



# PRODUCTIVITY COMMISSION REVIEW OF THE WORKPLACE RELATIONS FRAMEWORK

VECCI Submission





# ***Not Balanced, Not Effective***

**VECCI Submission to the  
Productivity Commission  
Review of the Workplace Relations  
Framework**

**March 2015**



## Who We Are

The Victorian Employers' Chamber of Commerce and Industry ("VECCI") is Victoria's leading and most influential employer group, servicing over 15,000 Victorian businesses every year. An independent, non-government body, VECCI was started by the business community to represent business. Our membership base is diverse, with involvement from all levels and sectors of industry including manufacturing; health and community; retail and distribution; resources and utilities; food and agribusiness; IT&T and media; managed services; education, business services, hospitality, infrastructure, construction and property; transport and logistics; retail and tourism.

VECCI's varied membership encompasses businesses from very small to very large, and includes that of the recently reinstituted Melbourne Chamber of Commerce, an entity which represents the interests of nearly 100 of Victoria's largest businesses and organisations and hundreds of thousands of employees nationally. VECCI also works in partnership with the Victoria Tourism Industry Council (VTIC), which represents the interests of over 700 members from the accommodation, attractions, destinations, events, tour and transport, and tourism services and hospitality sectors.

VECCI is a member of Australia's largest and most representative business advocate, the Australian Chamber of Commerce and Industry ("ACCI") which develops and advocates policies that are in the best interests of Australian business, the economy and the wider community.

## What We Do

VECCI are involved in every facet of industry and commerce across the State. Our role is to represent the interests of business at a State level as well as nationally. We act as a sounding board for government decision-making and as an instrument of strong advocacy. Our focus is clear – to lead business into the future, actively represent the needs of employers in a complex regulatory climate, and provide real business value.

The VECCI Workplace Relations Helpline provides VECCI members with relevant, up-to-date, independent and accurate advice on a range of workplace relations issues, including expert assistance with and interpretation of industrial instruments such as modern awards, performance management of employees and redundancies and employee entitlements.

The VECCI Workplace Relations Consulting team offers members professional, detailed advice and assistance. The VECCI Workplace Relations Consulting team – comprised of Industrial Relations, Occupational Health and Safety and Equality/Equal Opportunity specialists – offers a

complete service for members and regularly appears on behalf of members at courts and tribunals dealing with the spectrum of members' workplace relations issues, disputes and challenges under the Fair Work system.

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## REVIEW BACKGROUND

VECCI welcomes the opportunity to provide feedback to the Productivity Commission (“PC”) concerning its Review into the Australian Workplace Relations Framework (“Review”), and submits the following analysis and recommendations based on the experience of VECCI members impacted by operating under the present workplace relations framework.

VECCI notes on Thursday, 22 January 2015 the PC released five issues papers in which it confirmed the Australian Government had asked it to undertake a public inquiry to examine “*the performance of the workplace relations framework*” and identify “*improvements*” to it.

The five issues papers released by the PC provided further detail on the upcoming review and revealed the key areas which will be at the heart of the review, such as:

- The scope of the PC’s inquiry (“Issues Paper 1”);
- Safety nets, including the federal minimum wage, NES, modern awards and penalty rates (“Issues Paper 2”);
- Bargaining, industrial disputes and industrial action (“Issues Paper 3”);
- Employee protections, including unfair dismissal, General Protections and anti-bullying legislation (“Issues Paper 4”); and
- The efficiency and effectiveness of the WR systems institutions and framework (“Issues Paper 5”).

## EXECUTIVE SUMMARY

VECCI’s submission analyses six core concerns with the *Fair Work Act 2009* (Cth) that VECCI member businesses experience daily, resulting in difficulties for their operations, increased costs and compliance difficulties. These are broadly:

- Core Concern 1 - ‘Modern awards’ do not match or underpin a modern economy
- Core Concern 2 - Genuine, modern and flexible agreement-making options for business are needed, underpinned by a competitive and fair safety net of conditions
- Core Concern 3 – Unprotected industrial action must be discouraged
- Core Concern 4 – Lift the yoke of Unfair Dismissal from certain businesses;
- Core Concern 5 – General Protections claims – the nadir of the Fair Work system
- Core Concern 6 – Make the system simpler, fairer and more effective for business

In addition, VECCI highlights some other issues for consideration by the PC which require further assessment and review.

### ***Core Concern 1 - 'Modern awards' do not match or underpin a modern economy***

Concerning **modern awards**, it is difficult to reconcile the modern award system as a true minimum or 'safety net' it does not provide parity for employees doing the same occupation across different industries. Equally, many awards have 'minimum wage' coverage for classifications of employees with a minimum entitlement of over \$100,000 per annum,<sup>1</sup> with some going as high as \$158,000 per annum.<sup>2</sup>

Confusion reigns with many small businesses as to the proper application of the awards, and in many cases uncertainty as to the proper classification or award coverage. The intention of the modern awards was to provide a "simplification" of the State based Pre-modern awards, but has, in fact led to coverage and classification issues which are an unnecessary and time-consuming complication for businesses.

### ***Core Concern 2 - Genuine, modern and flexible agreement-making options for business, underpinned by a competitive and fair safety net of conditions***

In respect of **The Bargaining Framework**, our members are reporting a number of significant problems with a system containing little consideration for employers' needs and challenges in a difficult economic circumstances, whereby flexibility and the ability for them to effectively manage their workforce is pivotal. Our members are particularly concerned with:

- The ineffective operation of Individual Flexibility Agreements ("IFA"). Members report an overwhelming lack of familiarity and/or hesitance in implementing IFA's due to systemic issues including the narrow scope of matters altered, unilateral termination of the IFA at short notice, and inconsistency and uncertainty over the operation of the 'better off overall test' ("BOOT"). Furthermore, the current requirement for a flexibility clause in enterprise agreements, without specifying the minimum amount of flexibility to be included in the clause, is resulting in 'token' flexibility clauses that hamstring any 'true' flexibility being afforded to employers.

Additionally, our members are reporting a number of significant problems with a bargaining system containing little consideration for employers' needs and challenges in difficult economic circumstances and processes that are unwieldy. Of particular concern to our members are:

- Frustration with the time and effort involved unravelling the overly prescriptive and confusing procedural requirements under the FW Act for enterprise agreement bargaining and approval;

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<sup>1</sup> See, e.g. *Health Professionals and Support Services Award 2010*; *Port Authorities Award 2010*.

<sup>2</sup> *Air Pilots Award 2010*.

- The ‘matters pertaining’ doctrine relating to enterprise agreement content has been significantly eroded, primarily by the statutory wording of the FW Act and the Explanatory Memorandum,<sup>3</sup> resulting in an expansion of matters that are subject to negotiation and industrial action which otherwise has diminished management prerogative; and
- The current operation of ‘union-only Greenfields agreements’ is resulting in cost blowouts, delays to projects and results in an unbalanced negotiating advantage to unions whereby the knowledge of any delay in commencement will impact the enterprise adversely.

### ***Core Concern 3 – Unprotected industrial action must be discouraged***

Regarding **Industrial Action**, VECCI members have reported severe deficiencies in the operation of the principles regulating industrial action, namely:

- The Rise of Unprotected Industrial Action and Lawlessness in Victoria; and
- The ‘Strike First, Talk Later’ culture, and the ease obtaining Protected Action Ballot Orders, despite pursuing ‘non-permitted’ matters.

### ***Core Concern 4 – The Unfair Operation of the Unfair Dismissal Regime***

On **Unfair Dismissals**, VECCI members have encountered the following issues with the current system:

- A convoluted and expensive process for claims, including issues with the FWC process in which the FWC unfair dismissal claims are vetted, scheduled and heard; and
- The need to simplify and improve unfair dismissal laws through improvements for small business, simplifying the high-income threshold test and improving the test for ‘genuine redundancy’ dismissals.

### ***Core Concern 5 – ‘General Protections’ claims – the Nadir of the Fair Work System***

Regarding the operation of the **General Protections** provisions, our members report significant increases in costs and investment of considerable defending largely unmeritorious and frivolous claims. The current legislative scheme is flawed due to:

- The need to rescind or more tightly define the vague, unclear and ill-defined FW Act definitions; and
- A Biased, Anti-Employer Claims Process.

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<sup>3</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth).

***Core Concern 6 - Make the system simple and fairer and more effective for business***

Concerning the **Institutional Framework**, VECCI reports on some of its general experiences and calls for consistency and clarity for employers in applying the new legislation.

VECCI details its position in respect of these matters in the body of our submissions, supported by evidence and making detailed, specific and crucial recommendations on necessary reform.

## VECCI'S SUBMISSION

As Victoria's leading and most influential employer organisation, VECCI shares the experiences of business within the Workplace Relations Framework, drawing on our experience in the delivery of consulting and member services as well as specific witness statements and surveys. In the PC's Issues Paper 1 it states "*The prosperity of tomorrow is driven by what happens in our workplaces today and this is why it is in our national interest to make sure that the Fair Work laws are balanced and effective*". Thus, in considering this question, VECCI's response to the question 'are the Fair Work laws balanced and/or effective', the answer is sadly a resounding "no" on both counts.

### The Legislative Context

A principal focus of our submissions is the wording and operation of the *Fair Work Act 2009* (Cth) ("FW Act") which received Royal Assent on 8 April 2009. The FW Act provides the substantive detail to the so-called *Forward with Fairness* policy the Labor Government took to the 2007 federal election.<sup>4</sup>

The FW Act represented a substantial overhaul of the industrial relations legislative landscape, and is the fourth significant reformulation of Federal legislation in the past two decades.<sup>5</sup> The FW Act achieved its aim of dismantling the previous Coalition Government's 'Work Choices' industrial relations system, but went much further, imposing 'good faith bargaining' obligations on parties seeking to negotiate a collective agreement and vastly expanding the concept of unlawful terminations. The FW Act also expanded the minimum standards<sup>6</sup> of employment first encapsulated as statutory minimums in the post-Work Choices *Workplace Relations Act* ("WRA") in the form of the Australian Fair Pay & Conditions Standard ("AFPCS"); and overhauled both individual and collective bargaining arrangements.

### The Economic Context

This Review is being conducted at a time when businesses across the country are facing a challenging economic environment including such negative indicators as:

- Business confidence waning and economic growth flagging;

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<sup>4</sup> Kevin Rudd MP & Julia Gillard MP, *Forward With Fairness: Labor's plan for fairer and more productive Australian workplaces* (April 2007) Parliament of Australia <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fparty%2FWTWM6%22>>.

<sup>5</sup> *Industrial Relations Reform Act 1993* (Cth); *Workplace Relations and Other Legislation Amendment Act 1996* (Cth); *Workplace Relations Amendment (Work Choices) Act 1996* (Cth).

<sup>6</sup> *Fair Work Act 2009* (Cth) Part 2-2.

- Vast improvements in productivity bring required to maintain living standards; and
- Unemployment being at a 10-year high and structural change in the economy continuing.

All of these factors highlight the need for reforms to Australia's workplace relations framework to facilitate growth in employment and productivity.

### *Australia's International Competitiveness*

By international standards, Australia's labour regulations are onerous and burdensome. The World Economic Forum's *Global Competitiveness Report* ranks Australia 136th for the rigidity of its hiring and firing practices and 132nd for the rigidity of its wage setting.<sup>7</sup> In surveys conducted by the World Economic Forum, Australian businesses have identified our restrictive labour regulations as the most problematic factor in doing business.<sup>8</sup>

International competitiveness surveys, which show Australia as a laggard on the world stage, provide further evidence of the urgent need for Australia to possess a more flexible workplace relations system in order to maintain and improve international competitiveness.

### *A National Perspective*

VECCI further notes the results from the comprehensive Australian Chamber of Commerce and Industry ("ACCI") 2013 Triennial ACCI Pre-Election Survey<sup>9</sup> ("2013 ACCI Survey") from September 2013.

The 2013 ACCI Survey surveyed 1,700 businesses across every state and territory, representing different business sizes and across all industries.<sup>10</sup> In this survey, responses are also segmented by size of business, with small businesses being those having fewer than 20 employees, medium-sized businesses having 20 to 99 employees and large businesses having 100 or more employees. As such, the survey has 1,096 small businesses, 478 medium-sized businesses and 126 large businesses.<sup>11</sup>

The 2013 ACCI Survey asked 122 questions on a diverse range of business issues relating to taxation, workplace relations, skills development and training, government regulation,

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<sup>7</sup> World Economic Forum, *The Global Competitiveness Report 2014-2015* (2014) <[http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2014-15.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf)>.

<sup>8</sup> Ibid.

<sup>9</sup> Australian Chamber of Commerce and Industry, *ACCI Pre-Election Survey* (May 2013) <<http://www.acci.asn.au/getattachment/a75b19cc-d9b4-4cf6-9600-b6e7a6553ba6/ACCI-Pre-election-Survey-2013.aspx>>.

<sup>10</sup> Ibid, 2.

<sup>11</sup> Ibid.

international trade and overall economic management.<sup>12</sup> Thus, it provides a robust and comprehensive assessment of business concerns at that time.

The results of the 2013 ACCI Survey confirm Australian businesses overwhelmingly wanted wasteful government spending minimised and taxation and red tape burdens on businesses reduced.<sup>13</sup> Specific to the workplace relations framework, costs of employing workers was ranked highly on the list of business concerns; with 56.8 per cent of businesses expressing major concerns about '*Cost of Workers' Compensation*' and 46.9 per cent of businesses expressing major concerns about '*Wage Levels*'. In addition, the majority of businesses surveyed expressed major concerns with '*Penalty Rate Levels*' (50.3 per cent). The next three ranked issues and the percentage of businesses who ranked them of 'major concern' were:

- Complying with Fair Work Laws (52.1%);
- Limitations on Being Able to Set Wages and Conditions Directly with Employees (47.8%); and
- Cost and Compliance with Modern Industrial Awards (46.2%).<sup>14</sup>

Consistent with these submissions, other pertinent results from this comprehensive survey of Australian businesses include:

- 63.5% of businesses strongly agreed the Government should reform the Fair Work laws to increase productivity and flexibility in Australia's workplaces;
- 57.1% of businesses strongly agreed that the Government should exempt small businesses from the Unfair Dismissal laws;
- more than one in two businesses indicated '*High Labour Costs*' as the largest constraint on their business expansion (58.3 per cent); and
- when businesses were asked about the most important issues for the successful operation of their businesses and the policy areas on which the Government should focus) an overwhelming 72.4% indicated that minimising the '*Overall Cost of Doing Business*' was of major importance for the success of their business, with reforming '*Workplace Relations and Regulations*' (54. %) of major importance.<sup>15</sup>

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<sup>12</sup> Ibid, 3.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid, 9.

<sup>15</sup> Ibid, 18.

### *The Victorian Economic Position*

The 2014 (December Quarter) 'VECCI - Bank of Melbourne Survey of Business Trends and Prospects'<sup>16</sup> ("2014 (December Quarter) VECCI Business Trends Survey"), which gauged the views of more than 400 businesses across seven major industries, found business sentiment regarding the national economy's performance over the next 12 months fell by almost 11 percentage points. Sentiment for the Victorian economy similarly declined.

The survey results show there is enormous opportunity for governments to deliver policy reforms that raise business sentiment and competitiveness. Actions to reduce business costs and provide long-term certainty are crucial to ensure this is a one-off dip in confidence and not the beginning of a downward trend.

Similarly, the December quarter 2014 edition of the 'ACCI Business Expectations Survey', a national survey aggregated from the surveys conducted by member associations (including VECCI), showed the expected performance of the Australian economy over the coming year has fallen for the third consecutive quarter. This key measure of business confidence shows a negative outlook, and the pace of deterioration is increasing.<sup>17</sup>

### *Economic growth is below trend*

The Australian economy has been growing at only 2.5 per cent per annum over the past two years and growth is expected to remain below trend until 2016-17.<sup>18</sup> Meanwhile, the Victorian economy grew by only 1.7 per cent in 2013-14, and the Victorian Government's outlook for growth has recently been revised down to 2.25 per cent in 2014-15 and 2.50 per cent in 2015-16.<sup>19</sup>

### *We need productivity growth to maintain living standards*

While labour productivity growth has been higher over recent years, compared to much of the previous decade, it still falls short of levels needed to support real income growth in the face of declining terms of trade. Reforms to Australia's workplace relations framework are vital to secure increases in productivity.

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<sup>16</sup> Victorian Employers' Chamber of Commerce and Industry, '2014 (December Quarter) 'VECCI - Bank of Melbourne Survey of Business Trends and Prospects'.

<sup>17</sup> Australian Chamber of Commerce and Industry, *ACCI Business Expectations Survey - Issue 79 December Quarter 2014* <<http://acci.asn.au/getattachment/5728db7e-f71a-4bcf-9277-e77fb871400e/ACCI-Business-Expectations-Survey---Dec-Quarter-20.aspx>>.

<sup>18</sup> The Hon J.B Hockey MP & The Hon M. Cormann, *Mid-Year Economic and Fiscal Outlook 2014-15* (December 2014) Budget 2014-15 <[http://www.budget.gov.au/2014-15/content/myefo/download/MYEFO\\_2014-15.pdf](http://www.budget.gov.au/2014-15/content/myefo/download/MYEFO_2014-15.pdf)>.

<sup>19</sup> Department of Treasury and Finance (Vic), *2014-15 Victorian Budget Update* <<http://www.dtf.vic.gov.au/files/7a770b2b-52bf-44bf-8df0-a40a00b3d813/2014-15BudgetUpdate.pdf>>.



### *Unemployment is at a 10 year high*

Various domestic and international commentators have recently highlighted the softness of Australia's labour market. The unemployment rate has increased over the past year, peaking at 6.4 per cent in January 2015, its highest level since 2002. The participation rate and average hours worked have declined over recent years. Growth in wages also remains subdued.

The Reserve Bank points to conditions remaining soft in the labour market, consistent with a continuation of below-trend growth in economic activity and increases in spare capacity in the labour market. Meanwhile, forward-looking indicators of labour demand suggest only modest employment growth and a further slight rise in the unemployment rate in the near term.<sup>20</sup>

As the PC's Issues Paper 1 notes, Australia's youth unemployment rate has also risen significantly since 1998.

### *A flexible workplace relations framework is needed to respond to structural change*

Ongoing structural change is a characteristic of the Victorian economy. Announcements of job losses in traditional manufacturing, including future closures in the automotive industry, are part of the Victorian economy's continuing evolution.

Manufacturing has fallen from being Victoria's largest employing sector to its third largest, behind health care and social assistance, and retail trade.<sup>21</sup> These continued changes in the structure of the economy require a flexible workplace relations framework to facilitate the transition of workers between industries in the short term and to smooth the long term adjustment process.

### *VECCI Member Surveys and experience on how business is coping under current system*

VECCI relies on three comprehensive surveys<sup>22</sup> of member experiences to support its submissions on how Victorian business is faring under the current workplace relations system:

- 2015 Member Survey comprising 152 businesses;
- 2012 Member Survey comprising 121 businesses; and
- The 2014 (December quarter) VECCI Business Trends Survey.

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<sup>20</sup> Reserve Bank of Australia, *Statement on Monetary Policy February 2015* <<http://www.rba.gov.au/publications/smp/2015/feb/pdf/0215.pdf>>.

<sup>21</sup> Department of Treasury and Finance (Vic), *Victorian Budget 2014-15 Strategy and Outlook Budget Paper No. 2* <<http://www.dtf.vic.gov.au/files/360d5597-c503-49ae-b7c9-a32300f7ee54/BP22014-15.pdf>>.

<sup>22</sup> If further information is required regarding the approach taken by VECCI in conducting the 2014 (December quarter) VECCI Business Trends Survey, the 2012 Member Survey or the 2015 Member Survey, the survey documents in their entirety can be provided for in an electronic format upon request.

VECCI further relies on its direct experience in dealing with its members, customers and clients on Workplace relations matters, including:

- Experience and observations, with specific attention to VECCI's recent experience assisting business in unfair dismissal conciliations and hearings, comprising data from over 100 Fair Work Commission ("FWC") conciliations and 50 arbitrations;
- Ongoing interaction with VECCI members and customers with upwards of 700 contacts per week; and
- Provision of direct statements from VECCI members, customers and clients which are provided as part of the submission.

All provided attachments reflect valuable aspects of the impact of the current Workplace Relations framework on business and where applicable extracts have been used for illustration of particular issues or challenges for employers. They are all direct examples of current business experience. It is noted certain statements are referenced specifically for certain issues or challenges, and others are provided as attachments to be taken into consideration holistically alongside the submissions.

The 2015 Member Survey revealed that concerning the impact of modern awards, business owners report more working additional hours in their business (42%), an increase in red tape (41%), and increases to cost of wages (57%), penalties and overtime paid (45%). Less than 10% of respondents indicated any increase to employment of apprentices, productivity, flexibility, business performance, sustainability, growth or profitability under modern awards. Over 20% of respondents reported decreases in all of these areas with workplace flexibility decreasing by a concerning 50% and profitability by 41%.

Similar experiences were reported by businesses entering into collective agreements, with not a single business surveyed indicating any increase to business flexibility. Over half of respondents to this section indicated an increase in the use of contractors, casuals and labour hire, with a decrease to full time employment. Overall, there was also a slight increase to the part time hours, with the total number of staffing hours remaining unchanged.

These figures closely align with member experiences reported in 2012 demonstrating that the framework is continuing to place pressure on business in key areas, restricting flexible work practices and hampering productivity.

These difficult conditions have exposed the critical need for an industrial relations framework that allows businesses to adapt to the challenges that they face in order to survive and prosper, and in doing so underpin employment growth and prosperity.

## **1. 'MODERN' AWARDS' MUST MATCH AND UNDERPIN A MODERN ECONOMY**

Business competitiveness in the modern, global marketplace requires a high level of labour market adaptability and flexibility.

In today's economy, small business needs more flexibility to adjust their labour supply and productivity to compete in global supply chains. Enterprises operating in key service industries like retail, tourism and hospitality must be able to respond to peaks and troughs in demand. Inflexible workplace relations rules, which operate on a 'one size fits all' basis or a 9 am to 5 pm, Monday to Friday paradigm, do not reflect the evolution of business and specific needs of enterprises operating in the services sector. They do not reflect the needs and capacities of the majority of Australian employers, including small business.

They also do not reflect the diverse needs and preferences of job seekers and employees who also require more flexibility in not only the type of work, but the hours of work. It is vital that policy-makers recognise that good labour regulation must work across a range of diverse business arrangements and economic circumstances.

Inflexible labour rules do not allow a firm to structure their business operations in the most efficient and productive manner. Such rules add to cost and economic inefficiency, and contribute to less-than-optimum performance of the labour market and the economy.

Without major reform of the Workplace Relations framework, both in its coverage and application, the system will continue to act as a dampener on the capacity of enterprises to expand and create opportunities for workers to re-enter the labour force, and those entering for the first time.

VECCI considers key aspects of the system must be subject to urgent reform if Australia is to maintain workplace flexibility, increase productivity, grow employment and harness the opportunities presented in the Asian Century.

### **1.1. Modernise the existing outdated penalty rate structure for a 24/7 economy**

A majority of the 122 so-called 'modern awards' enshrine and continue a 'penalty' rate structure which is imposed on business seeking to employ workers on a weekend or weeknight. Such historical arrangements are more applicable to bygone days when the 'Sabbath' was paramount in society and Sunday attendance at a Christian faith-based church was near compulsory. VECCI believes greater flexibility in this area would unleash a wave of job creation, greater opportunities for those who are unemployed or under-employed, and benefit the Australian economy and consumer to a much greater degree than currently applies.

The 2014 (December Quarter) VECCI Business Trends Survey looked closely at how labour costs are impacting the profitability of Victorian business. Special questions in this survey found that, on average, penalty rates represented 13 per cent of surveyed businesses' total annual labour costs. Tourism and hospitality was the industry with the highest number of respondents reporting they were affected by penalty rates, closely followed by the manufacturing sector. The wholesale and retail trade, and education, health and community services sectors were also characterised by a high number of respondents affected by penalty rates.

Victorian (and Australian) businesses must remain competitive in a changing global economy. Where penalty rates were once in place to discourage the use of excessive overtime, we have moved into an age where business must be flexible, adaptable and nimbly able to compete with the changing pace internationally. This is a global, competitive economy where virtual workplaces, online retail and international work are emerging as significant factors in the way which Australia must work and must compete, or only continue ceding markets and profitability.

#### **Proposals for penalty rate relief for Australian business**

VECCI notes there have been a variety of recent submissions in various forums concerning different ways for Australian businesses to improve their competitiveness and obtain some penalty rate relief. These submissions could be broadly grouped as:

- 1) Some commentators have advocated abolishing all minimum prescribed weekend penalty rates in all awards, preferring instead to enabling a market-based mechanism to decide appropriate additional payment for weekend work;
- 2) Reducing weekend penalty rates to one standard rate for weekend work at 125%;<sup>23</sup>

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<sup>23</sup> See, e.g. Joe Kelly & Grace Collier, 'Battle brews on weekend penalties', *The Australian (online)*, 7 February 2015 <<http://www.theaustralian.com.au/national-affairs/industrial-relations/battle-brews-on-weekend-penalties/story-fn59noo3-1227211094949>>.

- 3) Creating an 'ordinary time' 5 day week regardless of the specific days worked, with an employee receiving penalty rates above 38 hours or on the sixth (6<sup>th</sup>) and subsequent day worked;<sup>24</sup> and
- 4) Exempting small business from penalty rates in the restaurant, catering and retail sectors.<sup>25</sup>

VECCI members clearly consider the current penalty rates regime has a negative impact on their capacity to do business. In the 2015 Member Survey, 80% of responses indicated a negative impact, with only 10% of respondents viewing current penalty rate arrangements as a fair cost to business.

VECCI members did not express an overriding preference for any of the above submission options considered, including the complete abolition of all penalty rates. The highest level of positive response from business (32%) in this section of the 2015 Member Survey related to the introduction of a set penalty rate, which was attached to an example of 25% loading for hours outside the ordinary span of hours.

VECCI's view is that such member responses – which mirror similar surveys of business' attitude to the current penalty rate regime<sup>26</sup> – indicates the strong need for reform. However, further analysis is clearly required as to what specific reform is the most suitable future approach to penalty rates which recognises the needs for Australian businesses and its workers.

It is VECCI's view that overregulation and complex formulae is not the solution. Australian workplaces need to be able to hire and undertake business confidently and with a clear, concise and simple approach. We highlight the experience of a Victorian industry association in the Tourism industry:

"These penalty rates are also confusing, and we field many calls to this office to outline the actual payment required for Public holidays, where there are differing amounts in place across the same holiday period.

Triple-time and double-time-and-a-half payments represent a barrier to employment for local businesses, and some parks will decrease their holiday activities (and the resultant employment

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<sup>24</sup> See, e.g. NSW Business Chamber, *Proposed amendments to the Restaurant Industry Award 2010* <<http://www.nswbusinesschamber.com.au/Advocacy/Policy/Australian-Business-Industrial/Results/Penalty-rates-case>>.

<sup>25</sup> Fair Work Amendment (Small Business-Penalty Rates Exemption) Bill 2012 (Cth).

<sup>26</sup> See, e.g. Australian Chamber of Commerce and Industry, above n 17.

opportunities in order to avoid these large pay entitlement obligations). This again reduces employment opportunities in regional areas where the part-time work would be welcomed by local residents.”<sup>27</sup>

From the input of our members and our broader experience, we consider businesses accept the payment of additional rates in a number of circumstances. We further consider it is likely that market forces would determine the need pay a ‘penalty’ rate in some form, for certain occasions such as weekends, even where there is no legislative requirement to do so.

Finally, the responses to the 2014 (December Quarter) VECCI Business Trends Survey were also instructive. When respondent businesses were asked how they would use the savings if weekend and public holiday penalty rates were removed, almost all businesses currently affected by penalty rates indicated that they would hire more staff, provide existing staff with additional hours, reinvest in capital or invest in other business improvements.

These results are a timely reminder that penalty rates can act as a deterrent to jobs growth and a re-tooling of penalty rates would likely lead to improvements in business competitiveness and other positive economic impacts.

The penalty rate issue extends beyond that of the quantum or loading payable. In what is surely the tail wagging the dog, the extension of restrictive practices to Australian workplaces has led to businesses either significantly changing how they operate or paying much more to produce the same outcome.

