former.

The SDA is aware of several cases where IFAs have been developed as pro forma documents distributed to all employees. Given that the intention of an IFA is to provide the ability to meet, "the genuine individual needs of the employer and the individual employee,[39]" it is laughable that a pro forma can be distributed to all employees and be considered to be meeting their 'individual' needs. It appears that some employers are using these as substitute Australian Workplace Agreements (AWAs).

It is clearly concerning that some employers have adopted IFAs as de facto AWAs and are continuing to undermine the safety net of entitlements enshrined in the FWAs modern awards and agreements.

There is no place for IFAs in a fair workplace relations system.

Good Faith Bargaining

There is a shortcoming in the current good faith bargaining requirements in that a party has the right to withdraw from an agreement made in good faith with another at any time prior to the employees voting.

In the SDA's experience this shortcoming translates to an absence of any right for a Union, employer or bargaining agent to take action against another party who has capriciously walked away from an agreement it has made. This appears inconsistent with the objects of Part 2-4 of the FW Act to enable

[39] [2008] AIRCFB 550

collective bargaining in good faith for enterprise agreements, and further appears that the Act is deficient in not providing a party with an avenue to address such a situation.

The SDA submits that the Fair Work legislation is not operating as intended in respect to Section 3 (f) achieving productivity and fairness through enterprise level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

The implications upon parties once an agreement had been made was heard in Australian Nursing Federation v Alcheringa Hostel Inc (2004) 134 IR 446, where a Full Bench of the Australian Industrial Relations Commission determined[40] that once an agreement was 'made', between an employer and one or more organisations, it was not possible for a party to withdraw from an agreement before it had been put to a vote of employees.

The Fair Work Act 2009 differs in its interpretation as to when an agreement is 'made' between parties from previous legislation.

Under s182, agreements that are not greenfields agreements are deemed to be 'made' only when a majority who cast a valid vote approve the agreement. Thus the agreement reached between the parties was not statutorily 'made' because it never went to a vote of employees.

Section 181(1) further appears to provide an employer with the discretion as to whether to put a proposed enterprise agreement to a vote, which consequently and evidently affords employers the dubious right to withdraw from an agreement made in good faith with a union or any other bargaining agent, at any time prior to the employee vote.

Although FWA can make good faith bargaining orders under s255 (1), it cannot issue bargaining orders requiring an employer to put an agreement to a vote.

Thus there appears to be no statutory capacity to require an employer to put an agreement made with a union or bargaining representatives to a vote, nor is there any recourse for unions or other bargaining agents to take action against an employer who has walked away from an agreement made.

[40] In respect of s170LJ of the Workplace Relations Act.

The SDA submits that the above-mentioned sections of Fair Work legislation are not operating as intended and are in fact hindering the achievement of productivity and fairness through enterprise level collective bargaining.

Trade-offs

Trading off financial entitlements such as penalties and loadings for non-monetary benefits such as more flexible working arrangements to meet an employees needs, for example, the ability to balance work and family responsibilities has a significant detrimental impact on our members.

These arrangements are most likely to occur in low-paid, low-skilled industries for employees who can least afford to trade-off financial entitlements, but do so in order to retain their employment.

The SDA continually sees members, and in particular, women accept reductions in hours, changes from permanent to casual status and demotions because they are unable to negotiate a change to their working arrangements which enables them to establish the necessary arrangements to care for family and balance work and life commitments.

In our submission to the AHRC on its Supporting Working Parents: Pregnancy and Return to Work National Review, the SDA provided several case studies demonstrating that employees in vulnerable situations such as when pregnant and on return to work from parental leave are invariably forced to accept a position or hours which leaves them severely financially disadvantaged as a result of their employer not accommodating a modest request for flexible working arrangements.[41]

Given this evidence it would be highly disadvantageous for the lowest paid Award and Agreement reliant employees in Australia for non-monetary benefits to be included in any assessment regarding BOOT or IFA's.

The SDA strongly opposes any changes to the BOOT which would consider non-monetary items such as flexibility for an employee about when they work. For the majority of our members trading off monetary entitlements for non-

[41] Shop Distributive and Allied Employees' Association, *Submission to AHRC Supporting Working Parents: Pregnancy and Return to work National Review*, February 2014.

monetary benefits leads to reduction in hours, casualisation, demotion and often severe financial disadvantage.

The BOOT is a fundamental safeguard that ensures employees have access to flexibility without having to accept a reduction in wages and conditions. Any change to this would render S65 of the Fair Work Act completely useless as employers who may be able to accommodate a request without incurring a cost would be able to refuse the request forcing employees to have to trade off a monetary entitlement in order to get the change they are seeking.

Conciliation and arbitration

The SDA strongly asserts that the absence of a universal right to arbitration in the FWC for employees whose conditions of employment or rights have been infringed or denied is a substantial weakness in the system.

