

Submission by

MASTER GROCERS AUSTRALIA

AND

LIQUOR RETAILERS AUSTRALIA

To the

**AUSTRALIAN GOVERNMENT
PRODUCTIVITY COMMISSION**

Workplace Relations Framework Inquiry

March 2015

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INTRODUCTION

Master Grocers Australia / Liquor Retailers Australia ('MGA/LRA') is an employer association and welcomes the opportunity to respond to the Australian Government Productivity Commission inquiry into the Workplace Relations Framework ('the Inquiry'). As an employer association, MGA/LRA is aware of the importance of the Fair Work Act to our organisation and our members. We appreciate the opportunity to comment on a number of issues that are raised in the Inquiry. It is our intention to focus on specific areas of the laws that are relevant to the independent supermarket sector and small liquor stores, and our commentary will be based on the experiences of our members in their businesses within the retail sector.

1. ABOUT MASTER GROCERS AUSTRALIA / LIQUOR RETAILERS AUSTRALIA

MGA/LRA is a national employer industry association representing independent grocery and liquor stores in all States and Territories. These businesses range in size from small, to medium and large, and make a significant contribution to the retail industry, accounting for approximately \$14 billion in retail sales.¹

There are 2,700 branded independent grocery stores, trading under brand names such as: Supa IGA, IGA, IGA Xpress, FoodWorks, Foodland, Farmer Jacks, Supabarn, Friendly Grocers, and SPAR, with a further approximately 1,300 independent supermarkets trading under their own local brand names. In addition, there are numerous independent liquor stores operating throughout Australia and trading under names such as: Cellarbrations, The Bottle O, Bottlemart, Duncans, and Local Liquor, which are either single or multi-store owners. These stores are comparatively much smaller when juxtaposed against the large supermarket chains of Coles and Woolworths which combined represent approximately 80 per cent of the retail supermarket industry.

A substantial number of employers in the independent supermarket and liquor sector operate under the General Retail Industry Award 2010 ('GRIA') and they are also significantly affected by the operation of the Fair Work Act 2009. As members of MGA/LRA they strive to be compliant with the law and aim to operate their businesses profitably in their capacity as small to medium sized businesses, thereby making a significant contribution to the economy of Australia.

MGA/LRA will endeavour in this submission to provide responses to a number of issues that are raised in the Inquiry, focussing on the areas that directly affect the independent supermarket industry.

MGA/LRA thanks the Australian Government for the opportunity to make a submission to the Productivity Commission on behalf of the members of MGA/LRA in respect of the Australian Workplace Relations Framework: Papers 1 to 4.

2. EXECUTIVE SUMMARY

In its response to this Inquiry MGA/LRA has focussed on the following issues:

¹ PricewaterhouseCoopers, *The economic contribution of small to medium-sized grocery retailers to the Australian economy, with a particular focus on Western Australia* (June 2007), p iv

(a) Issues Paper 1 calls, inter alia, for comments on the impacts of the Workplace Relations System ('WR system'); how it affects economic outcomes and impacts industries; and whether any changes should be made to the WR system.

MGA/LRA looks briefly at the development of our industrial laws and how Australia has come to rely on a prescriptive set of rules and regulations which define how workplaces are to operate. Whilst there have been attempts to operate under a less regulated system, this has generally been rejected in Australia in favour of the current WR system. The current WR system has been operational for approximately six years and although the Fair Work Act 2009 and award modernisation have been met with many positive results, a number of amendments are still required in the interests of productivity and fairness, but there is little need for radical change.

(b) Issues paper 2 calls for comment on the National Employment Standards, the award system and the opportunities for flexible arrangements within the award system. MGA/LRA discusses the predominance of small retail businesses that operate under the award system and the restraints that are felt in respect of flexibility. The four year reviews of the modern awards as required by the Fair Work Act 2009, MGA/LRA submits, should not be used as a vehicle for constant award amendments, otherwise the end result will be to have another set of complicated awards that constantly cause dispute and interpretation issues. The "better off overall test" is seen as a barrier to flexibility by many small businesses. It is often difficult to gain any flexibility within the award system when it is mandatory that the employee must be better off overall rather than before, and it often prevents the parties being able to reach an agreement that simply satisfies their mutual requirements.

The issue of penalty rates is a barrier to the ability for small businesses to grow and prosper and is the biggest hurdle for businesses to overcome. Our submission refers to the reasons why this area of the WR system needs to be amended.

(c) Issues Paper 3 seeks comment on the enterprise bargaining system in the WR system and in particular how they may be used to improve productivity. MGA/LRA refers to how most small businesses do not have the human resources and highly developed management practices that enable them to promote productivity through enterprise bargaining. Although a number of small to medium businesses have invested time and energy into the development of enterprise agreements, the better off overall test remains the greatest barrier to their implementation.

(d) Issues paper 4 refers to the unfair dismissal laws and the anti-bullying laws in our WR system, and their effectiveness. MGA/LRA submits that the unfair dismissal jurisdiction has a number of flaws, and we respond to the Inquiry in respect of suggested reforms. MGA/LRA submits that the number of employees within a business entity should be increased to 40 before an application for unfair dismissal can be lodged. Furthermore, an employee should be employed for a minimum period of 12 months before an application alleging unfair dismissal can be made to the Fair Work Commission ('FWC'). In comparison with international jurisdictions, the unfair dismissal process in Australia is highly regulated and very prescriptive. In regard to the anti-bullying laws in Australia there has not been the number of applications made to the FWC that was originally anticipated. It is suggested that the reason being that employees are able to pursue what is perceived as a more beneficial option in the workers' compensation jurisdiction.

3. THE VALUE OF INDEPENDENT SUPERMARKETS

The supermarket and grocery sector is the largest contributor to retail turnover and it has grown consistently over the last two decades.² Independent supermarkets constitute around 17 per cent of the supermarket industry.³ For these stores, wage costs, including the payment of penalty rates, are significant factors in assessing their viability.

More than 115,000 individuals are employed in the independent supermarket industry, either on a full-time, part-time or casual basis, working across a seven day working week. Given that almost 285,000 people are employed in grocery retailing (including supermarkets) accounting for almost one-quarter (23.9 per cent) of all retail industry employment in Australia⁴, the value of independent supermarkets cannot be downplayed.

Despite struggling for survival against the power of larger retailers, independent supermarkets play a fundamental role in the communities in which they operate, as they are heavily committed to supporting their employees, many of whom include working mothers, tertiary students, school children, trainees and apprentices. Further, independent supermarkets are a key means for developing transferable job skills (e.g. interpersonal and communication skills) which enables employees who work in the industry to better enhance their abilities and qualifications, thereby contributing to social and economic participation. The flexibility which they offer by way of employment options – offering both permanent and casual positions – as well as providing opportunities to those who wish to aspire to managerial levels, denotes their importance in encouraging and increasing labour force participation.