One employer provides an insight into the ongoing impact of the current Workplace Relations system and the impact of penalty rates and lack of flexibility in the current framework. This example relates to the employer moving from a situation where they were able to offer the part time workforce additional ordinary hours when available, without the imposition of overtime or penalties. In moving to the ‘modern award’ system in 2010, the following provision attached itself to this business:

An employer must inform a part-time employee of the ordinary hours of work and starting and finishing times. All time worked at the direction of the employer in excess of these hours will be paid at the appropriate overtime rate.<sup>28</sup>

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<sup>27</sup> Witness statement of Elizabeth White, *Victorian Caravan Parks Association*, Appendix 1.

<sup>28</sup> Witness statement of Darrin McGuigan, *WAW Credit Union One*, Appendix 1.

By way of our other observations on lack of parity within the current framework, we note this can be contrasted with other 'modern awards' that could result in a completely different outcome, by providing for:

Any agreement to vary the regular pattern of work will be made in writing before the variation occurs.<sup>29</sup>

The employer reported the following impacts to the business as a result of this restriction:

"Where we do use permanent and part-time staff, we now pay overtime for any and all additional hours. In many cases this would mean we are paying 15-20 hours overtime for an employee to work a 35 hour week.

From a costs perspective in 2015, this approach has meant that our annual overtime budget to cover leave and other absences increases the normal wages that would have been paid on these days by a factor of 80% or around \$60,000.00 for the year.

Other potential options to manage the cost – such as increasing the base hours of existing part time workers - are not feasible solutions as the work requiring cover is of an intermittent and unpredictable nature. Equally, creating a larger casual pool carries issues of increased costs of training for limited engagements, as well as the potential of service impacts."<sup>30</sup>

This statement is a compelling and stark example of the true impost of the current system for just one employer among many, in the situation of having to pay more for the same output – a reality that cannot continue.

Other relevant VECCI member experiences following transition to the modern award system included:

- A member in the regional eco-tourism industry who states:

"Tour operations typically involve 4 day 3 night walk experiences running back to back that have no correlation to a Monday to Friday work week. All workers in our industry understand the nature of the industry and that every day is a normal work day. Our customers expect a 7 day per week operation because this is the nature of the tourism industry.

Prior to the introduction of the modern awards, we operated under the Cultural and Recreational Services Industry award, which amongst other things, did not have penalty rates for weekends, public holidays and evening hours. It reflected the reality of our industry and pay rates, scaled fairly to relevant job responsibilities...

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<sup>29</sup> See e.g. *General Retail Industry Award 2010*, cl 12.3.

<sup>30</sup> Witness statement of Darrin McGuigan, *WAW Credit Union One*, Appendix 1.



The consequence of the transition to the new modern awards was that our wage cost increased by approximately 25%”.<sup>31</sup>

- A winery in regional Victoria:

“My company operates a Cellar Door; open 364 days a year, closing on Christmas day... Public holiday penalty rates are prohibitive and erode profitability. At my winery, a six to eight hour shift on a public holiday provides the employee with a payment in excess of \$500.00. My employees are paid a little over the award hourly rate based on historic hourly rates. The precedent has been set and I am unable to reduce the rate. When you put on casual loading then public holiday loading, the hourly rate becomes overblown for the task at hand. On any designated public holiday I need between two and three people working in Cellar Door however, public holidays fall mainly on a Friday or Monday. A public holiday falling in the middle of the weekend would see me employing four to six people to service the visitor. Easter is an example when I employ six people on the Sunday. Since July 1, 2011 my daughter and I have worked all public holidays.”<sup>32</sup>

- A member in the fast food industry with only 6 casual staff:

“The Fast Food Industry Award 2010 has impacted my business in the following way: Public holidays are just impossible to roster staff on because even the youngest employee costs the business as much per hour as they make in sales for that hour. The only profitable option for me is to close the business on public holidays altogether, or for me to work it out alone. Neither of these options are appealing.”<sup>33</sup>

- A member in the fast food industry with 15-99 staff:

As it stands, even the youngest/cheapest employee is too expensive to work on a public holiday. Forcing owners to work alone or be closed for the day as wages make opening redundant on p/holidays. Weekend rates means more and more often owners work 7 days which reduces wages, employees and increase stress and exhaustion.<sup>34</sup>

- A member running a business in the food manufacturing industry with 18 staff:

“It is unviable to offer students (who are typically cheaper employees depending on their age) who want to do work on weekends as penalty rates are too expensive. The net result of these restrictions is that we struggle to be competitive, particularly in the export markets that we are trying to expand into. The nature of employing students, it means that it is often suited them to come in after hours or Saturdays or Sundays to do non time

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<sup>31</sup> Witness statement of Gavin Ronan, *Twelve Apostles Lodge Walk*, Appendix 1.

<sup>32</sup> Witness statement of Wendy Kileen, *Stanton & Kileen Wines Pty Ltd*, Appendix 1.

<sup>33</sup> Witness statement of Nikita Nicol, *Treniky Pty Ltd T/A Wendys Capalaba Park*, Appendix 1.

<sup>34</sup> Respondent to VECCI Member Survey 2015.

specific jobs (e.g. packing, cleaning & maintenance) as they had other things on during normal week day but application of penalty rates makes this cost prohibitive”.<sup>35</sup>

- A member working as manufacturer, importer and distributor with over 200 employees:

Not much impact on minimum wages or award rates as we pay above award, however impact on penalty rates has an effect on costs of running the business.

We have ended up offshoring all of our manufacturing across 2 factories due to the excess, uncompetitive costs.

As it stands, even the youngest/cheapest employee is too expensive to work on a public holiday. Forcing owners to work alone or be closed for the day as wages make opening redundant on p/holidays. Weekend rates means more and more often owners work 7 days which reduces wages, employees and increase stress and exhaustion. <sup>36</sup>

### **Necessary Reform**

Enable businesses to employ more people and increase productivity by reforming penalty rate structures. VECCI's view is that while there are strong indicators of the need for reform from the current system, further analysis is called for by the PC as to what is the most suitable future approach which reconciles the needs for Australian businesses and workers.

Future change must recognise the fact we live in a more flexible society where the preferred days of rest are no longer necessarily Saturday or Sunday. Businesses require the flexibility to structure their employment arrangements such that they can open at times that maximise the productivity and output of their business without incurring excessive penalty rates for meeting such customer demand.

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<sup>35</sup> Witness statement of Phil Stuckey, *Kooka Brotha's Pty Ltd*, Appendix 1.

<sup>36</sup> Respondent to VECCI Member Survey 2015.

## 1.2. Unleash job growth through a sensible minimum engagement system

VECCI is on the record and has previously submitted applications via Fair Work Australia (as it was then) advocating its views on the need for greater flexibility within the Workplace Relations framework. VECCI sought to include flexibility across modern awards where employees genuinely wish to work fewer than three hours.

The application over time was confined to the *Clerks - Private Sector Award 2010* (“Clerks Award”) and was unsuccessful, for a variety of reasons outlined in the decision of the Full Bench which included evidence, the high bar set for interim review of awards and the wording of the legislation. The Full Bench viewed there was insufficient evidence make a finding the variation “*was required to meet the modern award objective*” and:

“The inclusion of a minimum engagement period in a modern award invariably reflected the fact that such provisions were to be found in a sufficient proportion of the pre-reform awards and NAPSAs that are operated within the coverage of the modern award...”<sup>37</sup>

This is indicative of many issues in the current system which have been carried through in award ‘consolidation’, ‘rationalisation’ and ‘modernisation, and does not reflect or support the modern day workforce. The Full Bench also referenced a previous Full Bench decision in determining the outcome:

“Two points about the historical context are particularly relevant. The first is that awards made as a result of the award modernisation process are now deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Provisions Act). Implicit in this is a legislative acceptance that the terms of the existing modern awards are consistent with the modern awards objective.”<sup>38</sup>

This is a difficult situation to rationalise for everyday business owners when faced with an employee wishing to arrange a pattern of work (or individual shifts) that suit their personal circumstances. It is also difficult for industrial practitioners, as we view this as a Kafkaesque scenario whereby you can make application for change if the modern awards don’t meet the modern award objectives, but only within a framework where effectively ‘the modern awards are consistent with the modern awards objective because they are modern awards’.

VECCI considers there is an necessity for the complete abolition of minimum engagement in ‘modern’ awards, preferring instead to allow the employment parties to decide the minimum shift

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<sup>37</sup> *Victorian Employers’ Chamber of Commerce and Industry* [2012] FWAFB 6913 (15 August 2012).

<sup>38</sup> *Modern Awards Review 2012* [2012] FWAFB 5600 (29 June 2012).

length, as well as payment for such shift (if so reduced), applicable in the circumstances. Failing that, a reduced minimum engagement period applicable to all relevant engagements would be preferable to the current regime. However we still maintain in this situation, the requirement for genuine flexibility within the system remains should an employee request it.

In the event the PC does not recommend minimum engagement periods in Australia's current workplace relations system be completely removed or 'wound back' to a sensible 'middle ground', VECCI urges the PC to recommend including 'minimum engagement' as an award matter that can be properly varied under the IFA's, which currently appear in all awards.

This would allow employees and employers to decide the most appropriate minimum hours of engagement per day. Currently IFAs allow variations to overtime rates, penalty rates, allowances, leave loading and working hours, but 'minimum engagement' is not explicitly stated. Whilst it is arguable this might be included as a potential area which an IFA can be made on (under the "*arrangements for when work is performed*"<sup>39</sup> limb), a Full Bench rejected this proposition in 2013.<sup>40</sup>

The experience of VECCI members is consistent with more general uptake, namely that IFA's are not broadly used. We catalogue the issues with IFA's separately within this submission. For examples concerning the difficulties members are experiencing:

- One member respondent to the 2015 Member Survey in the fast food industry:

"The Award is unable to provide flexibility for junior team member hours. We have had to let go of many of our junior staff as they could not work a 3 hour shift after school as the shopping centre closed. They could only work a 2 hour shift due to school commitments, which then requires me to find older (and more costly) staff to work these longer hours.

As a business owner, the modern award have forced me to work excess hours due to being unable to afford casual staff on weekends. I usually work 6 or 7 days per week in the store and then have to complete the book work and administration outside of the in store work".<sup>41</sup>

- One member respondent to the 2015 Member Survey in the food manufacturing industry:

"The minimum engagement period for casuals under the modern award has affected our profitability. We are not able to employ casual and juniors (mostly students) who are only

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<sup>39</sup> *Fair Work Act 2009* (Cth) s 139(1)(c).

<sup>40</sup> *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170 (15 April 2013).

<sup>41</sup> Witness statement of Michael McKee, *Rebalicourt Pty Ltd*, Appendix 1.

available to work from 2 – 3 hours after school, as the minimum engagement under the Award is 4 hours. We find the minimum engagement period stops student’s flexibility of hours.<sup>42</sup>

- Another member respondent to the 2015 Member Survey in the fast food industry:

“Some of my junior staff are still at school, and can only work reduced hours after school has finished during the week. I have to then find non-junior staff to cover these shifts, and then I have to pay them full rates. There are many young workers looking for an afternoon/after school jobs that want to work only 2 - 2.5 hours but are unable to due to the Award minimum engagement period.”<sup>43</sup>

VECCI notes employers in the retail sector been afforded some flexibility with respect to minimum engagement periods for casual school students working on weekdays between 3pm and 6:30pm.<sup>44</sup> VECCI further notes the highly-restricted nature of this ‘flexibility’ and the fact the variation was gained only after six tribunal and court proceedings in total (including three appeal proceedings).<sup>45</sup>

However, this ‘tinkering’ by the Commission falls well short of the flexibility required in a modern economy. VECCI considers a streamlined and more straightforward mechanism for determining flexibility proposals for ‘modern’ awards is needed for minimum engagement of casual employees. The time and cost involved in pursuing such a variation is unpalatable for a modern and flexible workplace relations system. The framework must be able to respond and adjust to economic conditions and emerging methods for allocating work as flexibly as possible to suit the genuine needs of employers and employees. A process which involved six proceedings over two years is quite simply unworkable.

### **Necessary Reform**

Minimum engagement should be removed from the workplace relations framework.

Failing the above, VECCI urges the PC to recommend including ‘minimum engagement’ as an award/enterprise agreement matter that can be properly varied under the IFAs.

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<sup>42</sup> Witness statement of Phil Stuckey, *Kooka Brotha’s Pty Ltd*, Appendix 1.

<sup>43</sup> Witness statement of Nikita Nicol, *Treniky Pty Ltd T/A Wendys Capalaba Park*, Appendix 1.

<sup>44</sup> *National Retail Association Limited* [2011] FWA 3777 (20 June 2011).

<sup>45</sup> Gary Black, National Retailers Association, quoted in ‘*Federal Court upholds short shop shifts for school schoolchildren*’, Workplace Express (11 May 2012) <[http://www.workplaceexpress.com.au/nl06\\_news\\_print.php?selkey=48019](http://www.workplaceexpress.com.au/nl06_news_print.php?selkey=48019)>.

### 1.3. Other Award Reform Priorities to Assist Business

#### Simplify and Streamline Award Content

It is imperative the FWC is urged (or required) to simplify and streamline the content of modern awards that the Australian Government has acknowledged “*can be particularly confusing for small business operators and individual employees who generally do not have specialist workplace relations experience*”.<sup>46</sup>

We note the FWC has taken steps to propose various “*technical and drafting changes*”<sup>47</sup> to the modern awards via the release of the ‘exposure drafts’ as part of the 2014 Review process. This process, however, is severely limited due to the breadth of s 139 of the FW Act which contains no less than eighteen categories of allowable award terms.

As a result, it sadly appears the initial exercise resulted in awards not being ‘modernised’ as such, but merely consolidated and the next foreshadowed exercise will similarly be ‘window dressing’ of minor and inconsequential amendments, rather than a ‘root and branch’ analysis and removal of outdated and unnecessary legacy work practices.

The purpose of awards should be to serve as a true ‘safety net’ of the wages and protections required for employees. . It should not be as a means to grow entitlements on an industry by industry basis, depending on the application and skill of particular industrial representatives ‘rent seeking’ for his/her particular industry group. It is hard to see the link to work value when a worker will get remunerated differently at a minimum entitlement level simply and only depending on the environment in which they do their work, when as outlined, these environments may in all reality be identical. The extremely broad discretion conferred upon the FWC under ss 139 and 142 of the FW Act allows this practice to flourish, resulting in a ‘mish mash’ of conditions which have been artificially raised and ‘inflated’ to be far above what could reasonably or objectively be considered a minimum ‘safety net’.

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<sup>46</sup> Department of Employment (Cth), *Submission to FWC in Matter AM2014/1* (24 January 2014) <[https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/submissions/AM20141\\_sub\\_AusGov\\_030214.pdf](https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/submissions/AM20141_sub_AusGov_030214.pdf)>.

<sup>47</sup> See, e.g. *Statement – 4 yearly review of modern awards* [2014] FWCFB 6188 (5 September 2014).

VECCI notes the ACTU has recent claimed<sup>48</sup> modern award provisions do not permit enough flexibility and further flexibility rights should be enshrined in modern awards and, presumably, the FW Act.

VECCI understands trade unions seek changes made:

- To enable employees returning to work after parental leave who has responsibility for the care of a child to ‘pick and choose’ their preferred working hours (be it permanent or part-time) unless their employer can satisfy an artificially high standard of “*substantial business grounds*” mitigating against such a request;
- where the pre-parental leave position no longer exists, the employer being required <sup>7</sup>to offer an employee a reduced hours position that is equivalent in status and pay, or pay that employee severance pay;
- An employee who has changed their work arrangements being able to revert to their higher pre-parental leave position hours of work which must be accommodated by their employer;
- Additional paid leave to attend appointments associated with pregnancy, adoption or permanent care orders;
- Additional ‘domestic violence’ leave.

Such additional ‘rights’ would be incredibly challenging and expensive for Australian businesses, further reducing their flexibility and competitiveness. The FW Act, supported by modern awards, contain some of the world’s most generous flexibility provisions<sup>49</sup> and entitlements granted, and benefits provided (such as through the *Paid Parental Leave Act 2010* (Cth)) for women in the workforce. Any further amendments to guarantee employees the right to choose their own working hours, and additional paid leave, would be at the expense of businesses. It is particularly difficult to see how small business could cope with these further regulations and restrictions.

VECCI’s view is that additional benefits or flexibilities such as these should be properly sought at the workplace level, Employees have ample opportunity to enshrine such flexibility and additional paid leave measures into their workplace instruments, be it through enterprise bargaining or individual flexibility agreements and arrangements on a case-by-case basis, should these matters be important to them as individuals. Any recommendation to Government, or FWC-imposed artificially high minimum standard enshrining such ‘rights’ as a guarantee to employees (be it on this or other matters) may result in less employment opportunities for employment of particular groups, and be retrograde to job creation generally.

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<sup>48</sup> Australian Council for Trade Unions, *Push for new workplace rights on pregnancy discrimination and domestic violence* (16 February 2015) <<http://actu.org.au/actu-media/media-releases/2015/push-for-new-workplace-rights-on-pregnancy-discrimination-and-domestic-violence>>.

<sup>49</sup> See, e.g. *Fair Work Act 2009* (Cth) ss 65, 75, 76, 79A, 81, 81A, 82A.

## Disparity between pay and entitlements for employees performing the exact same duties

Modern awards contain numerous discrepancies for employees performing exactly the same duties, again carried over by a *consolidation* rather than a ‘modernisation’ process. For example, a casual forklift driver, a typically autonomous role requiring limited skill level who is employed to do fork-lift driving (basic) duties can be classified under four different industry awards. Accordingly, a fork-lift driver is entitled to four varying base rates of pay and associated entitlements depending on the industry in they work. For example, **a casual fork-lift driver working on a Saturday** is entitled to the below rates of pay:

**Table 1: Disparity for a casual fork-lift driver**

Award	Ordinary Hours of Work	Classification	Base Rate	Casual Loaded Rate	Saturday Penalty	Casual Saturday Rate
<i>Manufacturing and Associated Industries and Occupations Award 2010 (MA00010)</i>	Monday – Friday 6am – 6pm	C12	\$18.02	\$22.52 (all-purpose)	50%	<b>\$33.78</b>
<i>Storage Services and Wholesale Industry Award 2010 (MA00084)</i>	Monday – Friday 7am – 5:30pm	Grade 1 (after 12 months)	\$18.46	\$23.08	50%	<b>\$32.31</b>
<i>General Retail Industry Award 2010 (MA00004)</i>	Monday – Friday 7am – 9pm Saturday 7am – 6pm	Grade 2	\$18.96	\$23.71	10%	<b>\$25.60</b>
<i>Road Transport and Distribution Award 2010 (MA00038)</i>	Monday – Friday 5.30 am - 6.30 pm	Transport Worker Grade 3	\$18.54	\$23.17	50%	<b>\$32.44</b>

VECCI understands that these conditions have been shaped over time by industry norms and other factors; however raises the issue in the context of what is the actual safety net, and how it is applicable to our current economy and needs.

As illustrated in the above Table 1, an employee working as a casual fork-lift driver on a Saturday can be paid a \$6-\$7 difference depending on whether they are covered by the *General Retail Industry Award 2010* (“Retail Award”) or the *Manufacturing and Associated Industries and Occupations Award 2010*, *Storage Services and Wholesale Industry Award 2010* (“Storage Award”) or the *Road Transport and Distribution Award 2010*. For a worker who is working casually for a number of employers, the chart demonstrates that retail would have to be the preferred environment to be in Monday to Friday.



The duties of a fork-lift driver are largely identical regardless of which ‘industry’ they are performing such duties in. In particular, the only delineating factor between a warehouse in the covered by the Retail Award or the Storage Award relies on whether or not the product is being purchased by the “final consumer”. The Retail Award provides the definition of “*general retail industry means the sale or hire of goods or services to final consumers for personal, household or business consumption including*”,<sup>50</sup> whereas the Storage Award provides the definition “*wholesale means the sale of commodities in large quantities other than to final consumers*”.<sup>51</sup>

It is difficult to see how if a warehouse has a shop-front where the final consumer can purchase the product, it can fundamentally affect a fork-lift driver in the performance of their duties. Therefore, based on this award coverage, whether or not a warehouse is selling directly to the public (for example, has a shop-front) or is selling to another business can result in a significant (\$6.71 per hour) difference in pay entitlements and conditions for employees performing the exact same job. We consider this does not reflect a fair and effective modern award framework and safety net. There has of course been development over time as seen in the retail award to cater for industry hours, for example the lower Saturday loadings – as we continue to move into a true 24/7 environment, the extension of this type of award element and the requirement for a ‘true safety net’ (one that is not determined by variables such as who is the end consumer) must at least be closely considered.

The question for the PC in considering this overall area, is whether this consolidated system as it stands is capable of providing a simple and effective framework that will take Australia forward,

### **Complex and illogical Award Coverage**

VECCI considers the process to determine award coverage is overly complex and difficult for businesses. For example, a reception centre providing food will be covered by the *Restaurant Industry Award 2010* (“Restaurant Award”).<sup>52</sup> However, if another reception centre was to be operating in association with a hotel it would, therefore, be covered by the hospitality industry award. Similarly, the award coverage between businesses in ‘food services’ industries are overly complex for small business. For example, a small café providing coffee and take-away food would clearly fall under the definition of the fast food industry “*where the meals, snacks and/or beverages, which are sold to the public primarily to be consumed away from the point of sale*”.<sup>53</sup>

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<sup>50</sup> *General Retail Industry Award 2010*.

<sup>51</sup> *Storage Service and Wholesale Award 2010*.

<sup>52</sup> *Restaurant Industry Award 2010* cl 3, “**restaurant industry** means restaurants, reception centres, night clubs, cafes and roadhouses, and includes any tea room, café, and catering by a restaurant business”.

<sup>53</sup> *Fast Food Industry Award 2010*.

However, if that same café was then to provide seating so customers could have the option to sit and drink their coffee or eat their food, the question of award coverage becomes unclear as the Restaurant Award also covers cafes.

Equally, we hear from larger business, in this case the experienced HR Manager of a manufacturer, importer and distributor (>200 employees) that:

The modern awards are fairly different to the older ones in some parts and what we are finding is that there is a lot to get to know in order to be compliant which takes up internal resources.....

VECCI is adamant genuine reform and further modernisation is required to streamline and contemporise the framework. Award documents of over 80 plus are simply not conducive to a process encouraging compliance. This position appears to be supported by the Fair Work Ombudsman, Natalie James, in a recent article published in the Australian Financial Review:

"Ms James said the Fair Work Commission had done a very good job in transforming the system into 122 modern awards but there's still a way to go before they could be described as genuinely modern documents.

"The national system has never been as simple as it is now so we've come a long way," she told The Australian Financial Review.

"But for the uninitiated, for the inexpert, the margin for error is still very high. It's our job to reduce the margin for error."<sup>54</sup>

Two member respondents to the 2015 Member Survey gave examples of the particular difficulty with the complexity of their underlying modern awards:

"Ridiculous terms in the Award such as the 'Break Breach Penalty' have been inserted into the modern award by people who have obviously never worked in hospitality. When a site that serves customers gets busy, it is simply not possible to be sending people on a break in the middle of service. Yet the Award requires that casual employees (already only working a short shift) be paid at time and a half from the time they do not go on a scheduled break until they take a break or the shift ends. This can amount to hundreds of extra dollars in wages on a busy day and makes it almost impossible for businesses to trade profitably".<sup>55</sup>

and

"We employ plumbers under the Plumbers and Fire Sprinklers Award 2010 and our administration staff are covered under the Clerks Private Sector Award 2010. The modern Plumbing Award

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<sup>54</sup> Ewin Hannan, 'Complex award system frustrating for business, says Fair Work Ombudsman', *Australian Financial Review* (online), 9 March 2015 <[http://www.afr.com/p/national/complex\\_award\\_system\\_frustrating\\_F5Srd2jlxeoOttjuF4vLrN](http://www.afr.com/p/national/complex_award_system_frustrating_F5Srd2jlxeoOttjuF4vLrN)>.

<sup>55</sup> Witness statement of Simon Bailey, *Chefs on the Run Pty Ltd*, Appendix 1.

conditions are complex - in particular the site, industry and tool allowances and the industry specific redundancy, which is different from the National Employment Standards. This specific award payment is paid when the employee chooses to terminate the employment and not the employer. It is calculated based on years of service...

The industry specific redundancy is also extremely unfair on small businesses like Webb Plumbing. Our revenue comes solely from the plumber and when they chose to leave the business, revenue is gone until the plumber is replaced. Yet, we are required to pay a redundancy payment when a plumber chooses to leave. For example, last year, we lost 4 plumbers within 3 months and the resulting redundancy payout for these 4 different plumbers placed our business under financial pressure".<sup>56</sup>

### **Necessary Reform**

We urge the PC to reconsider the award system in order to be a modern workplace relations framework that is simpler to understand, encourages compliances and affords genuine flexibility to employers in a modern and dynamic economy.

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<sup>56</sup> Witness statement of Jennifer Lang, *Webb Plumbing Services Pty Ltd*, Appendix 1.

## Public Holidays and penalties – Ongoing costs issues and impacts

VECCI note the ongoing issues face by business in managing public holidays. This issue was agitated in the FW Act Review, with the Panel summarising the issue as:

The ability for state and territory governments to declare additional public holidays has a fairly significant impact on wages costs for employers who operate on such days, due to public holiday penalty rates typically involving a loading of 200 per cent or 250 per cent of base rates of pay (in recognition of the unsocial nature of working on such days). Employers affected by the penalty rates typically include those operating in the hospitality, retail and tourism sectors. Employers may alternatively elect that it is not economic to open on the particular day (unless they are obliged to open on such days, due to, for example, lease requirements), which would mean forgoing any takings for the particular day. Additional public holidays also impose costs for businesses that decide not to operate on such days, as they may be required to pay employees even though the employees have not had to work.<sup>57</sup>

The Panel ultimately recommended that the Government consider limiting the number of public holidays under the NES on which penalty rates are payable to a nationally consistent number of eleven.<sup>58</sup>

This recommendation was not taken up, leaving Victoria particularly affected by this issue in 2015 with the newly appointed Labor Government formalising a new public holiday for Easter Sunday (5 April 2015) and proposing a new public holiday for the AFL grand final eve (2 October 2015), either of which imposes significant additional costs on the Victorian economy. In short, the new public holidays will result in both lost productivity and higher wage costs for business at a time when many are facing difficult trading conditions.

VECCI is on record in respect of the unaffordable and unnecessary extra costs that would attach to the grand final eve, whereby the cost to pay many of Victoria's almost 2 million full time employees not to come to work could reach \$543 million for the day.<sup>59</sup>

Additional wages for the retail, accommodation, food services and recreation industries are

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<sup>57</sup> Department of Education, Employment and Workplace Relations, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (15 June 2012) <<https://docs.employment.gov.au/documents/towards-more-productive-and-equitable-workplaces-evaluation-fair-work-legislation>>.

<sup>58</sup> Ibid.

<sup>59</sup> Victorian Employers' Chamber of Commerce and Industry, 'Victorian small business to be hit hard by new public holidays' (17 February 2015) <<http://www.vecci.org.au/policy-and-advocacy/news/media-releases/2015/02/17/victorian-small-business-be-hit-hard-new-public-h#sthash.kU8Gb4Xs.dpuf>>

estimated to cost small business owners \$105 million for the two holidays as wages can be 50 per cent higher on Easter Sunday and 150 per cent higher on grand final eve.<sup>60</sup>

The two new holidays widen the disparity between public holiday arrangements across Australia and will result in Victoria having a nationwide high of 13 days, compared to states like New South Wales with 11 and Queensland and Western Australia with 10.

These significant costs highlight the consequences of the States making populist decisions at the expense of good public policy and clearly go against the concept of a 'national' system for the determination of consistent wages and conditions. Australia ultimately cannot continue to trade in conditions whereby labour costs of this nature are unknown and continuing to increase.

VECCI notes the NES gives access to an entitlement for employers to request and employees to refuse to come to work on public holidays (both with a requirement of reasonableness). The award system then generates a set of inconsistent payment outcomes both on a State-by-State basis when considered in totality; and is also inconsistent in the context of individual days (for example the issues experienced when Christmas day falls on a Sunday as different states have different treatments of the public holiday).

