



CATHOLIC COMMISSION FOR EMPLOYMENT RELATIONS

SUPPLEMENTARY SUBMISSION TO THE PRODUCTIVITY COMMISSION INQUIRY INTO THE WORKPLACE RELATIONS FRAMEWORK IN RESPONSE TO THE DRAFT REPORT

SEPTEMBER 2015

EXECUTIVE SUMMARY

This submission is a supplementary submission prepared by the Catholic Commission for Employment Relations (CCER) in response to the Productivity Commission's Draft Report into the Workplace Relations Framework.

CCER advises and represents the interests of Catholic employers in NSW and the ACT on a broad range of employment relations and human resource issues. CCER's earlier submission to the Inquiry was intended to provide a perspective on some key elements of the workplace relations framework and *Fair Work Act 2009* (FW Act) based on the principles of Catholic social teaching, balanced with the mindfulness that our members are employers who need to run viable businesses so that they can continue to serve the community.¹

CCER welcomes the opportunity to provide further submissions on the Productivity Commission's draft report. This supplementary submission provides further comment in response to a number of the Productivity Commission's key draft recommendations, which

¹ [2015] Catholic Commission for Employment Relations *Submission to the Productivity Commission Inquiry into Workplace Relations* (submission 99) <http://www.pc.gov.au/inquiries/current/workplace-relations/submissions>

endorse specific proposals put forward by CCER in our earlier submission, as well as consideration of certain other draft proposals.

The supplementary submission focuses on the following key areas:

1. Unfair dismissal
2. General protections - workplace complaint or inquiry
3. Regulated weekend penalty rates for selected consumer services
4. Enterprise bargaining
5. The enterprise contract.

Unfair dismissal

CCER strongly supports the right of redress for genuine unfair dismissal. However, our concern is when applicant claims lack substance, are meritless, do not have reasonable prospects, are vexatious or instigated for the purpose of settlement, and yet, for commercial reasons, employers still pay '*go-away money*'. Our concern is, however, not a complaint about the performance of the conciliators employed by the Fair Work Commission.

CCER supports the implementation of more merit focussed conciliation processes and the proposed reforms to the process for managing unfair dismissal claims by the Fair Work Commission. We are pleased to note that the Productivity Commission has adopted this recommendation from CCER's recommendations in our original submission (figure 5.7 in the draft report).

This supplementary submission focuses on analysing and providing practical recommendations for how conciliation processes can be reformed to place greater emphasis on the merit and substance of claims and to provide Fair Work Commission conciliators with the necessary tools to effectively explore and discuss the merit and substance of each case at conciliation.

CCER proposes better use of technology (through development of a new software program) to design a more targeted and structured questionnaire for the initial unfair dismissal application and employer response. The new forms would require provision of concise information in response to specific questions aligned to each of the relevant elements of the statutory test for unfair dismissal (contained in section 387 of the *Fair Work Act*).

Since our original submission, CCER has further considered the option of the Fair Work Commission conciliator issuing a post-conciliation written opinion as to the merits and substance of the application. An option to address this is that the legislation only require the conciliator to issue an opinion in the event that he/she has formed the view that the application is '*lacking in substance*', or some other similarly worded test. The applicant will still be able to proceed to arbitration if they wish, as the opinion does not act as a '*strike out*' of their application. However, it will be a factor for applicants to consider in bringing further proceedings. Further consideration could also be given as to whether there are costs implications in any subsequent proceedings.

CCER does not support the recommendation, in the alternative, to give the Fair Work Commission greater discretion to deal with unfair dismissal applications '*on the papers*'. We consider the access to justice concerns originally identified by CCER and noted by the

Productivity Commission, remain compelling reasons not to proceed with this particular proposal.

CCER supports, in principle, the Productivity Commission's recommendation that procedural errors alone by an employer should not result in reinstatement or compensation, where an employer otherwise had a valid reason for dismissal, and where there were no other mitigating circumstances significant enough to render the dismissal unfair.

In our view, this recommendation would prevent perverse outcomes in arbitrated cases where a dismissal is clearly justified in substance, but only found to be unfair on procedural grounds. It is, however, important that the basic principles of procedural fairness are still considered in unfair dismissal cases in some form and as part of the overall factors required to be considered by the Fair Work Commission.

There are aspects of the draft recommendation that require further clarification including whether it is proposed to change the existing legal test for what constitutes an unfair dismissal or only to limit the circumstances for when reinstatement or compensation remedies are available to an employee.

General protections - workplace complaint or inquiry

CCER supports the general protections framework as necessary for protecting workers from victimisation for exercising their lawful workplace rights. However, due to inconsistency in the case law there is currently a significant lack of clarity surrounding the workplace right of a person who *'is able to make a complaint or inquiry...in relation to his or her employment'*.

CCER welcomes the Productivity Commission's recommendations, which are consistent with proposals put by CCER in our initial submission, to tighten access to general protections claims for making a workplace complaint or inquiry. Improved clarity will assist employers to understand their liability and appropriately manage their risks while ensuring compliance with the general protections.

CCER supports the Productivity Commission's recommendations to ensure that general protections claims have a genuine basis and are being pursued in good faith by the applicant. In our view, the draft recommendations will assist to address the concerns raised by CCER by requiring the Fair Work Commission to determine that complaints are made in good faith before the action can proceed, excluding complaints that are frivolous and vexatious and clarifying the operation for complaints or inquiries, which are only indirectly related to employment.

Regulated weekend penalty rates for selected consumer services

CCER does not support the draft recommendations to reduce Sunday penalty rates to the Saturday rates in the hospitality, entertainment, retail, restaurants and cafe industries or to provide greater consistency in weekend rates in those industries where that would result in rate reductions. CCER does not support the requirement for the Fair Work Commission to implement the reductions through the award review process.

As discussed in CCER's earlier submission to the Inquiry, the Catholic Church has rejected previous legislative and other attempts to abolish or reduce penalty rates due to concerns

about the negative impact on the incomes of vulnerable workers and the detrimental impact of unsociable working hours on rest, recreation, and family time.

Reducing Sunday penalty rates will disproportionately affect minimum wage earners, who rely on penalty rates to protect their living standards. It will also have flow on effects of reducing their disposable income. Further, arguments that a reduction in Sunday penalty rates would result in higher demand for labour and increased job opportunities particularly for young people are not convincing.

Those who argue for rate reductions argue that Sunday hours are of equal value to Saturday hours, however Sunday retains special status as a day preserved for family time, particularly for parents with children. Many workers have no real ‘choice’ to not work weekends. It is also fundamentally inequitable to treat retail and hospitality industry workers differently to others.

In CCER’s view, there is sufficient flexibility within the existing industrial regulatory framework to provide for changes to penalty rates. The detail of penalty rate setting should continue to be a function of the Fair Work Commission and properly considered in accordance with the explicit protections for a fair and relevant minimum safety net of terms and conditions.

Enterprise bargaining

CCER supports the Productivity Commission’s draft recommendation to give the Fair Work Commission more discretion to approve enterprise agreements where minor or inconsequential errors are made regarding the notice of employee representational rights, and where an employer in good faith has made these errors, consistent with proposals put by CCER in our initial submission.