The Act's Object at s.3, "is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians." In order to achieve this Object, the Act states at it will "ensur(e) the 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 "...provid(e) accessible and effective procedures to resolve grievances and disputes …"

The SDA fails to understand how the Object can be achieved when the enforcement of the safety net and effective procedures to resolve grievances and disputes have been denied by the Act's failure to include the universal right to arbitration.

The Fair Work Act denies workers the right to access arbitration by a third party in matters where there is a dispute between the employee and the employer.

The lack of the right for workers to initiate access to arbitration causes significant and long term disadvantage to employees. The removal of the right of an employee to initiate access to arbitration is a significant shift in the

power balance in favour of employers. Most of the benefits otherwise provided for in the Fair Work Act are without value if employees cannot initiate arbitration proceedings when they have a dispute with their employer. The inability of workers to access arbitration as a right has a serious impact on a number of workplace relations issues covered by the Fair Work Act and directly conflicts with the Object.

The Fair Work Act requires that both modern awards and enterprise agreements must contain clauses that provide dispute settlement processes. This appears to reflect the long-held approach that a dispute resolution process is both a necessary part of the management of industrial relations issues at the workplace and that such a clause will actually achieve a resolution of the dispute. The requirement to have such clauses also appears to reflect the approach that a proper dispute resolution process allows one party to the dispute to initiate the processes of mediation, conciliation and/or arbitration of the dispute. However, such is not the case in reality.

The Fair Work Act makes very clear that Fair Work Commission does not have the power to exercise arbitration in relation to a dispute before it unless arbitration is either specifically provided for in a provision of the Agreement or Award, or unless both parties to a dispute permit Fair Work Commission to arbitrate a dispute.

The long standing feature of the Australian industrial relations landscape whereby an employee with an intractable dispute with their employer was able to initiate the process of having the dispute referred to the Australian Industrial Relations Commission for arbitration has been removed. Making the exercise of arbitral powers conditional upon agreement by both parties to a dispute is a means that for many employees access to arbitration is denied.

An employer always has the capacity to change workplace terms and conditions of employment and can do so knowing that where a dispute arises in relation to the actions of the employer, the employee has no capacity whatsoever to force the dispute before Fair Work Commission for arbitration. Even where a dispute can be referred to Fair Work Commission for mediation and conciliation, there is no incentive on an employer to participate in a meaningful way in any mediation or conciliation where the employer knows

full well that Fair Work Commission can never arbitrate the dispute unless the employer agrees. Employers simply have to withhold permission from Fair Work Commission arbitrating a dispute to ensure that all matters are resolved in favour of the employer.

Arbitration is needed for the NES. The lack of procedural detail about how the NES will work in the case of any particular workplace means it is left up to the parties at the workplace. The Fair Work Act also places constraints on the ability of Modern Awards to deal with some of the practical difficulties that arise in the implementation of the NES. The inevitable outcome of this approach is that there will be disputes about the practical implementation of the employee rights guaranteed by the NES.

Employees need to be able to access arbitration over the practical implementation of an NES right. The issue arising in the workplace will not be a question about the entitlement to a right under the NES. The issue that will face most employers and their employees is how the NES rights will be practically implemented in the workplace. These are disputes about process, with the employer arguing for their preferred method of implementation and the employee arguing for their preferred method. Arbitration should be a right in such workplace disputes.

The clearest example of the need for such arbitration rights is in relation to work on Public Holidays.

An employer who requests an employee to work on a public holiday will insist that their request is reasonable and the employee's refusal of the request is unreasonable. Equally the employee will insist that the employer's request was unreasonable and that their refusal was reasonable. Either the employer or the employee needs to be able to access arbitration as a right to have these disputes settled.

Arbitration will not alter the NES or affect the NES in any way. It simply deals with the practical application of the NES. Arbitration as a right is a necessary tool to make the NES work effectively.

In the absence of a right to access arbitration, neither the employer nor the employee need make any concession on their position. In the absence of

arbitration of the dispute, the matter may end up in Court on the basis of the employer withholding payment for the public holiday on the basis of the employee's unreasonable refusal to work on the public holiday and the employee then using the Court to recover the lost wages. Recourse to a Court to resolve such a dispute is a costly process for both the employer and the employee and wastes the resources of the Court and of the Workplace Ombudsman in circumstances where the dispute could have been resolved easily and quickly if either side had a right to access arbitration before the FWC.

Employees should not have to access a Court to enforce a right under an NES. It is logical that the industrial 'umpire', FWC, should have complete jurisdiction to arbitrate over matters concerning the NES and thereby ensure the Object of the Act is being met in practical terms.

Arbitration in Modern Awards and Enterprise Agreements

Where Modern Awards and Enterprise Agreements provide basic provisions on the terms and conditions of employment, the practical application of the Modern Award or Enterprise Agreement is a matter which relies upon the actions of both an employer and employees.

Modern Awards and Enterprise Agreements are not intended to micro manage a workplace. Rather, the Modern Award or Enterprise Agreement sets the parameters for the legal minimum safety net of terms and conditions of employment.

The most common dispute in retail is over rosters.