VECCI's position remains that the operation of potential costs for business must be determinable in advance. Anything else is unacceptable and presents ongoing issues for business planning and the operations of a nationally focussed workplace relations system.

The issue of penalty rate levels more generally is addressed elsewhere in this submission. VECCI considers that any overarching changes to the system to address this must also consider the level of impact of the current public holiday interactions between the NES, the states and the modern awards.

### **Necessary Reform**

We urge the PC to recommend the public holiday framework must be amended to standardise the cost and impact on business Australia-wide and to be consistent within a National application.

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<sup>60</sup> Ibid.

## **2. CREATE GENUINE, MODERN AND FLEXIBLE AGREEMENT-MAKING OPTIONS FOR BUSINESS, UNDERPINNED BY A COMPETITIVE AND FAIR SAFETY NET**

The experience of VECCI members relating to enterprise bargaining and agreement-making has been mixed. Specifically, our members' evidence indicates this PC Review should make recommendations geared around the need to:

- Modernise an adversarial bargaining system that unfairly promotes trade unions and pays little attention to workplace flexibility and/or productivity enhancement and the specific needs of business in a modern economy;
- Provide genuine choice through reinstating fair individual statutory agreements, necessary in a modern economy given the ineffective operation of IFA's;
- Stop 'Greenfields agreements' being manipulated by trade unions, which results in employers paying well in excess of market conditions for job-creating new projects;
- Simplify an overly complex and unnecessary collective bargaining process, its rules and forms;
- Recognise 'Good Faith Bargaining' remains an area best left unregulated and considered on a case-by-case basis; and
- Reverse the incursion of bargaining into matters such as contracting and business management and resourcing, which is inappropriate, unproductive and in urgent need of reform.

## 2.1. Lack of Flexibility and Productivity Outcomes

Regarding PC Issues Paper 3 and the ‘*Objects*’ provisions of the FW Act,<sup>61</sup> VECCI member experiences show the current collective bargaining rules pay little regard to workplace flexibility and productivity enhancement at the enterprise.

Members have significant problems with the bargaining and agreement making rules under the FW Act, specifically regarding the effect of the removal of individual statutory agreements and the ineffectual nature of IFA’s, the terms of the ‘Model Flexibility Clause’ and the length of time required for termination of IFA’s. VECCI notes the promotion of productivity and flexibility outcomes was a key plank of the ‘*Forward with Fairness*’ policy<sup>62</sup> and, furthermore, is enshrined in the Objects of the FW Act.<sup>63</sup> Our members’ experiences show these Objects are aspirational only, and there is a significant divergence between these stated objectives and the reality faced by business under the constraints of the Fair Work system. As previously noted, VECCI members surveyed are adamant workplace flexibility, productivity and profitability has decreased substantially since the FW Act’s introduction.

### Effect of Removal of Individual Statutory Agreements

As the PC will understand, individual statutory agreements are neither detrimental by nature (as often portrayed by the trade union movement and the Labor Party following the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (“Work Choices”)) nor a recent phenomenon concocted under Work Choices.

In 1996, the then Coalition Government used the *Workplace Relations Act 1996* (Cth) (“WRA”) to introduce Australian Workplace Agreements (“AWAs”), a written agreement between an individual employer and an individual employee that deals with matters pertaining to the relationship between an employer and an employee and carried statutory force. These individual agreements were able to be offered by employers to employees as a condition of employment and were subject to the ‘No Disadvantage Test’ (“NDT”) assessed by the Office of Employment Advocate (“OEA”).

For the first time under Federal labour law, employers were able to make agreements with individual employees and submit them to a government institution for review and approval. Under the WRA, a certified AWA displaced both Federal and State awards and agreements that

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<sup>61</sup> *Fair Work Act 2009* (Cth) s 3.

<sup>62</sup> Rudd & Gillard, above n 4.

<sup>63</sup> *Fair Work Act 2009* (Cth) s 3.

might have otherwise dictated an employee's terms and conditions of employment. The AWA was analogous to a contract of employment, but was enforceable by statute rather than through common law.

In 2005, the then Coalition Government introduced Work Choices which removed a number of employee safeguards with the aim of making AWAs easier for parties to enter into and more attractive for employers to use. VECCI considers the major reason why AWAs were so controversial during the Work Choices period (2005 – 2007) is that AWAs essentially allowed an employer and an individual employee to contract out of an award on terms that may not be as favourable as those set by that award. Another significant point was that an AWA could be entered into and operated to the exclusion of an existing collective agreement. Both of these measures were at odds with the historical operation of the 'safety net' and award structure of Australia's industrial relations system.

In May 2007, the Coalition, in response to community concerns, introduced the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth) amending legislation which reintroduced a type of 'no disadvantage test' to AWAs, called the 'fairness test'. The fairness test ensured all AWAs met the Australian Fair Pay and Conditions Standard ("AFPCS") conditions.

In a significant departure from the Work Choices system, collective bargaining at every individual workplace was proclaimed as the heart of the Labor Government's so-called 'Forward with Fairness' workplace relations reforms. Such reforms have come at the expense of employers being able to have a direct relationship, and an individual agreement, with its employees.<sup>64</sup>

The FW Act then codified this collective focus, coupled with the removal of the ability to make any individual statutory agreements (such as an AWA under the WRA). Essentially, all employers were eventually funnelled into a collective bargaining stream, with that direct employment relationship with employees being reduced in many occasions, or lost altogether.

A direct quote by a VECCI member taken from a survey in 2012 stated:

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<sup>64</sup> Refer, for example, the then Opposition Leader Hon. Kevin Rudd stated publicly on 10 May 2007: "*When it comes to the future, we don't see the need for individual statutory agreements. We think there is sufficient flexibility within the common law arrangements, and/or enterprise arrangements...*" - David Speers, Interview with Kevin Rudd, Federal Labor Leader, (Television Interview, *Sky News*, 10 May 2007)  
<[http://parlinfo.aph.gov.au/parlInfo/download/media/tvprog/SB1N6/upload\\_binary/sb1n61.pdf;fileType=application/pdf](http://parlinfo.aph.gov.au/parlInfo/download/media/tvprog/SB1N6/upload_binary/sb1n61.pdf;fileType=application/pdf)>.



“We did have an AWA which was great for all - staff loved it, was easy to manage & everyone benefitted. This has now been scrapped, overtime has been cancelled...we now have less flexibility, work to the letter of the award....”<sup>65</sup>

Critics of individual statutory agreements argue such instruments are used to pursue ‘cost reduction’ strategies. There is scant evidence to support such simplistic claims. We consider a narrow-minded view of the potential uses for individual statutory agreements miss the point. By providing employers a variety of choices of employment instruments Australian businesses are able to employ staff on terms which best suits the needs of that individual enterprise. In some circumstances this may be an individual arrangement, in others it may be a collective arrangement. By removing one choice the Government has naturally inhibited flexibility and choice for such employers, and the experience of business concerning the lack of practical flexibility in the system bears that out.

As stated in 2011 by Richard Goyder, CEO of Wesfarmers, one of Australia’s largest employers, the Fair Work system has brought:

“...less flexibility into working arrangements, more red tape in terms of taking time to work through the system and it does allow parties, if they want, to be obstructionist and get in the way of enterprise and its employees working together in a constructive and collaborative way.”<sup>66</sup>

VECCI considers the previous Federal Government’s radical change to remove individual statutory agreements completely – which have existed in federal legislation since the mid-1990s – was a grave mistake, the effects of which are now only starting to be realised in a workplace relations system strangled by inflexibility and resulting in low-productivity outcomes. VECCI members are reporting a considerable lack of flexibility in agreement making under the Fair Work system and see little to no benefit in IFAs.

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<sup>65</sup> VECCI Modern Award Survey (2012), closing date 24 January 2012.

<sup>66</sup> Louise Dodson and Mathew Dunckley, ‘Business Council warns Australia is losing capacity to lock in prosperity - High cost, low productivity nation’, *The Australian Financial Review*, 14 February 2011, p 10.

## The IFA – An Ineffectual Replacement

Despite the IFA having promised much in terms of flexibility and being an appropriate statutory employment vehicle, it has delivered little to no practical benefit for employers and individual employees. We note flexibility (through IFAs) was promoted heavily as part of the Labor Government's Forward with Fairness reforms.<sup>67</sup>

The rhetoric in 2007 was encouraging but the reality in 2015 has shown flexibility under IFAs has not eventuated. Our members report little to no benefit in pursuing IFAs and few, if any, utilise them as a vehicle for achieving necessary flexibility or workplace efficiency practices on site. The chief reason for this is the lack of certainty IFAs provide employers.

In VECCI's Supplementary Submission to the FW Act Review Panel, we summarised the broad consensus of disenchantment from various employer and union parties regarding individual flexibility arrangements.<sup>68</sup>

In a 2012 VECCI survey of VECCI members,<sup>69</sup> 68% of employers who participated said they didn't use, or hadn't tried using, an IFA. Another 6% said they didn't even know what an IFA was. For the most part, the reason why employers didn't use them was because of their 'lack of understanding of the BOOT. Other comments included IFAs being too cumbersome and/or too complex and some employers reported their EBA, through union negotiation, now contained a flexibility clause which is too narrow.

This is consistent with responses to a 2012 Member Survey<sup>70</sup> in which responses included:

"Flexibility of employees and owner is reduced significantly"

"For the industry to grow there needs to be more flexibility with hours"

"Flexibility arrangements should be genuinely used to provide win/win situations and at times this means that the Better Off Overall Test will not always show a break even. There has to be some

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<sup>67</sup> See e.g. Deputy Prime Minister the Hon. Julia Gillard promised employers in February 2008: "...a simple, modern award system with opportunities for individual flexibilities will remove the need for any individual statutory agreements and the associated complexity and bureaucracy attached to those agreements" – Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 185 (Minister for Employment and Workplace Relations and Minister for Social Inclusion).

<sup>68</sup> Victorian Employers' Chamber of Commerce and Industry, *Fair Work Act Review – VECCI Supplementary Submission* (March 2012) Department for Education, Employment and Workplace Relations <<http://submissions.deewr.gov.au/sites/Submissions/FairWorkActReview/Documents/VictorianEmployersChamberofCommerceandIndustry.pdf>>.

<sup>69</sup> VECCI Modern Award Survey, 2012, closing date 24 January 2012.

<sup>70</sup> VECCI Modern Award Survey (2012), closing date 24 January 2012.

intrinsic value placed on work life balance and not just all be about pay rates to gain approval for IFAs.”

“Restricts flexibility for part-time staff to work extra hours at ordinary rates, that they request for personal reasons as well when the employer requests additional hours to cover operational needs in a busy or under resourced period.”

The 2015 VECCI Member Survey found similar outcomes, with only 22% of employers having used or tried to use an IFA. Specifically, VECCI members have experienced a number of issues impacting flexibility within the system including:

- Uncertainty regarding the application of the ‘better off overall test’ (“BOOT Issue”); and
- The ambiguous model IFA clause in modern awards (“Award Flexibility Issue”).

VECCI sees **no logical reason** why a modern and flexible workplace relations system cannot incorporate individual statutory agreements for employees assessed against a BOOT. VECCI considers the position that applied to individual statutory agreements existing before the Work Choices reforms, whereby Part VID of the WRA was an effective and successful method of engaging employees individually (where the employee and the employer so choose) and should be reinstated as an option for employers.

This legislative position provided flexibility needed by employers, but also provided sufficient safeguards for employees on individual statutory agreements. Such a reform would mean little need for the FW Act to retain the largely useless and unused IFAs. Alternatively, the Work Choices position post-the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth) amendments also achieve the above aims.

In the event IFAs are to be retained as non-statutory agreements in the FW Act, VECCI considers IFAs should be revised to provide the flexibility necessary for an effective and modern workplace relations system. VECCI notes the experienced practitioner and Professor of Law of Victoria University, Graham Smith<sup>71</sup> and Masters Builders Australia<sup>72</sup> (“MBA”) also provide submissions to the 2012 FW Act Review Panel regarding similar suggestions to reform and improve the FW Act.

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<sup>71</sup> Graham F Smith, *Submission to the Fair Work Act Review Panel* (3 February 2012) Department of Education, Employment and Workplace Relations <<http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Pages/Submissions.aspx>>.

<sup>72</sup> Master Builders Australia Ltd, *Submission to the Fair Work Act Review Panel on the Fair Work Act Review* (9 February 2012) Department of Education, Employment and Workplace Relations <<http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Pages/Submissions.aspx>>.

## Necessary Reform

**VECCI considers the PC should recommend the ability for employees and employers to make individual statutory arrangements be reinserted into the FW Act**, as applied under either the WRA or the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth) amending legislation.

In the event IFAs are to be retained as non-statutory agreements in the FW Act, VECCI considers IFAs should be revised to provide the flexibility necessary for an effective and modern workplace relations system as outlined in the following section.

## BOOT Issue

Regarding the BOOT Issue, we note the inconsistent application of the BOOT in cases where Fair Work Australia (as it then was) considered so-called ‘preferred hours’ or ‘voluntary hours’ clauses in Enterprise Agreements.<sup>73</sup> Although such decisions apply to Enterprise Agreements, VECCI considers these inconsistent cases may become relevant to the question whether, at law, a particular IFA inclusive of a ‘voluntary hours’ provision is valid due to uncertainty. Specifically, whether an IFA including such a clause satisfies the better off overall requirement.

As such, our members are reluctant to enter into IFAs inclusive of ‘voluntary hours’ provisions for fear of the IFA being challenged and our member being ordered to pay backpay and/or penalties for breaching an award. Interestingly, the Explanatory Memorandum (“EM”) in respect of s 203 of the FW Act suggests ‘voluntary hours’ are permissible in IFAs in the illustrative example of Josh:

“...In Josh’s case, however, he has agreed under the individual flexibility arrangement to give up a financial benefit (penalty rates) in return for a non-financial benefit (leaving work early). It is intended that, in appropriate circumstances, such an arrangement would pass the better off overall test...”<sup>74</sup>

The FW Act Review Panel appeared to agree with this position in its Report,<sup>75</sup> where it recommended:

“Recommendation 12: The Panel recommends that the better off overall test in s. 144(4)(c) and s. 203(4) be amended to expressly permit an individual flexibility arrangement to confer a non-monetary benefit on an employee in exchange for a monetary benefit, provided that the value of the monetary benefit foregone is specified in writing and is relatively insignificant, and the value of the non-monetary benefit is proportionate”.<sup>76</sup>

VECCI notes the Coalition Government’s Fair Work Amendment Bill 2014 acts on the above recommendation.

The lack of clarity on this key issue, particularly when combined with the restrictions on part time hours that has been consolidated into many modern awards, represents a significant issue and shortfall within the current framework.

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<sup>73</sup> See, e.g. *Top End Consulting* [2010] FWA 6442 (24 August 2010) contra *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 ors* [2010] FWAFB 2762 (15 April 2010).

<sup>74</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth) 867.

<sup>75</sup> Department of Education, Employment and Workplace Relations, above n 57.

<sup>76</sup> Ibid.

## Award Flexibility Issue

VECCI notes Section 3.2 *Individual Flexibility Agreements* of the Issues Paper. Regarding mandatory flexibility terms in enterprise agreements VECCI notes the FW Act requires all enterprise agreements to contain a flexibility term which “*enables an employee and his or her employer to agree to an arrangement (an **individual flexibility arrangement**) varying the effect of the agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer*”.<sup>77</sup> Such terms of an enterprise agreement must comply with the requirements in section 203 of the FW Act.

The prevalence of token flexibility clauses in enterprise agreements makes a mockery of genuine flexibility on site which suits individual employees. The dilution of genuine flexibility arrangements in enterprise agreements appears to be ignored by both the federal government and the FWC.

The examples AMMA has provided in its paper “*Individual Flexibility Arrangements (under the Fair Work Act 2009): The Great Illusion*”<sup>78</sup> are similar to those VECCI members are exposed to through the bargaining process with the same unions. These examples included:

“The terms that may be subject to an individual flexibility arrangement are a 15-minute tea break, paid at the rate prevailing at the time, which will be granted two hours after the start of an employee’s ordinary hours...

The IFA may only vary terms of the agreement relating to flexible working arrangements to assist with an employee’s family responsibilities...

“The employer will on an annual basis allow each employee to take up to 10 days’ annual leave in single day absences.”<sup>79</sup>

The unsuitability of the ‘flexibility’ in the current IFA framework in this regard was recognised by the FW Act Review Panel, given its recommendation in its Report:

“Recommendation 24: The Panel recommends that s. 203 be amended to require enterprise agreement flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in paragraph 1(a) of the model flexibility term in Schedule 2.2 of the FW Regulations, along with any additional matters agreed by the parties.”<sup>80</sup>

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<sup>77</sup> *Fair Work Act 2009* (Cth) s 202.

<sup>78</sup> AMMA, ‘*Individual Flexibility Arrangements (under the Fair Work Act 2009): The Great Illusion*’ (May 2010) <[http://www.amma.org.au/home/publications/AMMA\\_Paper\\_IFAs.pdf](http://www.amma.org.au/home/publications/AMMA_Paper_IFAs.pdf)> on 9 February 2012.

<sup>79</sup> *Ibid*, p 12.

<sup>80</sup> Department of Education, Employment and Workplace Relations, above n 57.

VECCI notes the Coalition Government's Fair Work Amendment Bill 2014 acts on the above recommendation.

VECCI notes s 144 of the FW Act requires that all modern awards must "*include a term... enabling [an agreement]...varying the effect of an Award*". Interestingly, whilst this provision does not restrict the award matters that can be varied, the AIRC decided to limit such variable terms to:

- arrangements about when work is performed;
- overtime;
- penalty rates;
- allowances; and
- leave loading.<sup>81</sup>

Whilst overtime, penalty rates, allowances and leave loading are largely certain, there appears significant uncertainty regarding what "*arrangements about when work is performed*" actually means. For example, some of our members argue this is a broad term that may include minimum engagement periods whilst other members consider it is defined more narrowly to include rostering only - a contention supported in part by ongoing applications to vary a number of awards to include these arrangements.

A VECCI member quote taken from a 2012 survey stated:

".... minimum engagement terms for PT/casual employees are very onerous especially where staff have requested shorter hours under EEO/flexible work arrangements provisions so that they can perform work from home on an hourly basis. Are we meant to pay them for 3 hours every time they perform 1 hour of work (totally unaffordable) or alternatively are we to refuse their request for workplace flexibility...?"<sup>82</sup>

Whatever the correct interpretation, the uncertainty has resulted in members largely shying away from using IFAs for shortening minimum engagements even where an employee requests the same. VECCI submits s 144 of the FW Act should be varied to provide examples of terms that can be varied via an IFA. One of these examples should include minimum engagements. VECCI also submits the 'model IFA' for enterprise agreements in the Regulations<sup>83</sup> should be amended to make it clear that minimum engagements can also be an IFA term.

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<sup>81</sup> *Award Modernisation* [2008] AIRCFB 550 (20 June 2008).

<sup>82</sup> VECCI Modern Award Survey, 2012, closing date 24 January 2012.

<sup>83</sup> *Fair Work Regulations 2009* (Cth) Sch 2.2.

Our member experience provides:

I have been advised that the IFA is there to provide for the variation of the application of certain terms of this award to meet the genuine individual needs of the employer and individual employee. However, the advice I have from IR specialists, is that denying an employee a penalty or loading, just to get the benefit of additional hours of work, may not meet the 'better off overall test' ("BOOT") for the employee.

I have been advised that if an employee and I agreed to make an IFA to provide additional hours to part-time employees at the ordinary rate of pay to avoid giving the hours to casual employees, and then the IFA was tested, there would be a number of areas of risk for me:

- a. I could be asked to prove the IFA was not signed by the employee under coercion or duress;
- b. Although in the IFA we need to state how the employee is better off overall, in retrospect, how will I be able to demonstrate this was actually the case if the employee is now disputing this; and/or
- c. The Fair Work Ombudsman (or similar) may state the BOOT was not met and I will be liable for huge amounts of back-pay.

As an employer, how am I to ensure the employee is 'better off overall' without paying at least what the award provides? What is the point of the IFA if I actually can't vary (decrease) an award term and then successfully offset that term by giving staff the benefit of receiving more hours at ordinary rates of pay?, For my business the safety-net in this modern award has been set too high for me to continue to provide my part-time employees with the additional hours they have received in the past and the IFA does not provide me, an employer, with a fair and 'safe' mechanism to use at my workplace.

I consider that an IFA does not provide me with flexibility as it is supposed to do. Instead it encourages me to hire casual employees and that means my part-time employees have had a real reduction in the number of extra shifts they work a year from around 30 down to 10 – 15, therefore reducing their supplementary income stream greatly.<sup>84</sup>

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<sup>84</sup> Witness statement of Darrin McGuigan, *WAW Credit Union One*, Appendix 1.



## Necessary Reform

In the event the PC does not recommend the return of statutory individual agreements subject to a 'BOOT', VECCI considers the FW Act should be amended to expand the current IFA framework to provide the flexibility necessary for an effective and modern workplace relations system, provided the following reforms are made:

- The 'model IFA' prescribed in the *Fair Work Regulations* (as a minimum) be a 'mandatory content' clause in enterprise agreements (with parties free to agree to additional flexibility but not being able to dilute the model IFA terms) – as per the 2012 FW Act Review Recommendation 24 and the Fair Work Amendment Bill 2014; and
- Section 144 of the FW Act be amended to provide examples of the types of matters that can be agreed to under modern award IFAs. This should include minimum engagements;
- The 'model IFA' in the *Fair Work Regulations* be amended to include minimum engagements; and
- Provisions dealing with employees being 'better off overall' under IFAs are amended to clarify that IFAs with voluntary hours clauses or providing non-monetary benefits will not be invalidated by a Court.

## Limitation of ‘Permitted Matters’

Regarding Issues Paper 3 and ‘*Restrictions on Agreement Content*’, the PC seeks views regarding “*what aspects of the employee/union-employer relationship should be permitted matters under enterprise agreements*”. VECCI has concerns regarding the broad reach of the current ‘permitted matters’, particularly regarding the engagement of contractors, labour hire and/or casual staff.

As noted in the Issues Paper, the FW Act “*moved away from legislative prescription to reliance on jurisprudence about ‘matters pertaining’ to the employment relationship*” following the introduction of the aforementioned legislative prescription under the Work Choices enactment.

The move back to the ‘matters pertaining’ formulation was expressly captured in the EM, where it was stated “*there is substantial jurisprudence about what the phrase [‘matters pertaining’] means*”.<sup>85</sup> The *Explanatory Memorandum to the Fair Work Bill 2008* (“EM”), in respect of clause 172(1)(b), states:<sup>86</sup>

The following terms would not be intended to be within the scope of permitted matters for the purpose of paragraph 172(1)(a):

- terms that would contain a **general prohibition** on the employer engaging labour hire employees or contractors;
- terms that would contain a **general prohibition** on the employer employing casual Employees

**(emphasis added)**

The task for businesses however, particularly for SME’s, to decipher the ‘*substantial jurisprudence*’ regarding this area of enterprise bargaining increases costs, restricts flexibility and productivity outcomes in an increasingly competitive global market. It is a task the High Court has grappled with on many occasions,<sup>87</sup> resulting in overly-technical and inconsistent rulings. This narrow technical formulation is expressly referred to in the EM, whereby the following is said in relation to the interpretation of a particular term –

“Whether a particular term is about matters pertaining to the employment **relationship will depend on its precise construction**, as well as **the circumstances surrounding the particular employment relationship**”.<sup>88</sup>

**(emphasis added)**

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<sup>85</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth) 670.

<sup>86</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth) 673.

<sup>87</sup> See e.g. *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board* (1966) 115 CLR 443; contra *Re Cram; Ex parte NSW Colliery Proprietors Association Ltd* (1987) 163 CLR 117.

<sup>88</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth) 671.

Rather than simplify enterprise bargaining, the EM and various decisions of the FWC have entrenched the uncertainty and highly technical nature of contractor or labour hire clauses in enterprise agreements under various guises of ‘job security’ and/or specific ‘consultation’ obligations.<sup>89</sup>

Despite the apparent unambiguous position, confusion still reigns. There have been at least seven Full Bench decisions<sup>90</sup> dealing with the issue of ‘permitted matters’. Furthermore, anecdotal and media coverage of one of the most significant workplace disputes in the last decade – the Qantas grounding dispute in 2011 – suggests non-permitted matters such as a 20% ‘cap’ on the use of contractors<sup>91</sup> and a commitment regarding aircraft maintenance operations<sup>92</sup> were crucial issues in the dispute.

The retention of the inconsistent ‘matters pertaining’ jurisprudence, and the inclusion of the phrase ‘*general prohibition*’ in the EM as discussed above has contributed to an increasingly complex and litigated area of enterprise bargaining, which results in lost time and substantial costs to business.

### Necessary Reform

In order to improve this area of the FW Act, VECCI consider s 172(1) is amended to clarify the following are **not** permitted matters:

- terms that would contain prohibitions or restrictions on the employer engaging labour hire employees or contractors;
- terms that would contain prohibitions or restrictions on the employer employing casual employees; and
- terms that would include restrictions or requirements regarding the terms and conditions of labour hire employees, contractors or casual employees.

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<sup>89</sup> Noting the EM clearly stated s 172 of the FW Act would “ensure that matters that clearly fall within the ‘managerial prerogative’, that are outside the employer’s control or are unrelated to employment arrangements are not subject to bargaining and industrial action” and the retention of the ‘matters pertaining’ doctrine “provides certainty to employers as to what matters can be included in enterprise agreements - Explanatory Memorandum, Fair Work Bill 2008 (Cth), 137.

<sup>90</sup> *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWA 368 (9 October 2009); *Australian Postal Corporation v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia-Communications Division* [2010] FWA 344 (20 January 2010); *Alcoa of Australia Ltd v Australian Workers’ Union - Western Australian Branch* [2010] FWA 4889 (9 July 2010); *Australian Postal Corporation v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2010) 189 IR 262; *Airport Fuel Services Pty Ltd v TWU* (2010) 195 IR 384.

<sup>91</sup> *TWU v Qantas* [2012] FWA 6612 (8 August 2012) [80].

<sup>92</sup> Pip Freebairn & Melanie Beeby, ‘What the unions want’, *Australian Financial Review*, 30 October 2011 <[http://www.afr.com/p/business/companies/what\\_the\\_unions\\_want\\_1XPzVNsdf08ijggol4e10](http://www.afr.com/p/business/companies/what_the_unions_want_1XPzVNsdf08ijggol4e10)>.

## 2.2. An Overly Prescriptive Approval Process and Approval Issues

We note Issues Paper 3 relating to ‘Bargaining and Industrial Disputes’ and highlight to the PC issues regarding the convoluted bargaining rules in the FW Act combined with the Commission’s approval processes for enterprise agreements.

VECCI members report a frustration with the time and effort involved unravelling the overly prescriptive and confusing procedural requirements under the FW Act for enterprise agreement bargaining. VECCI calculate an exhausting 14 step process from ‘cradle to grave’ for a member seeking to bargain for a single enterprise agreement:

- 1) Bargaining is initiated (s 173(2));
- 2) ‘Notice of representational rights’ (“NORR”) given to employees (s 173);
- 3) ‘Notice of representational rights’ content requirements are met (s 174(3));
- 4) Bargaining agents are determined (ss 174, 176);
- 5) Bargaining requirements are observed (s 179);
- 6) Employees have received relevant material (s 180);
- 7) Explanation of key terms has been provided to ‘vulnerable employees’ (ss 180(5)(b) and (6);
- 8) Agreement is achieved;
- 9) Employee vote requested by employer (s 181(3));
- 10) Majority approval obtained (s 182);
- 11) Employer applies for the FWC’s approval (s 185);
- 12) The FWC’s Approval obtained (ss 186, 187);
- 13) Model terms take effect (s 201); and
- 14) Agreement commences operation.

### **NORR – What is it good for?**

Surely there is a simpler process than the above? Members also face the daunting prospect that if one of the above procedural requirements stipulated in the FW Act is not met, the entire process may be held invalid. For example, if an employer fails to provide the NORR in the correct form to enough employees to be covered by the proposed agreement, the omission will likely taint the entire process.

