

# Workplace Relations Framework Inquiry 2015

Submission to the  
**Australian Government Productivity Commission**

by  
**Clubs Australia Industrial**

**March 2015**



**Clubs Australia**  
INDUSTRIAL

# WORKPLACE RELATIONS FRAMEWORK INQUIRY 2015

## Submission

### 1. Introduction

- 1.1 Clubs Australia Industrial (CAI) is the national peak body, representing the industrial interests of Australia's 4000 licensed clubs.
- 1.2 CAI is a registered organization under the *Fair Work (Registered Organisations) Act 2009* (Cth) and our board of directors constitutes the Chairpersons/Presidents of each State and Territory association.
- 1.3 Clubs are not-for-profit community based organisations whose central activity is to provide infrastructure and services for the community. Clubs contribute to their local communities through employment and training, direct cash and in-kind social contributions, and through the formation of social capital by mobilising volunteers and providing a diverse and affordable range of services, facilities and goods.
- 1.4 CAI is committed to assisting Australia's registered and licensed clubs with a focus on promoting better workplace outcomes for the industry and its estimated 90,000 employees. Our organisation considers that one of its primary purposes is to ensure that our members have a voice at the government level, by representing their interests on current and emerging industrial relations issues.

- 1.5 CAI generally supports the operation of the *Fair Work Act 2009 (the Act)* and the broader workplace relations system and believe that recent legislative developments have genuinely moved closer to providing a balanced framework for both employers and employees.
- 1.6 We also acknowledge however that as with all legislation and frameworks, the practical operation of some provisions may not necessarily be consistent with the intention of its objectives.
- 1.7 Accordingly, for the purposes of the Workplace Relations Framework Inquiry, CAI established an industrial relations sub-committee constituting senior representatives from the major Club Industry State Associations, that is, New South Wales, Queensland, Victoria, Western Australia and South Australia to constructively discuss areas that we consider could improve the operation of the workplace relations system.
- 1.8 Further, we have also had direct consultation with our membership who have had to operate within the existing framework.
- 1.9 It is against the background of the experiences of these stakeholders, that we form the basis of these submissions.
- 1.10 The key issues that these submissions will address go to the following areas:
- a) National Employment Standards
- public holiday and long service leave provisions
  - cashing out of annual and personal leave provisions
  - four yearly modern award reviews
  - penalty rates

b) Enterprise bargaining and individual flexibility agreements

c) Employee protections

- unfair dismissal processes
- anti-bullying provisions
- small business exemption

d) Increased litigation avenues available to employees

e) Other workplace relations issues

- the effectiveness of the workplace relations institutions
- transfer of business.

## **2. National Employment Standards**

### **Public Holidays**

2.1 One area identified as having had a deleterious impact on employers are the public holiday provisions under the National Employment Standard (**NES**). The difficulty appears to arise as a result of the duplicity of State and Federal laws in this area. In particular, the individual States gazetting “additional” public holidays, with the effect on employers essentially paying two separate days of public holiday rates arising out of the same public holiday, or simply gazetting a number of public holidays that are in excess of those defined within the meaning of section 115(1)(a) of the Act.

2.2 By way of example, in 2014, Clubs in NSW were required to pay public holiday rates of pay for five days within a one week period due to the gazetting of Easter Saturday and Easter Sunday, which are not days defined by the NES. The five public holidays that Clubs were required to pay 250% penalty rates in that week were as follows:

- i) Good Friday 18 April
- ii) Easter Saturday 19 April
- iii) Easter Sunday 20 April
- iv) Easter Monday 21 April
- v) ANZAC Day 25 April

2.3 Unlike other industry sectors where there is a degree of choice involved in whether businesses decide it's financially viable to open on a public holiday, there is a community expectation that Clubs will be open on those days. Consider the unacceptable event of RSL Clubs being closed on ANZAC Day.

2.4 In another set of examples of additional holidays being gazetted in NSW with respect to a day that has already been acknowledged and paid for at public holidays rates, we note the following:

- i) Christmas Day Friday, 25 December 2015 (250% penalty)
- ii) Boxing Day Saturday, 26 December 2015 (250% penalty)
- iii) Sunday Sunday, 27 December 2015 (175% penalty)
- iv) Additional holiday Monday, 28 December 2015 (250% penalty)

In this scenario, due to the operation of the *Holidays Act* (NSW), Clubs are required to pay twice for the Boxing Day public holiday. CAI considers this to be an unreasonable encumbrance on Clubs and an unnecessary windfall for employees who have already received the penalty for working on the actual public holiday.

- 2.5 CAI proposes that public holidays remain the sole jurisdiction of the Act and that employees only be entitled to one public holiday in respect of each celebration, either the day itself or any day substituted for the day itself.

### **Long Service Leave**

- 2.6 Whilst section 113 of the Act provides a national entitlement to long service leave via the NES, the complexities around the current framework can create unnecessary confusion and tension for both Clubs and employees.
- 2.7 The major challenge faced by Clubs in applying the current provisions is establishing which point of reference provides for an employee's entitlements to long service leave. The NES provides a plethora of options as to where the entitlements will derive from in different instances, including (but not limited to):
- State/territory based legislation (which is distinctly different in each state)
  - An enterprise agreement
  - A pre-reform Award
  - A pre-reform AWA
- 2.8 Many of the State based pieces of legislation were drafted decades ago, in completely different social and economic climates and in language not easily understood. These various schemes would greatly benefit from simplification in order for those affected by the provisions to meet their obligations as intended.
- 2.9 Additionally, the interaction of long service leave payments with redundancy pay entitlements under section 119(2) of the Act are worth noting. The NES contains one uniform table outlining an employee's entitlement to severance pay in the event they are made redundant.

- 2.10 This extends to up to 16 weeks of pay depending on the years of continuous service reached. These entitlements peak at nine years of continuous service, at which point an employee is entitled to the maximum of 16 weeks of severance pay. After this point, when the employee has been employed for 10 years or more, the entitlement drops back to 12 weeks of severance pay.
- 2.11 Historically, this reduction was created because under most schemes, an employee would have become entitled to be paid out their long service leave after 10 years of service. This would increase the overall payment required to be made by an employer at the time of redundancy. However, with some entitlements being amended by State legislation, others no longer applicable and new ones being introduced, this fixed severance pay scale can now produce inconsistent outcomes.
- 2.12 In the current legislative environment, it is not uncommon for employees to be better off being made redundant after eight or nine years than if they were made redundant after 10 or 11 years, when also taking into account long service leave.
- 2.13 Various options are available in achieving a long service leave minimum standard, all of which have their advantages and disadvantages<sup>1</sup>. Some of these include:
- a) Harmonisation of the long service leave legislation
  - b) Legislate a long service leave standard that overrides State and Territory laws for national system employers and employees
  - c) Commonwealth to exclusively cover long service leave through the NES with grandfathering or transitional arrangements for employees with pre-existing State or Territory entitlements

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<sup>1</sup> Casey R, McLaren J and Passant J, "Long Service Leave in Australia – An examination of the options for a national long service leave minimum standard," *Journal of Applied Law and Policy* 2012.

- 2.14 Whilst CAI is conscious of the challenges in harmonizing any aspect of employment legislation, we submit that it is timely to undertake a review of how to best simplify and effectively nationalise the long service leave laws, in a manner that reduces the complexity and prescriptiveness of the existing eight legislative frameworks currently operating in the various states and territories.

#### **Cashing Out of Annual Leave and Personal Leave**

- 2.15 Sections 92 and 100 of the Act only permit cashing out of annual leave and personal leave via enterprise agreements or modern awards. CAI is of the view that the ability for Clubs to enter into these arrangements with employees that wish to access their entitlements should not be left to the exclusive domain for those who have the ability to negotiate enterprise agreements or within the realm of the modern award, over which employees and Clubs have little control.
- 2.16 Accordingly, CAI submits that cashing out of annual leave and personal leave provisions should form part of the NES provisions dealing with these minimum entitlements.

#### **Four Yearly Modern Award Review**

- 2.17 CAI is of the view that the award modernization process was an effective way of overhauling and simplifying the national award system.