A standard rostering clause in a Modern Award or Enterprise Agreement sets the minimum required notice that an employer must give to initiate a roster change and some clauses will contain specific constraints on patterns of work to provide essential protections for employees. Outside these constraints the actual roster worked is determined by the employer. Employers have a degree of flexibility about how they implement the rostering arrangements in Retail.

Roster disputes can be caused by a variety of matters including:

- in circumstances where the employee insists that a verbal agreement exists with the employer that a particular roster will not be imposed on the employee,
- requiring an employee to work hours which the employer knows are difficult or impossible for the employee to work because of personal commitments or matters such as transport issues,
- to reduce hours of work in what is an apparent attempt to discipline a worker,
- so that more work can be given to a favoured employee (relative or friend) at the expense of other workers.

In such examples the affected employee will dispute the roster change and will want to have access to an Independent Umpire to determine the issues in dispute. In each case the employer will insist on their rights under the Modern Award or Enterprise Agreement to do whatever they want and will resist any attempt to require them to either explain their decision or review the roster change.

In too many cases employers will only agree to effective conciliation on the dispute if they know they can be subject to arbitration. It is only where the employee has an absolute right to access arbitration that the dispute will be resolved.

Arbitration of these disputes is all about ensuring that the discretionary powers of the employer to set rosters is exercised with a degree of fairness towards employees, whilst still permitting the employer to manage their business effectively.

Having right to access arbitration does not mean all matters go to arbitration – it is an incentive to get matters sorted earlier.

PAPER 4 – Employee Protections

General Protections and Adverse Action

The general protections provisions play an important role in the workplace relations framework. They protect important rights, in particular freedom of association, upon which the workplace relations system is substantially founded. The current protections are adequate; however the recent decisions of the High Court in Barclay[42] and BHP[43] , while providing some clarity, have exposed flaws which could be improved.

The High Court's interpretation of the adverse action provisions in Barclay and BHP has highlighted the difficulty for applicants to prove that adverse action has occurred for a prohibited reason. The High Court's approach to the provisions was essentially to focus on the subjective intentions of the decision-maker in determining whether the adverse action was taken 'because' of the prohibited reason. The result is that heavy weight is put on the testimony of the decision-maker.

The challenge with such an approach is that applicants find it difficult to adduce evidence that the alleged conduct occurred 'because' of the prohibited reason where the decision-maker asserts that the reason for the decision was other than the prohibited reason.

A common example in the retail industry is where an employer takes retribution on an employee for exercising a workplace right by changing the employee's roster to a more inconvenient time, or to a time which attracts less pay. In these circumstances, employers can simply assert that the reason for the decision was 'operational reasons'. Even if all the circumstances of the matter indicate that the change in roster and exercising of a workplace right are linked, it is very difficult for the employee to prove it is the case where the employer asserts otherwise.

The current provisions could better protect rights if a broader objective approach was taken to the causal link between the workplace right and the adverse action. The FWA should be amended to ensure that courts use an

[42] Board of Bendigo Regional Institute of Technical and Further Education v Barclay [2012] HCA 32
[43] Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [2014] HCA 41

objective approach to find the real reason for the conduct rather than the subjective intention of the decision-maker.

The primary purpose of the general protections is to protect workplace rights, protect freedom of association and provide protection from workplace discrimination.[44] Freedom of association and freedom from discrimination are fundamental human rights.[45] Protecting such freedoms can have positive economic impacts , however the protections of fundamental human rights[46], which derive from the inherent dignity of the human person, do not need to be justified on economic grounds.

The SDA has considered to what extent the removal of the 'sole or dominant' test that existed in previous legislation has shifted the balance between employee protections and employer rights.

The 'sole or dominant' test under the Workplace Relations Act 1996 (Cth) only applied in limited circumstances involving protections.[47] The test was appropriately removed with the introduction of the FWA which provides at s360 that a person takes action for a particular reason if the reasons for the action include that reason.

The multiple reasons test does not just apply to the protection of employees; it can apply to any person who has a protection under Part 3-1 of the FWA, including employers and independent contractors.

The introduction of the FWA consolidated many of the previously existing protections into one part of the legislation. Prior to the introduction of the FWA, similar provisions were found throughout the Workplace Relations Act 1996 (Cth). The current provisions are simpler and more rationalised and do not require substantial change.

---

[44] FWA s336

[45] See the Articles 22 and 26 of the International Covenant on Civil and Political Rights

[46] See for example the Marion Jansen and Eddy Lee (2007) Trade and Employment: Challenges for Policy Research, Joint study of the International Labour Office and the Secretariat of the World Trade Organization, pp 65-68

[47] Workplace Relations Act 1996 (Cth) s346ZJ in relation to protection where an agreement does not pass the no-disadvantage test; s792 in relation to protection because an employee is entitled to the benefit under an industrial instrument; and s 902 in relation to protection where the reason is to engage the individual as an independent contractor to perform the same work.

There is certainly overlap between the some of the discrimination protections in the FWA and other anti-discrimination legislation but the laws are not inconsistent. Section 351(2) of the FWA adequately deals with the interaction between the FWA and other anti-discrimination legislation.