CCER has extensive experience in the current system of enterprise agreement making, as we regularly act as a bargaining representative engaged to bargain multi-enterprise agreements on behalf of large numbers of Catholic employers in NSW and the ACT. In these circumstances, the administrative burden and logistical difficulties imposed by excessive or ambiguous compliance requirements are significantly amplified.

CCER recommends streamlining onerous and technical compliance requirements for the approval of enterprise agreements by simplifying the overly prescriptive Form 17 – *Employer’s statutory declaration in support of approval for an EA* and ensuring they are consistent with the Fair Work Act, Regulations, and Fair Work Commission Rules. We also recommend extending the 14 day timeframe for filing an application for approval of an enterprise agreement to at least 21 days, and preferably 28 days.

CCER supports the Productivity Commission’s draft recommendation to replace the ‘*better off overall test*’ (BOOT) with a ‘*no disadvantage test*’ (NDT) when approving enterprise agreements. In our view, an NDT will retain a strong safety net for employees, as no proposed enterprise agreement can result in an employee being disadvantaged overall, compared to the modern award which may apply to them. It will also reduce some uncertainty for employers regarding the application of the BOOT and by providing greater compliance certainty, result in a modest increase in the flexibility and scope of bargaining.

The enterprise contract

CCER has considered the Productivity Commission's suggestion to introduce a new statutory arrangement – an '*enterprise contract*' – that would allow employers to replace or vary an award or enterprise agreement for a group of employees without the requirement to negotiate or to seek Fair Work Commission approval.

CCER is not of the view that there is an existing gap in employment arrangements such that it warrants the introduction of an enterprise contract. CCER does not support the proposed model due to concerns about additional complexity and regulation for employers, and inequitable outcomes and lack of adequate safeguards for employees, even with the introduction of the new '*no disadvantage test*' and '*opt out*' provisions.

The capacity for wholesale replacement of an employer's award or enterprise agreement through an employer-driven enterprise contract fundamentally undermines the enterprise bargaining regime. The lack of agreement or approval or adequate scrutiny is also of concern.

As an alternative, CCER supports the Productivity Commission's recommendations to improve the current system of individual flexibility arrangements which provide an opportunity for employers to negotiate operationally required changes to hours of work, overtime, penalty rates and so on to meet the genuine needs of both employers and employees.

1. UNFAIR DISMISSAL

DRAFT RECOMMENDATION 5.1

The Australian Government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal applications ‘on the papers’, prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation processes.

SUPPORTED

Merit-focussed conciliation processes

CCER supports the implementation of more merit focussed conciliation processes pursuant to Draft Recommendation 5.1, and the proposed reforms to the process for managing unfair dismissal claims as set out in Figure 5.7 of the draft report, as adopted from CCER’s original submission.²

CCER has further reflected on how the alternative proposals within Draft Recommendation 5.1 could work in practice. We consider that the reform that will most effectively advance the fundamental purpose of the legislation and remedy the identified deficiencies in the current system³, is to implement the ‘*redesigned merit focused conciliation process*’ set out in Figure 5.7 of the draft report.

This part of our supplementary submission focuses on:

1. providing practical recommendations for how conciliation processes can be reformed to place greater emphasis on the substance and respective merit of claims; and
2. the reform recommended by CCER and adopted in the draft report, for the Fair Work Commission to issue the parties with an opinion on whether a case is ‘*without sufficient merit*’.

Determination of substance/merit ‘on the papers’

The alternative proposal within Draft Recommendation 5.1 is to provide the Fair Work Commission with greater discretion to consider and deal with applications which on their face lack substance or merit ‘*on the papers*’. We consider the access to justice concerns originally identified by CCER⁴ and the Productivity Commission⁵, remain compelling reasons not to favour this particular proposal. On reflection, we cannot see a sufficiently fair and workable way in which to implement this proposed reform, given the inherent right of a person to have a case heard and the disadvantage that may be suffered by applicants who lack written proficiency. This may be the case for a variety of reasons including disability or language barriers.

² [2015] Productivity Commission *Draft Report Workplace Relations Framework*, page 234.

³ [2015] Productivity Commission *Draft Report Workplace Relations Framework*, page 229-233.

⁴ [2015] Catholic Commission for Employment Relations *Submission to the Productivity Commission Inquiry into Workplace Relations* (submission 99) page 35.

⁵ [2015] Productivity Commission *Draft Report Workplace Relations Framework*, page 232.

Concerns identified with the current unfair dismissal conciliation system

As detailed in CCER's original submission, the main problem with the current unfair dismissal system is that inquiry into the substance and respective merits of unfair dismissal claims is not a requirement or consistent feature of the conciliation process.⁶

As a consequence, there exists an in-built bias prior to, or at, conciliation towards payment of 'go away' money by employers, irrespective of the merits of the particular case. This creates an incentive for unmeritorious claims, given the initial 'free kick' at settlement currently provided by a conciliation process that involves little more than a forum for the passing of settlement offers between the parties.

We are pleased the Productivity Commission has recognised the need for reform in this area to reduce the payment of 'go away' money for claims that are without genuine merit or lacking in substance. A system that affords a 'fair go all round' to employees and employers should not have as its primary focus the facilitation and encouragement of financial settlements for undeserving claims in this category.

Specific concerns with the current system

CCER's concern with the current system and advocacy for reform in this area is not a complaint about the performance of the conciliators employed by the Fair Work Commission. In our experience, conciliators generally perform their role in a professional, respectful and efficient manner, within the currently applicable legislative and administrative parameters.

Rather, our concern is with the alternative dispute resolution model used in current unfair dismissal system, which is a purely facilitative model involving formulation and communication of settlement options. We consider a more effective model would be a hybrid facilitative/advisory model, in which there is identification by the conciliator of agreed and disputed facts and how the relevant statute and case law may be applied if the matter does not settle and proceeds to arbitration by the Fair Work Commission. This model assists the conciliator to focus the parties on the merits of their respective positions.⁷ This in turn facilitates the development of appropriate, tailored settlement proposals that do not consist merely of 'go away' money. Merit-focussed conciliations of this kind are common in discrimination jurisdictions - for example, the Australian Human Rights Commission.

An impediment to merit-focussed conciliations within the current unfair dismissal process is the absence of an effective 'up front' filter which enables the parties and conciliators to gather the necessary information to consider the substance and merit of each claim.

A fundamental problem is that the *Form F2 – Unfair Dismissal Application*, does not capture in clear and concise terms the case the applicant is bringing, by reference to

⁶ See the online video on the Fair Work Commission website 'What happens at a conciliation? Fair Work Commission' <https://www.fwc.gov.au/content/video/conciliation>.