- 2.18 Equally, CAI is supportive of modern awards being reviewed on a four yearly basis. However, note 1 of section 156(1) of the FWA which requires that the FWC must be constituted by a Full Bench for the purposes of the review, is in CAI's view, unnecessary and counterproductive to the aim of reviews occurring as expeditiously and efficiently as possible. The requirement for a Full Bench to be constituted, in CAI's experience, has meant that dealing with pressing single issues in the modern award review where time is of the essence, have been met with substantial delay and been unnecessarily time consuming for both the parties and the FWC.
- 2.19 By way of example, the *Registered and Licensed Clubs Award 2010* contained transitional provisions relating to part time employment which allowed the various States to continue to employ their part time workers under pre-existing NAPSA provisions. The issue around what should be the ultimate prevailing provision has been the subject of applications before the FWC since the two yearly transitional review.
- 2.20 The transitional provisions were not able to operate post 31 December 2014 due to modern awards not being able to contain State differentials<sup>2</sup>. On or around 30 July 2014 CAI wrote to the FWC indicating that this matter needed to be determined well before that date as the impact of any changes would have significant effects on Clubs and their part time workers. The matter was not listed until CAI wrote again to the FWC on 10 October 2014. In the meantime, Clubs leading into their busiest trading time of the year and employees expecting to pick up extra work during this time, were indicating to CAI their anxiety about the matter not being resolved.

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<sup>2</sup> Section 154 of the *Fair Work Act 2009* (Cth).

- 2.21 Ultimately, an interim decision was handed down on Christmas Eve, well after Clubs had organized and put out their rosters for the Christmas/New Year trading period. As a result, CAI are aware that many Clubs, due to the uncertainty around the part-time case, did not roster as many part time workers as they historically have, and relied more heavily on casual workers during the holiday period.
- 2.22 CAI's preferred position regarding the handling of the modern award review is that single Commissioners or other judicial appointees of the FWC are designated individual Awards (or groups of like industry Awards) for the purposes of reviewing those Awards, and that matters only go to the Full Bench if there is an appeal about the determinations made by those Commissioners. Prior to award modernization, this was how changes to awards were implemented and it is CAI's experience that this process worked more efficiently, fairly and expeditiously, in a climate where CAI had carriage of five Awards.
- 2.23 CAI is also concerned that the concept of the award review dealing with FWC determined "common issues" has also created an unnecessary layer of complexity to the review of Awards which CAI believes has been an obstacle to the review occurring in a timely manner. The award modernisation process was a sophisticated way to simplify and condense the national award system in a manner that created awards unique to individual industries.
- 2.24 CAI considers that it is inconsistent with the notion of reviewing industry specific awards that there are common issues that have application to the majority or all modern awards. For example, part-time employment has been determined to be a common issue to all Awards, yet it is clear that arrangements for part-time work in the white collar, Monday-Friday 9-5pm work sector, will vary starkly with part time arrangements in the 24/7, 365 days a week hospitality industry. In this regard, it is difficult to see how a common issue, one size fits all, approach to part-time employment can work.

- 2.25 CAI submits that there needs to be greater consideration and analysis as to what truly constitutes a common issue across Awards and that if a matter is determined to be “common”, for example the cashing out of annual leave, that it is more appropriately placed in the provisions of the Act. There is a danger that by dealing with matters as common issues in the award review process that industry awards lose their uniqueness and take on the characteristics of a template.

### **Penalty Rates**

- 2.26 CAI acknowledges the requirements under section 134(1)(da), which require the FWC to take into account the need for modern awards to provide additional remuneration for employees working unsocial, irregular or unpredictable hours or employees working on weekends or public holidays.
- 2.27 CAI also notes its support for the modern award objective at section 134(1)(f) and (h) which provides that the FWC must also take into account “*the likely impact of any exercise of modern award powers on business, including productivity, employment costs and the regulatory burden*” together with the “*likely impact... on employment growth*”.
- 2.28 CAI submits that it is imperative that penalty rates structures do not act as a deterrent for employment growth and in particular do not impede the objective of Clubs to serve their members and the communities in which they operate.
- 2.29 Specifically, members expect Clubs to be open on weekends and public holidays however they are also the days in which they are most penalized in terms of the wages they are required to pay. Due to the community demands, it is not as readily open to Clubs to make decisions to close the business on certain days because they trade at financial losses when the penalty rates are too high.

- 2.30 For example in a national survey undertaken by CAI in 2015, Narooma Sporting & Services Club Ltd, a Club with 69 employees, stated:

*“Most public holidays we trade at a loss. A reduction in rate would help make these days more profitable. We would also open on Christmas Day.”*

- 2.31 CAI recognizes the need to provide an incentive for employees who work on weekends and public holidays however, the uniqueness of individual industries and current societal expectations must be taken into account in determining a fair and reasonable penalty structure that promotes employment growth, not stifles it.
- 2.32 Relying on both anecdotal evidence across all of the States and a NSW Club industry census<sup>3</sup> undertaken in 2011, Clubs are a significant employer for women, tertiary education students and those who rely on it as a second job. These groups are often only able to work on weekends. There is a concern that in a climate where many small to medium Clubs are struggling financially, that unsustainable penalty rates will have the effect of these employees suffering a reduction in hours or no employment all together.
- 2.33 There is little doubt that the world of work has changed dramatically and in particular the historical significance of weekends has largely diminished with the increasing secularization of society and declining influence of the church. In 2005, it was reported that only 9% of Australians attend church<sup>4</sup> and the trends show this is on the decline. These factors have had a significant impact on the 24/7, 7 day week hospitality sector. These changing cultural dynamics must be taken into account when reviewing the penalty rate system generally in Australia, and on an individual industry basis.

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<sup>3</sup> New South Wales Club Census 2011 – Report on the economic and social contribution of registered clubs in NSW (April 2012)

<sup>4</sup> Carole M Cusack, *The Future of Australian Secularism: Religion, Civil Society and the American Alliance*, Australian Review of Public Affairs, 10 October 2005

### 3. Enterprise Bargaining

3.1 At section 3(f) of the Objects of the Act it states:

*“achieving productivity and fairness through an emphasis on enterprise level collective bargaining underpinned by simple good faith bargaining obligations...”*  
[emphasis added]

3.2 CAI is of the view that whilst enterprise bargaining has a role to play for some businesses and employees, that it is not an appropriate, necessary or accessible option for the majority in Australia, being the small-medium business enterprise and accordingly, CAI queries the relevance of the section 3(f) objective.

3.3 CAI also considers that in the Club industry, as we believe to be the case in others operating in the service sector, that there is at best, a weak link between enterprise level bargaining and achieving productivity, again questioning the relevance of this Object of the Act.

#### **Productivity Gains**

3.4 It is CAI’s experience that there are limitations for employers when negotiating an enterprise agreement with respect to what can be offered to employees that will be considered sufficient off-sets for altering Award entitlements, sufficient to meeting the requirements of the BOOT.

- 3.5 The provisions of the Act that provides the union the power to force an employer to negotiate an enterprise agreement, often in circumstances where they have negligible union membership, together with the lack of value placed on non-monetary benefits under the BOOT, has created a situation where there has been an unbalanced shift of power in favour of unions and employees.
- 3.6 Under the Act, employers are being forced by the union to bargain and invest time, resources and energy, in cases where the Award appropriately serves the needs of many Clubs and employees, and feeling compelled to offer inflated wage increases to meet union demands and/or the BOOT, with no meaningful productivity gains in return. This has a particularly significant impact on our small to medium Clubs who do not have the human or financial resources that the larger metropolitan Clubs have available to them.
- 3.7 In the hospitality sector, there is scope to measure inputs and outputs at a given quality level, however CAI is of the view that achieving higher levels of productivity in this sector is not affected positively by entering into enterprise agreements.
- 3.8 Clubs may be able to measure productivity levels by analyzing data on the number of hours worked by employees, the costs of engaging those employees and the incoming revenue during those periods of time. Notwithstanding this, the time taken to pour a beer, generally, cannot be quickened or poured more 'productively' via provisions in an enterprise agreement. Equally, productivity in the service sector, as distinct from goods-producing industries, is impacted significantly by workplace culture and efficient management practices particularly with respect to rostering according to trade. In CAI's experience, these are not areas that are influenced greatly by enterprise agreements.

- 3.9 The only area where CAI has observed any link between improvements in productivity and an enterprise agreement has been in the case of Clubs who have incorporated cashing out of sick leave provisions, which has acted as a disincentive for employees to abuse their sick leave entitlements. Notwithstanding this, as noted above in paragraph [insert no.], CAI is also of the view that such cashing out provisions should be incorporated in the NES, and not solely be the domain for those businesses and employees who can afford to enter into enterprise agreements.