One area of discrimination protection which could be improved is the treatment of ill and injured workers. Section 352 of the FWA requires that, "[a]n employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations." The regulations define the illness or injury in regulation 3.01. An illness or injury is not a prescribed kind of illness or injury if the employee's absence extends for more than 3 months or the total absences of the employee, within a 12 month period, have been more than 3 months.

In some cases, employers see such provisions as a 'green light' to terminate employees once they reach three months of absence due to illness or injury. Employers do not always consider their obligations to make 'reasonable adjustments' under the Disability Discrimination Act 1992 (Cth). The FWA should be amended to require employers make reasonable adjustments for ill or injured workers.

The SDA has found that the convening of conferences by the Fair Work Commission is useful in assisting the parties to a quick and just resolution of the dispute.

The harmonisation of time limits for lodgements has given some assistance by providing certainty. However the benefits do not outweigh the potential costs to applicants where they make a poor choice of jurisdiction. There is no ability for an applicant to alter their application to switch jurisdictions.[48] Situations may arise where employees receive bad advice or no advice within the 21 days or where further evidence arises later in the process.

While there is little debate the current timeline for unfair dismissal, the SDA believes that general protections involving dismissal should not be restricted by such timelines. All other civil remedy provisions in the FWA have a time limit of six years.[49] There is little justification for applying different timelines to

[48] Peter Ioannou v Northern Belting Services Pty Ltd [2014] FWCFB 6660
[49] FWA s544

civil remedy provisions that involve a termination of employment to breaches that do not. A twenty-one day timeline is not always enough time for a potential applicant to adduce relevant evidence and seek proper advice to make a considered determination of whether to make a general protections claim.

Bullying

The SDA has seen a dramatic increase in bullying incidents and complaints in the past five to seven years. More cases involve physical bullying, resulting in injuries ranging from muscular skeletal injuries to significant psychiatric injury including in some cases hospitalization and suicide.

While there has been an increase in community awareness and education, it is our experience that the incidence of bullying is increasing and these incidents are more sustained, aggressive and violent.

Prior to the introduction of the anti-bullying laws, the ability to effectively manage bullying complaints was incredibly frustrating, difficult and rarely resulted in a positive resolution for the person experiencing the bullying behaviour. Unfortunately, a person who raised a bullying complaint was more likely to experience further bullying; see a premature end to their employment; and experience health and relationships difficulties.

Bullying complaints have traditionally been dealt with dispute resolution processes of OHS legislation. One of the most significant failings of the health and safety jurisdiction is the lack of individual or personal dispute resolution and remedy options. An individual cannot seek resolution or remedy for It is up the OHS Regulator to decide to pursue a case of bullying an individual cannot pursue a bullying complaint or seek individual redress if they are being bullied at work. Only the OHS regulator has the power to pursue legal redress and prosecute an employer for a breach of the Act. In the majority of OHS jurisdictions, the Regulator has a period of two years after the OHS breach has occurred to decide if they will pursue a prosecution. That prosecution relates to the employers alleged breach of the OHS Act. It does not address the issue of bullying for the employee concerned. This was one of the key failings which

the Anti-bullying laws have remedied because it has provided an individual complaint resolution model for those being subjected to workplace bullying.

The new regulatory framework was designed to provide a low cost, quick and effective process and appropriate outcome for the person affected by the bullying behaviour. Prior to the introduction of these anti- bullying laws there was a lack of genuine and suitable remedies for those affected by workplace bullying due to the lack of effective dispute resolution procedures which recognised the individual complainant. The experience of victims of bullying who raised a complaint is one of complete frustration and hopelessness. Employers simply did not address, investigate or deal with bullying behaviour in the workplace. In many cases this only further exacerbated the situation, causing greater harm and increased risk the development of a psychological injury.

It is our experience that the capacity for workplace-based policies and procedures to influence the incidence and seriousness of workplace bullying is negated by the fact there appears to be little will by the employer or OHS regulator to investigate bullying complaints. It has been our overwhelming experience that policies and procedures in place are rarely used and followed. When it is pointed out to employers they have not followed their own policies and procedures there is no interest in trying the remedy this. This is because, up until the introduction of the new anti-bullying laws, there has been no incentive to get it right, no incentive to prevent workplace bullying, and no incentive to protect employees from the damaging effects of workplace bullying. Employers previously understood that there was no real cause of action available to employees who experienced bullying which resulted in a lack of interest in changing current practices and addressing workplace bullying.

Without the anti-bullying laws in place there is no deterrent or incentive for an employer to provide a workplace free of bullying. Prior to the introduction of the anti bullying laws employers held a reasonable belief that they would never be the subject of an investigation into bullying by an external source, including the OHS regulator. The OHS regulatory framework is grossly inadequate and unable to deal with workplace bullying issues. The OHS

regulatory framework would require a total revision in order to effectively manage and resolve individual workplace bullying incidents.