Independent supermarkets and liquor stores employ staff under the award system and enterprise agreements. The majority of these businesses do not have the benefit of “in house” human resources and they rely heavily on employer associations. This submission is based on the activities of these small to medium businesses who struggle to deal with a plethora of red tape and legal compliance issues on a daily basis. The majority want to develop their businesses with the ability to treat their employees fairly and be treated fairly themselves within the WR system.

4. THE WORKPLACE RELATIONS FRAMEWORK: THE INQUIRY IN CONTEXT

Our workplace relations laws have developed significantly since the decision to award minimum wages in the Harvester Judgement of 1907. Since that date the WR system has evolved to the extent that it covers the majority of both employers and employees within the WR system. The creation of the federal system of industrial relations (with the exception of Western Australia) has provided jurisdictional uniformity, aided by the implementation of the National Employment Standards, the national system for unfair dismissal laws, and the introduction of federal anti-bullying measures. The creation of the FWC has been a major factor in providing stability for, and accessibility to, the modern WR system. The FWC has now commendably implemented and maintains the modern award system, and has played a major part in the monitoring of the enterprise bargaining system. Australia made a monumental step forward when, in the process of award modernisation, a new FWC was able to

² PricewaterhouseCoopers, *The economic contribution of small to medium-sized grocery retailers to the Australian economy, with a particular focus on Western Australia* (June 2007), p iii

³ Ferrier Hodgson – Ferrier’s Focus May 2011, *from Wesfarmers and Woolworths annual reports 2010, NARGA November 2010 Report, Master Grocers Australia December 2010*
<http://www.stuartalexander.com.au/aust_grocery_market_woolworths_coles_wholesale.php>

⁴ ABS, *Labour Force Survey – Detailed Quarterly – May 2013*, Catalogue No. 6291.0.55.003, Data cube E06, Employed Persons by Sex, Industry, State, Status in Employment.

collapse thousands of antiquated awards down to a mere 120. Despite the fact that the review of these awards continues to weigh heavily on the workload of the FWC, the current award system does provide greater clarity and direction to all participants than those that existed prior to award modernisation.

Despite the undoubted developments and improvements to the WR system that have taken place over many decades, there remains room for further improvement in some areas of the WR framework. The changes that have been made to the WR system over many years have predictably been influenced by societal, industrial and economic norms, and like any system that is subject to developmental change, further adjustments may become necessary. It is inevitable that businesses and employer/employee organisations associated with particular industries which are directly subject to a regulated labour system, will see flaws in the system that are pertinent to their employees or members and they will call for appropriate changes. Whilst some changes may be appropriate in specific areas, in order to improve the operation of WR system, any major amendments should be subject to economic justification.

5. THE PRODUCTIVITY COMMISSION PAPER 1

Paper 1 requests comments on the impacts of the WR system in Australia and how the WR system affects economic outcomes and impacts industries. Additionally, comment is sought on whether any changes should be made to the WR system and whether there are any risks associated with change.

Historically, wages, terms and conditions of employment, and dispute resolution mechanisms, have evolved from the enactment of the Conciliation and Arbitration Act (Cth) in 1904. The system of centralised wage fixing has developed over decades to emerge today in the form of the Minimum Wage Panel, established as part of the FWC. The Minimum Wage Panel endeavours through research, industry consultation and public engagement, to inform itself on the current economic environment. It is an independent body and subject to its maintaining its independence, there is no apparent reason why it should be changed.

Within the WR system, the current Fair Work Act regulates employment in Australia in a prescriptive way, and it is an unparalleled system. The WR system extends over all areas of every day employment: it determines the wages of millions of workers; through the awards and registered agreements it regulates the hours of work, the times of work and when additional payments are required; how employment can be terminated; and how and when disputes will be resolved. The establishment of the National Employment Standards, by legislation in 2009, determined a myriad of employment rules including, all forms of leave, redundancy and public holiday payments. There is very little freedom to do much outside the WR system unless you earn a large salary – so for the average working person, the WR system is largely a rigid one. In addition to the Fair Work Commission (FWC) that controls these aspects of the WR system, there is a watchdog in the form of the Fair Work Ombudsman (FWO) that monitors the WR system. There may be a degree of comfort that there is a major source of control that affords protection to employers and employees backed by an enforcer, but there is also little or no autonomy and freedom for these parties to negotiate independently outside the WR system.

It is inevitable that the operation of any WR system will impact on, or reflect, the country's economic performance. In recent years Australia has enjoyed significant economic growth even though the country has undergone several changes to its WR systems. In 2005, Australia saw a radical change

with the introduction of industrial laws that became known as WorkChoices⁵. Three years after the demise of WorkChoices, the unemployment level in February 2008 was at its lowest in Australia for 33 years, at a seasonally adjusted rate of 4 per cent. The Federal Treasurer at the time, Mr Wayne Swann, said that Australians should not take things for granted:⁶

'If we want to continue to have strong jobs growth, we've got to control inflation and we've got to lift our productivity.'

Inflation reached 4.4 per cent in December 2008.

In respect of the ambitious change in 2005 when Mr John Howard, the Prime Minister at the time, introduced the WorkChoices legislation, he said it was the intention to “modernise” the Australian WR system. The main objectives of WorkChoices were to offer flexibility to employers and employees with greater freedom to negotiate contractual arrangements between themselves; to reduce the role of the former Australian Industrial Relations Commission, particularly in the dispute settlement process; to reduce union involvement in workplaces; and to reduce the number of applications for unfair dismissals based on limiting the size of the workforce in a place of employment. In addition the making of the minimum wage was placed in the hands of a new body, the Australian Fair Pay Commission. Although the amendments to the Workplace Relations Act 1996 were initially welcomed as an opportunity to create more jobs and control wages growth, it soon became apparent that the new WR system was not a workable proposition compared to a system which was previously lauded as providing Australians with a “fair go all round”.

Many Australian businesses unfortunately took advantage of lowering or even abolishing penalty rates in agreements, and to be fair to them, the law allowed this to happen. However, the WR system with all of its opportunities did not work for those Australians who had not had the freedom to negotiate their own terms and conditions of employment in the past. Senator Sinodinos, who was a former advisor to Mr John Howard at the time of WorkChoices, later told the Senate that in respect of this legislation the Government at the time had ‘failed to prepare the ground for such reform’, that ‘some employers abused the system’ and that it ‘failed the “fair go” test’.⁷ Australians were never going to accept the radical transformation to the WR system that was proposed by WorkChoices.