### **Termination of Enterprise Agreements**

- 3.10 CAI acknowledges the importance of placing restrictions upon the ability to terminate an enterprise agreement during its nominal term, to ensure stability and security for both employees and employers who are bound by such agreements. Accordingly, CAI are supportive of the provisions outlined in section 219 of the Act which imposes conditions on the termination of an agreement during its term.
- 3.11 CAI considers however, that in the case of an enterprise agreement that has reached its expiry date, that the conditions outlined in section 226(a) of the Act which imposes a public interest test for such termination to be approved, are too onerous.
- 3.12 There have been a number of small to medium sized Clubs that entered into enterprise agreements quite naively, not understanding that once they departed from the modern award conditions, that it would be incredibly difficult to revert back if the agreement no longer suited the Club's business requirements.

- 3.13 One such Club was Catalina Country Club<sup>5</sup> who had entered into an enterprise agreement but was not able to financially sustain it post its expiry due to significant financial losses. Whilst it had attempted to maintain the agreement on foot by re-negotiating with the union a more realistic and balanced document, it was not able to do so and those negotiations failed, notwithstanding the obvious financial strain on the Club who had already stopped trading at one of its sites. Ultimately, the Club was successful in having the agreement terminated however, it was a lengthy protracted process. This not only caused damage to the workplace morale but whilst the issue remained unresolved, the Club continued to hemorrhage money, adversely affecting the business and ultimately the community that this Club served.
- 3.14 In the context where enterprise agreements arise as the result of negotiations between employees and individual businesses or groups of businesses, CAI is of the view there is no reason why the high threshold of meeting a public interest test should be determinative of whether an expired agreement can be terminated. Accordingly, CAI recommends the removal of section 226(a) from the Act.
- 3.15 CAI also recommends the bargaining provisions of the Act be amended so as to allow employees and employers who enter into enterprise agreements the ability to agree to a sunset clause after which time the agreement will cease to have effect. In allowing such a provision to be incorporated in an agreement, there ought be a requirement that the parties also agree to the terms and conditions that will have application to the parties when the sunset date is reached, for example, the modern award.

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<sup>5</sup> *Catalina Country Club Enterprise Agreement 2009* [2013] FWCA 2005



## Bargaining Orders

- 3.16 There is a need for clarification as to the timing of applications for bargaining orders pursuant to section 229(3) which states the following:

*“The application may only be made at whichever of the following times applies:*

*(a) if one or more enterprise agreements apply to an employee, or employees, who will be covered by the proposed enterprise agreement:*

*(i) not more than 90 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements (as the case may be); or*

*(ii) after an employer that will be covered by the proposed enterprise agreement has requested under subsection 181(1) that employees approve the agreement, but before the agreement is so approved;*

*(b) otherwise--at any time.”*

- 3.17 The wording at sub-paragraph (b) in particular requires clarification. There is doubt, for example, as to whether bargaining orders can be sought after employees have already voted in favour of the agreement, or in fact after the filing of the paperwork by the parties seeking for the agreement to be approved.
- 3.18 By way of example, in 2011, ClubsNSW represented the Broken Hill Democratic Club in what started as approval proceedings for an enterprise agreement but morphed into bargaining order proceedings before FWA. The history of the matter is set out below.

- 3.19 Around May 2011, a notice of bargaining rights was distributed to employees. At that time, there was one known member of the Broken Hill Town Employees Union (BHTEU) who, in writing, requested that the staff consultative committee be his bargaining representative. The BHTEU ceased accordingly to be the default representative.
- 3.20 Around September 2011 an information session was scheduled with employees to explain the contents of the negotiated agreement. On the eve of this meeting, the BHTEU demanded the right to be involved in negotiations even though at that stage, negotiations were considered at an end.
- 3.21 Following this however, the Club in good faith agreed to have a negotiation meeting with the BHTEU and requested in advance of that meeting a list of their demands so that they could be properly considered. This was presented on the day of the actual meeting. There were substantial offers of compromise made by the Club to try and reach agreement with limited success. At the end of that day, there was an agreement between the Club and the BHTEU to hold a meeting with staff the following week and ask the employees whether they wished for negotiations to continue or to put the agreement to a vote. Employees sought to take the agreement to a vote.
- 3.22 As at the time of the vote, there were 4 union employees out of a staff of over 40. The vote was successful in favour of the agreement and the appropriate paperwork was lodged. The BHTEU in their approval forms, objected to the approval of the agreement and particularized their reasons why. We note that on the same day that The Broken Hill Democratic Club's agreement was filed, a substantially similar agreement for another Broken Hill Club was also filed with no objection from the BHTEU.

- 3.23 On 11 January 2011, the hearing was listed at FWC in Sydney where the Club's general manager flew from Broken Hill especially to attend on a day of her annual leave. The BHTEU dialed in through tele-conference together with the staff consultative committee.
- 3.24 Verbal submissions were made by both parties at that hearing and the decision was reserved. The following day, the BHTEU had written to FWC, without advising the Club or its representatives, that it wanted to put on further submissions. FWC confirmed that further submissions would have to be in writing and granted ClubsNSW the right to reply on behalf of its member.
- 3.25 It was in the BHTEUs further written submissions, that a plethora of new issues were raised for the first time as to the basis for their objections to the agreement. The BHTEU sought in these submissions that FWC grant an application for a serious breach declaration pursuant to section 234 of the Act.
- 3.26 FWC wrote to the BHTEU advising that if they wished to pursue these orders that they would have to file a separate application to have it considered. The BHTEU subsequently filed an application for bargaining orders under section 228 and another hearing date was set for 7 February 2012. Again, the Club flew to Sydney for the hearing and the BHTEU dialed in. The matter was not determined on this occasion and the decision regarding the bargaining orders was reserved. On 14 February 2012 a decision was ultimately handed down in favour of the Club.
- 3.27 Notwithstanding the final result, this was a basic matter that was allowed to spiral into this complex and drawn out way of dealing with an approval application for an agreement. The fact that the union were able to file for bargaining orders well after employees voted in favour of the agreement and after the paperwork was filed with the FWC would seem to fly in the face of a fair and simple agreement making system.

- 3.28 CAI recommends that the provisions of section 229(3)(b) be removed as it is far too broad in its scope and accordingly open to abuse.

### **Individual Flexibility Agreements**

- 3.29 The Act states as part of its Objects at section 3(a) and (d), that its intention is to create flexibility for both employers and employees. As CAI understands it, one of the instruments established under the Act to promote this goal are individual flexibility agreements (**IFAs**).
- 3.30 Whilst in principle, we can identify many benefits behind the initiative of IFAs, there are a number of barriers that we believe act against the potential they can achieve. The result of this is that in the Club industry there has been little take up of IFAs.

### **Lack of Clarity Regarding What Can be Individually Negotiated**

- 3.31 The Model Clause relating to IFAs provides some guidance to employers and employees as to what aspects of an Award or Enterprise Agreement can be altered on an individual basis but is restricted to the following matters:
- a) Arrangements for when work is performed;
  - b) Overtime rates;
  - c) Penalty rates;
  - d) Allowances;
  - e) Leave loading.

- 3.32 Firstly, there is a lack of clarity around the terms of an Award or agreement that can be varied. In particular, there is no guidance about the scope of “arrangements for when work is performed” and whether this is to be interpreted broadly or narrowly.
- 3.33 For example, can an IFA be used in the case where there are inflexible part-time provisions in an Award, to allow an employer and an employee to agree to a span of minimum and maximum hours over a four week cycle, which allows for changes in the days and hours worked per four week cycle. This arrangement meets the fluctuating demands of the business and the personal needs of an employee who may heavily rely on an employer’s ability to be flexible. This is a very live issue for the Club industry where trade demands fluctuate regularly due to functions, events and seasonal changes. Equally, Clubs employ a significant number of females, carers, older generations and university students where personal commitments outside of work necessitates Clubs in being flexible with their rostering to accommodate employees.
- 3.34 A significant amount of affidavit evidence was obtained by CAI in the two yearly and four yearly modern award review to preserve the unique part time employment provisions in the Registered and Licensed Clubs Award. The vast majority of evidence came from Club employees who stated that more often than not, flexibility was sought by them, rather than the employer.
- 3.35 Further, can an employer utilize an IFA to allow an employee the right to request additional hours of work at ordinary rates of pay by agreeing to alter the “overtime rates” provisions and/or “arrangements for when work is performed” in the Model Clause?