It is clear that most employers do not treat bullying as an OHS issue or adopt a risk management model to bullying issues, even though bullying falls under the OHS jurisdiction. From its inception employers have treated bullying as workplace relations issue. The majority of employers have bullying policies incorporated into their workplace behaviour policies or codes of conduct and not in their OHS policies. Employers rarely consider and address bullying from an OHS perspective. Most 'workplace behaviour' policies which include bullying, fail to even make reference to the Safety Committee, the HSR (Health and Safety Representative) or the OHS Issue Resolution Procedure. The problem is never addressed as a safety issue, but rather is addressed as an individual workplace issue. Bullying cases are rarely investigated adequately or from a risk management perspective even where it is obvious that the bullying behaviour is cultural and systemic in the workplace. Employers seem more comfortable addressing this issue in the context of appropriate workplace behaviour rather than OHS. This is why the anti-bullying laws and the Fair Work Commission are best placed to address workplace bullying. The Fair Work Commission is the most appropriate and effective jurisdiction to deal with bullying issues. The FWC is better resourced to manage claims quickly, cheaply and has the experience and expertise to facilitate and manage the resolution of workplace conflicts and behaviours.

The most significant aspect of these laws is that they provide individuals with an avenue to try and get the bully behaviour to stop. A victim of workplace bullying must be able to raise the issue and be provided with a remedy, rather than being left in the hands of an ill-equipped OHS regulator. The person who is affected by the bullying behaviour should be able to seek personal redress. They should be able to get an order to make the bullying stop.

The anti bullying laws must remain.

Personal rights must be afforded to individuals along with appropriate and effective dispute resolution processes via the resources and expertise available in Fair Work Commission. This jurisdiction operates in the domain of the workplace and is therefore cognizant of the machinations which exist in

workplaces. FWA also provide fast and effective dispute resolution. And as evidence by the number of claims, there has been no flood gate scenario.

The PC issues paper under 4.3 makes reference to the 'broad anti bullying provisions.' This is a somewhat odd characterization of these laws, as they are anything but broad. These laws are more correctly characterised as narrow in scope and remedy. This is evidenced by the definition and its practical application. The definition is restricted to 'at work'; it cannot be used for past bullying incident, the bullying must be happening when the application is filed; it must be behaviour which presents a real risk to health and safety.

Further, behaviour is not deemed to be bullying behaviour if it is deemed reasonable management action taken in a reasonable way. Importantly, and unlike most other legal avenues of redress, the anti-bullying laws do not provide for financially compensation. In light of these issues, it is difficult to how a 'broad' characterisation can be claimed.

Reasonable adjustments

Disability discrimination in employment is a significant issue for members of the SDA in relation to both work-related and non-work injuries. It is of great concern that many employers have little regard for their legal obligations in this area. They regularly fail to make accommodations of any kind, even where the disability is not of a permanent nature.

It is important that there be a positive and explicit standalone duty on duty holders to make 'reasonable adjustments' under the Act. This positive duty should be clearly expressed and include a reference to the fact that an assessment regarding 'reasonable adjustments' must be made on an individual/case-by-case basis, which takes into consideration the circumstances and needs of that individual.

It is our experience that employers like to make generic policy decisions about job descriptions and task analysis. This then becomes a problem when an individual needs reasonable adjustments to be made in order to function in that workplace, yet the employer is wedded to a tasks' analysis which is inflexible and discriminatory.

This positive duty should be a separate type of discrimination and have specific remedies attached to a breach of this duty. This should help to remove any uncertainty regarding the obligations of duty holders.

The 'reasonable adjustments' duty should remain balanced with the concept of 'reasonableness' and 'unjustifiable hardship'. It is of great concern that the Fair Work Act (FWA) (2009) does not adequately reflect both State and Federal discrimination legislation and has deviated so dramatically to the detriment of those employees with a disability in the workplace. The FWA allows disability discrimination to occur where the inherent requirements of a position cannot be met. However under disability discrimination 'inherent requirements' are but one part of the test in determining discriminatory conduct. The second and third parts of the test are whether 'reasonable adjustments' could have been made by the employer without causing 'unjustifiable hardship'. However the FWA does not allow for these considerations when determining discriminatory conduct.

Section 351(2)(a) of the FWA does not meet Australia's international obligations under ILO Convention 111. The disability discrimination provisions in the FWA have the effect of creating a sub-standard discrimination jurisdiction which allows for widespread disability discrimination to occur in employment. This parallel, sub-standard discrimination jurisdiction only creates greater confusion for duty holders and for those with disabilities. It is most disappointing that at a time when the positive duty to make reasonable adjustments was being inserted into the Federal Disability Discrimination Act, the Federal employment legislation was drastically eroding the rights of people with disabilities in employment. FWA is creating a body of case law which has greatly diminished the rights of those with a disability in the workplace.