⁷ Australian Human Rights Commission, *Facilitator or Advisor?: A discussion of conciliator intervention in the resolution of disputes under Australian human rights and anti-discrimination law* (2004) <<https://www.humanrights.gov.au/our-work/complaint-information-service/publications>>

the specific elements of the statutory test needed to establish an unfair dismissal, as interpreted by the Fair Work Commission (s.387 of the *Fair Work Act*). The Form F2 only asks two questions of substance (as well a few brief explanatory points): ‘*What were the reasons for the dismissal, if any, given by your employer?*’ and ‘*Why was the dismissal unfair?*’ The *Form F3 – Employer’s Response to Unfair Dismissal Application*, is similarly unrelated to the elements of the statutory test, asking the employer: ‘*What were the reasons for dismissal?*’ and ‘*What is your response to the Applicant’s contentions?*’

These questions, particularly for unrepresented parties who have infrequently or never encountered the unfair dismissal system before, are too broad. In our experience, this lack of structure in the information elicited in the Forms can have produce two different, but equally problematic outcomes:

1. Excessive information filed: the parties submit voluminous material (including documents by way of annexures) in narrative form which is often unrelated to the core elements of an unfair dismissal claim. This can result in excessive and unnecessary time and sometimes costs being incurred by the parties reviewing and responding to such extensive material at the early conciliation stage. Conciliators equally are confronted with the need to review all such material, if they are to undertake any advisory role in the conciliation process. For these reasons, the filing of what is essentially evidence at the conciliation stage inhibits the implementation of a merit focussed conciliation model; and
2. Inadequate information filed: At the other extreme, the broad nature of the questions in the current Form F2 can result in applicants providing scant information, as they are not required to articulate and justify their claim against the specific elements of the statutory test. Such circumstances do not afford a ‘*fair go all-round*’, as the case the respondent employer is required to respond to is unclear. Currently, there is little or no scrutiny or push back against applicants who file claims with inadequate detail to identify the nature of their claim. The matter nonetheless proceeds to conciliation for settlement discussions as a matter of course. Unparticularised applications of this nature make the application of merit-focussed conciliations very difficult.

The Forms 2 and 3 provide applicants and respondents with insufficient guidance on what constitutes an ‘unfair dismissal’, and fail to require the parties to provide concise ‘on-point’ information under each of the relevant criteria of the statutory test set out in section 387 of the *Fair Work Act*. As such, this initial touch point of the system does not assist the parties to understand the fundamental purpose and applicable principles of the unfair dismissal regime, and the resulting strengths and weaknesses of their position.

For both parties, it may be that a range of grievances between them and/or a generally poor relationship (now aggravated by entry into an adversarial system), could cloud their perspective on the objective merits of the dismissal. Unstructured, generalised information in an application about why the applicant believes their treatment was ‘unfair’ may cause respondents, particularly those who are infrequent users of the system, to perceive the system is tilted in favour of applicants or that unfair dismissal

laws are too subjective, or just 'bad'. Misconceptions of this nature do nothing to maintain the integrity of the system and its fundamental principles.

We consider that any specific recommendations to implement more merit focussed conciliations, must acknowledge and address these issues.

Recommended solution – use of technology to design a more targeted questionnaire for the initial unfair dismissal application and employer response

In light of the above, CCER recommends that the most effective way to implement Draft Recommendation 5.1 (and Figure 5.7), is to provide Fair Work Commission conciliators with the necessary tools to effectively explore and discuss the merit and substance of each case at conciliation.

The system needs to be re-designed to ensure information provided by the parties prior to conciliation is in the form of concise argument firmly anchored to the elements of the statutory test, as interpreted and applied by the Fair Work Commission.

CCER recommends the Productivity Commission consider utilising an appropriate software program with a tailored online questionnaire, to replace the existing Form F2 and Form F3. This program should require the applicant to provide concise information in response to specific questions aligned to each of the relevant elements of the statutory test for unfair dismissal. We propose that the employer response should follow a similar format.

The meaning of unfair dismissal is defined for relevant purposes in sub-section 385(b) of the *Fair Work Act 2009* (Cth) as a dismissal which is '*harsh, unjust or unreasonable*'. The distinct meaning of these terms was considered by the High Court in *Byrne v Australian Airlines Ltd*⁸ as follows:

It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.⁹

These distinct concepts are incorporated into a plain English list of factors prescribed by section 387 of the *Fair Work Act*, which the Fair Work Commission is required to take into account in determining whether a dismissal is unfair. Section 387 states:

Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

⁸ [1995] HCA 24.

⁹ Ibid at [128].

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- (e) if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal; and
 - (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
 - (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
 - (h) any other matters that the FWC considers relevant.

The kind of information intended to be captured by this program / questionnaire is conceptually similar to pleadings in more formal jurisdictions, as opposed to evidence which is only adduced at an arbitration hearing. Therefore, when we refer to 'merit' and 'substance' in our submission, we are essentially referring to the merit of the 'shell' of a parties' case as argued, not the merit of the evidence which would ultimately be brought to prove the case. For clarity, we do not propose that parties should be required to draft anything like the formality of strict pleadings. Instead, what we are proposing is that the parties be simply required to provide concise, plain English responses to specific questions raised for them in the questionnaire, which elicits the relevant information and creates the 'shell' for them.

It would be unreasonable and unrealistic for conciliators to be expected to review extensive material in preparation for each conciliation, particularly given the large volume of cases filed with the Fair Work Commission. There is also the problem of excessive material filed by some parties. Accordingly, there should be limits on the amount of information that may be inserted in the relevant fields in answer to the questionnaire, and the number and type of attachments that can be submitted with the Form.

For the purpose of formatting the questionnaire, the factors in section 387 of the *Fair Work Act* can be further organised into three main parts: (1) whether the employer had a valid reason for dismissal, (2) procedural fairness, and (3) mitigating factors, which tend to focus on whether the dismissal was disproportionate or 'harsh' in the circumstances.

CCER attaches a draft sample questionnaire for an unfair dismissal application for consideration. The purpose of this draft is only to provide a guide to what an eventual design may look like.

The questionnaire is illustrative only of the general approach of the proposed on-line questionnaire, and does not cover the full range of scenarios, each of which would have to be explored in the final design of the program. For example, in the unfair dismissal sample questionnaire, we have not incorporated circumstances where a dismissal is alleged to be a constructive dismissal, or not a genuine redundancy.

We propose that the program would be carefully designed in consultation with experienced practitioners and Fair Work Commission members, and that its development be an iterative process, subject to improvements over time in line with developments in case law and feedback from stakeholders (particularly conciliators).

If this reform is adopted, we also recommend that its implementation is supported with appropriate training for Fair Work Commission conciliators on using the new Forms and techniques for facilitative/advisory ADR.

How will this information assist conciliators?

In a practical sense, the intended purpose of the new software program/revised Forms is to assist conciliators implement Draft Recommendation 5.1, in the following ways:

- (1) before each conciliation, the Forms provide the conciliator with an overview of information relevant to the application, to enable them to identify the key legal and factual issues in dispute, and use that framework to explore the issues with the parties at the conciliation. Drawing on their own expertise, this targeted information supports the conciliator to play a more active role in assisting the parties understand the respective strengths and weaknesses of their cases as outlined, rather than simply assist in formulating and communicating offers. The conciliator would not impose any outcomes, or be drawn into the minutiae of the evidence. Such functions will of course remain the role of arbitration; and
- (2) the information derived from the on-line questionnaire must assist conciliators prepare for and conduct each conciliation in a quick and responsive way, without imposing excessive workloads or undermining the overall efficiency or informality of the system.

Applicant Unfair Dismissal Sample Questionnaire

Topic – valid reason (relevant to ss. 387(a) & (b), and potentially (h))

In considering whether a dismissal was harsh, unjust or unreasonable, the FWC must take into account whether there was a '**valid reason**' for the dismissal, related to:

- your capacity to perform your role or otherwise carry out your employment; or
- your conduct.