Even if that employer (and even the relevant trade union) provides extensive feedback and explanation to employees on the proposed agreement terms, has a successful employee vote (and complies with all other procedural requirements, under the wording of the FW Act), the Commission must not approve the agreement because a **necessary** pre-approval step was not complied with.

This seems extraordinary as it usually involves that all-too-rare circumstance where the employer, employees, trade union (and even the FWC Member) all desire an outcome but are prevented from that outcome owing to overly-prescriptive legislative requirements. VECCI submits some form of discretion allowing the FWC to approve an enterprise agreement “*where in all circumstances the FWC considers it reasonable to do so*” where a pre-approval step has not been complied with should be inserted into the FW Act.

The unnecessary technicality and rigid procedural requirements which beget the Fair Work system are amply demonstrated by decisions such as *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* (“*Peabody*”).<sup>93</sup> In this decision, the Full Bench of the FWC held three documents that were stapled to the NORR formed part of the NORR and, as a result, the NORR deemed to contain ‘other content’ in non-compliance with sub-section 174(1A) of the FW Act.

The Commission held that the section, context and legislative purpose of the Act meant that a failure to comply with the provisions would invalidate the NORR. Accordingly, the Commission refused to approve the proposed enterprise agreement and the employer had to start the bargaining process again. Such decisions are becoming common even when there is no evidence parties were unaware of their bargaining rights or otherwise unaware of their right to involve their trade union (arguably the only purpose of the NORR). The NORR serves little practical purpose and its chief aim – to provide evidence trade union members were aware they could be represented by their union during any bargaining – can be obtained to satisfy the FWC in a less bureaucratic, rigid and formal way. This unnecessary ‘red tape’ document – which inhibits bargaining and results in a considerable number of agreements being denied approval by FWC on minor, technical grounds – should be removed from the FW Act.

### **Pedantic Approach at Approval Stage**

The above 14-step process doesn’t even take into account the proposed agreement being held up at approval stage with the Commission – despite the approval of the employer, majority of employees (who ‘voted up’ the proposed agreement) and likely the relevant trade union in support – refusing to approve the proposed agreement unless ‘undertakings’ are provided.

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<sup>93</sup> *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FWCFB 2042. See also *Boral Construction Materials Group Ltd T/A Boral Tasmania* [2013] FWC 8961 (15 November 2013); *Shape Shopfitters Pty Ltd* [2013] FWC 3161 (21 May 2013).

This step essentially requires the employer to commit to additional benefits/practices it will provide employees (in addition to the benefits/practices already agreed to throughout the negotiation) so as to satisfy the FWC Member concerned. A proposed agreement being held up at approval stage by the FWC is continuing problem for businesses under the FW Act system, and many FWC Members appear to be taking a very prescriptive approach to the application of the wording of the NES and the modern awards. Notable examples include:

- A decision at first instance took a strict approach to compliance with the NES, finding that an arrangement to pay a ‘rolled up’ rate inclusive of annual leave (whereby annual leave would be unpaid at the time of taking leave, by virtue of already receiving the monetary benefit per hour as part of the ordinary rate) excluded a clause of the NES (namely ss 55 and 56) and therefore could not be approved.<sup>94</sup> A Full Bench majority decision overturned the decision, and the majority correctly stated:

**“It may be that s 186(2) requires nothing more than a review of the Agreement to determine whether it expressly purports to exclude any NES provision.** However the **section has been interpreted as going beyond that** and to require FWA to examine the effect of the Agreement and be satisfied that the benefits under the NES will apply if the arrangements contained in the enterprise agreement are implemented.”<sup>95</sup>

**(emphasis added)**.

- A first-instance decision by FWA<sup>96</sup> to refuse to approve an enterprise agreement made by Galintel Rolling Mills Pty Ltd because the NORR contained a ‘reply slip’ which was considered to have altered the nature of the NORR such that it ceased to be a valid notice under s 173 of the FW Act. However, this was overturned by the Full Bench,<sup>97</sup> who decided it is “*generally unwise*” for employers to alter or add to the prescribed content in the mandatory NORR, however in this case “*there can be no doubt that the notice issued to employees in this case contained every word required by the Regulations*”<sup>98</sup> and that “*on our consideration of the slip these concerns are overstated and do not give rise to the conclusion that the notice is invalid*”.<sup>99</sup>

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<sup>94</sup> *Hull-Moody Finishes Pty Ltd* [2011] FWA 5618 (22 August 2011), [27].

<sup>95</sup> *Mr Irving Warren; Hull-Moody Finishes Pty Ltd; Mr Romano Sidotti* [2011] FWAFB 6709 (29 November 2011).

<sup>96</sup> *Galintel Rolling Mills Pty Ltd T/A The Graham Group* [2011] FWA 4603 (15 July 2011).

<sup>97</sup> *Galintel Rolling Mills Pty Ltd T/A The Graham Group* [2011] FWAFB 6772 (18 October 2011).

<sup>98</sup> *Ibid*, at para [41].

<sup>99</sup> *Ibid*, at para [43].

- Seemingly unprompted ‘frameworks’ being inserted as in the undertaking required for the St Albans Management Pty Ltd Drivers Employee Agreement<sup>100</sup> that concrete delivery drivers (working a 38 hour week) would not “*be required to work more than 82 hours in any week without payment for hours of work greater than 82 at the overtime rate prescribed by the Road Transport and Distribution Award 2010*”; and
- A VECCI member who had been bargaining with two unions and its employees for about seven months put their proposed enterprise agreement to vote. During this bargaining period the employer had been meeting regularly with the union and when negotiations hit a standstill the union applied for a protection action ballot. There was never any doubt between the unions and the employer that bargaining had started and was progressing well. In January 2012, the proposed agreement was ‘voted up’ and was ‘made’. However, whilst completing the Employer Declaration Form 17, the employer realised it had inadvertently not issued the NORR. As a consequence the employer was forced to go through the employee approval vote again despite union bargaining representatives having recommended voting up the agreement. The employer was forced to go through the inflexible steps of reissuing the NORR, allowing 21 days before the seven day access period could re-start, and then conducting an employee vote once again. Unsurprisingly, there were no new bargaining representatives nominated as a result of the issue of the NORR and it is highly likely the proposed agreement will be voted up again as the initial vote overwhelmingly approved the Agreement. VECCI considers that in these cases where the agreement making process is fully transparent, fully supported by bargaining representatives and approved by employees, the FW Act be amended to provide the discretionary power for the FWC to take circumstances as these into consideration when considering approval of a proposed agreement.

VECCI is aware the above example is unfortunately an all-too common occurrence, with VECCI frequently advising its members regarding this discrepancy in their process and having to advise members of the ‘snakes and ladders’ repercussions of this defect.

VECCI considers that in cases where the agreement making process is fully transparent, fully supported by bargaining representatives and approved by employees, the FW Act be amended to provide the discretionary power for the FWC to take circumstances as these into consideration when considering approval of a proposed agreement.

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<sup>100</sup> [2012] FWAA 1013 (5 January 2012).

Additionally, the interpretation of the BOOT by the FWC needs to be simplified and clarified, and made much less prescriptive, enabling parties to have an enterprise agreement not bonded to the precise wording and terms of the NES and/or modern award entitlements.

Regarding the inflexibility of the BOOT the FW Act Review Panel supported this position, recommending in its Report:

“Recommendation 25: The Panel recommends that the Government continue to monitor the application of the BOOT to enterprise agreement approvals, to ensure that it is not being implemented in too rigid a manner or resulting in agreements being inappropriately rejected”.<sup>101</sup>

### **Necessary Reform**

- Simplification of the procedural requirements for bargaining for an enterprise agreement;
- The FW Act should be amended to allow the FWC to approve an enterprise agreement “*where in all circumstances FWC considers it reasonable to do so*” where a pre-approval step has not been complied with; and
- The interpretation of the BOOT by the FWC needs to be simplified and clarified, and made much less prescriptive, enabling parties to have an enterprise agreement not bound to the precise wording and terms of the NES and/or modern award entitlements.

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<sup>101</sup> Department of Education, Employment and Workplace Relations, above n 57.



## 2.3. Other Issues with Enterprise Agreements

### The Manipulation of Greenfields Agreements

Greenfields agreements are being manipulated by trade unions under the FW Act system to force employers to pay well in excess of market conditions for new projects which are vital to Australia's continued prosperity.

The concept of an 'Employer Greenfields Agreements' introduced to the WRA<sup>102</sup> by the Work Choices amendments was an agreement set by a business for all initial work occurring on that Greenfields project. This arrangement was drafted to only last to new employees engaged on the project for a 'start-up' period of 12 months,<sup>103</sup> after which time an employer needed to negotiate directly with the employees and, in most circumstances, the relevant trade union with coverage over workers on that project. The use of such a 'start-up' agreement meant:

- It was subject to a minimum 'safety net' of standards;<sup>104</sup>
- No 'up front' negotiations or industrial action;
- Certainty and control for employers (e.g. on major construction projects);
- Employers being able to 'hit the ground running' on important projects, hopefully reducing delays and cost blowouts (particularly in the construction sector); and
- Employment conditional on accepting terms of the Greenfields agreement.

These employer Greenfields agreements were abolished under the so-called 'Forward with Fairness' reforms. Under the FW Act a Greenfields enterprise agreement could still be made for a genuine new enterprise<sup>105</sup> (which includes a genuine new business, activity, project or undertaking) but, crucially, such an agreement must be bargained with one or more relevant trade unions. These operate for a 4 year period.<sup>106</sup>

Members report the practical effect of these reforms has given trade unions (particularly in the construction and resources sector) the option to manipulate and stall new projects until their industrial demands are met, knowing the employer cannot engage employees on the contract without its say-so over the employment conditions they are engaged on. Employers are being held to ransom by trade unions to sign on to wildly-inflated terms and conditions in order to commence their planned project. The option for employers to engage workers on the project

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<sup>102</sup> *Workplace Relations Act 1996* (Cth) s 330 amended by *Workplace Relations (Work Choices) Act 2005* (Cth).

<sup>103</sup> *Workplace Relations Act 1996* (Cth) s 352(1)(a) amended by *Workplace Relations (Work Choices) Act 2005* (Cth).

<sup>104</sup> Following the Work Choices reforms, the then 'Australian Fair Pay and Conditions Standard'.

<sup>105</sup> *Fair Work Act 2009* (Cth) s 172(4).

<sup>106</sup> *Fair Work Act 2009* (Cth) s 186(5).

without the security of an industrial agreement – and expose the project to industrial action and considerable delays – is too great a risk to be contemplated for most businesses.

This has had a considerable effect on an inflationary escalation of wages and conditions of employees engaged on such projects and, consequently, a blowout of overall project costs. Much of this has been borne by the Australian taxpayer for government-funded projects. In the private sector, investors have been hesitant to finance projects or participate in public-private partnerships for major projects.

An alarming 48% of VECCI members surveyed in 2012 reported that since the introduction of the FW Act ‘red tape’ has increased substantially,<sup>107</sup> mirroring concerns from business leaders at this time.<sup>108</sup> The 2015 VECCI Member Survey found one response from McConnell Dowell Constructors (Aust) Pty Ltd was particularly notable explaining their experience with negotiating Greenfields Agreements in the Building and Construction Industry:

“MCD employ blue collar employees under predominately Greenfield’s Enterprise Agreements for new project work and in other areas we have coverage under the modern award, paying market rates to attract and retain experienced and competent employees.

When negotiating Greenfields Agreement we are somewhat at the mercy of the union during negotiations because of time constraints set by client(s) for project commencement particularly where there is a short lead time (as little as 2 weeks’ notice from contract award to mobilisation to site). With no time constraints to negotiate a Greenfields Agreement under the Act, the union exercise their ability to hold out until they get their preferred terms and conditions in the Agreement. This does not necessarily equate to a level playing field for employers in negotiations for Greenfields Agreement.

Where negotiations for a Greenfields Agreement has not been finalised in time for project mobilisation we are forced to sub contract out works to labour hire companies to ensure work commences on the site.”<sup>109</sup>

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<sup>107</sup> VECCI Modern Award Survey, 2012, closing date 24 January 2012.

<sup>108</sup> See, e.g. Matthew Stevens, ‘Do the math on roadblocks’, *Australian Financial Review*, 14 February 2012; and 2012 comments from business leader Grant King, managing director of Origin Energy, told the Australian Financial Review at a Business Council of Australia roundtable he was observing routine cost overruns in Australia’s major projects at least 20 per cent, and “if these roadblocks to efficiency continue, Australia risks unnecessarily adding \$200 billion of costs to the national infrastructure”.

<sup>109</sup> Witness statement of Mary-Jo Durrant, *McConnell Dowell Constructors (Aust) Pty Ltd (MCD)*, Appendix 1.

The FW Act Review Panel generally supported the submissions of VECCI,<sup>110</sup> MBA<sup>111</sup> and Professor Smith<sup>112</sup> and other bodies when it recognised the unfairness and restrictions inherent in the current system and recommended in its Report:

“Recommendation 30: The Panel recommends that the FW Act be amended to provide that, when negotiations for a s. 172(2)(b) Greenfields agreement have reached an impasse, a specified time period has expired and FWA conciliation has failed, FWA may, on its own motion or on application by a party, conduct a limited form of arbitration, including ‘last offer’ arbitration, to determine the content of the agreement.”<sup>113</sup>

In response, VECCI notes the Coalition Government’s Fair Work Amendment Bill 2014 aims to fix the current impediments to making a Greenfields Agreement, by amending the FW Act to allow:

- bargaining negotiations for genuine new enterprise agreements to be completed by the parties within three months of commencement;
- all parties to the negotiations, including trade unions, having to ‘bargain in good faith’; and
- if the bargaining negotiations are not successfully concluded within three months, then the Fair Work Commission being able to intervene and, if necessary, make and approve a Greenfields Agreement in accordance with prevailing industry standards (subject to the BOOT in the FW Act).<sup>114</sup>

### Necessary Reform

VECCI considers amendments to ‘Greenfields agreements’ to be crucial to the economy and necessary reform. It encourages the Federal Parliament to pass this legislation, or urges the PC to adopt a recommendation along the same lines as the proposed legislation.

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<sup>110</sup> VECCI submitted the FW Act should be amended to enable ‘Employer Greenfields Agreements’ to be made independently of trade unions for a project ‘start-up’ should negotiations with a trade union first break down or result in unaffordable or un-economical outcomes; Victorian Employers’ Chamber of Commerce and Industry, ‘*Fair Work Act Review Submission - Towards a Fairer, More Flexible and More Productive Workplace Relations System*’ (17 February 2012), 21 <<http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Pages/Submissions.aspx>>.

<sup>111</sup> Master Builders Australia Ltd, ‘*Submission to the Fair Work Act Review Panel On The Fair Work Act Review*’ (9 February 2012), 77 <<http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Pages/Submissions.aspx>>.

<sup>112</sup> Graham F Smith, above n 71.

<sup>113</sup> Department of Education, Employment and Workplace Relations, above n 57.

<sup>114</sup> Fair Work Amendment Bill 2014 (Cth) Part 5, Schedule 1.

### 3. INDUSTRIAL ACTION

Regarding the PC's Issues Paper 3 examining industrial action, VECCI considers the workplace relations framework relating to industrial action is not working. Specifically, VECCI members have experienced issues concerning:

- how unprotected industrial action taken deliberately by trade unions is becoming legitimised as a bargaining tactic and seemingly unpunished by the Commission and the workplace relations system; and
- the ease with which trade unions are able to obtain Protected Action Ballot Orders, despite pursuing 'non-permitted' matters.

### 3.1. Rise of Unprotected Industrial Action and Lawlessness in Victoria

In recent years, VECI has repeatedly warned about the re-emergence in Victoria of industrial action under the FW Act which involves threats of violence and intimidation to employers, employees and third parties. This is coupled by an increase in unprotected industrial action as a negotiation tactic, combined with a general feeling of lawlessness amongst trade unions in various industries.

We note the submissions of ACCI to the 2012 FW Act Review Panel which referenced the 'Baiada dispute'. Principally, we note the violence and intimidation which occurred from an NUW-organised picket line at Baiada Chickens against a security guard attempting to attend work at the premises being picketed:

More than 100 workers at the Laverton North plant went on indefinite strike on Wednesday evening over conditions at the plant. A security guard who tried to cross the picket line had his car keys taken away by union members. When they were returned he tried to drive through the crowd. "You should not have treated me like that guys. If you done the right thing I would have reversed," the guard told the crowd. He was met with a chant of "shame on you" before members of the crowd surrounded his car and tried to punch him. The Ambulance Service has treated one person struck by the car for an arm injury. Staff at the chicken processing plant say they need better job security, with claims many workers are contractors working below the minimum wage. Melbourne police were monitoring the picket line overnight.<sup>115</sup>

We consider the entire process which occurred reflects how the existing criminal and civil law framework is not working as it should for unlawful industrial action. We note on Friday, 14 November 2011, Baiada were forced to obtain an Order from the Supreme Court of Victoria to stop the illegal union blockade of its premises. That evening Victoria Police were sent to the premises to enforce the Court's Order. The process to enforce the Order and remove unlawful protesters can be contrasted with the successful removal of individuals associated with the unlawful 'Occupy Melbourne' protest movement only weeks earlier. The media reported the NUW triumphantly posted video online the following day (Saturday, 15 November 2011) showing police retreating as protesters cheered.<sup>116</sup>

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<sup>115</sup> Australian Broadcasting Corporation, *Brawl erupts at Baiada picket line* (10 November 2011) <<http://www.abc.net.au/news/2011-11-09/brawl-erupts-at-victorian-picket-line/3656228>>.

<sup>116</sup> Miranda Devine, 'Union heavies' evil game of chicken at Baiada Poultry, whose Laverton North factory is in Julia Gillard's electorate', *The Sunday Telegraph (online)*, 13 November 2011, <<http://www.dailytelegraph.com.au/news/opinion/union-heavies-evil-game-of-chicken-at-baiada-poultry-whose-laverton-north-factory-is-in-julia-gillards-electorate/story-e6frezz0-1226193442749>>.

The NUW was rewarded by the extreme, illegal industrial tactics employed by its organisers at the picket, with an 'in principle' agreement with the company being reached whilst the picket was still unlawfully operating against the company and freezing access to the Laverton North premises. This is an invidious situation for an employer and for innocent third parties.

In early December 2011, Victoria Police, through its Assistant Commissioner Steve Fontana, the officer in charge of policing both Occupy Melbourne protests and the Baiada chicken picket line, appeared to justify its insipid response by claiming the Baiada picket line would have become dangerous if police had attempted to break it twice. *"It was dangerous for all involved, we had intelligence that a large number of protesters would have rallied"*.<sup>117</sup>

Following the Baiada incident Victorian businesses have expressed growing concern that even Supreme Court Orders will not be enforced to the full extent and there is essentially nowhere else to turn to when industrial disputes involve threats to other employees, property or third parties. Unions should not be able to leverage this type of fear on businesses, in order to achieve their industrial objectives.

Since 2011 this seemingly successful industrial bargaining tactic has been extended and improved upon. Notable examples include:

- The CFMEU blockading Grocon's Myer Emporium site for four consecutive days in late August 2012, hindering access to the McNab Avenue site in Melbourne's western suburbs on 5 September 2012, and blocking concrete deliveries to the Myer Emporium site and another CBD project on 26 April 2013;<sup>118</sup>
- The NUW - through its members - staging an illegal occupation of an employer's premises following protected employer response action (lockout) to force that employer to accept pay and conditions it could not secure during enterprise agreement negotiations;<sup>119</sup>
- Boral Resources (Vic) Pty Ltd having to take Victorian Supreme Court action to seek contempt orders against the CFMEU that the union's alleged secondary boycott/blockage of the Regional Rail Link site in Melbourne's western suburbs on 16 May 2013 was in contempt of orders made by Victorian Supreme Court Justice Hollingworth on 7 March and 5 April 2013; and<sup>120</sup>

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<sup>117</sup> Stephen Drill, 'Liberal heavyweight warns business will go if picketers not dealt with', *Herald Sun*, 9 December 2011, <<http://www.heraldsun.com.au/news/more-news/liberal-heavyweight-warns-business-will-go-if-picketers-not-dealt-with/story-fn7x8me2-1226217649303>>.

<sup>118</sup> *Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2)* [2014] VSC 134 (31 March 2014).

<sup>119</sup> Workplace Express, 'Sit in over after in-principle deal struck', (2 February 2015) <[http://www.workplaceexpress.com.au/nl06\\_news\\_print.php?selkey=53068](http://www.workplaceexpress.com.au/nl06_news_print.php?selkey=53068)>.

<sup>120</sup> *Boral Resources (Vic) Pty Ltd & Ors v CFMEU* [2013] VSC 572 (28 October 2013).

- Union officials disregarding OHS laws to gain access to building sites, partly demonstrated by the FWBC having launched four recent court cases against union officials for allegedly disobeying safety laws on building and construction sites

Whilst there are supposed to be employer protection mechanisms, or responses to illegal and unprotected tactics the below cases show employers do not have sufficient protections under the current inadequate regime and legislative schema:

- *Construction, Forestry, Mining and Energy Union and Others v Bechtel Construction (Australia) Pty Ltd and Another* [2015] FWCFB (18 February 2015)
- *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining & Energy Union* [2014] FCA 1373 (16 December 2014)
- *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2015] FCAFC 25 (6 March 2015)

Indeed, the situation is so bad at present the FWBC has currently 72 CFMEU officials before the courts with fourteen of the 72 men facing court because FWBC is trying to have their Federal Right of Entry permit suspended, revoked, or permit application refused, and the remaining 58 men are facing a total of 403 alleged workplace law breaches.<sup>121</sup>

There are 18 Victorian-based officials currently before the courts, including State Secretary John Setka, former State Secretary Bill Oliver, President Ralph Edwards, Vice President Derek Christopher and Assistant Secretaries Shaun Reardon and Elias Spervovasilis.<sup>122</sup>

Further, VECCI notes the key features of *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) will further dis-incentivise those who consider engaging in lawlessness and not ‘playing by the rules’ relating to industrial action and dispute resolution. These reforms will have a positive ‘knock-on’ effect in the construction industry and wider economy by making construction projects cheaper and safer, and promote business confidence and investor confidence overall in Australia being a safe, predictable and solid investment choice, where rule of law is respected on building sites and large-scale projects.

The Bill’s key features include:

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<sup>121</sup> Fair Work Building and Construction, *Industry Update March 2015* <<http://fwbc.gov.au/72-cfmeu-officials-courts-0/>>.

<sup>122</sup> Ibid.

- The ABCC to be re-established, armed with the powers it previously held to compel the attendance and production of documents by persons with information relevant to an investigation;
- The definition of “building work” to be expanded to include transportation or supply of goods to building sites, and offshore resources platforms;
- New limits to be imposed on unlawful industrial action and unlawful picketing, supported by tougher penalties for breaches. Namely, the ABCC would be empowered stop disruptive pickets, coercion and discrimination, with a "reverse onus" requiring individuals to prove they were not motivated by industrial objectives to escape the maximum \$34,000 penalty (with a maximum \$170,000 fine for unions); and
- A new Building Code to be issued, imposing further obligations on building industry contractors and other participants in the industry as conditions of obtaining work on Commonwealth-funded projects.

### Necessary Reform

**VECCI contends** there must be further legislative reform (including, for example, competition laws) to prevent or further discourage the above behaviour from occurring in the future, as it has no place in a modern, regulated workplace relations system. To this end, we support ACCI's position in 2012 concerning recommended change:

*9.2 Threats of violence, intimidation, coercion or duress at picket lines, associated with protected or unprotected industrial action, should be unlawful. Contraventions should be able to be investigated and prosecuted by the FWO. Secondary Boycotts should be also be able to be prosecuted by the FWO.*<sup>123</sup>

VECCI notes the *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) appears to be stuck in the Senate with the Federal Government currently being unable to pass this critical legislation. As this Bill addresses all VECCI's concerns regarding the current parlous state of the Australian construction industry, VECCI urges the PC to make a key recommendation of its report that the *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) is necessary and beneficial to improve the construction industry and, by extension the Australian economy, and should be passed by the Federal Senate without delay.

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<sup>123</sup> Australian Chamber of Commerce and Industry, *ACCI Submission Inquiry into the Fair Work Act 2009 Australian Government Discussion Paper* (February 2012), 8 <[http://www.deewr.gov.au/Workplace\\_Relations/Policies/FairWorkActReview/Pages/Submissions.aspx](http://www.deewr.gov.au/Workplace_Relations/Policies/FairWorkActReview/Pages/Submissions.aspx)>.



### 3.2. 'Strike First, Talk Later' and the Softening of the 'Genuinely Trying' Requirement

As the PC notes, in pursuit of the right to strike, employees can take protected industrial action to support or further claims during bargaining. The PC also notes "*there is no requirement for bargaining to have commenced for parties to seek permission to undertake protected industrial action...*" and "*the Fair Work Amendment Bill 2014 proposed to introduce this requirement*".

#### Strike first, talk later

We note the FW Act Review Panel accepted the current situation needs vast improvement and modification when it recommended to the Government in its Report:

Recommendation 31: The Panel recommends that Division 8 of Part 3-3 be amended to provide that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained. The Panel further recommends that the FW Act expressly provide that bargaining has commenced for this purpose despite any disagreement over the scope of the agreement.<sup>124</sup>

We also note the Federal Government has clearly recognised this issue and indeed acted on the above recommendation by introducing an amendment to s 437 in the *Fair Work Amendment Bill 2014*.<sup>125</sup> We note this bill passed the Commonwealth House of Representatives on 27 August 2014, however has not been debated in the Senate since. We urge the PC to recommend Parliament pass this bill to rectify this clear and crucial inconsistency in the Act.

#### The Softening of the 'Genuinely Trying' Requirement

The power to make a protected action ballot order under the FW Act is predicated, by and large, on the FWC's satisfaction of each applicant "*has been, and is, genuinely trying to reach agreement with the employer of the employees who are to be balloted*".<sup>126</sup> Other 'form' requirements exist in the FW Act, however if these have been met (e.g. in respect of the form of the application under s 437), and the Commission is satisfied of the 'genuinely trying' consideration, the FWC **must** make the protected action ballot order. It is, in this respect, not a discretionary power.

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<sup>124</sup> Department of Education, Employment and Workplace Relations, above n 57.

<sup>125</sup> Fair Work Amendment Bill 2014, item 56.

<sup>126</sup> *Fair Work Act 2009* (Cth) s 443(1)(b).

Indeed, a recent FWC Full Bench decision of *Esso Australia Pty Ltd v AMWU, CEPU & AWU*<sup>127</sup> (“*Esso*”) of addressed the “*tension*”<sup>128</sup> between various Full Bench decisions<sup>129</sup> regarding the question of whether a union applicant was ‘genuinely trying’ to reach agreement notwithstanding the pursuit of non-permitted matters (subsequently ‘dropped’ from the ‘log of claims’).

The Full Bench in *Esso* concluded:

“There is no legislative warrant for the adoption of a decision rule such that if an applicant is, or has been, pursuing a substantive claim which is not about a permitted matter it is not genuinely trying to reach an agreement within the meaning of s.443(1)(b). The fact that an applicant is, or has been, pursuing a claim about a non-permitted matter is relevant to whether the test posited by s.443(1)(b) has been met, but it is not determinative of the issue...”<sup>130</sup>

The Full Bench in *Esso*<sup>131</sup> referred to observations in a previous Full Bench decision<sup>132</sup> that s 253 of the FW Act “*recognises that an enterprise agreement may contain terms that are about non-permitted matters*”. The Full Bench also pointed to various contextual considerations supporting the “*legislative intention that applications for protected action ballot orders be heard and determined quickly*”.<sup>133</sup>

In practical terms, the FW Act has greatly expanded the scope of matters for which parties can bargain,<sup>134</sup> and has ‘watered down’ the mechanism for seeking Commission-approval for industrial action even if the matters which are subject to bargaining are, at law, ‘non-permitted’, in the name of quick and informal ‘rubber stamping’ of protected action ballot orders.

In VECCI’s view, a workplace relations system which concurrently:

- Contains overly broad parameters of ‘permitted matters’, supported by an equally vague Explanatory Memorandum (see above, regarding ‘permitted matters’);

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<sup>127</sup> *Esso Australia Pty Ltd v AMWU, CEPU & AWU* [2015] FWCFB 210 (10 February 2015).

<sup>128</sup> *Ibid*, [46].