The SDAEA has seen a disturbing trend emerge over the past decade; the use of OHS legislation to undermine and exclude workers with disabilities. OHS legislation encourages a generic response to disability discrimination which is drastically failing those with disabilities. In fact, the use of OHS legislation to override other legal obligations has become common place. It has come to the situation where workers are being sent home because they have a broken finger, sustained in a netball match, having been told that they cannot return to work until they are 'fully fit " due to OHS obligations. However OHS

legislation provides that the primary duty holder (employer) provide a workplace which is safe for employees. It does not mandate that an employer cannot have an injured worker on site, whether work-related or non work-related, because they pose a danger to the workplace. Surely it is not the intention of OHS legislation that injured employees equate to dangerous or unsafe employees, yet this is exactly how OHS legislation is being manipulated in workplaces across Australia. It is this shift in basic understanding of the OHS Act which is causing workers with disabilities to be continually excluded and ostracized from workplaces. The FWA disability discrimination provision in s351 has further added to this exclusion and has allowed Australia to fail to meet its international legal responsibilities in regards to people with disabilities in the workplace.

The misunderstandings of OHS legislation and failure of employers to fully understand their legal obligations is greatly affecting the opportunity for meaningful and engaging work for people with disabilities. This comes at not only a great personal cost to employees but also has a substantial social and economic cost to the community at large. [50]

The SDAEA has great concerns about the structure and intent of the disability discriminatory provisions in the Fair Work Act (2009). S351 fails to reflect Commonwealth discrimination legislation to the point where it only affords minimal, if any, protection from discrimination for those with a disability in the workplace. The FWA allows disability discrimination to occur where the inherent requirements of a position cannot be met. However under disability discrimination 'inherent requirements' are but one part of the test in determining discriminatory conduct. The second and third parts of the test are whether 'reasonable adjustments' could have been made by the employer without causing 'unjustifiable hardship' to that employer. However the FWA does not provide part two and three of the long standing test which applies in both state and Federal disability discrimination legislation. This is not an acceptable position. The FWA must be overridden by the provisions of the

[50] For a detailed analysis of the economic impact of excluding people with disabilities from the workplace, see: International Labour Organization (ILO) ' The price of exclusion : the economic consequences of excluding people with disabilities from the world of work.' Employment Working Paper No. 43. December 2009.

new Consolidated Act so that the principles of anti-discrimination legislation and Australia's international obligations are met.

The FWA must be compliant with Commonwealth anti-discrimination legislation in order to meet Australia's international obligations under ILO Convention 111 and prevent the creation of a sub-standard anti-discrimination jurisdiction which encourages widespread discrimination in employment.

PAPER 5 – Other issues

How well are the institutions working? Fair Work Ombudsman

The SDA expresses its support for the Fair Work Ombudsman ("FWO"), particularly for the transparency of its decisions and advice, its increased consultation with employee and employer representatives, its educative role and its prosecutorial function when flagrant infringements of workers' rights have occurred.

The transparency of the FWO's decisions and advice it delivers is a far cry from the processes adopted by its predecessor, the Office of the Employment Advocate ("OEA"). The OEA conducted itself in a shroud of secrecy and undermined the working rights of Australian employees through opaque decisions approving questionable agreements and AWAs. It was arguably staffed with underqualified employees who were nevertheless endowed with the ability to make decisions affecting the working lives of countless Australians. This situation should never be repeated. Thankfully, the FWO is the antithesis to the OEA. Although the SDA may not agree with all of the FWO's interpretations and positions on certain industrial matters, it respects the transparency of its decision-making and its consultative approach in reaching such decisions.

The FWO's consultative approach is evidenced by the Memorandum of Understanding which the SDA has entered into with the FWO, with requires both parties to inform each other through regular meetings. Prior to this MOU, over the previous three years, the FWO had increased its contact with the SDA and enquired as to our position on interpretations of clauses across the modern awards in which we have coverage. Despite not always agreeing upon each other's interpretation, the SDA has welcomed this open approach from the Ombudsman.

The FWO has provided easier access to information. The website is informative and the pay calculator is accessible and helpful. The increased educative role for the FWO, combined with random auditing following training, most certainly helps employers and employees to better understand their rights and obligations under the Act. It reinforces the role of the FWO to both educate and monitor the application of terms and conditions in the workplace.

The void which existed prior to this role for the FWO resulted in a lack of fairness within the workplace. Low-paid and low-skilled workers, people with lower levels of literacy and/or English as a second language had rights, but very little knowledge of these without the assistance of unions.

Whilst we firmly believe that unions continue to play a significant role in educating their members about their workplace rights, the SDA also acknowledges the necessity of a government body having that educative task and funding to fulfil this role. Educating workers of their rights empowers them to exercise their entitlements and educating employers ensures they are fully cognisant of their obligations, thus promoting fairer workplaces.

One area of significant interest to the SDA which the FWO has developed, is information for franchisees. Given that the retail and fast food industries are populated with significant numbers of franchises, the provision of information by the FWO to such employers is pleasing to see. Too often, little information on workplace rights and responsibilities is provided by the franchisors to their franchisees, leading inevitably to many disputes and breaches of the wages and conditions to which employees are entitled. The Ombudsman's role in filling this void of knowledge for small and new employers is crucial to ensuring compliance with workplace laws and is to be commended.