(1) When did your employer notify you of their decision to dismiss you? *[Insert date]*

Did your employer notify you of the decision to dismiss you:

- A. In writing – if so, please attach the document, the date you received the document and how you received it from your employer. This may be the same document advising you of the reason or reasons for your dismissal, or a different document;
- B. Verbally in person or over the phone – if so, please specify the date you were notified, who notified you, how they notified you and who else was present (if anyone); or
- C. Other – please specify the date and way in which you were notified.

(2) Did your employer give you a reason, or reasons, why they dismissed you?

If 'no', go to question 6.

If 'yes' go to question 3.

(3) If a reason or reasons were given, were they notified to you in writing, or verbally, or both?

If in writing – please attach the relevant document, specify the date you received the document and how you received it from your employer.

If verbally (either alone or together with a written document) - please insert the reasons your employer gave you:

[1. Open text answer – insert reason for termination given by employer.

1A. insert when reason given – date

1B. insert where reason given – location

1C. insert names of any other persons present when reason given]

[2. Open text answer – insert reason for termination given by employer]

etc.

2A. insert when reason given – date

2B. insert where reason given – location

2C. insert names of any other persons present when reason given]

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- (4) Do you dispute the reasons given by your employer (if any) for your dismissal?
[Yes/No]

If 'no' go to question 6.

If 'yes' go to question 5.

- (5) For each reason given by your employer that you dispute or disagree with, briefly provide your response to the reason given, stating whether the reason is valid
[Open text answer – limit to 2 paragraphs and do not make provision for any attachments to be added].

Topic – procedural fairness (relevant to ss. 387(b), (c), (d), (f) & (g))

- (6) Did any discussions (in person or over the phone) occur between you and your employer about your capacity or conduct in connection with your dismissal?
Please list each such discussion, the date it occurred and who was involved:

[1. Conversation/meeting:

1A. insert when meeting occurred– date

1B. insert where meeting occurred – location

1C. insert names of any other persons present at the meeting]

[2. Conversation/meeting:

1A. insert when meeting occurred– date

1B. insert where meeting occurred – location

1C. insert names of any other persons present at the meeting]

- (7) Did your employer give you an opportunity to respond to the reasons they gave you for your dismissal, at these discussions or otherwise? [Yes/No]

If 'yes' go to question 8.

If 'no' go to question 9.

- (8) Please specify when you provided a response to any reasons your employer gave you for the dismissal, and whether you provided this response verbally and / or in writing. If you provided your employer with a written response, please attach it.

- (9) Did anyone attend any discussions that took place relating to your dismissal with you as your support person? If so, please specify that person, their relationship to you/position, and which discussions they attended with you.

- (10) Did you request your employer to have a support person in any discussions that took place relating to your dismissal? [Yes/No]

If 'no' go to question 13.

If 'yes' go to question 11.

(11) Did your employer refuse your request to have a support person? *[Yes/No]*

If 'no' go to question 13.

If 'yes' go to question 12.

(12) What were the reasons (if any) given by your employer for their refusal of your request to have a support person? *[Open text answer]*.

(13) As far as you are aware were any human resources, employee relations or legal specialists of your employer involved in your dismissal, or the process leading to your dismissal? *[Yes /No / I do not know]*

Topic – mitigating and other factors which may be relevant (s. 387(a), (e) & (h))

(14) This question relates to the reasons provided by your employer (if any) for your dismissal. Before your dismissal (including any processes/meetings immediately before your dismissal), did your employer ever raise these or any other related concerns with you regarding your work performance, conduct (behaviour), or capacity to perform your role?

If 'no' go to question 16.

If 'yes' go to question 15.

(15) Briefly describe what concerns were previously raised by your employer, approximately when they were raised, and how they were raised with you (for example, by written warning, informal counselling or a formalised process of performance management) *[Open text answer]*.

(16) When did you commence employment with your former employer (the respondent to your unfair dismissal application) *[Open text answer]*.

(17) Are you currently employed with another employer? If so, please specify whether you are employed on a full-time, part-time or casual basis?

(18) Regarding the reasons given by your employer for your termination, are there any mitigating factors you wish to raise to support your claim that your dismissal was *'harsh, unjust or unreasonable'*?

(19) Are there any other factors that you consider made your dismissal harsh, unjust or unreasonable, including if you feel you have not been given a "fair go" by your employer?

Note: The online questionnaire will also include the standard administrative and introductory questions which exist in the current F2 – for example the contact details of the parties.

Further comments regarding the conciliator's written opinion following conciliation

CCER supports the implementation of Figure 5.7 from the draft report, as adapted from the model proposed in our first submission but slightly modified with regard to the issuing of a written opinion.

Circumstances of issuing a written opinion

If the conciliator is required by the legislation to issue an opinion in respect of each conciliation, this would mean opinions stating that the claim *'is not without sufficient merit'*, as well as opinions that the claim *'is without sufficient merit'*. The former may be interpreted by the parties as meaning the claim *has merit*, and is therefore likely to succeed at arbitration, which is not the intent.

An option to address this is for the legislation to require the conciliator to issue an opinion only in the event that he/she has formed the view that the application is *'without sufficient merit'*.

This would only be after the conciliator had reviewed the information in the revised Forms, as explored at the merits-focussed conciliation. No opinion would be issued in any other situation.

It is submitted that this reflects the intent that the opinion operate as a 'funnel' to identify (and consequently seek to discourage) only that category of claims that fail to meet a minimum level of relevance and probity, assessed against the specific statutory requirements.

The applicant will still be able to proceed with their application to arbitration if they wish, as the opinion does not act as a *'strike out'* of their application. However it will be a relevant matter for both parties to consider in taking the next steps in the proceedings, including making/considering settlement offers and discontinuance of the application. The legislation may also apply particular cost consequences when an opinion of this kind is issued, either as a specific or general factor in the conduct of the proceedings.

Wording of test

We have further considered whether the phrase *'without sufficient merit'* is the most effective test for the Fair Work Commission to apply when issuing its post-conciliation written opinion as to the merits of the application.

The precise words used in this test are important to ensure the message conveyed is not misconstrued, particularly by unrepresented parties. Such alternate wording could be *'lacking in substance'*. It does not contain any words of relativity (such as 'sufficient') and is therefore a simpler test to understand and apply – the claim lacks substance, or it does not lack substance. There is no need to measure 'sufficiency'.

DRAFT RECOMMENDATION 5.2

The Australian Government should change the penalty regime for unfair dismissal cases so that:

- an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct
- procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or financial penalties.

SUPPORTED

The penalty regime for unfair dismissal

CCER supports the recommendation that procedural errors alone by an employer should not result in reinstatement or compensation, where an employer otherwise had a valid reason for dismissal, and where there were no other mitigating circumstances significant enough to render the dismissal unfair. The recommendation is consistent with the Productivity Commission's overarching focus on substance over form, a principle supported by CCER.

We believe this recommendation would prevent outcomes in arbitrated cases where a dismissal is clearly justified in substance, but only found to be unfair on procedural grounds. Where the Fair Work Commission accepts the employer had a valid reason, and no significant mitigating factors exist, the correction of procedural flaws would be unlikely in the majority of cases to have changed the employer's decision to dismiss, or the inherent merit of the dismissal.

This recommendation may also lead to fairer outcomes for employers in the quantum of any proposed monetary settlements of a claim, in circumstances where an applicant's submission is based on alleged procedural defects, but where a valid reason for dismissal is either obvious or uncontested.