- 3.36 The ambiguity with respect to the latter example is not assisted by some of the decisions that have been determined by the FWC with respect to Enterprise Agreements. Whilst these cases do not directly go to the issue of IFAs, they have involved clauses that on the face of it, should be able to be dealt with by an IFA, but have been deemed to fail the requirements of the “no-disadvantage test” as it was at the time of the decisions. Presumably the same determinations would have been made had the “better off overall test” (**BOOT**) applied.
- 3.37 The Full Bench in April 2010<sup>6</sup> determined that a preferred hours clause, similar to that outlined in paragraph 3.35 above was a term not capable of satisfying the appropriate threshold test. The relevance of this decision is that the BOOT applies to both IFAs and Enterprise Agreements and the only conclusion that can be drawn in this respect is that if a provision in an Agreement is considered to fail the BOOT, then that same provision, if found in an IFA, would also not satisfy the test.
- 3.38 To further add to the uncertainty in this area, is that since the Full Bench made its decision in 2010 on preferred hours, CAI is aware of a number of enterprise agreements that have been approved since that time with preferred hours-style provisions<sup>7</sup>.
- 3.39 A further issue arising from the fact that the Model Clause can be deviated from, is the potential for unions to use the ability to negotiate IFA clauses on a collective basis during bargaining, stymieing productive negotiations regarding more relevant provisions in the Agreement and significantly reducing the scope of the terms of IFA provisions so that employers and employees are afforded little flexibility in relation to what can be agreed between themselves.

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<sup>6</sup> *Bupa Care Services Pty Ltd. P & A Securities Pty Ltd as trustee for the D’Agostino Family Trust t/as Michel’s Patisserie Murwillumbah and others* - FWAFB 2762 (15 April 2010).

<sup>7</sup> *Black Crow Organics Enterprise Agreement 2009* - clause 10; *Karintha Orchards Pty Ltd Enterprise Agreement 2014* – clause 14; *Omega Training and International Protection Services Pty Ltd Security Enterprise Agreement 2010* – clause 7; *Henley Square Foodland Enterprise Agreement 2011* – clause 14.5; *P & KL Transport Pty Ltd Enterprise Agreement 2010* – clause 7.4.

- 3.40 By way of example, we refer to the first Enterprise Agreement negotiated for the Royal Sydney Golf Club<sup>8</sup>. This Agreement covered all employees except for the CEO and there was a significant amount of energy and resources invested by all stakeholders involved. This Agreement was generous to employees in a very substantial way, providing amongst other things a 5% increase which was back-paid to all staff on approval.
- 3.41 The employees were represented by a large consultative committee and both the United Voice Union and the Australian Workers Union. Whilst there were a number of areas that required negotiation, generally the parties were able to make concessions in order to provide a fair balance between the needs of the business and the employees.
- 3.42 What did become a very frustrating event for the Club and the consultative committee however, was the AWUs biggest issue, being the IFA provision. The Club had incorporated the model clause which both United Voice and the employee representatives understood and agreed with. The AWU argued strongly over this one issue over the course of approximately four meetings, the duration of which were about two hours each. When challenged as to what they found inappropriate about the model clause, the union representatives could only state that politically they were opposed to IFAs and they would only accept their version of an IFA provision which allowed for only one area of the Agreement to be altered.

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<sup>8</sup> Royal Sydney Golf Club Enterprise Agreement AG2010/13414.

- 3.43 It was only the result of the great frustration of the AWU's members which pressured the AWU to finally agree to the provision that everyone else was happy with, however this issue was fought in such an unproductive way that wasted a significant amount of time, that all other stakeholders in the process were prepared to give up on the Agreement altogether. Had the Club not persisted, employees would have missed out on extremely competitive wages and conditions to the standard terms of the Award.
- 3.44 If IFA provisions continue to be a mandatory feature of agreements, then we submit the model clause should not be permitted to be varied or alternatively, that the model clause provides the base standard for provisions that can be altered, with parties retaining the right to include additional aspects of an agreement/award that can be varied. If an agreement cannot be reached regarding any additional matters, then the default model clause applies.

#### **Financial versus Non-Monetary Benefits**

- 3.45 Secondly, the Explanatory Memorandum<sup>9</sup> provides an example where an employee, at their request, trades off a financial benefit in order to gain the non-monetary flexibility of being able to leave work early to continue his commitment in coaching a football team. In the example provided, it is considered that this arrangement would satisfy the BOOT.

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<sup>9</sup> *Explanatory Memorandum to the Fair Work Bill 2008* at page 137.



- 3.46 Whilst we acknowledge that this is a specific example of the individual needs of one employee using an IFA, there are a number of cases where Clubs have offered other non-monetary benefits, for example heavily subsidized or free gym membership, free flu-shots and medical screenings, accessible to all employees through Enterprise Agreements, yet the practical reality is that these benefits are given limited, if any, weight when determining whether an agreement satisfies the BOOT.
- 3.47 This highlights a number of issues. Firstly, an inconsistency in the treatment of the BOOT with respect to non-monetary benefits. Secondly, it places an additional burden on Clubs, to find sufficient financial resources in a very difficult economic climate to have an Agreement approved. In real terms, this creates a situation where Agreement making becomes a far less palatable option than remaining on the Award because the approval process only focuses on the financial gains of the employees without taking into consideration more sustainable pay increases together with employee flexibility and benefits which are offered that are difficult to quantify in monetary terms. Again, benefits are obtained for employees through this process but there are few significant gains from a Club's performance perspective.
- 3.48 Ultimately, the impact of this is that agreement making is realistically only accessible to the largest, most profitable Clubs which are not representative of the majority on a national level.
- 3.49 Due to the uncertainty around the weight given to non-monetary benefits under the BOOT, CAI would support any clarity in the legislation regarding this matter and/or provisions which provide for a different application of the BOOT for Enterprise Agreements and IFAs.

## **The Inability of IFAs to be a Condition of Employment**

- 3.50 The protections under section 144 and section 203 of the Act providing that IFAs must ensure that employees are better off overall in comparison with an Enterprise Agreement or an Award should alleviate any concerns with respect to exploiting prospective employees.
- 3.51 The Explanatory Memorandum<sup>10</sup> provides that an IFA cannot be a condition of employment for a new employee. There does not appear to be a prohibition however on offering an IFA to a prospective employee which creates some potential ambiguity and risk for an employer. The legislative note to the Act pursuant to section 341(3) is consistent with this and states the following:

*“A prospective employee is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer.*

*Note: Among other things, the effect of this subsection would be to prevent a prospective employer making an offer of employment conditional on entering an individual flexibility arrangement.”*

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<sup>10</sup> Ibid at para 1373 page 219.

- 3.52 An employer may wish to offer an IFA at the outset to outline the competitive terms and conditions available to the employee if they are offered a position, in order to attract the best candidates for a role. There would appear to be a major risk however in employers doing this in the event that they propose an IFA but then decide that the candidate is not appropriate for some unrelated reason. Such an employee may then find an opening to commence litigation under the new general protections provisions relying on the negative inference that the employer did not offer them the job because the employee wouldn't accept an IFA, even if the true reason was due to other factors.
- 3.53 Difficulties also arise from a broader workplace culture perspective when existing employees obtain the benefit of flexibilities in their IFAs that cannot be made a condition of employment for new employees as the date of their commencement of employment. For example in the case of an area of a Club that operates a rotating roster to ensure that all employees in that area have the benefit of a weekend off every cycle. Employees in that area are all on IFAs at higher rates of pay (in lieu of having to apply overtime rates) in order for this to occur, for both the employees and employer's benefit.
- 3.54 CAI recommends that amendments are made to the Act provide clarity in allowing IFAs to be offered to prospective employees as a condition of employment.

#### **Termination of IFAs with 13 weeks' notice**

- 3.55 If an IFA is negotiated from the Award, either party has the option of unilaterally terminating the IFA with 13 weeks' notice. CAI acknowledges this amendment was an improvement to the previous 28 days' notice requirement.