<sup>129</sup> *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWA FB 368 (9 October 2009); *Australian Postal Corporation v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia-Communications Division* [2010] FWA FB 344 (20 January 2010); *Alcoa of Australia Ltd v AWU* [2010] FWA FB 4889 (9 July 2010); *Australian Postal Corporation v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2010) 189 IR 262; *Airport Fuel Services Pty Ltd v TWU* (2010) 195 IR 384.

<sup>130</sup> *Esso Australia Pty Ltd v AMWU, CEPU & AWU* [2015] FWCFB 210 (10 February 2015) [59].

<sup>131</sup> *Ibid*, [45].

<sup>132</sup> *Alcoa of Australia Ltd v AWU* [2010] FWA FB 4889 (9 July 2010) [18], [23].

<sup>133</sup> *Ibid*, [63].

<sup>134</sup> Via the re-introduction of a watered-down ‘permitted matters’ methodology from the pre-Work Choices era.

- Nevertheless allows enterprise agreements to be approved including when ‘non-permitted matters’ are included in the Agreement (despite them being of “*no effect*”<sup>135</sup>);
- Allows for an employer to be subjected to potentially harmful industrial action because this issue is not ‘*determinative*’ of the ‘*genuinely trying*’ consideration in s 443

is inherently flawed, and begets a system of unnecessary technicality and complexity at the expense of genuine productivity improvements and beneficial outcomes for the Australian economy.

### Necessary Reform

The FW Act needs to be amended to clarify a party applying for a protected action ballot order will **not** be ‘genuinely trying’ to reach agreement with an employer where that party:

- Has not demonstrated ‘genuine’ attempts to negotiate an agreement relevant to the size, needs and circumstances of a particular enterprise (i.e. cannot demonstrate it is not engaging in ‘pattern bargaining’); or
- Is seeking agreement to potentially ‘non-permitted matters’ at the time the application is made (i.e. has not abandoned the potentially ‘non-permitted matter’ during the negotiation).

VECCI also notes the proposals contained in the *Fair Work Amendment (Bargaining Processes) Bill 2014* currently before the Federal Senate, which limits the FWC’s power to make a protected action ballot order if the applicant’s claims are manifestly excessive or would have an adverse impact on productivity at the workplace, and is broadly supportive of these reforms as a sensible and modest starting point of reform in this area.

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<sup>135</sup> *Fair Work Act 2009* (Cth) s 253.

#### **4. LIFT THE YOKE OF UNFAIR DISMISSAL FROM CERTAIN BUSINESSES**

The FW Act continued the ‘unfair dismissal’ protections and ‘wound back’ many of the exemptions of the Work Choices reforms, extending unfair dismissal protections significantly compared to that covered under the WRA regime (estimated at 3 million employees and around 100,000 employers).

While elements of the system are working well, VECCI Members have encountered the following issues with the current Unfair Dismissal system:

- A convoluted and expensive claims process;
- A rigid and inflexible test for ‘genuine redundancy’;
- Lack of protection for small-business; and
- Problems with the high-income threshold.

#### 4.1. Claims Process - An Insufficient Process for Determining Jurisdiction

The FWC have 'settlement quotas' as a reporting metric for its conciliation operations, which measures the percentage of claims settled at conciliation. The settlement figures reported (such as in FWC Annual Reports and Senate Estimates) are consistent with anecdotal evidence from VECCI members regarding paying 'go-away money'. Given the shifts in who is covered by the legislation over time and the manner in which metrics are reported, it is difficult to make direct comparisons. However, what is generally evidenced is that that claims are increasing and conciliation settlement rates have increased under the FW Act. Further, due to the confidential nature of the conciliations, it is not apparent how much is of such money paid by employers is connected to legitimate faults or shortcomings on their behalf, compared to 'commercial decisions' being made.

Having said this, what members are experiencing is that there is often significant pressure being applied on employers in such conciliations to make financial offers to settle claims, which is frequently divorced from the merits or specifics of the case. As the parties hearing these conciliations do not have any legislated ability or role to consider merits – and with a strong focus from the FWC on speed and timeliness - this experience is perhaps unsurprising. Member responses to the VECCI Member Survey sums this situation up best:

"The employee then sought unfair dismissal claim, during conciliation we felt our most efficient solution was to settle the claim with a monetary sum and avoid the unknown but suggested increase cost of a hearing.

This gave a solution but we don't feel a positive one for us or the former employee. Cost to us exceed \$15,000 and whilst it gave the former employee some short term financial comfort at no point during the dismissal or conciliation process were we able to address the best interests and future of the employee, beyond a 'go away' settlement." <sup>136</sup>

VECCI members in the 2015 member survey reported that 76% of businesses settling at conciliation did so as they felt it best to give 'go away' money rather than proceed to hearing, as opposed to 4% who paid money at conciliation as they felt they had a weak case.<sup>137</sup>

The timeframe (and therefore cost) to run matters through to arbitration should not be underestimated and it does not appear to be an area where there is accepted position on the time taken to participate in these matters. VECCI has recorded time spent as the **representative only**

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<sup>136</sup> Witness statement of Gary Deer, *Gallagher Australia*, Appendix 1.

<sup>137</sup> VECCI Member Survey 2015.

(as distinct from the time the employer must allocate within their own business) across over 100 conciliations and 50 arbitrations from mid-2011 onwards.

VECCI has recorded an average of 11 hours in assisting to defend unfair dismissal applications at and including conciliation, with a range of 0.75 hours to 39.75 hours, both of which took place in 2014. The median was 10.75 hours. At the lower end of the time spent, the employer was often simply just engaging an advocate familiar with the experience to attend with them. Matters requiring the upper range of time tended to attach themselves to reviewing multiple client records, extended pre or post negotiations and/or the employer instructing VECCI to ascertain directly what had occurred and give advice on prospects of success.

One business responding to the VECCI surveying in 2015 shared their experiences as a HR Manager, who would always engage representation:

We engage representation because we don't have time to respond to the paperwork. Equally, we recognise that we may be dealing with representatives and 'no win no fee lawyers' on the other side. It takes significant time to prepare for a conciliation hearing – if I can't verify something as correct; I don't allow it to go in the written response. In a practical sense, this therefore involves speaking to every party involved in the termination and reviewing all the paperwork. I then need to consider the facts of our case and what our position may be. I don't have the authority to determine ex gratia payments, and therefore I then need to arrange a meeting with our Chief Operating Officer and Chief Executive Officer to discuss what the recommended approach is at conciliation and what I am able to offer during that process.

My biggest issue is that it is easy to lodge a claim with the FWC, they don't actually filter any applications. I would like to see a method whereby if a matter is outside the jurisdiction, then goes no further.<sup>138</sup>

Reasons for settling the matter and comments can also be drawn from the 2015 Member Survey whereby extensive business feedback was recorded. Indicative comments included the following:

- *Commercial decision. Strong case but conciliation & go away money better use of company time, money & resources.*
- *The case was baseless - we closed an entire operation after nearly 12 months of letting the people engaged in it know we were in trouble - and they sued us for unfair dismissal. It was cheaper to pay them something (a fraction of what they were after) than to litigate.*
- *Employee was terminated for driving to work in a company vehicle at 180 km's/hr as clocked by police. ... Complete waste of company time, cost to lawyers around \$30,000K. End result matter dismissed.*

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<sup>138</sup> Interview and email correspondence with HR Manager of Medium designer, importer and distributor (100-150 employees), 11 March 2015.

- *We did not believe it was unfair but knew that all he wanted was a small payout. this was cheaper option than going to court.*
- *There is always an expectation from the Fair Work Commission conciliator that the employer will settle the case financially irrespective of the employer's views that they have a sound case, and have often received legal advice to this effect.*
- *This has been the system for a long time. It's well known that it, along with Workcover (Accident Compensation Act), is social legislation, so once in Fair Work, its highly unlikely you will come out without having to pay something. For commercial reasons, its more sensible to settle at conciliation, which keeps all costs down, the aim is to keep the obligatory payment to an absolute minimum.*
- *We find that in each case it is cheaper to pay the person to go away - regardless if the cases merit. As a business, it is considered imperative to have some form of representation - which is always costly. The problem arises because the whole fair work commission is angled towards helping the employee, not the employer. If the employee makes a mistake, fair work will accept that and ignore it. If the employer makes a mistake, they are penalised.*
- *I found that the dismissal claim process was quite stressful. the applicant wasn't required to submit evidence until we mediation occurred when we appeared before the tribunal. as the employer we were required to submit evidence before attending. this administration cost time & money for us to submit the evidence. ....if the employee had of been asked for evidence other than his words on his application then the waste of time and money for all parties would not have occurred.*
- *It's was totally unfair and groundless and we were told to pay the person (whose role was made redundant) so we did not have to spend any more time and money. We had to weigh up what it would cost us to fight it and we had already spent time and money on professional advise and mediator. As a small business we did not have resources in place to manage these kind of claims and the tribunal seems to accept any claim. We have had to reduce our work force further and the time going through all the processes for a small business is a joke. And despite ticking all the boxes, they tell you at the end the employee has the right to challenge it. Workers are made redundant because you have not the work for them and you can't afford to pay them. That is the reality, so I cannot understand why you are challenge on your business decision which only the business owners can or should make.*
- *The FWC did not substantiate whether the employee had a legitimate claim.....Given how easy this was for the employee it would seem every employed person should just submit a claim through the FWC against their employer because it is more than likely this step will result in a beneficial outcome for the employee.*
- *.....The system prevents employment opportunities as you would have rocks in your head top employ anyone unless you have \$50K banked for each one so you have to pay them out.*
- *The FWC Conciliators are clearly on Settlement KPI. Go Away Money is disgusting reality of their process. The time and energy and legal costs involved , are all conducive to go away money system prevailing,*
- *We didn't have the time to defend the case. In retrospect I wish we hadn't as the lawyer for the ex-employee was later reprimanded by one of the FWC judges for unethical conduct (similar to what he displayed in our case).*

- *As the system is a "no cost jurisdiction" the system encourages nuisance application. This in effect places an emphasis on the employer to defend the matter rather than on the applicant to demonstrate a breach of the Fairwork Act. Sure the matter is first heard at conciliation hearing but the employer still needs to prepare and give the time to the hearing. Although the FWC under section 611 can award costs it very rarely does. ....*

In respect of those matters proceeding to an arbitration hearing, VECCI has assessed the time taken for 50 arbitrations, also taking place since mid-2011. VECCI records an average of 52 hours of representative time in taking a matter through a hearing. In our view this is slightly inflated due to a recent number of extended day hearings however removal of these still resulted in an average of 44 hours per matter. We have proceeded with the larger data set for the purpose of completing this analysis.

The median was 50.5 hours, with a range of 6.5 hours through to 185.5 hours. Matters that had limited representative input included reviewing submissions, or appearing as an advocate only for the hearing. Several recent matters have involved hearings spanning multiple days with extensive witness evidence, in one case requiring 7 days of hearing. Given the general reliance of a representative on an employer to provide advice as to the contested facts, and the general practice of employer attendance of the business at tribunal it is reasonable to conclude that the employer time spent on arbitration matters is also significant.

VECCI members are experiencing a variety of issues with the way in which unfair dismissal claims are vetted, scheduled and heard by the FWC. VECCI notes the focus the former Labor Government placed on ensuring the process was speedier and reduced overall costs for employers and applicant employees. Overall, this has not been VECCI's experience under the Fair Work system.

Relevant to jurisdictional matters, the overall claims process to get to a decision-stage, whereby the claim can be dismissed, can be frustratingly complex, convoluted and confused. This often involves the FWC taking a range of preliminary steps before then channelling matters through formal and costly hearings to determine a claim's jurisdiction. The FWC frequently does not independently consider merits and jurisdiction of a claim prior scheduling formal conferences with a view to settle the claim and, as such, while sound decisions are being made in these areas, the process to get there may cost an employer more than a settlement payment (further embedding the practice of 'go away' money being paid for unmeritorious claims or claims without any *prima facie* jurisdiction to be brought in the first place).

The new system was meant to bring a renewed focus on informality and ease of use. The FWC are empowered to make an order "on the papers." However, if there are contested facts presented to



the FWC they must hold a hearing.<sup>139</sup> We further note under s 399 of the FW Act the FWC mustn't hold a hearing unless it considers it appropriate, considering:

- a) The views of the parties; and
- b) Whether a hearing would be the most effective and efficient way to resolve the matter.

Disappointingly, this process seems to pay no regard to the cost impost on employers in defending claims, and proceeding to a formal jurisdictional hearing in order to have the claim 'knocked out'. This occurs even where the claim appears to have no reasonable prospects of success, is well out of time or is otherwise fatally flawed.

Where an employer is notified of an unfair dismissal claim it may choose to object to the application if the employee falls into an exempted category. Except in cases of 'genuine redundancy', the employer can elect to either attend a merits conference (where an employer can attempt to pay to settle the claim) or ask the FWC to rule on the jurisdictional objection first. Once requested, the FWC will then list a Hearing and require the parties to prepare outlines of submission and provide signed witness statements of intended witnesses.

We note that under s 396 of the FW Act, the FWC is required to consider initial matters before considering the merits of the application. Section 396 states:

FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:

- a) whether the application was made within the period required in subsection 394(2);
- b) whether the person was protected from unfair dismissal;
- c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
- d) whether the dismissal was a case of genuine redundancy.

How to fix this unnecessarily convoluted system? The previous WRA's wording resulted in the AIRC adopting a practice of determining these jurisdictional matters based on written material submitted by the parties without a formal hearing.

### **Return of "On the Papers" Determinations**

Under the previous WRA system the AIRC **had to** invalidate any unfair dismissal application which is brought where:

- The employer employed 100 or fewer employees;

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<sup>139</sup> *Fair Work Act 2009* (Cth) s 397.

- The (non-casual) employee had not worked for the employer for 6 months or more;
- The casual employee had not worked for the employer on a regular and systematic basis for 12 months or more;
- The employee was excluded from bringing an unfair dismissal claim for any of the other existing reasons (e.g. being a probationer or a trainee).

Such claims were invalidated by the AIRC without requiring a formal and costly hearing.

The AIRC **could** do the following 'on the papers' (without holding a hearing):

- (a) where it is contended the employee is in an excluded category under s 638 (see s 645(5)(a));
- (b) when it is contended that the employee was dismissed during a valid probationary period under s 643(6) (see s 645(5)(b));
- (c) where it is contended the employer employs 100 employees or fewer under s 643(10) (see s 645(5)(c));
- (d) where the claim by the employee is alleged to be "frivolous, vexatious or lacking in substance" (s 646);
- (e) where the claim by the employee is made outside the period of 21 days from the date of termination (see s 647).

Section 648 of the WRA required the AIRC, when considering dispensing with a hearing in circumstances where the employer has moved the AIRC for dismissal of an application in any of the above categories, to take into account "*the cost that would be caused to the business of the employer concerned by requiring the employer to attend the hearing*" – s 648(1) of the WRA. Furthermore, if the AIRC decided not to conduct a hearing, it had to invite both parties to provide further information on the relevant issue(s) and take such information into account in reaching its decision.

Such provisions, which allowed the AIRC to dispense with a hearing in certain circumstances, saved employers time and cost when dealing with unmeritorious claims. This had the 'knock-on' effect of improving the efficacy and regard of the unfair dismissal process as unmeritorious or otherwise spurious, invalid or misguided claims were sifted out early and for little cost expended by employers, whilst genuine claims of substance and merit can proceed through the system and contested. VECCI considers conciliation could remain an alternative optional avenue prior to a jurisdiction being determined if both parties agree. However, conferences should not be automatically scheduled until the FWC confirms there is not a jurisdictional issue to the claim proceeding.

We note the inclusion of s 397 in the FW Act may have the effect of restricting the FWC from determining matters ‘on the papers’, despite this being a convenient matter for simple matters to be dispensed or dealt with absent a requirement for a hearing. On this matter, a Full Bench recently noted:

“We acknowledge that the consideration of matters, including jurisdictional issues, on the basis of written materials only is a common and effective approach adopted by the FWC and is an approach commonly convenient to parties. We support and endorse that approach. However, section 397 requires consideration where there is a disputed issue of fact.”<sup>140</sup>

In support of a more flexible process, the FW Act Review Panel recognised the FWC’s inflexibility and unnecessary formality in its processes when it recommended in its Report:

Recommendation 43: The Panel recommends that the FW Act be amended to provide that FWA is not required to hold a hearing when exercising powers to dismiss an application under s. 587, nor when exercising the recommended powers to dismiss an application involving a settlement agreement or a failure by an applicant to attend a proceeding or comply with an FWA direction or order. In each of those circumstances, FWA must be required to invite the applicant and the employer to provide further information before making a decision to dismiss the application or not.<sup>141</sup>

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<sup>140</sup> *Wessels v Midwest Vanadium Pty Ltd* [2014] FWCFB 6873 (1 October 2014).

<sup>141</sup> Department of Education, Employment and Workplace Relations, above n 57.

Noting, for balance, the additional comment on p 222 of the Report “*Ultimately, however, the various proposals by mainly employer interests to avoid this appear to be either a solution with potentially unacceptable indirect consequences (for example, increasing filing fees) or unlikely to be effective in addressing the issue. An example of the latter was a suggestion there might be some preliminary assessment on the papers. We were anxious, in our consultations, to explore options for reducing or avoiding the phenomenon of ‘go away money’. However, as some employer groups conceded in discussion, earlier attempts in other jurisdictions (Victoria was given as an example) to filter out unmeritorious claims by a preliminary assessment on the papers had not proved particularly successful...*”

## Necessary Reform

Given the above, VECCI considers the necessary and urgent change to the unfair dismissal regime to make the system more fair and effective for employers include:

- The FWC should be obligated to ‘channel’ jurisdictional matters to the forefront of proceedings and provide a process for determining jurisdictional coverage that is economical and timely and less-reliant on formal, expensive, in-person hearings.
- Emphasis being placed on ‘paper hearings’ where clearly flawed applications are systemically removed from the process at the initiative of the FWC rather than the employer. VECCI’s view is that the opportunity costs of attendance at a formal hearing to determine jurisdiction, the costs of engaging representation and the manner in which the process currently runs in scheduling a conciliation regardless of jurisdictional issues is paving the way for an entrenched system of ‘go away’ money; and
- A section in the FW Act incorporating that “*the cost that would be caused to the business of the employer concerned by requiring the employer to attend the hearing*” should be a key focus or consideration by the Commission in determining the process to be applied for each Unfair Dismissal application brought before it, as applied under the WRA.

## 4.2. Other Ways to Simplify and Improve Unfair Dismissal Laws

Other areas the PC should examine as part of the Review relating to unfair dismissal is the wording of the 'genuine redundancy' exemption under s 389 of the FW Act.

### Simplifying and Improving the Test for Genuine Redundancy Dismissals

In order to be considered a 'genuine redundancy' the employer has to have complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.<sup>142</sup> Most modern awards will have obligations to consult. There may also be some modern award or enterprise agreement requirements for 'consultation before terminations' in the Redundancy clauses.

Additionally, employers are also required to satisfy the FWC the requirements of s 389(2) have been met, namely that it has demonstrate it has considered "*if it would have been reasonable in all the circumstances for the person to be redeployed within the employer's enterprise or the enterprise of an associated entity of the employer*".

Full bench decisions such as *Jenny Craig Weight Loss Centres Pty Ltd v Margolina*<sup>143</sup> ("*Margolina*") appear to create a **positive obligation** on employers under the FW Act when contemplating making an employee redundant to:

- identify all lower-paying and/or diminished responsibility positions the employee has the necessary skills, qualifications and experience to perform;
- enquire with the employee whether he/she would be willing to perform any of the lower-paying and/or diminished reasonability positions identified; and
- if the employee is willing, offer such positions to the employee concerned as an alternative to making that employee's position redundant and reflect such changes in a new 'variation to employment' employment contract (if relevant).

The interpretation of the Full Bench has the capacity to vastly expand the "*reasonable redeployment*" requirement to an 'all and every potential redeployment' obligation. By creating a wide 'positive obligation' on employers to consider all potential redeployment options, and offer these to the employee, is a **massive expansion** of the existing (reasonably) solid body of case law in this area under the FW Act system previously,<sup>144</sup> as well as being potentially contrary to the

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<sup>142</sup> *Fair Work Act 2009* (Cth) s 389(1)(b).

<sup>143</sup> [2011] FWA 9137 (23 December 2011).

<sup>144</sup> Refer, for example, *Taylor v Tatiara Meat Company Pty Ltd* [2010] FWA 5150 (13 July 2010); *McAlister v Bradken Limited* [2010] FWA 203 (22 January 2010).

legislature's intention. If this was the legislative intention, we submit Parliament would not have inserted the word "*reasonable*" which opposes the interpretation a positive obligation in all circumstances.<sup>145</sup>

The combination of the onerous requirements relating to consultation, combined with such a wide positive obligation on employers to search out, consider, raise with the employee and then dismiss redeployment opportunities, creates a 'red tape' burden on struggling employers at a time when they can least afford such difficulties. This is shown by one VECCI member who reports his experience as:

"We closed a catering operation that had been doing poorly for 18 months after spending a lot of money on a re-launch and equipping the team. All of the team were aware that things were going poorly and that if sales couldn't be increased we would have to close the operation. Three months before we closed the operation we had another discussion to see whether we could increase sales, but in the end we lost three big proposals in the final round. We closed the operation and were sued for unlawful dismissal by two of the three personnel in that operation. The most senior team member was given notice at the same time as the others, but worked out his notice calling clients to cancel their booking and cleaning up the kitchen. The other two did the 'usual' "unable to find work" routine (when one of them could have worked on our Brigade immediately) and sought damages. We ended up paying about \$5K to settle the matter, but we shouldn't have had to – they were looking for \$100K." <sup>146</sup>

### Necessary Reform

By potentially creating a wide 'positive obligation' on employers to consider all potential redeployment options, and offer these to the employee, there is unwarranted expansion to the existing "*reasonable redeployment*" obligation in s 389(2) of the FW Act. The FW Act needs to be amended and simplified to reduce the burden on employers seeking to make redundancies and clarify the breadth of the 'reasonable redeployment' in 'all the circumstances' and the obligation on employers when considering redeployment issues.

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<sup>145</sup> This question was considered in *McAlister v Bradken Limited*<sup>145</sup> ("*Bradken*") where Richards SDP was dismissive of such arguments when he held: "*In my view, if the FW Act intended that an employer was required by virtue of s.389(2) of the FW Act to identify any position at all that an employee may be able to perform **it would have expressly so directed, and perhaps with some conditionality as to the range of such alternative positions which might be so identified***". **(emphasis added)**

<sup>146</sup> Witness statement of Simon Bailey, *Chefs on the Run Pty Ltd*, Appendix 1.

## Lack of Protection for Small Business

The Small Business Fair Dismissal Code (“Code”) was introduced in FW Act and was suggested as a less onerous and simpler process for small employers. The Department of Education, Employment and Workplace Relations (“DEEWR”) promoted the Code as a “*simple, fair system for small businesses*”<sup>147</sup> which recognises the “*special circumstances*”<sup>148</sup> of small businesses. DEEWR acknowledged that small businesses do not have human resource management departments and “*cannot afford to lose time*”.<sup>149</sup>

These sentiments were echoed by the then Federal Government at the time.<sup>150</sup> The Honourable Mr Crean stated that if “*the employer has followed the Code, the dismissal will be found to have been fair by Fair Work Australia*”.<sup>151</sup> Unfortunately the Code is not simple and in some instances imposes higher requirements on small businesses than it does larger organisations, which VECCI considers a perverse and unacceptable outcome for small business.

The Code provides for a number of requirements that must be met by an employer before the dismissal is considered consistent with the Code. Firstly the employer may terminate an employee for serious misconduct. In all other dismissals<sup>152</sup> the employer is required to provide a warning to the employee and allow them time to improve before the employee can be terminated. This provision means that employers who terminate an employee for a valid reason (for example, bullying other staff) will fall foul of the Code unless they have previously warned the employee. This is also likely to occur in other serious matters that warrant termination but may fall short of justifying serious misconduct.

In contrast, s 387(e) of the FW Act only requires employers of large organisations to have warned employees before terminating “*if the dismissal related to unsatisfactory performance by the person*”, and this is but *one* factor within the overall consideration s 387 of the FW Act.

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<sup>147</sup> Department of Education, Employment and Workplace Relations, *A simple, fair dismissal system for small business* <[http://www.deewr.gov.au/WorkplaceRelations/Documents/PDF/WRfactsheet\\_09.pdf](http://www.deewr.gov.au/WorkplaceRelations/Documents/PDF/WRfactsheet_09.pdf)>.

<sup>148</sup> Ibid

<sup>149</sup> Ibid

<sup>150</sup> The Honourable Mr Simon Crean, the then Minister for Workplace Relations, promoted the code as “*workable and simple for small businesses*” as it “*provides small business employers with best practice procedures to follow when dismissing an employee*”. Refer the Hon Simon Crean MP, ‘Small Business Fair Dismissal Code and Checklist’ (Media Release, 16 July 2010) <<http://ministers.deewr.gov.au/crean/small-business-fair-dismissal-code-and-checklist>>.

<sup>151</sup> Ibid

<sup>152</sup> See Australian Government, *Small Business Fair Dismissal Code* (1 January 2011) <<http://www.fairwork.gov.au/Templatesformschecklists/Small-Business-Fair-Dismissal-Code-2011.pdf>>.

The Code clearly requires a higher standard from small businesses than required of other larger businesses including those with dedicated human resource management departments. This has the effect of either requiring small business owners to continue putting up with inappropriate behaviour or actions by staff which could potentially put other staff or the business at risk, or dismiss the person and having to spend a great deal of time and money defending the claim in a traditional arbitration. VECCI considers the Code is neither workable nor simple for small business, with the difficulty and complexity of this seemingly simple document referred to by a FWA Senior Deputy President in *Murray & Ors v Electric Light Hotel P/L t/as Electric Light Hotel Partnership*:

“Whilst the legislation clearly intended the Code to provide an expedited mechanism for the consideration of fairness in dismissal is involving a small business, I have not found it possible to do this in any way other than a detailed assessment of the criteria addressed in the Code in a form which is inherently similar to that set out in s387 of the Act.”<sup>153</sup>

In *Narong Khammaneechan v Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Café*, Deputy President Bartel noted in the decision:

“If the dismissal was consistent with the Code, then pursuant to s.385 of the Act the applicant has not been unfairly dismissed .... It is only if it is determined that the dismissal is inconsistent with the Small Business Fair Dismissal Code do I need to explore whether the dismissal was harsh, unjust or unreasonable”.<sup>154</sup>

The requirement to ‘test’ whether the dismissal was consistent with the Code is not determined until arbitration stage. VECCI considers the process of determining whether the Code was followed at the late stage of arbitration is too onerous for small businesses. Arbitration is the most formal part of the process in determining whether a dismissal was unfair and inexperienced small business owners are unlikely to attend such an arbitration without representation. This is a significantly expensive and time consuming event for small business which means the process is counterintuitive to a ‘simple’ and ‘fair’ system.

The potential merits within the ‘protections’ are stifling for small business and a barrier to productivity. Given the issues within the system and the actual outcomes of ‘double hearings’ for small business, it is VECCI’s submission the existing system is not workable and cannot be amended to overcome these flaws. It must be removed.

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<sup>153</sup> [2010] FWA 2613 (9 April 2010), [14].

<sup>154</sup> [2010] FWA 7891 (14 October 2010).



### **Necessary Reform**

Small business should be exempted from the unfair dismissal coverage, as successfully occurred prior to the introduction of the FW Act. VECCI proposes adopting the ABS definitions around business size, thereby extending the meaning of a small business employer to 20 employees.

## Convoluting and Complicated Process to Determine High Income Threshold

VECCI members have experienced considerable frustration and confusion regarding the convoluted 'high income threshold' for unfair dismissal applications. Under s 330 of the FW Act an employee need only prove either he/she is covered by a modern award **or** earns less than the 'high income threshold' in order to be able to bring an unfair dismissal claim. Therefore, even if you have a 'high income workers' who earns over \$133,000 annually (and even if that employee has entered into an 'annual earnings guarantee' that exclude them from modern award coverage (see s 330 of the FW Act) employees will still be able to bring a claim based on meeting the threshold test in s 382 of the FW Act.