When the current Fair Work Act was introduced in 2009, a new workplace relations system was established which included a new safety net comprising the 10 National Employment Standards; a new bargaining system; an extension of unfair dismissal protections to employees; longer qualifying periods for employees working in small businesses; and a more streamlined process for dealing with unfair dismissal claims. In addition a new institutional framework was made up of Fair Work Australia and the FWO; strong compliance measures, including in relation to industrial action; and a national workplace relations system covering up to 96 per cent of private sector employees. The awards system was to be modernised and monitored every four years. This new system was meant to eliminate any semblance of the previously perceived draconian WR system.

In the last decade Australia therefore has seen two WR systems: one that was regarded as stepping too far outside the realms of “fairness”, and the other being the current system which, MGA/LRA submits, requires some changes without total reform. Freedom to negotiate directly between parties, of the kind that was envisaged by WorkChoices, was simply not an acceptable option in a system that had been so closely regulated for a long time.

⁵ Workplace Relations Amendment (WorkChoices) Act 2005

⁶ ABC News Reporter Adrian Thirsk 13 March 2008

⁷ Address by Senator Sinodinos MP to the Senate November 2011.

The current WR system has been operational now for 5 years and MGA/LRA submits that although there are several aspects of the system that require amendment – which will be referred to later in this submission – the current state of the economy should be a driving factor when appraising the system or considering any significant changes. Recent figures show that wages growth in Australia is currently at 2.6 per cent⁸ and the unemployment rate in Australia has increased to 6.4 per cent in January 2015.⁹ The current inflation rate is 1.7 per cent as prices rose by 0.2 per cent in the December 2014 quarter.¹⁰

There are some strong arguments on the issue of whether there is need for significant WR system reform. Mr Jeff Borland in his paper delivered at Melbourne University¹¹ compared the economy at the time of WorkChoices with the economy under the current system. In particular he looked at wages growth in Australia in the WorkChoices era and under the current Fair Work Act system, and observed that there was ‘very little difference in wage outcomes between these eras.’ He further stated:

‘It does not seem that there is economy wide evidence that the shift from Work Choices to Fair Work has affected the rate of wage inflation.’

He also compared the disparate unfair dismissal laws under WorkChoices, which made it more difficult to dismiss workers compared with the current system. Mr Jeff Borland considered statistics which compared the flow from employment under WorkChoices with the flow from employment under the Fair Work Act. On an analysis of the data, Mr Borland argued that there was little difference between the outcomes of the two systems.¹²

Radically changing the WR system may not be the panacea for the repair of any perceived defects in the current system. Fundamentally, changing policies in the current WR system is unlikely to result in widespread economic benefits, but being able to improve productivity may be a more achievable objective. In his article, “Does Industrial Relations Policy Affect productivity?” David Peetz writes:¹³

‘IR policy often appears aimed at more objectives than it can meet. With few exceptions, it has much more of an impact in the long run on fairness, however defined, than on economic performance. If claims are made that a particular industrial relations policy is going to have very large (positive or negative) consequences for economic performance, such claims should be examined sceptically, as there is a reasonable probability that the effects may be small, even non-existent, or perhaps the opposite of what is claimed.’

The factors that will assist in productivity growth in all industries will include acquiring and utilising the skills of qualified personnel; increasing technology and research; improving resource allocation; and increasing competition. Having a well-developed human resources system in place, or at least having access to a substantial support system, will contribute to fostering productivity development.

⁸ Australian Bureau of Statistics- 6345.0 Wage Price Index December 2014

⁹ Australian Bureau of Statistics-6202.0 Labour force Australia January 2015

¹⁰ Australian Bureau of Statistics -6416.0 Consumer price Index Australia 2015

¹¹ “Industrial Relations Reform: Chasing a pot of gold at the end of the rainbow?” Jeff Borland, Department of Economics University of Melbourne –Lecture given at the University of Melbourne on March 19th 2012 as retuning Visiting Professor of Australian Studies at Harvard University.

¹² Supra page 7 and Diagrams 8 and 9 (page 19)

¹³ Does Industrial Relations Policy affect Productivity? ”David Peetz Department of Employment Relations and Human Resources Griffith University ABL Vol 38 No 4 2012 PP 268 292 (page 269

In January 2015 the Fair Work Commission released the Australian Workplace Relations Study ('the AWRS Study') into the structure and operations of Australian workplaces since 1995.¹⁴ The data was collected from 3,050 enterprises across approximately 8,000 employees. One aspect of the report was to consider the level of productivity in these workplaces. The Report's results indicate labour productivity measurement at the enterprise level. According to the sample taken 69 per cent of workplaces had measured productivity in the workplace and one in ten enterprises indicated that workforce productivity in the last financial year was higher than the previous year. The report did not indicate the level or effectiveness of these productivity levels, although it does indicate the varying levels at which employers are engaging with employees, which demonstrates that sound employment practices and communication with staff will go a long way to increasing productivity.

In the independent supermarket industry, which largely consists of small to medium sized businesses, there is mixed reliance on enterprise agreements and the award system, with a tendency to rely more on the award system. Although the majority endeavour to pursue worker-friendly practices, opportunities to be innovative in a dominated business environment where competition is constantly hampered will result in lower productivity. Many independent retailers struggle to survive in an industry that is dominated by big business. If amended competition laws relieve the pressure that many smaller supermarket businesses are currently experiencing, in a context where survival is the uppermost consideration at present, there is likely to be increased productivity in the retail industry in this sector. The Independent supermarket sector is currently awaiting the outcome of the Harper Review Committee's findings.¹⁵ If there are any changes to competition laws as a result of the Harper Review, it is hoped there will be significant growth in the productivity levels of independent supermarkets as a result.

Currently in Australia there is low growth in annual wages and the unemployment rate is continuing to rise. In 2010 the Global Financial Crisis slowed down wages demand and the high dollar contributed to the decrease in the price of imports. Now with unemployment at an increasingly higher level, the growth in real wages will continue to remain weak. Now as our currency is weakening and inflation is decreasing, this does not lend itself economically to promoting significant change to the WR system. That does not necessarily mean that there cannot be positive steps taken towards some WR reforms that will foster economic growth, but to consider any significant changes to the WR system, MGA/LRA submits, should be avoided.

6. THE PRODUCTIVITY COMMISSION PAPER 2

National Employment Standards

MGA/LRA submits that the National Employment Standards ('NES') have provided stability and a working foundation for both employers and employees. At this stage MGA/LRA does not propose to make any suggested changes to the NES.

The Award system and flexibility

The award system grew out of years of negotiation between employer associations and trade unions, overseen by the independent umpire in the form of an Industrial Commission. It established a unique set of employment rules that sat alongside various acts of Parliament, both State and Federal.