- 3.56 Notwithstanding this, the provisions are still a significant departure from IFAs' predecessors under the *Workplace Relations Act 1996* which were required to reach a nominal expiry date before unilateral termination could occur. This also contradicts basic employment law principles about reaching mutual agreement to enter into a contract of employment and having mutual agreement to substantially alter the terms of that contract.
- 3.57 The continuing challenge that these unilateral termination provisions presents for both parties to an IFA is the lack of certainty. For example, an employee may be relying on a higher rate of pay only available under an IFA in order to meet mortgage repayments. An employer who is looking at ways to reduce a wages bill may decide, without any obligation of consultation with the employee, revert to the base Award or Enterprise Agreement conditions and the employee is placed in a situation where they can no longer meet their mortgage repayments. Employers, particularly Clubs due to the nature of the industry, need certainty that they can rely on the flexible arrangements they have made with an employee for operational reasons and for budgets amongst other things.
- 3.58 Another challenge faced by employers when employees unilaterally terminate an IFA, is that they are then potentially faced with a multitude of different industrial arrangements, that is employees on Awards, those on Agreements and those who are on IFAs. The rostering obligations, as one example, may be fundamentally different across all three instruments posing enormous difficulties for the operations of business on both a practical and administrative level.
- 3.59 CAI proposes that IFAs should continue to operate indefinitely, subject to a mutual agreement to terminate. Alternatively IFAs should operate in accordance with a mutually agreed set time-frame. This will create the certainty that both employers and employees mutually desire.

## **4. Employee Protections**

### **Unfair Dismissal - Unmeritorious Claims**

- 4.1 Since the commencement of the Act, the majority of club industry unfair dismissal cases have settled and CAI is of the view that as a whole, the telephone conciliations work very efficiently in these matters. It is concerning however, that a significant number of those cases would appear to be try-ons, for example in the case of a probationary employee who clearly has no jurisdiction to bring a claim.
- 4.2 With the rare exception, of all the matters that have settled, Clubs have parted with money in exchange for the claim being discontinued even where their prospects of success would be high if the matter proceeded to hearing. As their representatives, we are constantly hearing from our members that they believe they have followed proper process and had valid reason, but as a question of economics, it is cheaper to pay the applicant and settle at conciliation than arbitrate.
- 4.3 Whilst we acknowledge that “go-away” money is often a feature of litigation generally, CAI believe that there may be a number of ways in which the unmeritorious claims can be reduced (saving both employers and FWA valuable resources), which would in turn reduce the rate at which employers are rewarding bad employees with monetary settlements. We submit that some initiatives which could be adopted to reduce the incidence of frivolous claims are as follows:
- a) If matters are not resolved at the first telephone conciliation conference, ensure that a second stage of face to face conciliation occur at the FWC which is conducted by a Commissioner;

- b) If a matter is not settled at the second phase of conciliation, the Commissioner presiding over the conciliation must provide a written opinion to the parties regarding prospects of success. A certificate which simply states that no opinion can be expressed should not be permissible;
- c) Re-introduce the Notice of Election to proceed for unfair dismissal claims (pursuant to section 651 of the *Workplace Relations Act*) requiring an applicant to file such a Notice within 7 days of receiving the certificate noted in sub-paragraph (b) above;
- d) In the event that a Commissioner has formed an opinion against one of the parties in their certificate and that party proceeds to hearing and is unsuccessful, the other party is entitled to lodge an application for costs.

#### **Unfair Dismissal - Jurisdictional Objections**

- 4.4 Section 396 of the Act specifies that FWC must decide specified jurisdictional matters before considering the merits of the application. We strongly support this provision on the basis that it would allow for the expeditious resolution of matters when an employee has no right to bring a claim to begin with.
- 4.5 Similarly, we support the provisions pursuant to section 399 which indicates that a hearing “must not” be conducted by FWC in relation to this part of the Act unless appropriate to do so.
- 4.6 It is our experience however in representing our members that this is not occurring in practice and that in the vast majority of jurisdictional cases brought before the FWC, parties are required to expend the same amount of time and resources as if proceeding to full arbitration on the merits of an unfair dismissal case.

- 4.7 We consider that this is not assisted by the provisions under section 394(3) which provide that FWA may consider an extension of time in an unfair dismissal claim, by considering a number of factors, including the merits of the application<sup>11</sup>.
- 4.8 CAI and its related State Associations, has been involved in a number of jurisdictional cases that have proceeded as though the full unfair dismissal claim was being arbitrated. Some of these cases have been relatively uncontentious with respect to the jurisdictional issue at hand. There is a significant concern in relation to the time and resources required to be spent by our members and employers generally in these matters which we submit could have been dealt with on the papers.
- 4.9 One example which highlights the problematic nature of section 394(3)(e) of the Act in out of time claims, involved the Cronulla Leagues Club Limited<sup>12</sup> who was represented by ClubsNSW in defending a claim for unfair dismissal brought by a senior manager.
- 4.10 In summary, the applicant effectively resigned his employment and despite substantial attempts from the Club to have him return to work, the applicant refused. Following requests by the applicant through his solicitors to have his entitlements paid out, the Club requested details of the date that the applicant considered his employment at an end in order to calculate the entitlements. A letter from the solicitor confirmed the date at which the applicant considered himself to no longer be an employee. Twenty days after this date, an unfair dismissal claim was filed, outside the former, 14 day statutory time frame to bring such a claim.

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<sup>11</sup> Section 394(3)(e) *Fair Work Act* (2009).

<sup>12</sup> *Brad Linsell v Cronulla Sutherland Leagues Club Limited t/a Sharkies* [2011] FWA 3193.

- 4.11 Ultimately, the Club was successful in its defence and the matter was dismissed however, the process of getting to this position was long and arduous. Due to the difficulties the applicant faced in attempting to argue that the employment end date that his solicitor's communicated in writing was not correct, the solicitor and the barrister that represented the applicant at the hearing focused on the merits of the case in an attempt to overcome the time limitation issue. Of course many other arguments were mounted alongside this.
- 4.12 The main argument for the applicant from a merits perspective was that he had been subjected to serious bullying and harassment at work and accordingly, even if the application was considered out of time, it should be allowed to proceed on this basis. Again there was a significant amount of paperwork from both parties that did not support the allegations.
- 4.13 The formalistic approach that the FWC took in this matter meant that that in order to robustly defend the claim, a significant amount of time and resources were spent putting together a witness statement from the Club's President which annexed the paper-trail of events for the months leading up to the lodgment of the claim. Due to the concerns the Club had about the allegations being made and the fact that the FWC was required to consider the merits of the application<sup>13</sup>, the witness statement was prepared as though it was for a final unfair dismissal hearing and for the most part dealt with the history of the claim and the allegations mounted against the Club. Due to the serious and complex nature of what had been constructed by the applicant and his legal representatives as to the merits, the President's statement was 92 pages long.

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<sup>13</sup> Section 394(3)(e) *Fair Work Act* 2009.



4.14 We submit that there was a substantial enough paper-trail to have allowed the FWC to determine this out of time matter on the papers. If further information was required, we submit the FWC should have been able to write to the parties requesting particulars or further documentation that could have been produced in an informal manner. The amount of time, cost and resources spent in defending this matter was entirely inconsistent with the concept of deciding jurisdictional matters early on in the litigation quickly and cheaply, so as to not waste parties or the FWC's time in hearing/defending such cases.

4.15 CAI also notes and supports the provisions of section 396(d) of the Act which state:

*"The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits [our emphasis] of the application: whether the dismissal was a case of genuine redundancy."*

4.16 CAI is aware of a number of recent Club matters that are currently before the FWC on the jurisdictional objection of 'genuine redundancy' and there is a concern that the manner in which these cases are timetabled by the FWC unfair dismissals rosters team, is inconsistent with the intent of section 396(d).

4.17 One such case is Cabra-Vale Diggers Club<sup>14</sup> which involved the redundancy of a cleaner due to outsourcing the Club's cleaning operations. As the applicant was not able to attend the set conciliation date, the matter was immediately timetabled for both "Jurisdiction (Genuine Redundancy) and Arbitration Conference/Hearing."

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<sup>14</sup> *Antonleta Cavero v Cabra-Vale Ex-Active Servicemens' Club Limited T/A Cabra-Vale Diggers* U2014/13890.

4.18 At the time of writing, the Directions require the following to occur:

- a) The applicant to file and serve an outline of submissions and witness statements in support of the application [our emphasis] by 30 March 2015;
- b) The respondent to file and serve an outline of submissions and witness statements in support of the jurisdictional objection [our emphasis] by 30 March 2015;
- c) The respondent to file and serve an outline of submissions and witness statements in opposition to the application [our emphasis] by 20 April 2015;
- d) The applicant to file and serve an outline of submissions and witness statements in opposition to the jurisdictional objection [our emphasis] by 20 April 2015.
- e) The matter has been listed for hearing on 4, 5, 6 May 2015 to determine all matters.

4.19 In this case, it is apparent from the Directions that have been issued, that despite the operation of section 396(d) of the Act, the parties in this matter will be required to prepare for both the substantive and jurisdictional matters which largely defeats the purpose of having jurisdictional exceptions to unfair dismissal claims.