As a result 'high income workers' who would still be classified under a modern award (such as engineers, miners, educators, doctors, health professionals etc.) are able to bring unfair dismissal claims regardless of their annual earnings. Consequently, members are seeing a raft of employees in high-status and/or high-paid positions being able to make unfair dismissal applications despite their overall remuneration being far in excess of the purported 'cap' or 'high income threshold' in the FW Act.

Under the previous Work Choices method of calculating remuneration, a non-award employee earning \$100,000 base salary plus nine per cent superannuation (\$109,000 total employment cost) could not bring an unfair dismissal claim.

Relevant to the 'high income threshold', s 382 of the Act provides:

382 When a person is protected from unfair dismissal

(b) one or more of the following apply:

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any)

worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

Section 332 of the Act provides a definition of "*earnings*": Under this definition a monetary value of an employee's non-pecuniary benefits can be considered for the purpose of determining an employee's "*earnings, and such other amounts*" under s 382 of the Act under the following provisions:

(a) s 332(1)(c) of the Act which applies where "*... a reasonable money value has been agreed by the employee and the employer*";

(b) r 3.05(6) of the Regulations which broadly applies where "*... a reasonable money value of the benefit has not been agreed to by the person and the employer*"

It is not clear from the FW Regulations whether non-monetary benefits are considered to form part of an employee's earnings where the value of the non-monetary benefit is not agreed. It appears to VECCI allowances and payments in respect of overtime will be included as 'earnings' where these are guaranteed and can be determined in advance however there remains uncertainty regarding the calculation of earnings. This area of the FW Act is one which remains frustratingly unclear for employers.

The question of whether an employee is a 'high income' earner is dependent on whether earnings could be determined in advance is unnecessarily technical. It results in employers being prevented from being able to include significant financial benefits to employees such as sales bonuses and other discretionary incentives, bonuses or benefits.

Similarly, VECCI sees no persuasive reason why the ability to make an unfair dismissal claim is reliant on whether the employee is or is not covered by an agreement or modern award. The confusion and over-regulation of s 382, 'annual earnings guarantees' and the 'high income threshold' can be easily cured by amending the FW Act to remove the relationship between award and/or enterprise agreement coverage and the ability to make an unfair dismissal claim. This would result in a simpler 'dollar value' calculation where the employee for the 12 months (or other designated period) prior to the dismissal either has 'earnings' above or below the dollar value of the 'high income threshold'.

The practical effect of the complex and confusing calculation of this area of the FW Act has been to enable a whole range of employees earning well in excess of the \$133,000 'high income threshold' to obtain an additional avenue to claim against their former employer, through being included back in the unfair dismissal jurisdiction.

## Necessary Reform

A much simpler, clearer and appropriate legislative test is to amend ss 382(b) and 332 of the FW Act to:

- Codify an employee over the 'high income threshold' but covered by a modern award will **not** have access to unfair dismissal; and
- Remove the practical requirement that earnings must be determined in advance from s 332(2)(a), so that bonuses and commissions **will** contribute to an employee's earnings for the purpose of the 'high income threshold'.<sup>155</sup>

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<sup>155</sup> See e.g. *Jenny Craig Weight Loss Centres Pty Ltd v Margolina* [2011] FWAFB 9137 (23 December 2011).

## 5. GENERAL PROTECTIONS

Since the FW Act introduced the ‘General Protections’ provisions, including new protections from broadly defined ‘adverse action’ purportedly *because of* the exercise or existence of a similarly broadly defined ‘workplace right’, VECCI members have had an extremely tough time responding to and defending largely unmeritorious claims from aggrieved ex-employees.

Practical difficulties in defending these claims has encouraged the rise of ‘go away’ money and businesses throwing away tens of thousands of dollars in commercial decisions to avail themselves of defending claims with a ‘reverse onus’ of proof and little cost consequences for applicants running unmeritorious or frivolous claims. Despite VECCI securing a crucial win in late 2011 representing a member in a General Protections claim before the Federal Magistrates’ Court<sup>156</sup> (“FMC”) (as it then was) the tide has not turned for employers and this area of the FW Act means Australian businesses remain flooded by ex-employees bringing vague, ill-defined and unmeritorious and/or vexatious claims against them to secure additional, undeserved ‘go away money’ post-dismissal.

In the Fair Work Commission’s Annual Report 2013-14<sup>157</sup>, of the 2,778 general protection dismissal-related claims that were finalised, the FWC issued a ‘certificate’<sup>158</sup> for 967 matters (approximately 35% of claims finalised). It is noteworthy the total number of these claims has steadily increased in each of the three previous reporting years – 12% in 2012-13 from the previous year, and a 19% increase in 2013-2014 from the previous year.

VECCI considers the ‘perfect storm’ of

- The broad, vague and nebulous concept of ‘workplace rights’ and the broadened ‘adverse action’ definition;
  - a reverse-onus provision; and
  - the essentially cost-free nature of these claims in the Courts -
- is leading to VECCI members increasingly reporting many of the matters settled at the FWC are settling because they have paid ‘go away’ money. The payment of ‘go away’ money, and the productive time lost responding to spurious claims imposes heavy costs on employers and impacts on small business continuing to grow.

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<sup>156</sup> *Muzzicato v New Aged Cleaning Services Pty Ltd* [2011] FMCA 1044.

<sup>157</sup> Fair Work Commission, *Fair Work Commission Annual Report 2013-14* (15 October 2014) <<https://www.fwc.gov.au/annual-report-2013-14>>.

<sup>158</sup> Under s 368(3)(a) of the FW Act, a ‘certificate’ is issued if the FWC is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have bene, or are likely to be, unsuccessful. An applicant must not make a General Protections court application unless the FWC has issued such a certificate, s 370 FW Act.

Of 55 General protections conciliations assessed by VECCL to determine representative assistance required, we identified average time spent of 10.5 hours, with a median of 9.25 hours. We have conducted separate analysis with respect to other aspects and further proceedings involving general protections, which we would be happy to share with the PC on a confidential basis.

## 5.1. The need to Amend Vague, Unclear and Ill-defined FW Act Definitions

Regarding 4.4 of the Issues Paper 4, the General Protections regime in the FW Act is not working properly or effectively and should be amended. Particularly, the concept of a 'workplace right' is far too broad. VECCI member statements enclosed with these submissions demonstrate the experience of VECCI members generally who have been forced to defend vague and ill-defined General Protections claims brought against them.

These experiences have overwhelmingly shown the nebulous and ill-defined nature of a 'workplace right' means applicants can largely claim any action in the workplace was the exercise of a 'workplace right', for which they have a potentially lucrative compensation claim against their employer. If the concept of a workplace right is to be retained in the FW Act, VECCI considers it needs to be amended and tightened in several important ways, as shown below.

### Broad scope of 'workplace right'

**There is evidence that supports the need for the broadened definition of a 'workplace right' from previous 'unlawful termination' protections under the previous regime.** The successful General Protections claims we are seeing would also have attracted protection under the former WRA; or other Federal or State Legislation (such as discrimination provisions in state and Federal Acts).

We, therefore, consider reverting to the previous legislation regarding 'unlawful termination' will not remove any 'safety net' provisions for employees yet will provide clarity as to what the protections are and remove spurious claims from the system.

### Complaint "*in relation to*" employment

VECCI contends that a "*complaint in relation to employment*" as stated in s 341(c) of the FW Act should only apply if such a complaint was made externally to a 'competent administrative authority' as previously applied under s 659(2)(e) of the WRA, which stated:

#### **659 Employment not to be terminated on certain grounds**

...

(2) Except as provided by subsection (3) or (4), an employer must not terminate an employee's employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons:...

(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...

Under the current framework, an ex-employee can lodge a General Protections claim (and proceed to litigation through the courts) without ever having raised the subject of the claimed workplace issue with a manager, particularly concerning non-discretionary benefits such as training opportunities and/or ‘bullying’ allegations. This leads to circumstances where the first time these issues are raised is either the lodging of the General Protections paperwork, or (worse still) at the FWC conference.

This is antithetical to the concept of employees and managers discussing issues and concerns at the workplace level, with elected employee representatives as and when required, before the problem escalates to one which cannot be resolved internally and may require additional external assistance.

The FW Act does not operate in any way to restrain employees from having to demonstrate they have made any attempts to raise such issues with the employer internally prior to lodging their complaint. Thus, VECCI considers s 341(c) of the FW Act, if it is to be retained in the legislation, should also be amended to require an employee to provide evidence he/she has formally attempted but has been unable to resolve their “*complaint in relation to [their] employment*” with the employer (such as enacting the ‘dispute settlement procedure’ contained in modern awards and are ‘mandatory content’ clauses in enterprise agreements) as a prerequisite to lodging a General Protections claim.

### Necessary Reform

The FW Act be amended to:

- Remove General Protections provisions entirely, which are not working as intended and the legislation should revert to the ‘unlawful termination’ provisions as applied under the WRA. Failing that, the notion of ‘workplace rights’ must be tightened in order to operate effectively.
- Failing the removal of the ‘General Protections’ expanded regime and a return to the more appropriate ‘unlawful termination’ provisions included in previous incarnations of workplace relations legislation, the FW Act should be amended so:
  - 1) A “*complaint in relation to employment*” in s 341(1)(c) be amended to only apply if the complaint is made to a ‘competent administrative authority’ (as applied under the previous WRA);
  - 2) A “*complaint in relation to employment*” forming a General Protections claim is only able to be made following the applicant first providing evidence he/she has formally attempted, but has been unable to, resolve the “*complaint in relation to [their] employment*” with the employer (such as enacting the ‘dispute settlement procedure’).



## 5.2. A Biased, Anti-Employer Claims Process

A successful ‘General Protections’ claim only requires an applicant to establish their complaint (or the exercising of a ‘workplace right’) was *a* reason - for their dismissal.<sup>159</sup> Applicants do not even have to establish that it was the ‘sole or dominant reason’, which was the test used by the predecessor provisions. Employer respondents are further prejudiced by the ‘reverse onus of proof’,<sup>160</sup> and the virtual inability to recoup any costs if a claim is successfully defended.<sup>161</sup>

### The “Reason” for the Action & the Reverse Onus

The standard of proof expected of employers has become near impossible to meet. The alleged proscribed reason should be the “*sole or dominant*” reason (as applied under the WRA) for the adverse action taken. For example, s 792 of the WRA stated:

#### **792 Dismissal etc. of members of industrial associations etc.**

(1) An employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:

- (a) dismiss an employee;
- (b) injure an employee in his or her employment;
- (c) alter the position of an employee to the employee’s prejudice;
- (d) refuse to employ another person as an employee;
- (e) discriminate against another person in the terms or conditions on which the employer offers to employ the other person as an employee.

...

(4) An employer does not contravene subsection (1) because of paragraph 793(1)(i) unless the entitlement described in that paragraph is the sole or dominant reason for the employer doing any of the things described in paragraphs (1)(a), (b), (c), (d) and (e) of this section.

Much of the case law in this area has ‘bedded down’, particularly following the High Court’s sensible re-casting of the s 340 & s 360 tests in its decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 (“Barclay High Court Decision”). Despite the Barclay High Court Decision, VECCI notes other court decisions such as *Grant v State of Victoria*<sup>162</sup> - where it was found at first instance it was “*impossible to disaggregate*” a decision to dismiss an employee from his illness - have required appeal proceedings to apply the correct reasoning of the Barclay High Court Decision, at great time and cost to the parties involved.

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<sup>159</sup> *Fair Work Act 2009* (Cth) s 360.

<sup>160</sup> *Ibid*, s 361.

<sup>161</sup> *Ibid*, s 570.

<sup>162</sup> [2014] FCCA 17 (23 January 2014).

For the avoidance of doubt, VECCI considers the FW Act needs to be amended to codify the test as applied in the Barclay High Court Decision and confirm the 'subconscious test' as was applied in the majority Full Court of the Federal Court's ruling<sup>163</sup> in *Barclay* is forever buried. This position was supported by the FW Act Review Panel which recommended:

Recommendation 47: The Panel recommends that Division 7 of Part 3-1 be amended so that the central consideration about the reason for adverse action is the **subjective** intention of the person taking the alleged adverse action.<sup>164</sup>

Additionally, a reverse onus of proof on employers - to prove the actions taken did not include a prohibited reason - has made the vague, nebulous and poorly-worded provisions in the FW Act a boon for plaintiff solicitors running weak and unmeritorious claims. The lack of robustness in this area of the FW Act has created a lucrative avenue for weak claims made by applicants often jurisdictionally prevented under the FW Act from bringing an unfair dismissal claim.

The application of a reverse onus of proof is undoubtedly an infringement of natural justice principles, where ordinarily an applicant must prove their claim on the balance of probabilities. For managers and Directors of businesses to have to *disprove* an action was taken because of a vaguely defined 'workplace right' is unreasonable boon for applicants.

Despite a large number of court decisions dismissing applicant's claims, employers - faced with enormous practical difficulties and costs to defend these claims - have had few options at their disposal and have paid tens of thousands of dollars in 'go away' money since the commencement of the FW Act.

### **Cost Consequences of Pursuing Unsuccessful Claims in the Courts**

Proceedings commencing in a court invested with jurisdiction under the FW Act are a particular species of the civil jurisdiction, in that they differ greatly from the large body of case law which indicate 'costs follow the event' in civil claims.

This may be viewed by some commentators as a 'legacy' aspect from various legislative iterations of employee protection mechanisms, however the broadening of the General Protections provisions (as discussed above) was unprecedented and consequently, necessitates reform to the costs consequences of General Protections litigation.

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<sup>163</sup> *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 (9 February 2011).

<sup>164</sup> Department of Education, Employment and Workplace Relations, above n 57.

Section 570(2) of the FW Act states a court exercising jurisdiction under the FW Act will award the successful party's costs to be paid by the unsuccessful party **only if**:

- (a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
- (b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or
- (c) the court is satisfied of both of the following:
  - (i) the party unreasonably refused to participate in a matter before FWC;
  - (ii) the matter arose from the same facts as the proceedings.

Whilst some representatives have been successful in seeking costs orders after substantive applications have been dismissed – such as in *Muzzicato v New Age Cleaning Services Pty Ltd*<sup>165</sup> (“*Muzzicato*”) – this worryingly only occurred under s 570(2)(b) because the applicant rejected our member's written settlement offer and elected instead to proceed to a contested hearing.

The FW Act should make it clearer such an outcome is likely should an applicant reject a reasonable settlement offer and proceeds to litigation, imposing further time and costs on the employer and the Court's resources. Unfortunately, it is not the common practice for the courts in considering applications for costs orders.

*Muzzicato* is to be contrasted to the body of decisions which came before the courts and the FWC in which the employer was not able to secure costs against the employee. For example, in *Miller v Executive Edge Travel Pty Ltd (No.2)*<sup>166</sup> (“*Miller*”) an employer who offered the applicant settlement amounts on **two** separate occasions, and after the applicant's claim was subsequently dismissed was refused costs by the Court.

The recent decision in *Shea v Energy Australia*<sup>167</sup> is also illustrative. In this decision, the Federal Court awarded indemnity costs against an employee who made a claim against her former employer, finding she had committed several “*unreasonable acts*” in bringing her claim which caused the employer to incur considerable costs. Accordingly, it found she was liable to pay the legal costs incurred by her ex-employer (on an indemnity basis) it spent successfully defending her claim.

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<sup>165</sup> [2011] FMCA 1044 (1 December 2011).

<sup>166</sup> [2014] FCCA 2271 (8 October 2014).

<sup>167</sup> *Shea v EnergyAustralia Services Pty Ltd* (No 7) [2014] FCAFC 167 (8 December 2014).

A robust interpretation – or reform of s 570(2) of the FW Act - assists to counter the erroneous belief and assertions that ‘General Protections’ claims are a risk-free and cost-free exercise for applicants in obtaining quick compensation from an ex-employer. Worryingly, however, an award of costs was only possible for our member in *Muzzicato* after it had offered substantial ‘go away’ money to the Applicant to avoid the costs of a hearing, and a similar approach in *Miller* was not successful.

We note the courts are experiencing a significant increase in the number of ‘General Protections’ claims, yet the procedural processes and relevant legislative tests (such as whether a matter is to be considered to have “*no reasonable prospect of success*”) are relatively untested judicially.

However, by virtue of the courts’ hesitancy (due to the limitations of the FW Act) to award costs, General Protections claims threaten to be the nadir of the Fair Work reforms – without much in the way of jurisdictional hurdles, the operation of a reverse onus of proof, requiring only ‘one reason’ (not being the sole or even dominant reason) as the basis for the adverse action taken by an employer, and uncapped compensatory possibilities in addition to pecuniary penalties that may be imposed.

The FW Act should include clear consequences and the treatment the courts will give unmeritorious claims before them and assist with the integrity of a claim avenue which has little, if any, credibility amongst the business community. Additionally, the FW Act needs to be much stricter on claims with little to no merit where an applicant employee (or his/her representative) rejects a settlement offer of ‘go away’ money and elects to ‘roll the dice’ and proceed to hearing. The consequences of such actions in other civil claims are clear – a high likelihood of costs being awarded against a litigant for taking that risk. Amendment of s 570 would assist greatly in this regard.

One survey member in the building and construction industry provided their experience:

“We have had several General Protections claims from white collar workers paid in excess of the unfair dismissal jurisdiction. These Applicants were paid well in excess of the ‘unfair dismissal jurisdiction threshold and were award-free employees.

The first matter was settled because legal costs were approximately \$85,000 and if the matter had of continued in the Federal Court a further \$60,000 of legal fees would have been incurred. At the outset lawyers advised ‘excellent case, the Applicant has no claim’ but the matter was eventually settled for many thousands of dollars to the Applicant so as to avoid the ongoing legal fees.

The second General Protections matter was settled for many thousands of dollars of ‘go away money’ plus legal fees when at the outset there was legally no basis for the claim but to have contested the claim in the Federal Court would have meant further legal fees..”<sup>168</sup>

For a further example of a VECCI member experience dealing with General Protections claim after dismissing an employee after one week of employment see the witness Statement of Ollie Gladwell, *Practical Outcomes Pty Ltd* in Appendix 1.

### Necessary Reform

VECCI reiterates its stance that the ‘General Protections’ ought to be removed altogether. Failing that however, VECCI considers at a minimum the following must occur:

- The FW Act be amended to codify the test as applied in the Barclay High Court Decision and confirm the ‘subconscious test’ as was applied following the majority Full Court of the Federal Court’s ruling in Barclay is forever buried.
- The FW Act be amended to reintroduce the ‘sole and dominant’ purpose test under the previous WRA.
- The reverse onus’ of proof in the FW Act be removed, consistent with principles of natural justice;
- The costs provisions of s 570 of the FW Act be amended so that ‘costs follow the event’, as is the ordinary course for other matters before federal courts.

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<sup>168</sup> Witness Statement of Mary-Jo Durrant, *MConnell Dowell Constructors (Aust) Pty Ltd (MCD)*, Appendix 1.

## 6. INSTITUTIONAL FRAMEWORK

In its Issues Paper 5, the PC asks “*How well are the institutions working?*” Generally, the courts and regulators charged with responsibility for administering and policing Australia’s workplace relations system do so effectively, save for some glaring omissions as outlined below where dramatic improvement is required.

## 6.1. Inconsistency of FWC Decisions Increase Costs and Uncertainty

VECCI has been watching with alarm as the development of case law generated by FWC has become highly subjective, inconsistent and in need of genuine, proper and impartial review.

Examples of such concerning and inconsistent decisions include employer guidance on:

- whether enterprise agreements can include "loaded hourly rates" clauses;<sup>169</sup>
- whether enterprise agreements can include "*preferred hours*" or "*voluntary overtime*" clauses;<sup>170</sup>
- whether urine testing for drugs is permissible;<sup>171</sup>
- whether dismissal for an employee distributing pornography is appropriate;<sup>172</sup>
- whether dismissal for a workplace assault is appropriate;<sup>173</sup>
- the ability for undischarged bankrupts to pursue unfair dismissal remedies;<sup>174</sup>
- whether a dismissal for a safety breach is appropriate and justified;<sup>175</sup>
- whether an employer can dismiss an employee for social-media related breaches;<sup>176</sup>
- whether a dismissal via text is 'unfair';<sup>177</sup> and
- how the FWC should apply the FW Act's requirements for enterprise agreement approvals.<sup>178</sup>

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<sup>169</sup> Workplace Express, *New appeals body needed for consistent rulings: AMMA* (14 February 2014) <[https://secure.workplaceexpress.com.au/nl06\\_news\\_print.php?selkey=52027](https://secure.workplaceexpress.com.au/nl06_news_print.php?selkey=52027)>.

<sup>170</sup> With no approval given to such arrangements in the AIRC Full Bench decision of *Re MSA Officers Certified Agreement 2003* [PR937654](#), applied and followed by the FWA Full Bench in *BUPA Care Services Pty Ltd* [2010] FWAFB 2762, and a recent rejection of 'voluntary overtime' arrangements in *Mondex Group Pty Ltd* [2015] FWC 1148 ("Mondex"). Conversely, such arrangements have been approved by FWC in *Samphie Pty Ltd t/a Black Crow Organics* [\[2010\] FWAA 5060](#), *Top End Consulting Pty Ltd* [\[2010\] FWA 6442](#), *Agribusiness Enterprise Agreement 2013* [\[2013\] FWCA 6970](#) ("Agribusiness"), *Metro Velda Peterborough Enterprise Agreement 2009* [\[2010\] FWAA 2622](#). Of particular concern was the approval by the FWC of the 'voluntary overtime' arrangement for Agribusiness, and the rejection of an identical clause by the FWC in Mondex, despite both companies "*competing for the same meat processing clients... [competing] for labour from the same pool of s 417 visa holders... [and as Mondex] does not currently have a voluntary additional hours provision, employees of Agribusiness Pty Ltd are getting more hours from clients than [Mondex's] employees are being offered*" – Mondex decision at [41] and [42].

<sup>171</sup> Workplace Express, n 171.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> With such a dismissal being fair in *Parmalat Food Products Pty Ltd v Mr Kasian Wililo* [2011] FWAFB 1166 (2 March 2011) but unfair in similar circumstances in *Paul L Quinlivan v Norske Skog Paper Mills (Australia) Ltd* [2010] FWA 883 (8 February 2010).

<sup>176</sup> With such a dismissal considered fair in *O'Keefe v The Good Guys* [2011], FWA5311 (11 August 2011) but dismissal for similar (arguably worse) conduct found to be unfair in *Stutsel v Linfox Australia Pty Ltd* [2011], FWA8444, (19 December 2011).

<sup>177</sup> With such a dismissal being fair in *Brett Martin v DecoGlaze Pty Ltd* [2011] FWA 6256 (15 September 2011) but unfair in *Sedina Sokolovic v Modestie Fashion Australia Pty Ltd (ABN: 671444920838)* [2011] FWA 3063 (18 May 2011).

<sup>178</sup> Workplace Express, n 171.

The Commission appears unwilling or unable to be able to provide employers with necessary consistency and uniform application of precedent regarding particular issues, particularly around whether an employer can proceed with confidence to dismiss an employee who has deliberately accessed pornography in the workplace or ignored safety directions. We note with some alarm the submission to this Review by recently retired FWC Deputy President McCarthy – a man with intimate knowledge of the inner workings of the FWC during his 13 years there when he calls for sweeping changes to the operation of the workplace tribunal, highlighting a "central command and control model" from the President, a "bloated" Melbourne office (comprising 75% of the entire Commission staff) and processes which keep important cases under the control of a narrow base of Commission Members.<sup>179</sup> Indeed, employer association AMMA contends the appropriate characterisation of the FWC given the above conflicting decisions is a "*tribunal ... racked with inconsistency*".<sup>180</sup>

Similar to AMMA, VECCI considers an external appeals jurisdiction capable of reviewing and overturning (or approving) first instance decisions would be a positive development to improve the FWC and, in turn, repair business confidence in its decision-making ability. We further note such a system has worked successfully in the courts at State level (for example the Supreme Court appeal jurisdictions across the country) and would lend itself easily to the industrial tribunal framework. AMMA notes "*A number of countries (including in particular Australia's fellow OECD and common law countries) have appeal jurisdictions broadly comparable to the option under consideration in Australia*".<sup>181</sup>

VECCI notes the existing system of how the FWC allocates, hears and determines appeals to be highly subjective and unusual. Indeed, we note the criticism of employer association AMMA where it notes a disproportionate allocation to recently appointed FWC Vice President Hatcher – which has noted he has been hand-picked for such appeals "*demonstrably more*" than long-serving Vice Presidents, Michael Lawler and Graeme Watson.<sup>182</sup>

This arbitrary and unusual practice even seems to attract criticism from within the Commission itself, noting a Memo from recently retired McCarthy DP to Ross J in which he highlights how

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<sup>179</sup> Ewin Hannan, 'Unaccountable' Fair Work lacks expertise, says former insider', *The Australian Financial Review* (online), 10 March 2015

<[http://www.afr.com/p/national/unaccountable\\_fair\\_work\\_lacks\\_expertise\\_Cla0CllxWHYVQoZnEOghVP](http://www.afr.com/p/national/unaccountable_fair_work_lacks_expertise_Cla0CllxWHYVQoZnEOghVP)>.

<sup>180</sup> Workplace Express, n 171.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid.



unclear Ross J's system is for how decisions are made regarding the composition of Full Benches<sup>183</sup> and the appointment of panel heads. McCarthy DP notes:

"[u]ntil the last few years Panel Heads appeared to be selected on seniority. Seniority was most likely a transparent proxy for experience. In recent years it is clear that panel head selections have not been based on seniority."<sup>184</sup>

McCarthy DP also observes the FWC *"does not, in my view, have a competence, and certainly not a core one, of understanding the workings of the economy, or of economics generally or on how enterprises work"*.<sup>185</sup>

Given these criticisms are echoed by many participants in the IR system, the question is raised as to whether greater transparency, accountability and consistency can be achieved under the Commission as presently constituted. Alternatively, can such reforms only occur through the establishment of a separate appeals body which better serves the needs of business and, in turn, the Australian economy itself.

### Necessary Reform

Legislative reform is required to establish a stand-alone body to hear appeals from the FWC.

As to recommended models, VECCI notes the work of employer association AMMA in its prior submissions and efforts in favour of a new FWC appellate jurisdiction, and the consideration of such a body in the Federal Coalition's "IR Plan" released before the 2013 Federal election, and considers the PC should recommend such a body be created.

We consider the preferred model, as originally advocated by AMMA, is for the Government to appoint between five and seven "highly qualified/experienced" members to a new "non-court appeals tribunal/body" with this body being representative of the modern workforce relating to union density and have experience in business (ideally small business) having operated in, managed or otherwise advised on business and workplace issues for sectors predominantly comprised of small businesses.<sup>186</sup>

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<sup>183</sup> When he notes that no resident West Australian ("WA") Member had been on a standard-setting full bench since 1989, and, for the past three years, none had been involved in any full bench matters (apart from those involving appeals arising out of decisions of WA-based Member).

<sup>184</sup> Brendan McCarthy, *Submission to Productivity Commission Inquiry into Workplace Relations* (10 March 2015) Productivity Commission <[http://www.pc.gov.au/\\_data/assets/pdf\\_file/0009/187542/sub0043-workplace-relations.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0009/187542/sub0043-workplace-relations.pdf)>.

<sup>185</sup> Ibid.

<sup>186</sup> Workplace Express, n 171.

## **7. OTHER KEY CONSIDERATIONS**

VECCI identifies the below issues as important but not as urgently necessitating reform as those stated above. VECCI further encourages the PC to consider the following aspects of the workplace relations framework:

## 7.1. Good Faith Bargaining

Regarding the PC's Issues Paper 3 and the question posed "*To what extent are the good faith bargaining arrangements operating effectively and what if any changes are justified? What would be the effect of any changes?*", the experience of VECCI's members supports the view of the FW Act Review Panel<sup>187</sup> that good faith bargaining is an area best left unregulated and considered on a case-by-case basis.

As the PC would no doubt be aware, with the election of the Rudd Labor Government, good faith bargaining requirements made a comeback<sup>188</sup> to Federal workplace legislation, primarily under sub-section 228(1) of the FW Act. At the time many of the good faith bargaining requirements appeared controversial.<sup>189</sup> Encouragingly, our members report that – following initial uncertainty regarding what was required and how to respond to allegations from other bargaining participants relating to having acted in 'bad faith' – the obligations in s 228 of the FW Act (and particularly the FWA and FWC case law interpreting such obligations) have 'bedded down' and on the whole act as an effective (but not overly intrusive) tool to assist negotiating parties.