¹⁴ Fair Work Commission Australian Workplace Relations Study – First Findings Report :Pay Equity Unit Fair Work Commission 28 January 2015

¹⁵ Harper Review -Competition Policy Review Australian Government 2014

However, over the years as awards were amended and restructured, they became, in most cases, complicated and confusing. When the modern award system was developed, it provided greater clarity and guidance. There are many critics of the modern award system, but it offers definitive guidelines and provided that there is a mechanism to monitor the interpretation of an award, which is either conducted by the FWO or by the FWC, then once a degree of familiarity is established by an employer or through an employer association, it becomes relatively simple and represents a vast improvement on the pre- modern award era. For those who work with a particular award, the current system is an improvement on previous awards, but there are aspects of the General Retail Industry Award ('GRIA') in particular, such as the reduction in penalty rates, that need to be addressed.

Award modernisation was a major step forward for many small businesses because with it came the simplification of many outdated and complicated clauses that had developed over years of amendments and additional clauses. Although, with the current four year review there are a number of applications to insert new clauses or redraft others which have the potential to return to a less practical and plain system that was originally established in 2010.

In the independent grocery and liquor retail sector there is a heavy reliance on the award system, in particular, the GRIA. Whilst statistics in issues Paper 1¹⁶ show there is a downturn in award-only contracts this is not the case for most small to medium supermarkets and liquor outlets in this sector of the retail industry. A significant number of independent supermarkets and liquor stores operate their businesses over 7 days and the businesses that operate in regional and rural areas have a greater reliance on the award than those based in the city. They also tend to be medium to small organisations. The composition of award-reliant employees tends to have a higher proportion of females, and a significantly higher number of casual employees are both female and male.¹⁷ The retail industry has one of the highest numbers of award-reliant employees as compared with other non-public sector industries.¹⁸ In 2012, 25.6 per cent of retail employees were subject to the GRIA which was 9.5 per cent higher than the average across all industries.¹⁹

The reliance on the GRIA in independent supermarkets is due to the reluctance of these businesses to consider an enterprise agreement. The benefits of having an enterprise agreement have been pointed out to retailers on many occasions, such as the opportunity to insert clauses in an agreement that enable opportunities to establish better workplaces; opportunities to be more flexible; and to offer incentives to enhance productivity. The reason for the reluctance stems from the constraints of the "better off overall test" ('the BOOT'). The primary concern for small to medium retailers is wages costs and therefore these businesses regard the Award as a stable starting point for their enterprise.

The independent retail sector operates on a 7 day working week with what is currently considered to be a high Sunday penalty rate of 100 per cent. In the negotiation process for an enterprise agreement, trying to lower the Sunday penalty to about 50 per cent means providing for other benefits in the agreement as part of the BOOT;²⁰ generally by increasing the ordinary hourly rate. Retailers see this as a burdensome barrier to agreement-making and therefore they prefer to meet the basic requirements that are found in the GRIA. Whilst altering rostering provisions and eliminating leave loading are often presented as opportunities to negotiate favourable terms and conditions in an agreement, smaller businesses often find it difficult to adjust their base wage rate to comply with the

¹⁶ Productivity Commission Workplace Relations Framework issues paper 1 – The inquiry in context Jan 2015 p 11

¹⁷ Award reliance FWC Research Report 6/2013 Workplace Research Centre, Sydney University Page 16

¹⁸ Ibid p17

¹⁹ Productivity Commission Economic Structure and Performance of the Australian Retail Industry Report No 56 Canberra 2011 p 313

²⁰ Fair Work Act Section 193(1)

requirements of the BOOT. It raises the question as to whether it is necessary to have the BOOT. If an employer and employee want to reach an individual agreement on a specific issue, is there any reason why there cannot be a “trade-off” without either party being seriously disadvantaged? For example if an employee wishes to work overtime at the ordinary hourly rate and the employer has the available hours but cannot afford the additional overtime penalty then the parties should be able to make an agreement to that effect. Currently, the GRIA states that a casual employee must work a minimum of 3 hours. There are often situations where an employee will request work for 2 hours but the constraints of the award require in the employer to pay for 3 hours in spite of both parties mutually wishing to agree to 2 hours work. There is no flexibility in the GRIA to permit such an arrangement. The agreement would be based on its being mutually beneficial to the parties and the award should be sufficiently flexible to allow this and similar situations to be addressed.

That is not to say that some independent retailers do not favour the agreement making process and there are agreements where they have managed to negotiate agreements that have decreased Sunday penalties, albeit with a higher hourly rate, but they are usually larger employers who can adapt their rostering times or include clauses that are seen as an added value for their employees. However, there is one large independent retailer that has adopted the GRIA across a large number of stores nationwide and has found that it is best suited to its current needs and finds that it functions adequately for their requirements.

Whilst the implementation of the GRIA in 2010 has not been without some difficulties in respect of adjusting to the new system, retailers appear to have found it a relatively workable document. It was inevitable that there would be some hurdles in the implementation of the modern award but compared with some continual issues of interpretation in the previous State awards, adapting to the new one has been comparatively easy.

Penalty rates

In its considerations for assessing policy proposals the Commission has called for suggestions as to how the economy might be improved by policy changes. MGA/LRA submits that the penalty rates system in Australia is currently restricting the ability to grow small independent businesses. At a time when unemployment is continuing to rise (6.5 per cent ABS Feb 2015)²¹ employers are restricted in their ability to offer employment because they simply cannot afford to pay the penalty rates that exist in the current award system. In this submission MGA/LRA will focus mainly on the Sunday penalty and will briefly address the reasons why these penalty rates considerations need to be a high priority for this inquiry, including the economic effects, and whether they affect the prices of goods. We will also consider how Sunday penalty rates are used in overseas jurisdictions.

In his article “Paying the penalty-the High Price of Penalty Rates in Australian Restaurant”²², Phil Lewis refers to the concept of penalty rates payments, particularly on Sunday, as one that evolved in Australia from the introduction of payment for working unsociable hours in a decision of the Commonwealth Court of Conciliation and Arbitration in 1919. He refers to the decision as saying that the loss of Sunday as a time that should be devoted to family, social and religious activities was regarded as worthy of compensation. The consequence was to provide a higher hourly rate for this inconvenience. The payment of the additional Sunday penalty through an award has become firmly embedded as part of our industrial relations system and even though there is evidence to show that our societal values have changed over decades the Sunday penalty rate remains deeply entrenched.

²¹ Australian Bureau of Statistics Labour Force Australia January 2015 released February 12th 2015

²² Paying the Penalty “The high price of penalty rates in Australian restaurants” University of Canberra.

There is no longer the same level of emphasis on church attendance and today a significant part of our Sunday leisure time is spent in recreational/sporting activities but a significant part is spent in pursuing activities involving audio/visual media interests.²³ These leisure pursuits, particularly in respect of electronic media, are increasingly taking up the time of the average Australian.