CCER's support for this recommendation is also subject to the qualifications discussed below.

Procedural fairness factors should still be taken into account overall

While we support the view that reinstatement or compensation should not be awarded on the basis of procedural errors alone, we believe it is sound public policy to retain, *in some form*, the basic principles of procedural fairness as part of the overall set of factors the Fair Work Commission is required to take into account (as currently prescribed by s. 387 of the FW Act) with respect to unfair dismissal.

Termination of employment should not be taken lightly. As stated in the Productivity Commission's draft report:

'Dismissal is typically a shattering experience for employees, and can have long term effects on their employment prospects and their lives'¹⁰,

...

'Unfair dismissal can result in large adverse impacts on an employee, including loss of income, stress, reduced social status, lower future employment prospects and the loss of social networks in their workplaces'¹¹

Given the personal and economic impacts a dismissal can have on individuals and their families, CCER believes the primary principle of procedural fairness, that being a right of response before a decision is made whether or not to terminate employment, should still be recognised as a fundamental matter of equity and sound public policy. This view also reflects Catholic social teaching to promote fairness and justice in the workplace.

For the above reasons, it is important to ensure Draft Recommendation 5.2 does not “*throw the baby out with the bathwater*” in terms of recognising a legitimate, albeit reduced, role for procedural fairness in the unfair dismissal system.

Considerations regarding procedural flaws should be applied in a common sense and practical way¹² rather than a forensic or overly technical manner which places onerous requirements on employers. This should be clearly articulated in any changes to the legislation.

The legislation should also confirm that procedural defects should not render a dismissal unfair if:

- there was a valid reason for dismissal, and
- had the procedural defects not occurred, it would not have changed the employer's decision to dismiss the employee.

CCER has identified some cases below which demonstrate this common sense principle has been applied by the FWC.

DP Sams stated in *Travis Northey v Bradken Resources Pty Ltd* [2013] FWC 6423 at [202]:

In my opinion, for a procedural defect to be of such significance as to be of itself a sufficient basis for a finding of unfairness, the defect must be one which could have altered the outcome of the respondent's decision making or it resulted in a miscarriage of justice such as to have impacted on the respondent's decision to dismiss the applicant. This was certainly not the case in this instance.

The Full Bench of Fair Work Australia upheld the dismissal in *Gramotnev v Queensland University of Technology* [2011] FWA 2306 at [6]-[7]:

[6] The Commissioner found that Dr Gramotnev's conduct in authoring and sending the emails in question amounted to serious misconduct as defined by the Agreement. The

¹⁰ [2015] Productivity Commission *Draft Report Workplace Relations Framework* p 200.

¹¹ *Ibid* at p 215.

¹² *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1 at [7] – in relation to equivalent provisions of the *Workplace Relations Act*.

Commissioner determined, after considering the factors required by s. 387 of the Act, that the conduct was a valid reason for dismissal but that the manner in which the termination was effected had procedural defects arising from the limited nature of the Applicant's ability to respond to the allegations put to him.

[7] The Commissioner recognised that the allegations put to Dr Gramotnev were allegations of authoring and sending the emails only and that the characterisation of his actions as misconduct (serious or otherwise) as defined by the Agreement were not put to Dr Gramotnev for his response. Accordingly she found that Dr Gramotnev was not provided with an appropriate opportunity to respond to the allegations. However she found that Dr Gramotnev had been aware of QUT's concern regarding the content and sending of the emails and that this procedural defect was not fatal to the overall procedure engaged in and did not undermine the validity of the reason for the dismissal.

SDP Richards in *Hutchings v Alex Fraser Group* [2013] FWC 73 at [55]:

Whilst the Respondent possessed a valid reason for the dismissal of the Applicant it cannot be said that it afforded him procedural fairness in relation to the non-completion of the lock out protocol. But that said, there is little practical or reasonable likelihood that if the Applicant had been afforded such an opportunity that the ultimate outcome would have in any way been different. Nothing the Applicant brought to these proceedings about that matter (the lock out protocol) was persuasive of an alternative set of facts that if conveyed and appropriately considered at the relevant time (prior to the dismissal) would have been sufficient to sway the Respondent's decision making on the wider front.

Issues requiring further clarification in Draft Recommendation 5.2

CCER believes that further clarity on the precise nature of Draft Recommendation 5.2 will be helpful in its final report to inform policy in this area. In particular, whether Draft Recommendation 5.2 proposes to:

- (1) not change the legal test for unfair dismissal, but only to limit circumstances when the remedies of reinstatement or compensation are available to an employee i.e. the FWC may still find an employee has been unfairly dismissed on the basis of procedural errors alone, however where this occurs, remedies are limited to education, counselling or financial penalties for the employer at the discretion of the FWC.
Or alternatively;
- (2) change the existing legal test for what constitutes an unfair dismissal i.e. the FWC cannot find that an employee has been unfairly dismissed on the basis of procedural errors alone. If this is the case, no consideration of remedy is necessary.

Draft Recommendation 5.2 is ambiguous because the draft report references '*changing the penalty regime*'¹³, however it also states: '*where the FWC is satisfied that: the employee has either committed serious misconduct or genuinely underperformed, their dismissal is upheld without any compensation*'¹⁴ (our emphasis).

The abovementioned decisions in *Travis Northey*, *Gramotnev* and *Hutchings*, are of the view that procedural defects alone cannot render a dismissal unfair if the employer had a valid reason, and that even if the defect(s) had not occurred, it would not have changed the employer's decision to dismiss the employee. CCER supports this approach.

¹³ [2015] Productivity Commission *Draft Report Workplace Relations Framework* page 99.

¹⁴ [2015] Productivity Commission *Draft Report Workplace Relations Framework* page 233.

2. GENERAL PROTECTIONS – Workplace complaint or inquiry

DRAFT RECOMMENDATION 6.2

The Australian Government should modify s. 341 of the *Fair Work Act 2009* (Cth), which deals with the meaning and application of a workplace right.

- Modified provisions should more clearly define how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment.
- The FW Act should also require that complaints are made in good faith; and that the Fair Work Commission must decide this via a preliminary interview with the complainant before the action can proceed and prior to the convening of any conference involving both parties.

DRAFT RECOMMENDATION 6.3

The Australian Government should amend Part 3-1 of the *Fair Work Act 2009* (Cth) to introduce exclusions for complaints that are frivolous and vexatious.

SUPPORTED

Tightening access to general protections claims for making a workplace complaint or inquiry

CCER supports the general protections framework as necessary for protecting workers from victimisation for exercising their lawful workplace rights. However, due to inconsistency in the case law there is currently a significant lack of clarity surrounding the workplace right of a person who *'is able to make a complaint or inquiry...in relation to his or her employment'* for the purposes of the FW Act.