A crucial part of bargaining in good faith is the ability for employers to not be forced to agree to crippling or unsustainable demands made on them by another bargaining representative. Importantly, sub-section 228(2) of the FW Act states that the good faith bargaining requirements do not require a bargaining representative to make concessions during bargaining for the agreement, or a bargaining representative to reach agreement on the terms to be included in the agreement.<sup>190</sup> VECCI notes the ability to 'walk away' from the bargaining table (after having bargained in good faith) and particularly, the ability to then declare an 'impasse' to negotiations has been reached, end the negotiation and seek to put an employer-sponsored proposed agreement directly to the workforce has been confirmed by the FWA Full Bench in *Construction, Forestry, Mining and Energy Union-Mining and Energy Division v Tahmoor Coal Pty Ltd*<sup>191</sup> ("*Tahmoor*").

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<sup>187</sup> Department of Education, Employment and Workplace Relations, above n 57, 138.

<sup>188</sup> The *Industrial Relations Act 1988* (Cth) as amended by the *Industrial Relations Reform Act 1993* (Cth) ("IRRA") contained section 170QK which provided that parties bargaining for an agreement must do so in good faith. However, good faith bargaining was removed from federal workplace relations legislation by the Coalition Government with the introduction of the *Workplace Relations and Other Legislations Amendment Act 1996* (Cth).

<sup>189</sup> Such as bargaining representatives having to disclose relevant information (other than confidential or commercially sensitive information) in a timely manner (FW Act s 228(1)(b)) and refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining (FW Act s 228(1)(e)).

<sup>190</sup> *Fair Work Act 2009* (Cth) s 228(2).

<sup>191</sup> [2010] FWAFB 3510 (5 May 2010).

Additionally, we note the FWA decisions such as *AMWU v Heinz Company Australia Ltd*<sup>192</sup> and *LHMU v Mingara Recreation Club Ltd*<sup>193</sup> ("*Mingara Recreation Club*") confirming the ability of employers to communicate directly with their employees during negotiations concerning the negotiation, without having to 'channel' such communications through the employees' nominated bargaining representatives (i.e. trade union) negotiating on their behalf. This is of fundamental importance to members to ensure the negotiations (process, claims made and compromises reached etc.) are being accurately fed back to employees.

We note, however, this decision and the FWC's approach has received criticism, with some claiming the tribunal's reluctance to restrict employers from bypassing unions is undermining the union recognition obligation in the legislation's good faith bargaining provisions.<sup>194</sup> VECCI is strongly opposed to any suggestions the current interpretation of s 228(1)(e) of the FW Act, as shown in cases such as *Mingara Recreation Club*, should be overturned or in any way restricted.

### **Is Change Necessary to 'Good Faith Bargaining' provisions?**

In our initial submissions to the FW Act Review Panel<sup>195</sup> we relayed our members' experience which indicated good faith bargaining had 'bedded down' since the commencement of the FW Act and, on the whole, acted as an effective guide to assist negotiating parties and was an area best left unregulated and considered by the FWC on a case-by-case basis.

Conversely, we note many parties made submissions to the FW Act Review Panel concerning the need for an expansion of the good faith bargaining obligations in the FW Act. Specifically, we noted the submissions of academics Anthony Forsyth and Andrew Stewart<sup>196</sup> and the ACTU<sup>197</sup> who agitated for further changes to be made which would fundamentally re-shape this purportedly voluntary bargaining exercise, weaken employers' bargaining positions and further entrench trade union power.

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<sup>192</sup> [2009] FWA 322 (22 September 2009).

<sup>193</sup> [2009] FWA 1442 (1 December 2009).

<sup>194</sup> Rosalind Read, 'Direct Dealing, Union Recognition and Good Faith Bargaining: early decisions under the Fair Work Act 2009' (Paper presented at the Australian Labour Law Association Conference, Adelaide, November 19, 2010)

<sup>195</sup> Victorian Employers' Chamber of Commerce and Industry, above n 109.

<sup>196</sup> Andrew Forsyth and Andrew Stewart, '*Fair Work Act Review – Submission by Anthony Forsyth and Andrew Stewart*', February 2012, at p 15,

<<http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Pages/Submissions.aspx>>.

<sup>197</sup> Australian Council of Trade Unions, *Submission to the Post Implementation Review of the Fair Work Act 2009* (17 February 2012), 37 <<http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Pages/Submissions.aspx>>.

In addition to various amendments regarding the timing and nature of good faith bargaining obligations, the AMWU called for the promulgation of a 'good faith bargaining code' by the Minister pursuant to s 796 of the FW Act. This would include, *inter alia*, access and consultation for bargaining representatives to employees during work time, and "*joint communication meetings with all bargaining representatives and employees to be covered by the proposed agreement every thirty days or sooner by agreement*".<sup>198</sup> VECCI submits such a proposition is unnecessary and would further add to the complex web of requirements that already strain the operation of a fluid and robust bargaining process.

We reiterate our position in our initial submissions to the FW Act Review Panel and **strongly disagree** there is any need for the good faith bargaining principles to be further regulated and bargaining participants to be further constrained by additional obligations:

The dynamics of industrial relations negotiations require a practical approach which acknowledges that both parties may alter their position during the course of negotiations for tactical or other reasons.<sup>199</sup> This does not mean that they are not genuinely bargaining. Given the enterprise-specific and case-by-case nature of enterprise bargaining, the Panel should resist calls from parties seeking to implement further restrictions on the freedom of parties to choose to negotiate how they see fit, or otherwise attempt to 'straightjacket' bargaining representatives into having to rigidly follow a code, defined negotiation procedure or other prescriptive list of bargaining 'do's and don'ts'.

### **Should Bargaining Be Voluntary?**

A crucial part of bargaining in good faith is the ability for employers to **not** be forced to agree to crippling or unsustainable demands made on them by another bargaining representative.

VECCI has concerns regarding some commentators who advocate further controls should be placed on employers concerning their freedom to determine collective arrangements which best suit their operations.

If the FW Act was to be amended to force employers to reach agreement with trade unions at the bargaining table, and sub-section 228(2) of the FW Act was restricted and strangled to a point whereby employers bargaining for an enterprise agreement was essentially compelled to submit to trade union or employee demands (regardless of their reasonableness), this would be a patently unacceptable position for our members. The concept of involuntary bargaining, or an

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<sup>198</sup> Australian Manufacturing Workers Union, *Submission to the Fair Work Act Review Panel Post-Implementation Review* (February 2012), 38

<<http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Pages/Submissions.aspx>>.

<sup>199</sup> *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Amcor Packaging (Australia) Pty Ltd t/as Amcor Cartons Australasia* [2006] AIRC 782, [34].

employer being forced to concede to trade unions demands or compelled (either through Tribunal Orders, unions or some mechanism in the FW Act) to conclude an agreement against its wishes (after having bargained in good faith), would be an unacceptable extension of the 'good faith bargaining' regime in the FW Act and should be rejected out of hand as a viable potential amendment to the legislative bargaining framework.

#### **Necessary Reform**

**None required. VECCI remains strongly opposed** to any submissions seeking legislative change for s 228 of the FW Act to reduce or remove the potential for decisions such as *Tahmoor* or *Mingara Recreation Club* supporting the positions available to employers during enterprise agreement bargaining.

## 7.2. Bullying – No Extension Needed

Regarding Issues Paper 4, which queries the effects and design of the present anti-bullying laws in the FW Act. With the commencement of the ‘stop-bullying’ jurisdiction on 1 January 2014, employees who reasonably believe that they have been bullied at work could now apply to the FWC for an order to “stop” the bullying. Prior to commencement, our organisation was one of many who cautioned thousands of potential claims would be commenced by employees due to the broad scope of the ‘stop-bullying’ jurisdiction, however thankfully this did not materialise.

In *DP World*,<sup>200</sup> the Full Bench of the FWC held that the bullying jurisdiction is narrower than conduct that has a ‘substantial connection to work’ and took a restrictive interpretation to the definition of ‘workplace’ and conduct connected to that workplace. This was a sensible and appropriate definition and a win for employer groups (such as ACCI) who had long argued for reasonable boundaries to be applied to the responsibilities and liabilities of employers. The decision ensured the reach of the anti-bullying jurisdiction was appropriately confined.

The FWC’s powers and reach in this space are currently being handled appropriately and in a restrained fashion.

### Necessary Reform

Whilst VECCI maintains genuine safety issues such as this should better be left to State-based safety regulators (such as WorkSafe) to investigate and enforce (as applied prior to 1 January 2014), we are prepared to adopt a ‘wait and see’ approach to the current powers granted to FWC in this space. Certainly, the PC should be reticent to recommend any extension or further powers to FWC to regulate bullying issues in the workplace above that currently contained in the FW Act.

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<sup>200</sup> *Stephen Zwarts v DP World Melbourne Limited T/A DP World; Maritime Union of Australia, The Victorian Branch and Others* [2014] FWCFB 9227 (19 December 2014).

### 7.3. Clarify No Annual Leave Loading Payable on Termination

As the PC would be aware, the Federal Court of Australia has recently ruled<sup>201</sup> that employers must pay leave loading on accrued annual leave when an employee leaves, regardless of what is specified in a modern award or enterprise agreement.

In 2012 the issue was raised as part of the Fair Work act review. The review panel recognised the issue as one that would benefit from clarity and recommended “that *s. 90 be amended to provide that annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect*”. This recommendation was “*Backed with the weight of past practice and to provide certainty on the issue*”.

The Labor government of the time did not take up this recommendation; however the current Minister, Eric Abetz, introduced a Bill to enact this change in February 2014.<sup>202</sup> The legislation appears to have stalled in the Senate after it was introduced there in August 2014.

We submit the rate of payment of annual leave on termination (namely, whether leave loading or other penalties are payable) is a matter left within the ambit of the modern awards. Furthermore, the current interpretation has a regrettable and unacceptable by-product in that it implies that the Full Bench of the Australian Industrial Relation Commission (“AIRC”) was not empowered to include terms relating to the payment of leave loading during the award modernisation process.

The AIRC was of the demonstrable view it was empowered (during the award modernisation process) to include terms in modern awards relating not only to the quantum of annual leave loading, but the **time** such payment must be rendered – for example, “*during a period of annual leave*”<sup>203</sup> or, alternatively, expressly negating an obligation to pay leave loading on termination of employment.<sup>204</sup> This is shown by the presence of annual leave loading clauses in various modern awards.

As the PC will be aware, the award modernisation process was extensive and undertaken over a period of almost two years. In effect the modern awards were determined by an AIRC Full Bench

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<sup>201</sup> *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union* (No 2) [2015] FCA 136 (27 February 2015).

<sup>202</sup> Fair Work Amendment Bill 2014 (Cth).

<sup>203</sup> See, for example, the *Hair and Beauty Industry Award 2010*, which states, at clause 33: “*During a period of annual leave an employee will receive a loading calculated on the rate of wage prescribed in clause 17 of this award. Annual leave loading payment is payable on leave accrued*”.

<sup>204</sup> See, for example, the *Road Transport and Distribution Award 2010*, which states, at clause 29: “*During a period of annual leave an employee will receive a loading calculated on the minimum wage rate in clause 15 of this award. Annual leave loading payment is payable on leave accrued and taken but it is not payable on leave paid out on termination.*”



(consisting of between 3 and 7 Members). The current position is agitating a view that is contrary to the entirety of that process. We note that specific wording still appears in the modern awards relating to loading not being payable on termination. This situation is also unacceptable - businesses trying to do the right thing by following the legal industrial instrument are at the same time being told **not** to rely on what is written in 'black and white' by the government regulator and information service.

If the position is indeed the 'official stance' or 'final word', then the situation whereby the express wording of an award is invalid however remains in the official copies of the modern award (available on the FWC website) is a regrettable return to the days of the post-2006 *Workplace Relations Act 1996* (Cth) where "non-permitted matters" littered the awards but were never removed, resulting in uncertainty and confusion, and, ultimately, a disregard for the integrity of the award system.

#### **Necessary Reform**

VECCI recommends sub-section 90(2) of the FW Act should be amended as proposed in the Fair Work Amendment Bill 2014 (Cth).

## **APPENDIX 1 – VECCI MEMBER, CLIENT AND CUSTOMER WITNESS STATEMENTS**

## FOR THE PRODUCTIVITY COMMISSION REVIEW

### STATEMENT OF DANIEL DEDOMENICO

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I, **DANIEL DEDOMENICO** OF 5 Mareno Road Tullamarine, say as follows:

- 1) I am CEO of a business in Victoria. I have worked for this business for 9 years, commencing employment on July 2006.
- 2) Our organisation is the largest manufacturer and installer of a specialised product used in all sectors of the building and construction industry. This includes the provision of product and service to government, builder's, civil contractors and the like.
- 3) We employ employees on our Enterprise Bargaining Agreement which is with the CFMEU Building and Construction Industry.
- 4) THE CFMEU EBA has significantly impacted on our business. Our once highly flexible, productive work force has been reduced in an effort to reduce costs. Profitability has decreased significantly now threatening the viability of our business.
- 5) The EBA is a joke, it doesn't allow us to bargain in any way, rather it has been forced upon us and in overall terms has had a negative impact not only on the business but also the employees.
- 6) The CFMEU will not allow anything other than their agreement. It has been a nightmare and has cause the loss of jobs due to inflexibility and lack of ability to bargain direct with our employees. We were held to ransom by the CFMEU who basically know nothing about our business and how it operates. Our unique circumstances were neglected.
- 7) CFMEU stopped us from working on all sites across Victoria. They have basically held us at ransom.

- 8) The penalties provided for in the Agreement, namely double time on overtime is ridiculous. It does not represent fair and reasonable compensation for work done outside of normal hours. It is a penalty on doing business.
- 9) The Travel allowance provisions are completely unworkable and do not take into account our circumstances whereby our employees are provided with transport. This effectively increases employee wages by \$4. 91 per hour for no benefit to the business.
- 10) The minimum wage for a labourer on a unionised construction site has now increased to \$35.82 before site allowance which is typically \$4.94 per hour. Without other allowances the hourly rate, plus site allowance, plus travel equates to "doctor's" wages of \$45.67, with no skill requirements.
- 11) Despite the fact that our employees are full-time, we are forced to make contributions to Inco-link and Co-Invest, which are funds created for long-service leave and redundancy respectively. In the case of long-service, if it was any other industry, this provision would normally only exist for employees with greater than 7 years of service. This is an extra cost of doing business in Victoria with no benefit in return.
- 12) Our current agreement is now due to expire and we are being forced into a new agreement, no doubt with even higher costs. We have been told by CFMEU officials, quote: "If you don't accept the new EBA, we won't sign the agreement and you won't be doing any work in the construction industry", so much for enterprise bargaining!
- 13) Victoria is a basket case. The CFMEU does whatever it likes. Companies are forced into a position where they must "play ball" or risk being driven out of the industry.

I declare that this statement is true to the best of my knowledge and belief. I also acknowledge and accept that this Statement and any other evidence that I have provided in relation to this matter may be used in a submission to the Productivity Commission.

SIGNED by DANIEL DEDOMENICO

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6 March 2015

## FOR THE PRODUCTIVITY COMMISSION REVIEW

### STATEMENT OF DARRIN MCGUIGAN

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I, Darrin McGuigan of WAW Credit Union, say as follows:

- 1) I am employed by WAW Credit Union. I have worked at WAW Credit Union for 9 years, commencing employment on 8 August 2005.
- 2) I employ 82 employees, predominantly in the role of Customer Service and Loans Officers. WAW Credit Union predominantly operates as a mutual cooperative financial institution as regulated by APRA and ASIC.
- 3) In 2012 I set out my initial experience in the current workplace relations framework, in the context of the Fair Work Act review. This is attached and forms part of my current statement.
- 4) The conditions around the restrictions on flexibility and constraints within the new 'modern' system have continued to impact us as an employer. As outlined in my previous statement, we had a long standing practice allowed under our award of offering additional hours at ordinary rates of pay when available to our part time workforce.
- 5) The lack of clarity and certainty around individual flexibility arrangements within the current workplace relations framework meant that this practice stopped in 2010. The way that we employ staff has radically shifted from almost total coverage within our existing and trained workforce, to one where we have significantly increased our use of casuals and reduced reliance on permanent and permanent part-time staff.
- 6) Where we do use permanent and part-time staff, we now pay overtime for any and all additional hours. In many cases this would mean we are paying 15-20 hours overtime for an employee to work a 35 hour week.
- 7) From a costs perspective in 2015, this approach has meant that our annual overtime budget to cover leave and other absences increases the normal wages that would have been paid on these days by a factor of 80% or around \$60,000.00 for the year.

- 8) Other potential options to manage the cost – such as increasing the base hours of existing part time workers - are not feasible solutions as the work requiring cover is of an intermittent and unpredictable nature. Equally, creating a larger casual pool carries issues of increased costs of training for limited engagements, as well as the potential of service impacts.
- 9) As such, we see long term staff miss out on hours that they previously enjoyed, at times less skilled workers are doing the role, the business is more reluctant to offer permanent and/or part-time roles due to the restrictions outlined and we pay more to produce the same outcome. Long term part-time staff who were dependant on the previously regular offering of additional hours have had to make choices along the way based on the restrictions and in some cases have left our employment.
- 10) Our view is no one wins in these situations and change is required.

I declare that this statement is true to the best of my knowledge and belief. I also acknowledge and accept that this Statement and any other evidence that I have provided in relation to this matter may be used in the context of the Productivity Commission Review.

SIGNED by Darrin McGuigan

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9/3/2015  
(please date)

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## FOR THE PRODUCTIVITY COMMISSION REVIEW

### STATEMENT OF ELIZABETH WHITE

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I, **ELIZABETH WHITE** OF 8/88 Dynon Road, West Melbourne say as follows:

- 1) I am the CEO of the Victorian Caravan Parks Victoria Association.
- 2) The Victorian Caravan Parks Association is the peak body for caravan park owners and lessees, with more than 380 Victorian members and another 30 Interstate members in southern NSW.
- 3) The sector provides more than 54% of all the total accommodation available in the state.
- 4) Data on the industry collected in 2013 showed that an average of 5 people are employed at each park, including full and part-time employees, and the owners themselves in most cases.
- 5) Most parks are in regional locations around Victoria. Labour costs form a very large proportion of the total business operating costs. A recent report on the industry concluded that caravan parks in rural locations are more likely to be low revenue and low profit.
- 6) Qualifications to enter the industry are low – few formal qualifications are required, and little formal training courses exist.
- 7) Finally, the industry as a whole is managed by owners and lessees who are aging; until recently there has been little evidence of a generational handover to younger owners, although this is slowly occurring.
- 8) So the need of the industry to hire additional support staff is growing.
- 9) The Hospitality Award is confusing. Our members are generally Mum-and-Dad businesses that are required to be across all operational, financial, and legislative and consumer-related aspects of park management. The complexity of the Award provisions as they relate to length of time in the industry, complexity of duties and other components makes this a mine-field for park owners who want to hire part-time help to cover annual holiday leave or attendance at training for staff and owners, to assist with busy weekends in holiday periods, or to support the operations of an on-site café or store in the park.
- 10) This complexity is a definite barrier to employment in regional locations where local people would welcome such opportunities for temporary work positions.

- 11) These penalty rates are also confusing, and we field many calls to this office to outline the actual payment required for Public holidays, where there are differing amounts in place across the same holiday period.
- 12) Triple-time and double-time-and-a-half payments represent a barrier to employment for local businesses, and some parks will decrease their holiday activities (and the resultant employment opportunities in order to avoid these large pay entitlement obligations) This again reduces employment opportunities in regional areas where the part-time work would be welcomed by local residents.
- 13) Again, our members do not manage large staff numbers, and rarely in country locations do they come up against situations where they are forced to dismiss staff for incompetence, theft, workplace unsuitability, etc. When they do need to consider dismissal as a last resort, they founder in the complex procedural requirements for transparency and employee justice, and can easily find themselves in deep waters. The current legislation seems to be heavily weighted in favour of the employee's rights; the needs of the employer for a clear and uncomplicated process are not as evident.

I declare that this statement is true to the best of my knowledge and belief. I also acknowledge and accept that this Statement and any other evidence that I have provided in relation to this matter may be used in a submission to the Productivity Commission.

SIGNED by ELIZABETH WHITE

5<sup>th</sup> March 2015

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## FOR THE PRODUCTIVITY COMMISSION REVIEW

### STATEMENT OF Gary Deer

I, Gary Deer of 14 Somerton Park Drive, Campbellfield, Vic, 3061, say as follows:

- 1) I am employed by Gallagher Australia. I have worked at Gallagher Australia for 15 years, commencing employment on 6<sup>th</sup> May 1999.
- 2) Our organisation is a wholly owned subsidiary of the Gallagher Group Ltd, a global leader in the innovation, manufacture and marketing of technology solutions for Animal Management, Security and Fuel Systems with 58 employees around Australia
- 3) We employ employees on Individual Employment Contracts
- 4) My experience with the Fair Work Act 2009 has been around management and ultimate dismissal of an injured or unhealthy employee.
- 5) A former employee became unable to perform the duties for which he was employed through injury.
- 6) After a long period of management (3+ years) and a lessening chance of a return to pre-injury duties, escalating associated costs gave us little option other than to terminate the employee.
- 7) The employee then sought unfair dismissal claim, during conciliation we felt our most efficient solution was to settle the claim with a monetary sum and avoid the unknown but suggested increase cost of a hearing.
- 8) This gave a solution but we don't feel a positive one for us or the former employee. Cost to us exceed \$15,000 and whilst it gave the former employee some short term financial comfort at no point during the dismissal or conciliation process were we able to address the best interests and future of the employee, beyond a 'go away' settlement.

- 9) We feel the General Protections process is too quick to focus on financial factors without long term benefits specifically when involved are injury or capacity challenged employees.
- 10) Fair Work Act 2009 is far too complex for the average employer to understand by themselves, nor is there adequate support via Fair Work to assist employers, we must pay for professional advice at accept the added expense as a business cost.

I declare that this statement is true to the best of my knowledge and belief. I also acknowledge and accept that this Statement and any other evidence that I have provided in relation to this matter may be used in 2015 Review before the Productivity Commission.

SIGNED by Gary

6th /March / 2015

## FOR THE PRODUCTIVITY COMMISSION REVIEW

### STATEMENT OF Gavin Anthony Ronan

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I, Gavin Anthony Ronan of 735 Ormond Rd Springbank, Victoria, say as follows:

- 1) I am the owner of Twelve Apostles Lodge Walk. My wife and I have operated Twelve Apostles Lodge Walk for 10 years, commencing in 2005.
- 2) Twelve Apostles Lodge Walk is a leading Victorian nature based eco-tourism operator specialising in the Great Ocean Walk, an iconic long distance walking trail to the 12 Apostles. We operate our activities from a purpose built walking lodge midway along the trail, and have been recognised as one of Australia's leading walk experiences via our foundation membership of Great Walks of Australia (backed by Tourism Australia) and various tourism awards.
- 3) We employ 8 employees under 2 separate Modern Awards:
  - a. Amusement, Events and Recreation Award 2010(MA000080)
  - b. Hospitality Industry (General) Award 2010 (MA000009)
- 4) Tour operations typically involve 4 day 3 night walk experiences running back to back that have no correlation to a Monday to Friday work week. All workers in our industry understand the nature of the industry and that every day is a normal work day. Our customers expect a 7 day per week operation because this is the nature of the tourism industry.
- 5) Prior to the introduction of the Modern Awards, we operated under the Cultural and Recreational Services Industry award, which amongst other things, did not have penalty rates for weekends, public holidays and evening hours. It reflected the reality of our industry and pay rates, scaled fairly to relevant job responsibilities.



## FOR THE PRODUCTIVITY COMMISSION REVIEW

### STATEMENT OF JENNIFER LANG

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I, **JENNIFER LANG OF** 542 Glen Huntly Road, Elsternwick say as follows:

1. I am employed by Webb Plumbing Services. I have worked at Webb Plumbing Services for 13 years, commencing employment on 2001.
2. Our organisation is a plumbing business specialising in maintenance and emergency plumbing servicing for both domestic and owners corporation customers. Webb Plumbing has been in business for over 25 years.
3. We employ plumbers under the Plumbers and Fire Sprinklers Award 2010 and our administration staff are covered under the Clerks Private Sector Award 2010. The modern Plumbing Award conditions are complex - in particular the site, industry and tool allowances and the industry specific redundancy, which is different from the National Employment Standards. This specific award payment is paid when the employee chooses to terminate the employment and not the employer. It is calculated based on years of service.
4. I feel the current award for plumbing has a very negative impact on businesses. Due to the shortage of skilled maintenance plumbers, all employees are paid above the award rate in order to remain competitive. Paying above the award rates, one would assume that all allowances are covered, but not so. This is bureaucratic nonsense as it requires us to customised our systems so all allowances are shown as calculated and separately.
  - a. The industry specific redundancy is also extremely unfair on small businesses like Webb Plumbing. Our revenue comes solely from the plumber and when they chose to leave the business, revenue is gone until the plumber is replaced. Yet, we are required to pay a redundancy payment when a plumber chooses to leave. For example, last year, we lost 4 plumbers within 3 months and the resulting redundancy payout for these 4 different plumbers placed our business under financial pressure.

- b. Even though we do not work in construction and our employees are full time and permanent, we are still required to pay into the portable long service leave scheme Co-Invest. There is no distinction made between permanent and contract trade workers. This scheme should not apply to our type of business.
  - c. Add on OH&S compliance costs, payroll tax to a small business like ours and you can start to see the pressure we are under to remain competitive. Plumbing is highly competitive industry and it is not a level playing field.
  - d. Our charge out rates to customers become unmarketable when we take into account the penalty rates and all the conditions such as minimum rate of pay, double time next working day as per the Modern Award.
- 5. I look very closely at everything we do in our business and constantly look at ways to make our business productive, efficient and find ways to reduce costs and overheads. We have invested heavily in technology and training, however in our business our overwhelming costs are WAGES, SUPER, CO-INVEST and WORKCOVER.
- 6. I speak to many small trade businesses and all complain of the difficulty in running a professional business, remaining competitive and managing staff and costs. Trade businesses are competing with self-employed persons who do not have the same overhead costs and businesses who use unqualified staff and cut corners.
- 7. Small and professional businesses like ours are important to the economy. A self employed plumber will never get the opportunities that we provide. We offer training, working in teams and safety. We are vital to the plumbing industry and to the health and safety and yet we still find we are ignored by the Construction Industry and Government.

I declare that this statement is true to the best of my knowledge and belief. I also acknowledge and accept that this Statement and any other evidence that I have provided in relation to this matter may be used in a submission to the Productivity Commission.

SIGNED by JENNIFER LANG

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10/2/2015  
(please date)

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## FOR THE PRODUCTIVITY COMMISSION REVIEW

### STATEMENT OF MARY JO DURRANT

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I, **MARY-JO DURRANT OF** 3/109 Burwood Road, Hawthorn, say as follows:

- 1) I am employed by McConnell Dowell Constructors (Aust) Pty Ltd (MCD) as National Employee Relations Manager and commenced employment March, 2013.
- 2) In Australia MCD undertakes building and construction infrastructure projects, including road, marine, mining and rail work.
- 3) MCD employ blue collar employees under predominately Greenfield's Enterprise Agreements for new project work and in other areas we have coverage under the Modern Award, paying market rates to attract and retain experienced and competent employees.
- 4) When negotiating Greenfields Agreement we are somewhat at the mercy of the union during negotiations because of time constraints set by client(s) for project commencement particularly where there is a short lead time (as little as 2 weeks' notice from contract award to mobilisation to site). With no time constraints to negotiate a Greenfields Agreement under the Act, the union exercise their ability to hold out until they get their preferred terms and conditions in the Agreement. This does not necessarily equate to a level playing field for employers in negotiations for Greenfields Agreement.
- 5) Where negotiations for a Greenfields Agreement has not been finalised in time for project mobilisation we are forced to sub contract out works to labour hire companies to ensure work commences on the site.
- 6) There appears to be no recognition by some unions across Australia that the economy is down when negotiating Agreements. The unions are continuing to demand high wages and conditions in this industry which is out of step with the economy.
- 7) Ongoing challenges with unions accepting that Agreements in building and construction must be code compliant to applicable State and Federal Codes/guidelines.