4.20 The additional issue with jurisdictional objections based on genuine redundancy, is that the evidence led for both the jurisdictional matter and substantive matter will necessarily be the same. This is because if the FWC is not satisfied that the redundancy was genuine at the jurisdictional level, the matter will proceed to a fully arbitrated hearing on exactly the same arguments and evidence. The employer who has sought to argue there was a genuine redundancy and hence the matter is jurisdictionally barred, will need to run these arguments again if they are unsuccessful in having the matter dismissed in the first instance.

- 4.21 CAI is aware of a further Club industry case, currently before the FWC, where almost identical Directions to those outline in paragraph 4.18 have been made in a redundancy matter. This is a case involving Tumut RSL Club<sup>15</sup>.
- 4.22 In this regard, CAI recommends that for redundancy matters, the FWC amend its processes of requiring parties to file separate submissions and witness statements for jurisdictional objections and the substantive matter that arise out of the same facts.
- 4.23 CAI supports provisions of the Act that require the FWC in the first instance to determine simple jurisdictional matters on the papers and to have the power to request information from parties to assist them in making the decision. We submit that the merits of the case should have no relevance in jurisdictional determinations and that hearings should only be conducted as a last resort if the matters are so highly contentious that FWC is unable to make a decision without the benefit of formal evidence being tested under cross-examination.

#### **Anti-bullying Provisions**

- 4.24 There is no doubt that workplace bullying has impacts on workplace morale, productivity and employee health, and in this regard CAI is supportive of the introduction of the anti-bullying provisions.
- 4.25 In the Club industry, there has not been a significant incidence of bullying claims lodged in the FWC and it is considered that the primary reason for this is the lack of compensation available to applicants in this jurisdiction.

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<sup>15</sup> *Todd Bevan v Tumut RSL Club Ltd* U2014/14166.

- 4.26 Notwithstanding the relatively low rates of such claims and the fact that there are other avenues available to employees to agitate bullying complaints, CAI is of the view that the provisions are of value. From the perspective of an employee who genuinely is seeking that the bullying stop rather than compensation, the FWC is a low cost and user friendly tribunal to appear in. For employers, the same benefits apply, and it provides an alternative option for employees who would otherwise go to the more costly, adversarial jurisdictions to seek a remedy.
- 4.27 In this respect, CAI has observed a spike in recent years with workers compensation claims being made on the basis of workplace bullying. Due to the difficulties in defending these psychological injury claims, they are often accepted by the workers compensation insurers, significantly impacting on insurance premiums and Club operations when they have someone unable to return to work indefinitely.
- 4.28 Additionally, CAI considers that greater clarity is necessary as to the interpretation that should be given by the FWC to section 789FF(1)(b)(ii) of the Act.
- 4.29 Section 789FF provides the following:

**789FF FWC may make orders to stop bullying**

(1) If:

- (a) a worker has made an application under section 789FC; and
- (b) the FWC is satisfied that:

- (i) the worker has been bullied at work by an individual or a group of individuals; and

- (ii) there is a risk that the worker will continue to be bullied at work by the individual or group [our emphasis];

then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work by the individual or group.

4.30 CAI are aware of a current case before the FWC involving Gerringong Bowling Club<sup>16</sup> where an employee brought an anti-bullying claim but was subsequently terminated from their employment. The Respondent has sought to rely on previous authority on the meaning of section 789FF(1)(b)(ii) highlighting that as the applicant was no longer employed, there was no continuing risk of being bullied at work and hence the application has no reasonable prospects of success and should be dismissed.

4.31 Whilst this is an area of emerging jurisprudence, there are a number of cases that have already considered this issue, including the case of *Shaw v Australia and New Zealand Banking Group Limited T/A ANZ Bank; Bianca Haines* [2014]<sup>17</sup>. In this case Deputy President Gostencnik stated:

*“It seems to me clear that there cannot be a risk that Mr Shaw will continue to be bullied at work by an individual or group of individuals identified in his application because Mr Shaw is no longer employed by ANZ and therefore is no longer at work.”*

4.32 In the Gerringong Bowling Club case, the applicant’s representative refused to withdraw the claim and the matter is now subject to a jurisdictional hearing on the point, together with the unfair dismissal claim<sup>18</sup> now filed by the applicant.

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<sup>16</sup> *Shelly Godbee v Gerringong Bowling and Recreation Club Ltd* AB2015/116.

<sup>17</sup> *Mitchell Shaw v Australia and New Zealand Banking Group Limited T/A ANZ Bank; Bianca Haines* [2014] FWC 3408 at paragraph 16.

<sup>18</sup> *Shelly Godbee v Gerringong Bowling and Recreation Club Limited* U2015/558.

4.33 Despite the general views expressed by various FWC members in the cases that the risk of bullying continuing lapses upon the cessation of employment of an applicant, CAI is aware of a recent decision which expresses a broader interpretation. In the case of *P.K.* [2015] FWC 562, it was determined that on the issue of risk:

*“...there is presently no risk that the applicant will be bullied...given the fact that the applicant has been terminated and no longer at work in the relevant workplace. It is however prudent to consider whether there is any reasonable prospect of a relevant risk arising in the future”* [our emphasis].<sup>19</sup>

4.34 This contemplates the scenario where the applicant files another claim where there is a possibility of reinstatement occurring, for example an unfair dismissal claim, as is the case with Gerringong Bowling Club.

4.35 Due to the operation of section 587(1)(c) of the Act which provides the FWC the discretion to dismiss an application if there are “no reasonable prospects of success”, CAI is concerned that Clubs are being forced to defend anti-bullying claims concurrently with other litigation, in circumstances where applicants are no longer at imminent risk of bullying continuing.

4.36 CAI recommends the Act be amended to confine the meaning of “risk” in section 789FF to imminent risk, not the possibility of future risk depending on the outcome of other litigation avenues being pursued by an applicant. CAI is of the view that in the event that such a scenario were to eventuate, it is open to the applicant to file a fresh application under the anti-bullying provisions, meaning they would not be prejudiced by any such changes.

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<sup>19</sup> *P.K.* [2015] FWC 562 at paragraph 26.

- 4.37 CAI submits that it is the interests of efficiency and fairness to remove the discretion for the FWC to dismiss such applications on the basis of no reasonable prospects, and create a mandatory requirement for the FWC to dismiss applications where the person is no longer employed.

### **Small Business Exemption**

- 4.38 On a national level, small to medium Clubs constitute the majority of the industry. As at 2011<sup>20</sup>, in NSW alone, 91% of Clubs fell within the small-medium category and of those, 46% generated less than \$200,000 in annual EGM revenue<sup>21</sup>.
- 4.39 As the regulatory and economic climate for Clubs continues to impact on their business and present significant challenges, we have seen many Clubs seek out and go on to amalgamate with larger Clubs in order to best ensure their ongoing survival. In less fortunate cases, we have seen Clubs close their operations altogether, causing detriment to the communities they once served and the employees they once employed.
- 4.40 Section 23 of the Act defines a small business employer as an employer who employs less than 15 employees at that time, on the basis of a headcount.

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<sup>20</sup> *NSW Club Census 2011 – Report on the economic and social contribution of registered clubs in NSW* – April 2012 at page 16.

<sup>21</sup> EGM revenue refers to revenue derived from electronic gaming machines.

- 4.41 There are many Clubs who fall within the small category, who may have 20 employees on their pay roll of which 15 are casuals who do not work regular weekly shifts but are called in on an as needs basis or only work nominal hours per week. Core hours are often filled by the remaining permanent employees and volunteer directors, or part time employees who may only work 8 hours a week. In many cases, if one were to calculate the total number of hours worked by those combined staff in a given week, and provide an assessment of the equivalent number of full time employees working those hours, the average number of workers running some of these Clubs in any week might only be 4 or 5.
- 4.42 CAI is of the view that these scenarios, which are very common in the regional and more remote geographical areas, are clearly indicative of a small business operation, however, the failure to take into account the number of employees based on full time hours, distorts the true nature of whether it meets the existing small business test.
- 4.43 CAI is also concerned that the Australian definition of small business, significantly departs from what is accepted in the international sphere on this issue. In the USA, the Small Business Administration (SBA) is the government body that sets and reviews business size standards. It establishes its standards on an industry by industry basis, but as at 2014, it generally adopts two widely used size standards which are:
- 500 employees for most manufacturing and mining industries and
  - \$7.5 million in average annual receipts for many non-manufacturing industries<sup>22</sup>.