However, original reasons for the introduction of the Sunday penalty are still regarded by some sources as sound reasons for its retention, in addition to the fact that it would be, in their opinion, economically disastrous to reduce the penalty rate. The Shop, Distributive and Allied Employees' Association ('the SDA') is a strong opponent of any attempt to reduce the current Sunday penalty rate from 100 per cent to 50 per cent. In a recent paper the SDA argues that Sunday is still a "family day" and that any reduction in penalty rates will not create more jobs and in fact it would simply be a mechanism to take away an opportunity to earn a few extra dollars from those who are amongst one of the lowest paid industrial sectors.²⁴

Conversely, there have been numerous calls for changes to the penalty rate system calling for, at a minimum, the reduction from 100 per cent on Sundays to at least 50 per cent on the basis that society has changed, we are a seven day society and in the retail industry in particular, Sunday work is no different to any other day of the week. In 2012 A Senate Standing Committee²⁵ examined the proposed amendments to the Fair Work Act in 2012 and examined the issue of whether the rationale for penalty rates was largely outdated as claimed by the Australian Chamber of Commerce and Industry (ACCI) in its submission:²⁶

'Typically awards have adopted a series of penalty rates which compensate employees for working unsociable hours. This original justification for a high penalty rate regime has limited foundation, with the advent of fundamental changes in our society, particularly in the retail and restaurant sectors. Despite this reality, a number of modern awards have adopted a more restrictive span of ordinary hours, that is, hours where employers are not required to pay higher rates, and maintained higher penalty rates. These penalties rates are a deterrent to operating outside of the designated ordinary hours and where penalties have increased under the new modern award this has threatened the viability of business, the majority of them in the small to medium enterprises in the services sector...'

This extract was then followed by the ensuing employer quote from a survey undertaken by ACCI:²⁷

'I still do not understand how we can move to seven day trading and still have penalties. Surely any hour of the day should be an hourly rate. Sure if staff work over a sensible number of hours overtime should be paid not simply because it is a Sunday – many of our part time and casual staff can only work weekends so in fact there is no penalty. We open to provide a service in a remote area and at best break even. Further we try to employ pharmacy students and school students to give them experience but this gets challenging when wages have penalties attached as well. It defeats the purpose.'

MGA/LRA endorses this last quote as a typical response from small retailers in the independent supermarkets and liquor stores around Australia. The impact of high penalties continues to affect the

²³ "How Australians use their time" 4153 released 21/2/2008

²⁴ "There can be no winners in the race to the bottom on wages" Peter Malinauskas SDA Secretary 2014

²⁵ Senate Standing Committee 2012 Education Employment and Workplace Relations Committee : Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012

²⁶ Australian Chamber of Commerce and Industry Submission 106 page 10 to Senate Standing Committee 2012. : Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012 Page

²⁷ Ibid page 10

livelihoods of many small retailers. In some areas stores only open on Sunday if they self- operate the business or use family members as labour. This naturally impacts on their lives and the lives of their families. Some retailers prefer not to open their businesses at all on Sunday. This has a serious impact on employment because if the cost of labour is too high and jobs are not available then ultimately both employees and employers will suffer losses.

The penalty rates debate is not new, it has been raging for several years and determining whether to impose or maintain a penalty and the mechanism for doing so is bound to meet with the strong opposing opinions of interested parties. The Commission proposes consideration of either a regulated system of penalty rates setting, or alternatively the adoption of a less regulatory system, that would enable employers and employees to make their own decisions in regard to the application of penalty rates. This would allow variations to penalty rates according to market needs and the specific industry.

There is a persistent cry that retail is driven by consumer demand and this has resulted in the extension of trading hours in Australian jurisdictions over the last twenty years, and in most parts of Australia, retailers open their doors for trade on Sunday. The consequence of wanting to trade on Sunday means there is a demand for labour. A retailer may have a sufficient number of full time and part time workers for the Monday to Saturday trade but may find that the need to employ more weekend staff to cope with an increased number of Sunday shoppers, who want the store to open on Sunday. The retailer naturally wants the benefits of the potential profits and is also aware of the need to service the community. To fill the employment need most retailers will look to employing casual labour, with either juniors or students as the main targets. Students are usually the objective of the required labour and are attractive because they are likely to be flexible in the hours they are prepared to work. Women, who are often unable to work during the week because of family commitments, are also generally available at weekends when their partners are free to provide child care.²⁸ So there is a ready supply of labour but at what cost? Who determines the value of work that is performed at allegedly “unsociable hours”? The FWC is currently the authority charged with this responsibility and as the FWC has assumed this role over decades and previous attempts to allow employers and employees to determine their own penalties, as in WorkChoices, the likelihood of deregulated approach to determining penalty rates is unlikely.

The question posed in this Inquiry as to whether a regulated penalty rate system is preferable to an unregulated one is a question that has been tested in Australia in the last decade. As a representative of employers MGA/LRA would support an unregulated system but realistically, the removal of the FWC in the immediate future as the arbiter of “fairness” when considering penalty rates is unlikely. We submit that freedom for two parties to negotiate their own contractual terms is a right that should be available to all Australians. It is suggested that parties should be able, to negotiate what they consider to be fair to suit their own needs in the first instance, and then to seek the compulsory guidance of a third party, in the person of a Commissioner within the WR system, who could ensure that no group or person, who might be perceived as vulnerable, is disadvantaged. However, the sceptre of WorkChoices still runs deeply in the minds of those who regarded that system as unfair and to simply allow contracting out of the current award system is an improbable scenario in the immediate future. Australia is a long way from deregulation to the extent that the parties will achieve total freedom to determine their own rules.

At the present time the FWC has set a penalty of 100 per cent on Sunday for all age groups employed under the GRIA. Despite recent consideration by the Fair Work Commission to reduce penalty rates,

²⁸ Supra 4 page 14

the FWC regarded the evidence to reduce penalty rates as not sufficiently compelling.²⁹ Recently a second application was made to the FWC by retail industry associations to reduce the Sunday penalty rate by 50 per cent.³⁰ According to Phil Lewis³¹ businesses would benefit from reductions in penalty rates, he said:

Businesses would increase turnover and would be better able to manage in a more efficient way. There would be more employment as turnover increased. There would be greater choice of shifts. There would be more employment opportunities for the unemployed. For many employees although their wage rate would fall they would receive higher total earnings since the potential to work a greater number of hours would increase.

All industrial parties who have an interest in either the reduction or retention of penalty rates would be focussed on the need to increase productivity. Keeping jobs available and increasing job opportunities is obviously a priority whether there is support for a regulated system or not.

In 2013 there was a proposal by the then Federal Labour Government to enshrine penalty rates in the Fair Work Act. The Prime Minister at the time, Ms Julia Gillard, in an address to the Australian Council of Trade Unions flagged the proposal to insert a new modern award objective into the Fair Work Act to protect penalty rates.³² This proposal was applauded by trade unions and condemned by employers. It caused a wave of opposition from employers who had long been fighting for either the abolition of penalty rates or at least their reduction. The experiences of the so called “WorkChoices system”³³ still weighed heavily on the minds of trade unions and employees and hence this proposal to ensure the protection of penalties in law was seen as the antithesis of the amended laws that were introduced in March 2006. The Fair Work Act was not amended to provide for the inclusion of a “penalty clause” at that time.