- 8) Furthermore, the CFMEU (VIC) and AWU(NSW) are not accepting the standards set by various State and Federal building codes/guidelines and resisting changes to 'status quo or custom and practice changes' terms and conditions of employment.
- 9) Building and Construction unions have fought to negotiate very high overtime rates, particularly in Victoria which is at 200% payment for all hours. Historically employers have agreed to these overtime penalties 'perhaps in the good times' and now the union(s) in the 'financial difficult times' are not giving up prior hard fought rates. This is one example of many others. Victoria is the only State that has 200% for all hours of overtime compared to other States that have 150% for first 2 hours, 200% thereafter.
- 10) Unions are continuing to push for their 'pattern Agreement' terms and conditions despite this being against the spirit of Enterprise bargaining under the Fair Work Act.
- 11) Unions want extensive consultation in Agreements, many items/areas that should remain as management prerogative.
- 12) At site level unions are continuing to push for same terms and conditions of employment for labour hire/sub contractors on the site.
- 13) We have been involved in unfair dismissal claims against our company which have been brought on by several building unions. Some of these cases related to employees engaging in serious misconduct with some resulting in grave safety breaches.  
Some of these cases have had no substance or merit, but we have still had to go through the Fair Work Commission process which has resulted in us having to proceed to arbitration or pay 'go away money' for commercial reasons due to the cost of legal fees and management's time to defend the case. Irrespective of the merits of the case, it appears that some unions utilise the FWC to prolong the matter in an attempt to get 'compensation for the Applicant' but when the matter proceeds to arbitration, they fail to complete and file their written submissions or witness statements which results in the matter being closed and many people including the Commissioners time being wasted. In some of these unfair dismissal cases the Applicant never appeared in any proceedings (as the union represented them), and the Commissioner kept the matter open, which resulted in being a complete waste of time for us, with the addition of unnecessary legal fees: upwards of \$10,000 – \$50,000 per case.
- 14) Eligibility for General Protections claims need to be tightened up as it has been utilised inappropriately by some Applicants.

- 15) We have had several General Protections claims from white collar workers paid in excess of the unfair dismissal jurisdiction. These Applicants were paid well in excess of the 'unfair dismissal jurisdiction threshold and were Award free employees.
- 16) The first matter was settled because legal costs were approximately \$85,000 and if the matter had of continued in the Federal Court a further \$60,000 of legal fees would have been incurred. At the outset lawyers advised 'excellent case, the Applicant has no claim' but the matter was eventually settled for many thousands of dollars to the Applicant so as to avoid the ongoing legal fees.
- 17) The second General Protections matter was settled for many thousands of dollars of 'go away money' plus legal fees when at the outset there was legally no basis for the claim but to have contested the claim in the Federal Court would have meant further legal fees..
- 18) We anticipate further challenges in Victoria from building and construction unions following a change of Government and abolition of the Victorian Building and Construction Code. The Victorian Building and Construction Code kept behaviours under check to an extent. Employers and unions were brought to account for such areas including unions strictly following right of entry. These Building and Construction Codes are being dismantled or abolished as Labour secures power across other States including QLD and possibly NSW.
- 19) The Building and Construction unions are still wanting to do business on their terms; ie : push for Pattern Agreements; wage increases of at least 5% annual increases; insistence to engagement of employee union preferred labour including employee and OHS reps.

I declare that this statement is true to the best of my knowledge and belief. I also acknowledge and accept that this Statement and any other evidence that I have provided in relation to this matter may be used in a submission to the Productivity Commission.

SIGNED by MARY JO DURRANT )

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\_\_11\_ / \_\_03\_ / \_2015\_\_\_\_ )  
(please date)



## FOR THE PRODUCTIVITY COMMISSION REVIEW

### STATEMENT OF MICHAEL KORSTEN

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I, MICHAEL KORSTEN OF 136 Fairbank Road, Clayton South say as follows:

- 1) I am employed by MacFarlane Generators Pty Ltd. I have worked at Macfarlane Generators for over 4 years, commencing employment in January 2011.
- 2) Our organisation sells, services and hires out generator sets.
- 3) We employ employees on various awards including electrical, mechanical and by individual agreements.
- 4) The awards have not had a major impact but more of a minor impact. We probably have 1-2 less apprentices than we would have and it does affect profitability, but only to a minor level.
- 5) We find that in each case put to the Fair Work Commission it is cheaper to pay the person to go away - regardless if the cases merit. As a business, it is considered imperative to have some form of representation - which is always costly. The problem arises because the whole Fair Work Commission is angled towards helping the employee, not the employer. If the employee makes a mistake, Fair Work will accept that and ignore it. If the employer makes a mistake, they are penalised. The whole FWC system is a disgrace. It costs the tax payer a fortune to run and typically benefits only those employees who know how to abuse the system or have a grudge against the employer. This is majorly evident in unfair dismissals.
- 6) The inability of an employer to enforce confidentiality for employment agreements is a hindrance. Instead of rewarding a good employee with extra money, we can't as others will find out what that extra is and demand it - despite not deserving the extra amount. But the biggest issue is FWC with unfair dismissal claims. They are too easy for the employee/ex-employee to complete and win. They don't need evidence or even a valid reason - employers are forced to pay out instead of going through an expensive legal defence.

I declare that this statement is true to the best of my knowledge and belief. I also acknowledge and accept that this Statement and any other evidence that I have provided in relation to this matter may be used in a submission to the Productivity Commission.

SIGNED by Michael Korsten )  
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11 / 03 / 2015 )

## FOR THE PRODUCTIVITY COMMISSION REVIEW

### STATEMENT OF MICHAEL MCKEE

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I, Michael McKee of 713/555 Flinders St Melbourne, say as follows:

- 1) I am the sole director of my company, Rebalicourt Pty Ltd in trust for the Mike McKee Family Trust.
- 2) I currently operate a Wendy's franchise business in Horsham Plaza and have done so for the past 7 years and have also been a franchisee in other Wendy's businesses for over 23 years.
- 3) I am currently working as the regional manager for Wendys in Vic/Tas.
- 4) In my Wendys Horsham business, I employ 10 people under the Fast Food Industry Award 2010.
- 5) The Fast Food Industry Award 2010 is not modern after all in the following ways:
- 6) The Award requires the payment of penalty rates for hours that the general public consider 'normal' trading hours - i.e. Saturdays, Sundays, late night shopping, and public holidays.
- 7) The Award is unable to provide flexibility for junior team member hours. We have had to let go of many of our junior staff as they could not work a 3 hour shift after school as the shopping centre closed. They could only work a 2 hour shift due to school commitments, which then requires me to find older (and more costly) staff to work these longer hours.
- 8) As a business owner, the modern award have forced me to work excess hours due to being unable to afford casual staff on weekends. I usually work 6 or 7 days per week in the store and then have to complete the book work and administration outside of the in store work.
- 9) This has also devalued my business as no one wants to pay for a business that they have to work so hard in.
- 10) I am reticent to employ permanent staff as it is too hard to get rid of them if they do not perform.
- 11) As a small business I can't afford to carry someone who chooses not to do their work.
- 12) My wage costs have increased by over 5% of sales, which equates to \$23500 per annum since having to switch to the Fast Food Industry Award 2010. These additional costs have come straight out of my pocket. The costs additional allowances that are provided for in the

Award such as the laundry allowance for each shift does not normally get done anyway. It basically means that my wife and I are working twice as hard as we were 10 years ago for half the money.

I declare that this statement is true to the best of my knowledge and belief. I also acknowledge and accept that this Statement and any other evidence that I have provided in relation to this matter may be used in a submission to the Productivity Commission.

SIGNED by MICHAEL MCKEE

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## FOR THE PRODUCTIVITY COMMISSION REVIEW

### STATEMENT OF NIKITA NICOL

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I, NIKITA NICOL of Shop K14 Capalaba Park Shopping Centre, Capalaba 4157, say as follows:

- 1) I am a director of TReNIKY Pty Ltd trading as Wendys Capalaba Park. I have been a director of TReNIKY Pty Ltd for 2 years, commencing in January 2013.
- 2) Our business employs 6 casual employees under the Fast Food Industry Award 2010.
- 3) The Fast Food Industry Award 2010 has impacted my business in the following way: Public holidays are just impossible to roster staff on because even the youngest employee costs the business as much per hour as they make in sales for that hour. The only profitable option for me is to close the business on public holidays altogether, or for me to work it out alone. Neither of these options are appealing.
- 4) It frustrates me that I am unable to provide flexibility for junior team member hours. Some of my junior staff are still at school, and can only work reduced hours after school has finished during the week. I have to then find non-junior staff to cover these shifts, and then I have to pay them full rates. There are many young workers looking for an afternoon/after school jobs that want to work only 2 - 2.5 hours but are unable to due to the Award minimum engagement period.
- 5) As a business owner, the Modern Awards have forced me to work excess hours due to being unable to afford casual staff on weekends. The penalties are too high. A typical work day in store (Monday-Friday) for me is 7 am – 6pm or 7pm in store **alone** (no breaks) until 3pm when a **Senior** staff member works a 3pm-6pm shift - because I cannot afford a longer shift and **junior** staff cannot work due to only being available at 4pm – making it too short for a minimum shift of 3 hours.
- 6) My wage cost is 27%-30% of the business gross income – this kind of wage cost is just not sustainable. This is not including SUPER.

- 7) The Award requires me to spend good money on supplying them with clothing to wear for their shifts and we have to pay them every shift to wash them too. It's just ridiculous.
- 8) I believe in Fair pay – but fair to both parties: employee and employer. As it stands I am too busy working IN my business than working ON my business.

I declare that this statement is true to the best of my knowledge and belief. I also acknowledge and accept that this Statement and any other evidence that I have provided in relation to this matter may be used in a submission to the Productivity Commission.

SIGNED by NIKITA NICOL

11 March 2014

## FOR THE PRODUCTIVITY COMMISSION REVIEW

### STATEMENT OF OLWEN GLADWELL

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I, **OLWEN GLADWELL** OF 240-242 Caroline Springs Boulevard, Caroline Springs say as follows:

- 1) I am employed by Practical Outcomes I have worked at Practical Outcomes for 4 years, commencing employment on March 9th 2010.
- 2) Our organisation is a training company that specialises in training in early childhood, hospitality and first aid.
- 3) We employ employees on a permanent basis. We are an employer of choice who prides ourselves on doing the right thing by our staff and our students. We employ over 40 people at this stage.
- 4) Late last year (November 2014) we employed an accountant who we thought would be a good fit for the company.
- 5) However within the first two days it became apparent that he would not only be someone who would argue with management - continually telling us that he could do things better but his personality was one which was not going to be a good fit for the company. As the General Manager I spoke to him about the issues we had encountered on the Friday of the first week, his response to me was quite arrogant. On the Sunday night the person he had been employed to replace informed me that she would not be able to continue to do the handover with this person as he was making her so uncomfortable she felt she could not come to work.
- 6) I called a meeting on the Monday morning where I discussed the concerns I had with the two Directors and the person leaving the position. Both Directors raised concerns relating to both performance and attitude - including taking personal calls during meetings and arguing with one of the directors.
- 7) As it was under 6 months employment - and the employee was only with our company for one week we felt we were safe to dismiss with no repercussions.

- 8) I called the employee down and told him of our decision and why we were dismissing him. He then told me he would try harder if we would give him another chance but I informed him again that we felt he was not a good fit for our company.
- 9) We then received the General Protections claim and were just dumbstruck that nothing in his claim actually backed up anything to do with the law. The minute we spoke to lawyers we were told we would have to pay - even though no one could tell us what we had done wrong.
- 10) Four people including the directors then met, decided based on the information we had to employ VECCI to represent us. Again we were told there was no case but to get a letter to stop the ex employee claiming against us in a higher court or coming back with something else we would have to consider payment.
- 11) The whole process took a great deal of time, effort and stress and certainly has changed all our policies and procedures when employing and thinking about laying staff off.
- 12) There was no claim - the Fair Work Commissioner kept asking the ex employee how his claim related to the provisions of the Fair Work Act and there was nothing. The ex employee was looking for a month's pay as 'compensation'. We offered two weeks.
- 13) Eventually the matter settled for 10 days compensation to the Applicant.
- 14) We also had to pay for our legal representation. It was an expensive process for a case which had no merit.
- 15) We then were subjected to another round of emails from the ex employee accusing us of trying to 'rip him off' and deliberately underpaying him. The Commissioner eventually got involved and told him to take it up with the tax department.
- 16) The actual case should never have been accepted. It was obvious reading his initial claim that he didn't have a case. However because he had paid his money to lodge a General Protections Claim he was entitled to be heard. For us to be told at every avenue that we should be looking at how much we would be willing to pay him was insulting. The Commission should be dealing with cases where there is some merit to the case. It is

obvious the provisions of General Protections in the Fair Work Act 2009 (Cth) in this case was used to extort money from us.

- 17) At the FWC Conference the Commission ascertained that the ex employee could not back up his case - however we then got into the discussion as to how much we would be willing to pay. Surely the Commissioner should have had the power to tell the ex employee he had no case and as such the case would be dismissed with no repercussions for us.
- 18) To receive an email notifying us that this was happening was also not professional. We had no idea what 'General Protections' were and until we spoke to VECCI could not work out what it meant. Even when we spoke to VECCI it made no sense - to us or them. However we had to go through the costly process - even though we had done nothing.
- 19) Surely if everyone can see there is no case it should never have been accepted by the Fair Work Commission. It just seems the system is open to rorting - you pay the money to lodge your form - knowing whatever happens on the day you will get money.

I declare that this statement is true to the best of my knowledge and belief. I also acknowledge and accept that this Statement and any other evidence that I have provided in relation to this matter may be used in a submission to the Productivity Commission.

SIGNED by OLWEN GLADWELL

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11 / 03 /2015

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## FOR THE PRODUCTIVITY COMMISSION REVIEW

### STATEMENT OF PHIL STUCKEY

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I, **PHIL STUCKEY** OF 6 Moloney Drive, Wodonga, Vic 3690 say as follows:

- 1) I am the Manager Director of Kooka Brotha's Pty Ltd. I have worked in this capacity since 1987.
- 2) Our organisation, Kooka Brotha's Pty Ltd trades as Kooka Brotha's Patisserie.
- 3) We employ 18 staff which are made up of full-time, part-time and casual employees.
- 4) We employ employees under the Food, Beverage and Tobacco Manufacturing Award 2010.
- 5) Our company's profitability has decreased significantly in recent years. It is our experience that this situation has been due to a significant degree to inflexibility caused by the introduction of the Modern Award in 2010.
- 6) The main reasons for decrease in our profitability is the inflexibility of working hours for casual staff and the high penalty rates which are incurred if we attempt to extend shifts. This has resulted in a reduction in staffing hours and the number of casuels we can afford to employ.
- 7) The requirements of the modern award that has affected Kooka Brotha's significantly is the spread of ordinary hours. In order to operate efficiently we should be operating expanded shifts, from 5am to 9pm, but currently penalties would apply to those hours before 6am and after 6pm which make it unviable.
- 8) The minimum engagement period for casuels under the Modern Award has affected our profitability. We are not able to employ casual and juniors (mostly students) who are only available to work from 2 – 3 hours after school, as the minimum engagement under the

Award is 4 hours. We find the minimum engagement period stops students flexibility of hours.

9) We need to operate on Saturdays to maintain efficiencies however the current penalty rates prevent this; as the penalties are too expensive.

10) It is unviable to offer students (who are typically cheaper employees depending on their age) who want to do work on weekends as penalty rates are too expensive. The net result of these restrictions is that we struggle to be competitive, particularly in the export markets that we are trying to expand into. The nature of employing students, it means that it is often suited them to come in after hours or Saturdays or Sundays to do non time specific jobs (eg packing, cleaning & maintenance) as they had other things on during normal week day but application of penalty rates makes this cost prohibitive.

11) We have chosen not to use Individual Flexibility Arrangements with employees to date is due to finding them too time consuming to implement and there is too much red tape and unknowns. I believe if there was a simple and reliable system would be more likely to use such a system.

I declare that this statement is true to the best of my knowledge and belief. I also acknowledge and accept that this Statement and any other evidence that I have provided in relation to this matter may be used in a submission to the Productivity Commission.

SIGNED by PHIL STUCKEY

10 March 2014



## FOR THE PRODUCTIVITY COMMISSION REVIEW

### STATEMENT OF Simon Kenneth BAILEY

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I, Simon Kenneth BAILEY of 21 Sandra Grove Bentleigh Victoria 3204, say as follows:

- 1) I am the co-owner and CEO of Chefs On The Run Australia. I have worked at Chefs On The Run for 25 years, having established the company in 1990.
- 2) Our organisation supplies the Hospitality & Catering Industry with casual hospitality personnel, specifically chefs, cooks, kitchen hands, canteen assistants, waiters, bar staff and baristas. We supply hotels, restaurants, caterers, aged care sites, mines and site management companies with these personnel on a temporary and casual basis.
- 3) We employ our casual employees under the Hospitality Industry (General) Award 2010.
- 4) The 'Modern Award' has effectively increased the cost and complexity of employing people due to the fact that it has taken the assorted complexities from each State-based Award (such as tool allowances, uniform allowances, break breach penalties) and attempted to bundle them all into one universally applicable Award. The fact of the matter is that the costs of living vary significantly between major cities, with Sydney being a lot more expensive to live in than Melbourne and Melbourne more expensive than Brisbane. This attempt to 'simplify' matters has resulted in an inequitable result for many of our employees – or in many cases a significant reduction in the margins available to our business as we have to pay above Award in Sydney, but absorb the additional expense by reducing our operating margins.
- 5) Ridiculous terms in the Award such as the 'Break Breach Penalty' have been inserted into the Modern Award by people who have obviously never worked in hospitality. When a site that serves customers gets busy, it is simply not possible to be sending people on a break in the middle of service. Yet the Award requires that casual employees (already only working a

short shift) be paid at time and a half from the time they do not go on a scheduled break until they take a break or the shift ends. This can amount to hundreds of extra dollars in wages on a busy day and makes it almost impossible for businesses to trade profitably.

- 6) The unlawful dismissal laws also make me regret being an employer. We pride ourselves on being a good employer, caring for our employees and both accommodating and supporting them wherever possible. Some recent examples of how ridiculous the current legal framework is include –
- a. A casual chef who works at multiple sites and had been doing a lot of hours at one particular site started causing trouble for the client by disrupting other workers and complaining about the smoking area allocated to them and the client asked us to supply someone else. We offered the chef work elsewhere and they responded that this was 'their' site and that they would sue us for unlawful dismissal if we didn't place them back there. We probably would have had to go to mediation, except that we found that the person had been claiming a travel allowance whilst living adjacent to the site – so we were able to end the discussion without further action. We should not have to be placed in such a position with a casual who is paid a loaded rate, has no consistent workplace with us and works for other employers.
  - b. We closed a catering operation that had been doing poorly for 18 months after spending a lot of money on a re-launch and equipping the team. All of the team were aware that things were going poorly and that if sales couldn't be increased we would have to close the operation. Three months before we closed the operation we had another discussion to see whether we could increase sales, but in the end we lost three big proposals in the final round. We closed the operation and were sued for unlawful dismissal by two of the three personnel in that operation. The most senior team member was given notice at the same time as the others, but worked out his notice calling clients to cancel their booking and cleaning up the kitchen. The other two did the 'usual' "unable to find work" routine (when one of them could have worked on our Brigade immediately) and sought damages. We ended up paying about \$5K to settle the matter, but we shouldn't have had to – they were looking for \$100K.
  - c. It appears that if someone wants to misbehave and then make sure they get away with it, all they have to do is mention the word 'bullying' and they can do as they please. Our industry has been known for a culture of bullying by chefs and we do not

in any way condone it. However, things frequently get 'heated' in a busy kitchen and sometimes tempers flare. We have had a number of recent instances where a casual who started a screaming match with one of our coordinators behind closed doors and then alleged bullying, one chef placed his hand on the shoulder of a female chef during service and we had to submit an "Incident Report" to protect against a potential action for bullying or sexual harassment, a discussion between one chef and another about their Facebook page and the fact that the female chef was 'available' resulted in allegations of bullying and harassment and when a senior chef raised his voice when requiring other chefs to return to the kitchen after a very long smoko break in a busy period he was accused of bullying and we had to suspend him until an enquiry could be held. Now, as I stated, we will never condone predatory, damaging or demeaning behaviour from any of our personnel – whether permanent or casual. However, these days we live in fear of a completely innocent interaction becoming a legal action if there is even the slightest nuance of irreverence – when this is often the way people communicate. It seems that we've started to treat everyone as so fragile that they can't cop a bit of a ribbing or some criticism and survive – which may be good for therapists everywhere, but certainly doesn't make employing young people an even vaguely attractive proposition.

- 7) Australia has a highly educated and well skilled workforce, although we continue to do really poorly at providing a solid education for our tradespeople. The Hospitality Industry has seen a steady decline in the availability of critical F&B personnel and will continue to do so while the education system remains the way it is. There is little doubt that the Unions are more concerned with power than outcomes for employees these days and their disdain for the hard work done by those of us who have started and built businesses is clear in their never-ending efforts to entrench work conditions that are simply not affordable. I do not believe that there is a problem paying people who are prepared to give up their weekends extra money – because sacrificing this time comes at significant personal cost. If we stop making it worthwhile for casual personnel to work on weekends, the hospitality industry will grind to a screaming halt – because many people work in this industry to top up their earnings. That said, taking a 'one size fits all' approach and imposing completely impractical wage rates, penalties and conditions on businesses that often struggle to pay the wages will do nothing but further harm the fragile economy. We need more room for a sensible discussion that

reflects reality on the ground in the many States around Australia – and less dogmatism and denial about those realities in the minds of both Unions and regulators.

I declare that this statement is true to the best of my knowledge and belief. I also acknowledge and accept that this Statement and any other evidence that I have provided in relation to this matter may be used in a submission to the Productivity Commission.

SIGNED by Simon Kenneth BAILEY )  
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5<sup>th</sup> March 2015 )

## FOR THE PRODUCTIVITY COMMISSION REVIEW

### STATEMENT OF WENDY KILLEEN

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I, **WENDY KILLEEN** OF 440 Jacks Road, Rutherglen Victoria 368 say as follows:

- 1) I am a director and CEO of Stanton and Killeen Wines. I have worked in this capacity since July 1, 2011.
  - 2) Our organisation, Stanton and Killeen Wines, is a wine grape growing and wine production business. My family have been in the wine industry in Rutherglen for 140 years.
  - 3) We employ 12 full time staff members and four casual staff members.
  - 4) We employ employees under the Wine Industry Award 2010.
  - 5) My experience with the modern award is specifically related to the lack of rights I have in relation to employment of staff and the financially crippling penalty rates in place.
  - 6) My company operates a Cellar Door; open 364 days a year, closing on Christmas day. We are located in a strong tourist region and the expectation is we are open during normal daylight hours, seven days a week. I employ two casual staff members on a standard weekend. The penalty rates associated with those days are severe and unfair. One employee working an eight hour shift earns in excess of \$350.00.
  - 7) The busiest days of the week are Saturday and Sunday. Visitors from a wide range of locations head to the North East of Victoria for the weekend. Not all cashed up but all definitely looking for a good place to relax and get away for a break. The state of Victoria has a strong tourism focus and the North East is one of the premier regions.
  - 8) Public holiday penalty rates are prohibitive and erode profitability. At my winery, a six to eight hour shift on a public holiday provides the employee with a payment in excess of \$500.00. My employees are paid a little over the award hourly rate based on historic hourly rates. The precedent has been set and I am unable to reduce the rate. When you put on

casual loading then public holiday loading, the hourly rate becomes overblown for the task at hand. On any designated public holiday I need between two and three people working in Cellar Door however, public holidays fall mainly on a Friday or Monday. A public holiday falling in the middle of the weekend would see me employing four to six people to service the visitor. Easter is an example when I employ six people on the Sunday.

9) Since July 1, 2011 my daughter and I have worked all public holidays. We are a small family company and need to eliminate expenses where we can. Some public holidays, Australia Day and Anzac day for instance, occasionally fall mid-week. Those days are not text book days as the number of potential visitors is hard to ascertain. Often the income on those days wouldn't cover wages if I employed someone. Penalty rates greatly affect my business in a financially detrimental way and the prospect of increased public holidays will see me reviewing my business practice and the hours I operate.

10) The wine industry is in turmoil due to many negative factors and being a small, family operated business, we feel financial pain due to the unfairness of severe penalty rates.

I declare that this statement is true to the best of my knowledge and belief. I also acknowledge and accept that this Statement and any other evidence that I have provided in relation to this matter may be used in a submission to the Productivity Commission.

SIGNED by WENDY KILLEEN

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5 March 2014

5 March 2015

## FOR THE PRODUCTIVITY COMMISSION REVIEW

### STATEMENT OF COLIN PETERSON

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I, Colin Peterson of 1 Acacia Road Hurstbridge Victoria, say as follows:

- 1) I am employed by Carer Solutions Australia Pty Ltd. I have worked at Carer Solutions Australia Pty Ltd for 4 years, commencing employment on 1 June 2011.
- 2) Our organisation works in the disability environment and enables people who need Support Workers to employ Support Workers of their choice. We pride ourselves on our flexibility and have a unique business model when compared to traditional care agencies. Many of our families utilise our services in conjunction with existing arrangements.
- 3) We employ employees on the Social, Community, Home Care and Disability Services Industry Award 2010.
- 4) The requirement, or more accurately the introduction, of penalty rates in the Social, Community, Home Care and Disability Services Industry Award 2010 for hours that the general public consider 'normal' hours - i.e. Saturdays, Sundays, evenings, public holidays - proves difficult for people living with disability for whom the use of Support Workers is not an option but a necessity. These individuals are dependent of funding from a number of organisations including the Victorian Department of Health and Human Services (DHHS).
- 5) The introduction of the penalties in the Modern Award for casual employees who are required to work on the weekends has resulted in a decrease in profitability as there penalties were not applicable under the old Social and Community Services (Victoria) Award 2000.
- 6) Funding for these support workers is limited and the use by individuals living with disability is dependent on need and not on the time of day when the "cheapest" option is available based on when penalty rates may be applicable. An individual living with disability who needs assistance getting to bed or on weekends has this need and Support Workers who

- 7) Before it was a case that they just rostered people on to do whatever it was they needed, however now you have limited funds to pay people. If Support Workers are employed on a Saturday or Sunday, often they cannot be employed as many times during the week.
- 8) People with a disability are now using family members who volunteer to provide this assistance instead of paying for a Support worker covered by the Modern Award. As a result has reduced the quality of care for these people living with a disability, as often people living with a disability are not as comfortable with family members or others who may not be as competent in providing this service.
- 9) Further the application of penalty rates can result in an unfair advantage to some Support Workers. Those that choose to make their fulltime employment assisting individuals living with disability are often Monday to Friday workers, who have their own families. Those that are available for evening and weekend work have other employment or are students. The result is that those assisting in fulltime capacity do not earn the same as those that work evenings, weekends and public holidays.
- 10) The application of penalty rates makes it difficult to assist these people and can result in our organisation bearing the cost of some of the time clients require, to assist in ensuring clients are able to, as much as possible, meet their needs.
- 11) It should be noted that a number of organisations have had to withdraw services on hours where penalty rates apply. The current landscape for individuals living with disability is not suited to the application of penalty rates with the reduction in service providers and the associated increase in costs due to conditions imposed by the Modern Awards.
- 12) The fundamental issue is one of generality. The assumption that an award condition is applicable to all scenarios is inherently incorrect. The further assumption that all Support Workers under the award are funded out of an employer's profits is also incorrect. In the disability sector, if there is no funding there is no care, if there is insufficient funding there is insufficient care. It is the individuals living with disability who end up bearing the cost of Modern Award conditions; not in monetary terms rather in support and the ability to lead full and enriched lives.



I declare that this statement is true to the best of my knowledge and belief. I also acknowledge and accept that this Statement and any other evidence that I have provided in relation to this matter may be used in a submission to the Productivity Commission.

SIGNED by Colin Peterson

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10/3/2015  
(please date)

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**INSERT DATE OF EXHIBIT CREATED**