The FWO's prosecutorial role is also commendable. Flagrant flouting of the law, resulting in the erosion of employees' terms and conditions should not be tolerated and should be vigorously pursued. Its high profile, successful prosecutions serve well to alert employers that their actions are accountable and are being monitored.

The high profile given to campaigns undertaken by the FWO assists in promoting the rights of workers and ensures employers are prosecuted. The FWO's different roles in the workplace, from educating, to investigating, correcting and prosecuting are invaluable in ensuring that the terms and conditions for all employees are adhered to and are not merely theoretical.

The SDA commends the Fair Work Ombudsman for ensuring that Australian workplaces are fair workplaces and seeks no changes to the role it plays within the industrial relations system.

How well are the institutions working? Fair Work Commission

As with the Fair Work Ombudsman, the SDA commends the Fair Work Commission ("FWC") for the tasks it undertakes to ensure that workplaces are fair for all Australians. Its role as the independent umpire is also far removed from the Office of the Employment Advocate which had carriage of approving enterprise agreements and AWAs.

The SDA seeks no changes to the role of the FWC.

Role of competition law

'…the labor of a human being is not a commodity or article of commerce.' [51]

Competition law is not a neglected limb of the WR system. Current labour exemptions from the *Competition and Consumer Act 2010* (Cth) exist because of the recognised inequality of bargaining power that exists between employers and workers. Competition law is designed to deal with market distortions and inefficient resource allocation through regulating aggregations of capital. It is not appropriate to use competition law to regulate aggregations of labour. While some argue that competition law and labour law are analogous, and therefore should be subject to the same regulation, such arguments fail to properly understand the nature of labour and the purpose of labour regulation.

It is well established and recognised internationally that labour is exempt from most aspects of competition law for two reasons; firstly, the nature of capital is different to the nature of labour, and secondly, there is important societal value in labour being able to collectively bargain to improve wages and conditions of employment. The second reason is also reinforced by Australia's international human rights obligations, in particular ILO Convention 98 'The Right to Organise and Collective Bargain', ratified by Australia in 1973. The right of a worker to join with other workers and freely associate in a union is recognised internationally as a fundamental human right. The right to collectively bargain is a fundamental right which should not be encroached on by competition law principles which seek to ignore the inequality of the

[51] Section 6, *Clayton Act* (US) 1914

bargaining relationship and the ethical and social imperatives of a fair and equitable labour 'market'.

Competition law is designed to rectify and control efficiencies in the allocation of scarce resources and ensure consumer welfare. It is an important tool, used to protect against the development of market distortions, such as monopolies, which result in the misallocation of resources. A workplace is not the same as the marketplace and should not be subject to 'anti-competitive' regulation. Labour should not and cannot be characterised as a mere 'resource 'or 'commodity' that can be treated like an economic unit of production. Labour, in any civilised society, must be treated as a vital part of the social framework which respects the rights of an individual to earn a living and the rights of workers to collective bargain to improve their pay and working conditions.

It is well recognised, both nationally and internationally, that the market place and the workplace are different because of the nature of the employment relationship is one of inequality in bargaining power;

> *Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organise in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom or labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation or representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organisation or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...* [52]

The push to deregulate the labour market and apply competition law theories to collective labour is naïve and misguided and has the practical effect of applying a different test to organisations of labour than to collective organisations of capital. A trade union is an aggregation of employees who come together for the purpose of bargaining to improve their working conditions. It is an organisation whose purpose is to advance their collective interest. A company is also a collective of individual investors who share a common purpose of improving their commodity value or stock price. Yet

[52] Section 2 of the *Norris-LaGuardia Act (US)* 1932

competition law does not seek to challenge the aggregations of capital in joint stock companies, it is only concerned when a company of collective investors seeks to merge with or buy out another collective of investors which results in anti-competitive behaviour. A labour collective does not have the same ability to redirect or distort capital resource allocation as that of a capital collective.[53]

It is frequently suggested that anti-competition law should play a greater role in labour law so as to facilitate a worker's right to bargain and contract freely. The freedom to contract and the freedom to bargain are important features of free market economic theory; however these freedoms are only valid when there is an equal bargaining power. In the workplace such equality of bargaining power simply does not exist. In recent times the issue of unequal bargaining power has been recognised and addressed in market regulation. In particular, market protections have been put in place in recognition of the unequal bargaining power which exists between large business and small business;

> *The fundamental irony is that while the WRA sought to promote the goals of competition and efficiency by advocating freedom of contract in the labour market, the TPA was amended at the same time to reflect the realisation that freedom of contract does not necessarily exist in many product markets. In 1998, the Federal Government introduced new legislation providing relief for small businesses on the grounds of unconscionable conduct; sections 51AC and 51AD. This legislation was enacted on the basis than in many circumstances small businesses were in the same position as consumers in their dealings with larger suppliers, ie effectively powerless. Accordingly, as the inequality of bargaining power between small business and large suppliers was so great, the TPA needed to be amended to provide relief.*[54]