CCER welcomes the Productivity Commission's recommendations, which are consistent with proposals put by CCER in our initial submission, to tighten access to general protections claims for making a workplace complaint or inquiry. Our concerns about the ambiguity and uncertainty about a workplace complaint or inquiry were outlined in the draft report at Box 6.4 (page 253) as follows:

1. Whether an employee making a complaint needs to hold a genuine belief in its merits in order for the complaint or inquiry to fall within the definition in s 341(1) (c) (ii) of the FW Act.
2. 'Complaint or inquiry' is not defined in the FW Act or in the Fair Work Regulations 2009, nor is it comprehensively analysed in the Explanatory Memorandum to the Fair Work Bill 2008. As a consequence:
 - a. There is no test or qualification regarding the substance or content of a complaint for it to constitute a 'complaint' within the meaning of the FW Act.
 - b. The FW Act does not define how the complaint or inquiry right must be exercised. Consequently, there is a lack of clarity as to whether the complaint

needs to be properly communicated to the employer, or for the employee to demonstrate that they reasonably intended for the employer to take significant steps in response to it. In other words, there is uncertainty as to whether a complainant needs to reasonably put the employer on notice that they have actually exercised the right to make a complaint.

3. There is uncertainty as to the meaning of a complaint or inquiry that is 'in relation to his or her employment'. There is a divergence in the case law on this point, and consequently it is unclear whether the protection is limited to complaints directly related to the complainant's own employment, and if not, the extent to which a complaint may be indirectly 'in relation to' the complainant's employment.
4. Whether the meaning of the words 'is able to' in s 341(1) of the FW Act, means there are certain circumstances in which an employee is not able to make a complaint or inquiry that attracts the protection.
5. Whether 'complaint or inquiry' is one cumulative workplace right with a single meaning, or whether they constitute two distinct workplace rights with their own scope and meaning.

CCER supports the Productivity Commission's recommendations to ensure that general protections claims have a genuine basis and are being pursued in good faith by the applicants involved. Improved clarity will assist employers to understand their liability and appropriately manage their risks while ensuring compliance with the workplace protections.

In our view, the draft recommendations will assist to address the concerns raised by CCER by requiring the Fair Work Commission to determine that complaints are made in good faith before the action can proceed, excluding complaints that are frivolous and vexatious and clarifying the operation for complaints or inquiries, which are only indirectly related to an employee's own employment.

3. REGULATED WEEKEND PENALTY RATES FOR SELECTED CONSUMER SERVICES

DRAFT RECOMMENDATION 14.1

Sunday penalty rates that are not part of overtime or shift work should be set at Saturday rates for the hospitality, entertainment, retail, restaurants and cafe industries.

Weekend penalty rates should be set to achieve greater consistency between the hospitality, entertainment, retail, restaurants and cafe industries, but without the expectation of a single rate across all of them.

Unless there is a clear rationale for departing from this principle, weekend penalty rates for casuals in these industries should be set so that they provide neutral incentives to employ casuals over permanent employees.

DRAFT RECOMMENDATION 14.2

The Fair Work Commission should, as part of its current award review process, introduce new regulated penalty rates as set out in draft recommendation 14.1 in one step, but with one year's advance notice.

NOT SUPPORTED

CCER does not support the draft recommendations to reduce Sunday penalty rates to the Saturday rates in the hospitality, entertainment, retail, restaurants and cafe industries or to provide greater consistency in weekend rates in those industries where that would result in rate reductions. CCER does not support the requirement for the FWC to implement the reductions through the award review process.

As discussed in CCER's earlier submission to the Inquiry, the Catholic Church has rejected previous legislative and other attempts to abolish or reduce penalty rates due to concerns about the negative impact on the incomes of vulnerable workers and the detrimental impact of unsociable working hours on rest, recreation, and family time.

In CCER's view there is sufficient flexibility within the existing industrial regulatory framework to provide for changes to penalty rates, including consideration of providing neutral incentives to employ casuals over permanent employees. The FWC is well placed to consider evidence of the impacts of penalty rates during the four-year review of modern awards with a rigorous process for the FWC to hear proposals from parties in the retail and hospitality sectors set down for September 2015. The detail of penalty rate setting should continue to be a function of the FWC and properly considered in accordance with the modern award objectives in s134 (1) of the FW Act, not just by giving primacy to the operational requirements of industry.

Vulnerable workers will have their pay cut

CCER reiterates concerns expressed in our original submission that reducing penalty rates on Sundays in the hospitality, entertainment, retail, restaurant and cafe industries will

disproportionately affect minimum wage earners, who work non-standard hours in precarious and low paid jobs and rely on penalty rates to protect their living standards.

The majority of employees that would be affected by the draft recommendation are low paid, women and young people working weekends. ABS data shows that 72% of workers in the accommodation and food services sector and 56% of workers in the retail sector work on weekends, compared to 34.5% of workers across the economy.¹⁵

Younger workers aged 18 – 24 are more likely to work on weekends in these industries. These are also the sectors with the largest number of low paid, award reliant employees (17.2% of retail employees and 17% of accommodation and food services employees). Average weekly total cash earnings (including applicable penalty rates) were \$553.70 for retail employees and \$519.20 for employees in accommodation and food services.¹⁶

A reduction in Sunday penalties would have a significant impact on the wages of these workers. In 2012 the Department of Education, Employment and Workplace Relations estimated that if restaurant and catering and retail businesses were exempt from paying penalty rates, the average casual non-managerial employee would lose income of \$58 (11%) a week in restaurants, \$47 (9%) in hospitality, \$37 (6%) in fast food and \$29 (6%) in retail. This would affect some 200,000 typically award reliant and low paid employees.¹⁷

The Productivity Commission has acknowledged the impact of its proposal to reduce the Sunday rate to the Saturday rate calculating a wage reduction of 17% for restaurant industry employees and 37.5% in retail.¹⁸ For low paid workers and their families a pay cut of this magnitude will hurt their living standards.

As the Productivity Commission also notes, most employees facing reduced earnings will be unlikely to obtain enough additional hours to offset the earnings effects of lower wage rates. In CCER's view even if employees were willing and able to work extra hours to avoid a net pay cut, it is fundamentally inequitable that they would need to do so.

CCER cannot agree with the Productivity Commission's conclusion that Sunday rates appear to extend beyond the '*safety net*' role of the award system. For many low paid workers Sunday penalty rates are an *inherent* part of the safety net.

Flow on effects of reducing disposable income

Reducing Sunday penalty rates will punish some of Australia's most vulnerable workers. It will also impact on consumption as reductions in these workers' incomes will have adverse consequences on their ability to purchase goods and services from other businesses.

Research estimates the impacts of penalty rate reductions in the retail and hospitality industries in rural Australia on workers' earnings and the effect on local economies as disposable income is reduced. About 18 per cent of the rural workforce is employed in the retail and hospitality sectors (about 500,000 people).

¹⁵ [2009] Australian Bureau of Statistics 4102.0 *Australian Social Trends, Patterns in Work* December <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features50Dec+2009>

¹⁶ [2014] Australian Bureau of Statistics Cat 6306.0 *Employee Earnings and Hours*

¹⁷ [2012] Department of Education, Employment and Workplace Relations Submission, *Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into Fair Work Amendment (Small Business – Penalty Rates Exemption) Bill 2012*, page 11

¹⁸ [2015] Productivity Commission *Draft Report Workplace Relations Framework*, p516

The research calculates that a partial reduction of penalty rates (including a halving of the applicable Sunday rates) would result in workers losing between \$371 – \$692 million in wages per annum. There would be a corresponding decline in discretionary spending in local economies of between \$175 - \$343.5 million per annum. The report identifies that ironically the greatest detriment will be on local businesses in the retail and hospitality sectors.¹⁹ Similar reductions in consumption would be expected across the economy in cities and suburbs affecting business profitability, confidence, jobs and growth.