Sunday penalty rates provisions in other countries provide interesting comparisons with Australia. There are non-regulated or minimally regulated systems for determining Sunday penalties in the United Kingdom. The employer and the employee determine the terms and conditions for working on Sunday using their own contractual arrangement.³⁴ There is no law or award, similar to the Australian award system that governs working on Sunday in the United Kingdom. Sunday in the UK retail industry is no different to working on any other day. There are rules around whether an employee can be compelled to work on Sunday but the system otherwise is not regulated to the extent that applies in Australia.

In Europe a similar system of payment for work on Sunday exists as in the United Kingdom. The European Parliament encourages all European states to respect the rights on workers not to work on Sunday on a regular basis. Members of the European Parliament have taken a pledge to promote a day of rest during the working week which “in principle will be Sunday.”³⁵ However, with respect to payment for work on Sunday in European countries it is mainly left to the contractual arrangement between the employer and employee, although some countries do provide statutory compensation for work on a rest day. However, it may be that Sunday in the retail industry is not always the “rest

²⁹ Fair Work Commission Award Modernisation (interim review) 2012 Application to reduce Sunday penalty rates in the General Retail Industry award.

³⁰ Application to reduce Sunday penalty rates by ARA, MGA, NRA Award Modernisation Four year review 2015

³¹ The Conversation “Viewpoint: Should penalty rates be abolished? Phil Lewis and Bill Mitchell 19 February 2014

³² Address by Prime Minister, Julia Gillard to the ACTU Canberra March 13th 2013

³³ Amendments to the Workplace Relations Act 1996

³⁴ Gov. UK-- Sunday working

³⁵ European Sunday Alliance – Pledge for a work free Sunday and decent work” 2014

day". In the Productivity Commission Research Report in September 2014, reference was made to the payment of penalty rates for Sunday work:³⁶

'The information for most jurisdictions is based on the statutory provisions contained in the ILO legal data base applying to compensation for work undertaken on rest days and /or public holidays and is not retail specific. The level of compensation may vary due to state or provincial legislation or through the use of collective agreements.'

There is almost no compensation for working on Sunday in any states in the USA or New Zealand. There is evidence that supports the less restrictive industrial relations system in New Zealand as a cheaper and more attractive system for employers, where penalties and wages are lower. Economic factors have caused many businesses to move to New Zealand from Australia. In 2011 the restructure of Heinz Ltd caused the loss of 330 jobs across its Australian factories and the company cited the cost of labour and restrictive labour laws as major factors for the move.³⁷ The managing director of Simplot Australia, a food processing company, said in 2013 when the plant moved from Tasmania to New Zealand that penalty rates were a major factor in the move. He was quoted as saying:³⁸

'...a base rate of pay of \$60,000 a year could leap to \$100,000 a year when overtime, payroll and penalties were included.'

Mr Bill English the Finance Minister in New Zealand said that his country benefitted from, "a more flexible industrial relations environment"³⁹

The Australian award system of providing for penalty rates on Sundays is highly regulated compared with other countries and although the proposal to enact legislation to regulate penalty rates in 2013 in Australia did not eventuate the prospect of further regulation of penalties by statute remains a possibility. The current system of a regulated penalty system has become embedded in Australia. MGA/LRA has a particular focus on the small independent retail business sector and recognises the need to retain a form of regulation that may provide compensation to those who work during what may still be regarded as "unsociable hours" but, at the same time providing an opportunity for small business owners to operate in a consumers world, that requires them to service the community needs over a seven day period, with longer hours of trade. MGA/LRA submits that a regulated system has the advantage of providing clear guidelines to a small retailer who may not have the necessary skills or the time to negotiate appropriate penalty rates with an individual employee. Most retailers are not concerned about reducing penalty rates to unreasonable levels they are more concerned with having penalty rates that enable them to operate their businesses efficiently and profitably.

In respect of penalty rates payable in the GRIA MGA/LRA supports the reduction in the payment of penalty rates for work on Sunday from 100 per cent to 50 per cent.

6. THE PRODUCTIVITY COMMISSION PAPER 3

Increasing productivity in Australian workplaces is obviously an important aspect of any WR system and the development of agreements that lend themselves to increasing workplace productivity should be a focus for all Australian workplaces. Helping employers to understand what can be

³⁶ Productivity Commission Research Report "Relative costs of doing business in Australia : Retail trade September 2014 Page 96

³⁷ "Australian jobs on the move to NZ "Sydney Morning Herald Madeleine Heffernan April 18th 2012

³⁸ Supra note 20

³⁹ Supra note 20

achieved by promoting productivity in workplace agreements would be welcomed by small and medium sized businesses. There is therefore merit in the proposed amendment to the Fair Work Act.

Section 3 of the Fair Work Act 2009 refers to the role of the FWC as

“providing a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.

To further promote productive workplaces the Australian Government recently proposed an amendment to the Fair Work Act that would, if enacted, require that the Fair Work Commission is satisfied that parties to a bargaining discussion would take account of productivity before approving an agreement.⁴⁰ In 1999 the Productivity Commission developed a framework of factors affecting productivity and it examined the influences and factors that influenced the immediate causes of productivity growth.⁴¹ The proximate causes include, inter alia, accumulation of human and physical capital, research and development, management practices, resource allocation and firm / plant turnover.⁴² After examining the impact of these reasons it was concluded from the study that effective human resource management, employee development, new technologies and efficient workplace practices were determinants of increased productivity. The same Future Directions Initiative also lists focussed management practices and competition as ways of encouraging increased productivity through the agreement making process.⁴³ How to incorporate such factors into enterprises and into enterprise agreements presents challenges for smaller businesses.

The Future Directions Report⁴⁴ examined number of clauses that were placed into enterprise agreements as a means of encouraging or increasing productivity, based on the views of the parties to the agreements which had been deliberately designed to boost innovation or productivity. Of the nine clauses that were taken from the same number of agreements, all of which could readily and easily meet the aims of the designers, all were from very large businesses.

The problems faced by small independent businesses are the lack the human resources or the finances to be innovative. That is not to say that many small businesses have not developed a number of commendable clauses in agreements that assist their employees, but they are sparse. It is not necessarily the lack of innovation that holds back small to medium sized businesses, and there are millions of them, it is funding, time and the biggest barrier to making an agreement and that is the BOOT. Placing greater emphasis on providing government assistance to small businesses to be move away from the award to making innovative agreements would be helpful in overcoming the perceived barriers.