The National Competition Council (NCC) conducted a review in 1999, which examined the employment related exemption contained in section 51(2)(a) of the then *Trade Practices Act 1974* (TPA) exemption and concluded that the exemption should remain on the basis that:

The objectives of section 51(2)(a) is to excise the labour market from goods and services markets for the purpose of applying competition law, supporting a

---

[53] M. Terceiro. *The Relationship between Competition Law and Labour Law.* 14 September 2008. http://competitionandconsumerprotectionlaw.blogspot.com.au

[54] M. Terceiro. *The Relationship between Competition Law and Labour Law.* 14 September 2008 at 20. Available online at http://competitionandconsumerprotectionlaw.blogspot.com.au.

public policy that labour markets should be regulated through the industrial relations framework and not the TPA. [48]

The NCC believed that that labour market should be “excised" from competition law on public policy grounds and to date, no examples have been given for the need to remove or amend these exemptions. Simply improving wages and conditions for workers is not anti-competitive behaviour.

If any change is to occur to the relationship between labour law and competition law, it is that employer associations should be removed from the current competition law exemptions. There is no valid reason why employers should be afforded the same protections as collective labour, as the purpose for this exemption lies in the principle of inequality in the employment relationship. Employers already hold the position of power, so why are they afforded protection from anti-competitive behaviour? Employer collective action can create market distortions because their purpose relates solely to improving the value of the company and share price, whereas collective labour has no such impact on capital value.

The TPA is already an effective means of dealing with the types of conduct which fall outside the labour exemptions.

There appears to be little benefit, and no demonstrated need, in seeking to extend the scope of the TPA to deal with labour conduct, unless specific examples of conduct have been identified which offend the important public policy reasons for the exemptions and current scope of the TPA.

Further, a removal of these important exemptions would result in the ACCC suddenly having an ability to be involved in labour relations like never before. The ACCC does not have the requisite skill and knowledge, nor should they have the power, to oversee or intervene in enterprise bargaining arrangements and workplace arrangements. Such powers would create a significant degree of uncertainty in workplace bargaining and negotiations, which would negatively impact on the collective bargaining system.

Right of Entry

Right of entry regulations serve an important function in the workplace relations framework by ensuring employees have access to their union representatives and allowing them to exercise freedom of association. Right of entry regulations also provide an important enforcement function by allowing unions to inspect suspected breaches of industrial and safety regulations.

One of the objects of the FWA is to enable "fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented..."[55] The current right of entry provisions support and help achieve this important object.

The FWA also recognises that right of entry laws must strike a balance between the interests of employees and their employers by allowing employers to go about their business without undue inconvenience.[56] The existing laws are adequate in balancing the interests of employees and employers.

In 2013 the FWA was amended by Parliament with the Fair Work Amendment Act 2013 ('the 2013 amendment'). Part of the 2013 amendment was to amend section 492, which had the effect of making the lunch room the default position where the permit holder and the occupier are not able to agree on the room or area to be used for discussions with employees

The SDA's experience is that the amendment has had a positive impact on employees by allowing better access to their representatives. Prior to the amendment it was not uncommon for some employers to require entry permit holders to hold meetings in rooms where employees were discouraged from attending the discussions. Sometimes this would be because the room was in an area not easily accessible or because management would cause employees to feel uncomfortable about attending the meeting.

The 2013 amendment also balances the interests of employees with employers by making it easier for discussions to take place during meal breaks without disruption to the running of the business.

[55] FWA s3
[56] FWA s480

The 2013 amendment also amended s505 of the FWA, which gave the FWC more powers to deal with disputes about right of entry. The FWC is a respected institution with a long history of dealing with industrial disputes. The FWC is the most appropriate forum for assessing the balance between employers and employees where disputes arise.

Transfer of Business

The SDA has had experience with dealing with transfers of business with its members. **The SDA has not found any substantial problems with the transfer of business provisions in the FWA.**

The SDA has found the provisions in the FWA are simpler and provide more certainty than under previous legislative regimes.

The SDA also notes that in its experience the vast majority of employees who experience a transfer of business are transferred to the new employer rather than retrenched. The transfer of business arrangements are not deterring employers from continuing to employ transferring employees.

Appendices

1. Expert Opinion from Associate Professor Lyn Craig UNSW 12 September 2012
2. Expert Opinion from Associate Professor Lyn Craig UNSW 12 September 2012
3. Expert Opinion from Associate Professor Lyndall Strazdins - Report 4 Sept 2012
4. Expert Opinion from Associate Professor Sara Charlesworth – Sept 2012
5. Expert Opinion from Dr Dan Woodman - September 2012
6. Research Paper on Penalty Rates, McKell Institute – 2014
7. Evesson J, et all, September 2007, 'Lowering the Standards': From Awards to Work Choices in Retail and Hospitality Collective Agreements, University of Sydney