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<sup>22</sup> U.S Small Business Administration, Small Business Size Standards as at 14 July 2014 (<https://www.sba.gov/content/summary-size-standards-industry-sector>)



4.44 Again, in stark contrast to the Australian legal definition, the European Union defines a small business as being an employer that:

- Has less than 50 employees and
- Annual turnover or a balance sheet total of less than 10 million euro<sup>23</sup>.

4.45 Accordingly, CAI recommends that the meaning of small business employer be amended in the Act to reflect an employer that employs 25 full time equivalent employees or less.

## **5. Litigation Avenues**

5.1 CAI is aware of an increasing incidence of Clubs having to defend general protections claims and other litigation outside of unfair dismissal matters. These other claims are typically lodged when employees are represented by solicitors (as opposed to the union).

5.2 There are a number of significant concerns about the general protections provisions under the Act and they are outlined below.

5.3 Firstly, CAI is of the view that the general protections provisions<sup>24</sup> under the Act are far too broad, adding to the plethora of litigation avenues already available to employees under other parts of the Act and separate pieces of legislation.

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<sup>23</sup> EU Recommendation 2003/361 and European Commission, What is an SME?  
([http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition/index\\_en.htm](http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition/index_en.htm))

<sup>24</sup> Chapter 3, Part 3-1, Divisions 1-8 *Fair Work Act* 2009.

- 5.4 In particular, we refer to section 351 of the Act which provides that an employer cannot take adverse action against an employee on account of a discriminatory attribute. We consider that this is duplication of well established State and Federal discrimination laws which employees have the choice to utilize if they believe they have been discriminated against.
- 5.5 Similarly, section 352 prohibits an employer under the adverse action provisions to dismiss an employee who is temporarily absent from work because of an illness or injury.
- 5.6 Whilst we acknowledge that adverse action does not need to involve termination of employment, the general protections provisions do cover incidence of termination. In this regard, we fail to see the continuing relevance of the unlawful termination provisions found at section 772(1) of the Act which provide the following grounds as being prohibited reasons for termination:

*(1) An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons:*

*(a) temporary absence from work because of illness or injury of a kind prescribed by the regulations;*

*(b) trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;*

*(c) non-membership of a trade union;*

*(d) seeking office as, or acting or having acted in the capacity of, a representative of employees;*

*(e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;*

*(f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin;*

*(g) absence from work during maternity leave or other parental leave;*

*(h) temporary absence from work for the purpose of engaging in a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.*

5.7 The above section substantially mirrors the protections available under the adverse action provisions and we submit that the duplication of litigation avenues for employees unfairly exposes employers to a greater range of liability in areas where employees are already more than adequately protected.

5.8 Accordingly, CAI recommends the removal of the general protections provisions where alternative legal avenues and remedies already exist for matters that arise out of the same facts, and/or allege the same unlawful conduct.

### **Double-dipping**

5.9 We acknowledge and support sections 725-732 under the Act which serve as the anti-double dipping provisions to prevent employees from bringing multiple claims in relation to their termination of employment.

5.10 There would appear however to be a technical loop hole which would allow sophisticated advocates and/or applicants to issue proceedings under separate

pieces of legislation, but splitting their claims so as to not be in breach of the multiple action provisions.

- 5.11 For example, there does not appear to be a protection for employers under the Act that would prevent an employee who has been terminated for lengthy absences from work due to illness and is no longer considered by the Act to be temporarily absent, from bringing an adverse action claim for unlawful discrimination under section 351 of the Act on the basis of disability. The employee may also bring a claim before the Anti-Discrimination Board under the *Anti-Discrimination Act* (NSW) for unlawful discrimination in the period leading up to but not including termination.
- 5.12 An employer in this circumstance would have to have very deep pockets to defend both claims or succumb to the pressure of settling for an unfavourable amount because of the excessive costs of having to defend the claims in two different jurisdictions.

#### **Time limitations**

- 5.13 CAI refers to section 544 of the Act which provides a six year statutory limitation from the time a contravention occurred for a civil remedy provision. This would capture a claim made by an employee who was not terminated but who alleges their employer took other adverse action against them during their employment.
- 5.14 In the interests of fairness, there is no reason why an employee should have six years from the time of an alleged contravention to bring a claim against an employer and we submit that employees who wait till the end of such a long time limitation are highly likely to lodge unmeritorious claims.

- 5.15 CAI proposes that a more balanced approach which would effectively reduce the vexatious and/frivolous claims, should be between 60-90 days after the alleged contravention has occurred.

## **6. Other Workplace Relations Issues**

### **Effectiveness of the Institutions**

- 6.1 Generally, CAI is of the view that the bodies that administer and enforce the various workplace relations laws are performing their functions in a manner which is both efficient and effective, particularly the FWC in its handling of unfair dismissal matters.
- 6.2 Notwithstanding this, CAI notes that the general protections provisions, are arguably not accessible to the majority of employees as they are typically cost prohibitive proceedings to run. We believe this is due largely because of their referral to the Federal Circuit Court or Federal Court if they are not able to be settled at the FWC during conciliation. In all of the Club cases that CAI are aware of in this space, solicitors and barristers have represented the applicants.
- 6.3 This has often created a situation where a matter that at its core, is really a simple unfair dismissal claim has evolved into a case with very complex, technical legal arguments which are unnecessarily protracted because of the Courts' difficulties in finding early dates for parties to proceed. These are not issues that commonly arise in the FWC but seem to be a feature of matters that proceed in the Federal Courts.

- 6.4 The complexity which we have seen become a feature of these cases, necessitates the Clubs who are respondents, to also retain counsel to defend these matters, even in unmeritorious claims. The costs arising from this is one that many of our struggling, smaller and/or regional Clubs cannot afford to bear. The fact that proceedings under the Act are generally fought on the basis that each party wears its own costs, unless section 570<sup>25</sup> of the Act can be satisfied, also means that for Clubs who are forced to defend such cases are in a financially prejudiced position even if they are successful.
- 6.5 In one example, ClubsNSW represented the Batlow RSL Club in Federal Magistrates Court proceedings lodged by the former General Manager (**the applicant**)<sup>26</sup>. The applicant had been terminated on grounds of serious misconduct. She brought a significant monetary claim in the then Federal Magistrates Court against the Club and its President for non-payment of National Employment Standard entitlements, amongst other things. The Club was forced to pay a substantial financial settlement to the applicant because this was still cheaper than meeting the continuing costs of the litigation, and the club was at serious risk of not being able to continue to trade if it attempted to keep defending the claim.
- 6.6 Further, we are concerned that although an Industrial Division of the Federal Circuit Court has been established to deal with adverse action claims, that the Federal Magistrates who preside over such matters are also dealing with bankruptcy cases, discrimination matters, trustee disputes, immigration cases and other unrelated yet significant areas of law. The question arises as to whether these Federal Courts have the resources, understanding and expertise of employment and industrial law to appropriately interpret the legislation and decide these matters.

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<sup>25</sup> Section 570 *Fair Work Act 2009* (Cth) outlines the circumstances in which costs may be ordered by a Court against a party for proceedings arising under the Act.

<sup>26</sup> *Paula Jane Enright v Batlow RSL Club and Robyn Burns* SYG 743/2011.

- 6.7 CAI is also aware of a number of discrimination matters, involving Clubs, that were brought before the Australian Human Rights Commission (AHRC) and conciliated. A number of these matters were settled at conciliation however, after the conciliation the applicant would change their mind and refuse to sign a settlement agreement. When requests were made to the AHRC to bring the matter back on, with a view to enforcing the agreement reached, the response was that there was no authority or power to do so<sup>27</sup>.
- 6.8 CAI believes this compromises parties confidence in the conciliation process with respect to discrimination matters, particularly when there is perception that the AHRC is a “toothless tiger” in resolving cases. In this regard, CAI would consider any changes that strengthens the power of the AHRC in enforcing agreements reached between parties at conciliation, to be a positive step in promoting the function of the AHRC.
- 6.9 CAI acknowledges the challenges in creating one Tribunal or Court to exercise the full breadth of industrial and workplace relations legislation however, given the overarching positive experiences with the general manner in which the FWC administers its functions, CAI considers it should, where possible, be the one-stop shop for as many areas impacting on workplace relations as possible. The model proposed by CAI is one where the FWC is divided into a Tribunal and a Court function operating in a similar manner to the way the NSWIRC was established.