Two tier system is inequitable

It is fundamentally inequitable to treat the retail and hospitality industries differently to others such as nursing, aged care, police, and other essential services workers, where existing penalty rates will and should continue to be paid. CCER does not accept the Productivity Commission's view that it is justifiable to pay penalty rates as they are currently constructed in these industries but not in others. We oppose a two-tier system that unfairly targets Australia's lowest paid workers because of lower skills, and historical industry differences.

In CCER's view, the extension of trading hours, largely in response to consumer demand, does not diminish the unsociability of weekend work for retail or hospitality workers when compared to workers in other industries, regardless of the historical differences in weekend demand.

The Productivity Commission asserts that community attitudes on penalty rates for Sundays have changed, but this view is not supported by public sentiment. An Essential Media poll found that 68% of voters oppose cutting weekend and public holiday penalty rates for hospitality and retail workers compared to 23% in support.²⁰ Even if community expectations are changing about weekend access to consumer services there is no change in community expectations about compensating the workers who deliver those consumer services.

CCER is concerned that a precedent set for these industries would eventually '*set the scene*' for reductions in penalty rates for the rest of the workforce. This is of great concern when Australia already faces growing labour shortages in the health care, aged and disability care sectors and can ill afford to make these sectors less attractive to prospective employees.

Job creation arguments are not convincing

CCER rejects the arguments that a reduction in Sunday penalty rates would result in higher demand for labour and increased job opportunities particularly for young people in these industry sectors. The Productivity Commission draft report states that '*excessive penalty rates for Sundays reduce hours worked, mean unemployment is higher than it needs to be, and reduce options for business and consumers*'. ...'*As there is a significant differential between Saturday and Sunday penalty rates, their greater alignment is likely to have sizeable employment effects.*'²¹

Not all economists agree with this proposition. Ross Gittins recently stated the argument that weekend penalty rate reductions would have great economic benefits is '*fallacious*'. There appears to be no real evidence that reductions in Sunday rates will translate to increased

¹⁹ [2015] McKell Institute *Who loses when penalty rates are cut?*

²⁰ [2015] Essential Media Report, *Cutting Penalty Rates*, 13 January <http://www.essentialvision.com.au/cutting-penalty-rates>

²¹ [2015] Productivity Commission *Draft Report Workplace Relations Framework*, p483, 522

sales and therefore staffing levels – as opposed to just increasing profit margins. Some retail and hospitality businesses would not open for longer hours on Sundays, simply increasing their profit by paying lower wages, with no increase in employment opportunities.

Even assuming that many businesses did open longer, increased custom (theoretically creating more jobs) would depend on consumers spending more on Sundays. In light of constraints on consumers' total discretionary spending, an increase in Sunday sales may simply occur at the cost of reduced consumer spending at other times of the week, and therefore at the expense of other businesses (and jobs). The potential outcome may be the same number of sales spread over longer opening hours, which, while more convenient for consumers, is unlikely to increase the total number of jobs across the economy.²²

A recent survey of 1000 restaurant and cafes indicated that while 52% said they would employ more staff if penalty rates were reduced, only 10% of respondents are now closed on Sundays. Of this group, 40% stated they would not be more likely to open on Sundays if penalty rates were reduced. Of the 90% that remain open on Sundays, 51% stated they do so because it is profitable. Less than 25% stated that opening on Sundays (and consequently paying the applicable penalty rate) is reducing their profits.²³

It is CCER's view that the significant evidentiary gap identified by the FWC that '*There is also no reliable evidence about the impact of the existing differential Saturday and Sunday penalties upon employment patterns, operational decisions and business performance*' remains the case, notwithstanding the claims of industry employers that they would put on additional staff if rates were reduced.²⁴ In its restaurant industry award decision the FWC concluded Sunday penalty rates have some effect, but not a significant effect, on employment on Sundays.²⁵

In any event, even if the proposition that Sunday penalty rate reductions would assist job creation is accepted, it is a fundamental Catholic principle that it is not *morally* acceptable to reduce unemployment or underemployment by lowering the wages and conditions of vulnerable employees and the living standards of their families.²⁶ While measures to promote greater employment are of critical importance, other strategies are required to assist the unemployed.

Sundays are still 'special' - for families and leisure

While CCER acknowledges the Productivity Commission's observation that, among other factors, one of the likely contributors to changing social mores and attitudes to business activity on weekends is a reduction in religious observance, research continues to show that quality time is essential to keeping families strong, a key value of the Catholic Church.

Weekend workers regularly miss important family engagements, social occasions and sporting events. These events are important for rest, recuperation, and cementing social ties, which have positive effects on workers' health, well-being, and social inclusion. In

²² [2015] Gittins, R, *Don't be sure lower penalties mean more jobs* 10 August <http://www.smh.com.au/business/dont-be-sure-lower-penalties-mean-more-jobs-20150806-giti4j.html>

²³ [2015] Restaurant and Catering Industry Association, *The effect of penalty rates on staffing, opening hours and profitability in Australian restaurants and cafes*, Jetty Research

²⁴ [2013] FWCFB 1635 *Transitional Review Penalty Rates Decision* [para 234]

²⁵ [2014] FWCFB 1996 *Restaurant Industry Award – Appeal* [para 139]

²⁶ [2005] Australian Catholic Bishops Conference, *The Bishops' Statement of 25 November 2005*

particular, research suggests that shared leisure time is key to positive relationships and good family functioning with couples' shared leisure time important for marriage quality.²⁷

Those who argue for rate reductions argue that Sunday hours are of equal value to Saturday hours, however Sunday retains special status as a day preserved for family time, particularly for parents with children.²⁸ A 2014 UNSW study found that weekend work is most disruptive to family time with resultant impacts on health, wellbeing and social inclusion.²⁹

The FWC also recognises the particular impact of working on Sunday rejecting the general proposition that the level of inconvenience and disability for working on Sundays is no higher than that for Saturdays stating, '*... Working on Sundays involves a loss of a day of family time and personal interaction upon which special emphasis is placed by Australian society*'.³⁰

As the Productivity Commission acknowledges '*Sunday employment does more adversely affect outside activities and relationships compared with Saturday work*'. In CCER's view, if leisure or family time on Sunday is more highly regarded than on Saturday, this undermines the proposition that the penalty paid for working such time on Sunday should be aligned with the Saturday rate.

No real 'choice' to not work weekends

While CCER acknowledges that for some workers, such as students or carers, weekend work is convenient and desirable, for many other workers it is a necessity rather than a real choice. Even for many students the '*choice*' to work weekends is illusory because they need this income to survive, particularly while in tertiary education. By lowering Sunday penalty rates the '*choice*' would be to work additional hours to earn the same income. The fact that some of these employees only work these unsociable hours '*in the earlier years of their working lives and may have high lifetime expected incomes*' as asserted by the Productivity Commission is also irrelevant, particularly if they cannot support themselves to study.