7. THE PRODUCTIVITY COMMISSION PAPER 4

Unfair Dismissal

Unfair dismissal laws in Australia are the bane of most employers' lives. Some employers never have the experience of an employee lodging an unfair dismissal claim but applications are becoming more frequent in Australia mainly due to the ease of access to the unfair dismissal jurisdiction under the

⁴⁰ Fair Work Amendment Act (bargaining processes) Bill2014 Item 1of Schedule1

⁴¹ Future Directions 2014- 15 Initiative 29 –Fair Work Commission- “Productivity and innovation in enterprise agreement clauses: an overview of literature, data and case studies at the workplace level.” Para 1.2.1 page 10

⁴² Supra page 11

⁴³ Supra page 14

⁴⁴ Supra page 25

Fair Work Act, and the procedures that have been adopted in the Fair Work Commission. The FWC stated in its Annual Report in 2013-2014 that unfair dismissal matters are a substantial part of the Commission's annual workload and they represent almost 40 per cent of applications made to the Commission.⁴⁵ The same report indicates that employees have relatively easy access to the information required in the event of an alleged unfair dismissal and applicants have found the process a relatively simple and supportive one.⁴⁶

The Fair Work Act provides that harsh, unjust and unreasonable termination of employment⁴⁷ will, subject to the status and length of employment of the dismissed employee,⁴⁸ enable an action to be taken against an employer. Factors such as proper procedures being followed by the employer will have a strong impact on the outcome of the proceedings.⁴⁹ Whilst it is recognised that many employers ignore, or are not aware of the need to follow correct warning procedures when addressing problem employees, there are many cases where employers have followed the correct procedures and yet the employee lodges an erroneous application. If there was a screening process of applications available by the Fair Work Commission it would be possible to eliminate the burden of employers having to proceed to an unfair dismissal conciliation conference and still having to pay a settlement.

The Fair Work Act provides for a conciliation process to enable a speedy resolution between the parties, which is followed by litigation in the event that this initial procedure is unsuccessful. However of the 15000 applications for unfair dismissal that were made in the year 2013- 2014 almost 11,000 were resolved at the conciliation stage.⁵⁰ Whilst applications for unfair dismissal are relatively high the speedy resolution at conciliation invariably involves a monetary settlement. This does not necessarily indicate that the compensation amounts paid are not always justified but, in many cases the complaint by employers is that it constitutes "go away money" remains dominant. In the majority of cases an employer who has the fear of a high cost court case looming will choose to pay an amount of money to an employee in order to reach a resolution in spite of money not always being justified.

The Act contains the Small Business Fair Dismissal Code⁵¹ ('the Code') that was designed to protect the interests, as the title suggests, of "small business". This enables summary dismissal to be carried out in the event of serious misconduct and provides a recommended process for termination provided there is a valid reason. The procedure is set out in a recommended document designed for small businesses which must be available to the Fair Work Commission in the event of a termination. The difficulty with the successful application of this Code is that many businesses that are relatively "small" do not satisfy the definition of a "small business"⁵² provided in the Act. Section 23 defines a "small business as one with fewer than 15 employees".

A recent example was a claim by a casual employee that she had been unfairly dismissed and the employer at the time of the dismissal had 16 casuals, most of them under 18 working a few shifts regularly, was unable to utilise the Code as the business was not recognised as "small" within the meaning of the Act. Businesses that have numbers of employees as high as 45 using mainly casual

⁴⁵ Fair Work Commission Annual Report 2013-2014 Page 46

⁴⁶ Supra pages 15-16

⁴⁷ Fair Work Act 2009 Section 385(b)

⁴⁸ Supra Sections 382, 383, 384

⁴⁹ Supra section 387

⁵⁰ Ibid (note 24 page 48

⁵¹ Small Business fair Dismissal Code Fair Work Act 2009 [388(1)]

⁵² Fair Work Act 2009 section 23.

employees are not large businesses and should not be categorised as such. The legislation does not therefore protect “small businesses” in this regard.

The definition of a small business under the former Workplace Relations Act 1996 provided that an application for relief for unfair dismissal could not be made if at the time of the dismissal the employer employed 100 employees or less.⁵³ A large proportion of businesses were therefore excluded from the unfair dismissal jurisdiction and this clause has been the basis of debate for some time. The concept of what constitutes a “small business” varies not only between countries, but also in federal laws. As previously stated, in the Fair Work Act the definition is less than 15 employees, but the Bureau of Statistics defines a small business as 20 employees. In Asia a small business has less than 50 employees and in the USA the number is 500 employees.⁵⁴ One of the questions that can be pondered in relation to defining the definition of a small business is whether “size” can be determined according to wages or turnover as relevant factors.

It should be noted that an independent supermarket, or a small retail shop, is vastly different in structure to most other types of “small “businesses”. As an example, a singly owned supermarket may operate for 98 hours a week across seven days (14 hours x 7 days), this could be longer if the store trades until 11 pm. This may require upwards of 10 staff to operate the store each day, working shifts of approximately 4 to 6 hours a day at varying times, even only a few days in each week. Therefore, the actual number of employees employed in one week could easily be in as high as, or more than, 50 in one week over that period. So the actual number of employees, “on the books” is not necessarily a fair indicator of what constitutes a “small business”. These figures show that limiting the size of a “small business” to less than 15 employees is not a realistic figure.

MGA/LRA submits that consideration should be given to amending the definition of a small business within the Act to provide for an increase in the number of employees required to constitute a small business. Whilst the use of 100 employees or less as the exclusionary figure from unfair dismissal laws might be regarded as too high, consideration should be given to a number such as 40 employees and an amendment to the Act to this effect considered.

Currently, in the event that an employee does not seek reinstatement after making a successful application for unfair dismissal or the Commission considers reinstatement inappropriate, the employee is entitled to a payment of up to a maximum of six months wages by way of compensation. The Commission then has the benefit of exercising its discretion as to what is appropriate taking into account all the circumstances of the claim and assessing the criteria for determining compensation in the Act.⁵⁵ This at least provides guidelines for compensation that will be considered if a finding is made in an applicant’s favour. If the cap was lifted it could lead to massive compensation payments and result in extreme hardship for some employers. MGA submits that the cap should be retained at the present time.

The main source of the cost of an unfair dismissal claim is the impact that it has on the business operations. A major financial burden is placed on the employer personally and other employees where they become implicated in the application. The cost of having other personnel, such as managers and other employees involved even at the preparation stage erodes productivity, and becomes more expensive if the matter proceeds beyond conciliation. One way of reducing cost was previously mentioned and that is to adopt a screening process when the application is lodged. If the

⁵³ Workplace Relations Act 1996 section 643(10)

⁵⁴ The Conversation – April 2012 Tim Mazzarol

⁵⁵ The Fair Work Act 2009 Section 392(2)

matter proceeds beyond conciliation then prior to the Arbitration there should be a further pre-arbitration hearing, before a Commissioner to consider a resolution.