### **Right of Appearance**

- 6.10 We have also experienced an inconsistent approach by Federal Magistrates with respect to rights of appearance by advocates of an employer association. In two matters that we have represented our members before this Court, one of our senior lay advocates who has worked in industrial relations for over 10 years was told she had no right to appear.

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<sup>27</sup> *Mingara RSL t/a The Lantern Club v Leila Toal* - AHRC 2013.

- 6.11 On another occasion, the executive manager of the industrial relations team with over 20 years experience in the field, who has completed a law degree (but does not hold a practicing certificate) was also told that he would be heard on that particular day but that he was not expected to appear in any further mentions of the matter because of his lack of standing. This was notwithstanding being told at a Federal Magistrates Court briefing that employer association advocates had the right to appear.
- 6.12 CAI recommends that if the Federal Courts retain jurisdiction over matters under the Act, that the legislation ought to clearly specify the rights of employer and employee association advocates to appear.

### **Transfer of Business**

- 6.13 CAI draws on the many years of experience of its industrial practitioners and the feedback from the industry, clubs both large and small, when making the submission that the transfer of business provisions under the Act are acting against the interests of both employers and employees.
- 6.14 The provisions are drafted in a manner which to a large extent are incomprehensible and ambiguous, failing to address some basic issues that arise when transfers of business occur.
- 6.15 The transfer provisions are critical to the club industry in a climate where many small clubs are being involved in amalgamations with larger clubs. We are also finding that many of our members require advice relating to outsourcing or insourcing parts of the business and in the industry it is not uncommon for this to occur in relation to catering functions, cleaning and/or security.



- 6.16 The complexity of the provisions of the Act that apply to these scenarios make it more enticing for employers to retrench employees rather than transfer them and ultimately this is a lose-lose scenario. The club/business loses the skills and expertise that established employees take with them and employees find themselves out of work.
- 6.17 CAI have also recently had feedback from two large Clubs who have amalgamated with a number of smaller Clubs within the last 12-24 months. The amalgamated sites are geographically positioned within close proximity of the main Clubs and there is a desire for the businesses to be able to roster employees at the multiple sites. The anecdotal evidence about these arrangements is that there are many employees who would love the opportunity to obtain additional hours at the other sites.
- 6.18 The large Clubs however have been stifled in their ability to proceed with these mutually beneficial arrangements because they have enterprise agreements for their main sites, they have amalgamated with Clubs that had their own enterprise agreements which they are required to continue to apply and other sites are still covered by the modern award. This poses a logistical nightmare as to what instrument applies to employees whilst they work at the difference venues. As a result, these arrangements have not come to pass. Another example of an unnecessary loss for both the employer and employee at the hands of complex regulatory burdens in this area.
- 6.19 Aside from the complexity in the provisions themselves, this area of the law is currently dealt with in many areas of the Act making them difficult to follow. We consider that this adds an unnecessary layer of difficulty in the legislation to have transfer arrangements dealt with at section 22 (5) & (7), section 91, section 122 and then again throughout Part 2-8, Divisions 1-3 of the Act.

- 6.20 In undertaking consultations with the industry for the purposes of this submission, we received feedback from a senior HR manager at one of the largest and well-resourced clubs in the country, express to us that they were contemplating engaging solicitors to deal with the outsourcing of one of the major functions of the business because they could not make sense of the Act and could not justify the time wasted in trying to work it out.
- 6.21 The concern about this of course is the situation that arises with small, under-resourced clubs and other employers who do not have the means to fund lawyers to give them advice about the operation of these provisions, which at the end of the day is unlikely to be of great assistance anyway because of the way the Act is framed.
- 6.22 Areas that CAI have experienced as creating much confusion amongst Clubs due to the ambiguity in the Act, arise in relation to transferring employee's entitlements, in particular redundancy payments; other leave entitlements and the application of a different industrial instrument to transferring employees.

### **Transferable Instruments**

- 6.23 We note that across the club industry, different industrial arrangements apply including enterprise agreements and the Registered and Licensed Clubs Award. We are also aware however that in the case of catering, cleaning and security functions that many clubs contract out, those contracting businesses have their own industrial instruments that apply to their employees. We submit that the Act does not assist employers in any useful or productive way in relation to the application of transferring industrial instruments.

- 6.24 CAI recommends that the Act should be amended to contain provisions which prevent new employers from having transferable instruments apply to them. To do otherwise creates an impractical, logistical administrative nightmare for new employers which cannot allow a business to operate efficiently and which poses a major disincentive for a new employer to consider a transfer of business arrangement.

### Qualifying Periods

- 6.25 Further, the Act does not provide adequate guidance about a new employer's right to put transferring employees of an old employer on probation. The current body of case law does not provide much assistance in this respect and we consider this arises because the Act does not directly address it.
- 6.26 CAI submits it is critical that a new employer has the ability to review the performance of employees who have just commenced working for them, when they have not otherwise had the opportunity to do so. It is also essential that some clarity around this right is addressed in the legislation as it also has flow on ramifications to unfair dismissal jurisdictional matters.

### Definition of Transfer of Business

- 6.27 With respect to the definition of when a transfer of business has occurred, the Act states the following<sup>28</sup>:

*1) There is a **transfer of business** from an employer (the **old employer**) to another employer (the **new employer**) if the following requirements are satisfied:*

*(a) the employment of an employee of the old employer has terminated;*

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<sup>28</sup> Section 311(1) *Fair Work Act 2009*

- (b) within 3 months after the termination, the employee becomes employed by the new employer;*
- (c) the work (the **transferring work** ) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer;*
- (d) there is a connection between the old employer and the new employer as described in any of subsections (3) to (6).*

6.23 We submit that this definition is critical to all other aspects of the transfer provisions and could be amended to reduce the incidence of unintended interpretations of when a transfer has occurred. In this respect we make the following observations:

- i) Section 311(1)(a) - termination of employment can arise by way of resignation or by termination of the employer. The definition leaves it open to an interpretation of either of these occurrences which we acknowledge that the Explanatory Memorandum<sup>29</sup> indicates is the intent, however, we submit that subsection (a) should only relate to cases where the old employer has terminated the employee.

It cannot be considered a logical outcome if an employee resigns from an old employer years after a transfer of business has occurred and then within 3 months of that resignation becomes employed by the new employer, that the new employer be burdened with the transfer of a transferable industrial instrument.

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<sup>29</sup> *Explanatory Memorandum to the Fair Work Bill 2008* at paragraph 1215, page 193.

- ii) Section 311(1)(b) – the three month period from termination to re-engagement needs to also refer to the time at which the business transferred to avoid the scenario outlined in paragraph (i) above.
- iii) Section 311(1)(c) – there appears to be an inconsistency with the language used in the Act and the intended scope of what constitutes transferring work. The Act states that the work is to be the “*same or substantially the same...*” however in the Explanatory Memorandum<sup>30</sup> it is stated that “*it may be possible to categorise the work more generally.*” It then goes on to provide the example of a supermarket employee who stacked shelves for an old employer but works on the checkout for the new employer would satisfy this aspect of the legislation.

We consider this to be an extremely broad interpretation of the words used in the Act and submit that this ought be properly clarified if it is to remain. Further, we submit that the “character of the business” test as considered by the High Court in *PP Consultants Pty Ltd v FSU*<sup>31</sup> should be enshrined in the legislation as an integral feature of whether a transfer of business has occurred.

- 6.24 We submit that the Act should be amended to incorporate one dedicated chapter which includes all of the transfer of business provisions as opposed to the scattered, piecemeal approach that currently exists. These provisions should be drafted in plain English, reflect language that is consistent with its intent, and in a manner that covers all standard transfer scenarios, including employees’ entitlements, probationary periods and coverage of industrial instruments.

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<sup>30</sup> Ibid at paragraph 1218, page 193.

<sup>31</sup> *PP Consultants Pty Ltd v FSU* [2000] HCA 59.

## **7. Conclusion**

- 7.1 Overall, CAI supports the existing workplace relations framework and believes that in many respects, the laws governing this area have met many of their objectives. The areas outlined above are those which we believe are aspects of the system which could be improved to produce better outcomes for both employers and employees, and areas that CAI has directly experienced as problematic in either our capacity of advising Clubs, representing them in proceedings or consulting with them about areas of concern.
- 7.2 CAI welcomes any positive changes to the framework that remove barriers to flexibility and productivity and which promotes employment in the Club industry, whilst achieving the ultimate aim of a balanced and simpler system of industrial relations.