In respect of the likely success of a claim there is a need for continued widespread employer education. There has been considerable work undertaken by various organisations which provide advice on how to avoid unfair dismissals, including government agencies and industrial organisations. However, despite these efforts there remains a lack of ignorance as to the correct procedures that should be followed. This is frequently evident during conciliation conferences where Conciliators explain why an application might not be successfully defended in an arbitration hearing. The question as to the main grounds on which people assert unfair dismissal is the failure of many employers to understand what is referred to as “procedural fairness”. The Act provides criteria that have to be followed including whether the dismissal is “harsh, unjust or unreasonable, whether there is a “valid reason” for the termination and the procedure that was followed at the time of the dismissal. There is a wide lack of understanding on what these terms mean or what is involved. The old adage of “3 strikes- you’re out” still resounds with many employers but there still remains a glaring absence of the finer points needed to constitute a fair termination. The claims that are likely to succeed are those where the key element of fairness is absent in the process.

This Issues paper asks the question whether there are any comparisons or beneficial information that can be gained from overseas experiences in respect of unfair termination of employment.

In the United Kingdom the law⁵⁶ states that a period of twelve months continuous employment is required before an application for unfair dismissal can be lodged, whereas under current Australian law a period of only six months applies for businesses over 15 employees. In New Zealand⁵⁷ there is no period of continuous employment unless a defined “probationary period” is specified in the contract of employment. In Canada there is no statutory protection for most employees and they rely on common law protection where they are who are able to make a claim a breach of good faith. However, the Canada Labour Code exists to protect workers in “federal work “which includes parliament, maritime, banks or work associated with federal laws. There are also some provincial laws that afford protection to workers. In the United States there is limited protection for employees, although again a written contract will afford protection against unfair termination but, most contracts are defined in employment as “contracts at will” which permit an employer to terminate an employee for any reason at all. In Germany the “Protection Against Unfair Dismissal Act” and a German Civil Code exists to provide protection against unfair dismissal and a dismissal is considered unfair unless it is justified by the employee’s behaviour. In Germany an aggrieved employee is able to lodge a summons for breach of contract in a local Labour Court or a Civil Court. In France termination of employment is regulated by the Labor Code⁵⁸, by agreement making and case law. The Labor Code contains such provisions as collective agreements, in house agreements, rules for a company and a copy of the employment contract. An employer in France must have a justifiable reason for termination of employment and if an employer has in excess of 20 employees there are Regulations that will control the employment relationship. An employer needs to follow a set procedure prior to termination and there are criteria that determine the types of conduct that warrant dismissal.

There appear to be variations in how countries approach termination of employment. There is emphasis in most European countries and in the UK on providing a litigious path for employees, with varying types of legal processes and there is also a heavy emphasis on the contractual relationship

⁵⁶ The Employment Rights Act 1996 (UK)

⁵⁷ Employment Relations Act 2000 (NZ)SS67(a) and (b)

⁵⁸ Labor Code (Code du Travail) May 1 2008

between the employer and employee. Most jurisdictions have specific labour courts to deal with termination issues. However, in the USA and Canada the laws seem to be less regulated.

On a comparative basis Australian unfair dismissal laws are highly regulated. There is also some emphasis placed on the terms of the contractual arrangement that is made between the parties at the time of employment which can override what is contained in the Act. Compared with the UK model, our WR system provides shorter period for employees to qualify for lodging an unfair dismissal claim, except for businesses with less than 15 employees. In the United Kingdom an employee must be employed for a minimum period of 12 months before making a claim for unfair dismissal, irrespective of the size of the business. MGA/LRA submits that the adoption of a 12 months qualifying employment period before being able to make an application for unfair dismissal would be an appropriate amendment to the Fair Work Act. Furthermore, consideration needs to be given to reducing the number of employees required to constitute a small business, which particularly for the purposes of unfair dismissal should be increased to 40 employees.

Bullying

The Inquiry raises the question as to the utilisation rates of the anti- bullying provisions and the factors likely to affect the rates and the effectiveness of the anti-bullying measures.

The anti-bullying jurisdiction has not had the anticipated high number of complaints that were expected when the laws were passed in 2013. In fact the figures revealed in the quarterly reviews released by the Fair Work Commission⁵⁹ in 2014 reveal approximately 680 applications in the period since the commencement of the anti-bullying laws.⁶⁰

If an employee believes he or she has been bullied at work then the employee has several options, apart from adopting a process of consultation and reporting to management and resolving the problem internally in accordance with the workplace policy. The employee can complain the FWC by utilising the anti- bullying provisions of the Fair Work Act or lodging a WorkCover claim pursuant to the relevant State or territory workers compensations laws. In most cases the employee will pursue the WorkCover claim.

The complaint numbers that have been revealed by the FWC make it very clear that this area of the Fair Work Act is being under- utilised. A suggested reason is that if an employee is allegedly being bullied, then the employee is more likely, from a rehabilitative perspective, to make a claim for workers compensation.

There have been benefits in having the new anti-bullying laws in respect of having a clear definition of the meaning of bullying conduct,⁶¹ more employers adopting policies and procedures to avert or eliminate bullying in the workplace and having procedures in place to address the problem in the FWC. However, there is no provision for monetary recompense and if an employee feels that their health has been affected they are more likely to seek an alternative assistance that provides more practical support.

The “anti- bullying” jurisdiction claims, even if relatively low and the increase in claims for workplace stress do highlight the increased need for emphasis on effective human resources facilities in all businesses both large and small. The better the availability of these facilities in workplaces, the greater the likelihood of increased productivity.

⁵⁹ Fair Work Commission- Quarterly Reviews- Anti- bullying 2014

⁶⁰ Fair Work Amendment Bill 2013 -Fair Work Act 2009

⁶¹ Ms.SB and Amie Mac v. Bank of Queensland Ltd (2015)FWC 774(13 February 2015)

CONCLUSION

The outcomes of the WR system are vital to the prosperity and productivity of all employers and employees in Australia. There is no doubt that there has been considerable dedicated time and energy devoted over decades to deliver the WR system as it stands today. MGA/LRA has pointed out in this submission that there are flaws in the system that need to be addressed, and there are opportunities to improve the system without necessarily committing to drastic reform measures.

It is in the particular areas of flexibility, unfair dismissals and penalty rates that MGA/LRA submits that independent retailers would especially like to see reform. It is our submission that these measures are not ones that require considerable change. They are areas which would enable retailers to employ more staff and encourage greater productivity that will deliver greater prosperity for Australia.

MGA/LRA thanks the Australian Government for this opportunity to make this submission on behalf of our members for the purposes of the Productivity Inquiry into the Workplace Relations Framework.

Jos de Bruin

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