The '*choice*' to work unsociable hours is largely driven by the financial incentive of penalty rates with women, workers with combined household incomes below \$30,000 and rural and regional employees most financially vulnerable to their removal. Research indicates more than 72% of those employees relying on penalty rates for household expenses would stop working Saturdays, Sundays and weeknights if penalties were removed. Those with household incomes below \$30,000 and most reliant on penalty rates are also the least likely to continue working these hours if a wage premium was not offered. This group has indicated they would seek to move to other work that meets their financial needs.³¹

As the Productivity Commission notes however, this apparent alternative of finding a different job is difficult and a daunting prospect even in positive economic times. Even allowing for the proposal to provide 12 months advance notice of a change to Sunday rates in these industries, it is likely that many affected employees would simply have to 'cop' the

²⁷ [2007] Shepanski, P., & Diamond, M. *An unexpected tragedy: Evidence for the connection between working patterns and family breakdown in Australia* Sydney: Relationships Forum Australia

²⁸ [2005] Bittman, M. *Sunday working and family time* Labour & Industry [pp16, 59–83]

²⁹ [2014] Craig, L. *Weekend Work and Leisure Time With Family and Friends: Who Misses Out?* University of New South Wales, Social Policy Research Centre, Journal of Marriage and Family

³⁰ [2014] FWBFB 1996 *Restaurant Industry Award – Appeal* [para 154]

³¹ [2014] Daly T, *Evenings, nights and weekends: working unsocial hours and penalty rates* Centre for Work + Life University of South Australia

cut in pay (and consequently have no real choice but to work more unsociable hours to earn the same income).

Sufficient flexibility for penalty rate setting by the FWC already exists

The setting of payments for the evident disabilities associated with working unsociable hours should continue to be the function of the FWC consistent with the explicit protection in the regulatory framework which requires the FWC to ensure that modern awards, together with National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions.

In CCER's view there is sufficient flexibility within the existing industrial regulatory framework to provide for changes to penalty rates on a case by case basis. For example, we note that the FWC has used its existing powers to consider casual penalty rates on an industry case-by-case basis evident in the decision to reduce the Sunday loading payable to certain casual employees under the Restaurant Industry Award 2010. The FWC accepted that the evidence filed demonstrated the special and peculiar characteristics of the industry's '*transient and lower-skilled casual workforce*' meant that the Sunday penalty rate is higher than is required to attract them for work on that day.³²

The FWC is well placed to consider evidence of the impacts of penalty rates during the four-year review of modern awards. The detail of penalty rate setting should continue to be a function of the FWC and properly considered in accordance with the modern award objectives in s134 (1) of the FW Act, not just by giving primacy to the operational requirements of industry.

³² [2014] FWBFB 1996 Restaurant Industry Award – Appeal against decision [2013] FWC 7840

4. ENTERPRISE BARGAINING

DRAFT RECOMMENDATION 15.1

The Australian Government should amend Division 4 of Part 2-4 of the *Fair Work Act 2009* (Cth) to:

- allow the Fair Work Commission wider discretion to approve an agreement without amendment or undertakings as long as it is satisfied that the employees were not likely to have been placed at a disadvantage because of the unmet requirement.
- extend the scope of this discretion to include any unmet requirements or defects relating to the issuing or content of a notice of employee representational rights.

SUPPORTED

CCER supports Draft Recommendation 15.1, particularly granting the FWC more discretion to approve enterprise agreements where minor or inconsequential errors are made regarding the notice of employee representational rights, and where these errors have been made by an employer in good faith. This supports the overarching view of the Productivity Commission to prioritise substance over form in the workplace relations system

CCER provided extensive research and detailed practical recommendations on the issue of notices of employee representational rights in pages 18-22 of our original submission. CCER encourages the Productivity Commission to adopt these specific proposals in implementing Draft Recommendation 15.1.

Further specific concerns with compliance requirements for enterprise bargaining

As outlined in our original submission, CCER regularly acts as a bargaining representative for Catholic employers in NSW and the ACT in enterprise agreement negotiations, frequently for multiple employers negotiating for one agreement. In these circumstances, the administrative burden and logistical difficulties imposed by the onerous and in some circumstances ambiguous compliance requirements for approving agreements are amplified. To add to this burden is the tight timeframe the employer has to lodge an application for approval of an enterprise agreement after it is made, being only 14 days.³³

In addition to the issues regarding notices referred to in our original submission, CCER has identified a number of specific concerns for employers regarding the *Form F17 – Employer’s statutory declaration in support of an application for approval of an enterprise agreement* (‘F17’). These issues are discussed below.

The F17 is too long and prescriptive

CCER believes the overall length and level of prescription of the F17 is excessive. For example, CCER recently lodged two applications that totalled 134 and 79 pages respectively, including annexures but excluding the text of the agreement. These

³³ *Fair Work Act 2009* (Cth) ss 185(3)(a).

forms required significant time to complete.

The process for properly completing the approval application includes, but is not limited to:

- Collating supporting documentation – including the notice of employee representational rights, evidence of the consultation process, information from the ballot provider, and instruments of appointment of bargaining representatives (if any);
- Providing details of how and when notices of employee representational rights were issued;
- Providing details of the ballot, the ballot results, and how and when employees were notified of the time and place of the ballot;
- Providing details of the specific steps taken by the employer to explain the terms of the agreement and the effect of those terms;
- Articulating specifically how the employer took into account the particular circumstances and needs of any employees from non-English speaking backgrounds, young employees, employees who may have a disability or those who may not have had a bargaining representative;
- Completing a written comparative analysis of any conditions contained within the proposed agreement which are more beneficial, as well as those that are less beneficial, compared to the equivalent terms of the reference instruments. The reference instruments include not only the relevant modern award, but also any *'pre-reform award(s) or NAPSA(s) that covered the employer and any of the employees covered by this agreement as at 31 December 2009'* notwithstanding the majority of those instruments no longer have any 'live' transitional arrangements.
- Completing a further comparative analysis identifying how the classifications within the proposed enterprise agreement translate to the classification structure of the modern award.
- Identifying any conditions of the proposed agreement which may contravene the NES.
- Articulating why the employer thinks the FWC should be satisfied that the group of employees covered by the proposed agreement were fairly chosen, including whether they are geographically, operationally or organisationally distinct (to satisfy ss. 186(3A) of the FW Act).
- Including statistical information for how many employees to be covered by the proposed agreement are female, from a non-English speaking or Aboriginal or Torres Strait Islander background, are disabled, are part-time, casual, under 21 years of age, and over 45 years of age.
- Obtaining a justice of the peace (or other prescribed person) to sign it;
- Complying with the signature requirements for the proposed agreement pursuant to Reg 2.06A.
- Completing the F16 - *Application for approval of enterprise agreement*.
- Liaising with the relevant union regarding their completion of the Form F18.

CCER recommends the F17 form be reviewed with a view to streamlining its design and content, to ensure the significant administrative burden on employers is reduced. Reducing the volume and complexity also reduces the scope for procedural errors.

14 day timeframe for lodging approval application is too onerous

In light of the extensive requirements imposed on employers in completing the F17 form, the 14 day timeframe to file the form is too onerous. CCER recommends this timeframe be extended to between 21 – 28 days following the end of the ballot.

Inconsistencies between Fair Work Act, Fair Work Commission Rules 2013 and F17

There is a significant discrepancy between the F17 form, the *Fair Work Act*, and the Fair Work Commission Rules 2013, as to whether a bargaining representative for an employer is permitted to complete the F17 on behalf of employers covered by the proposed agreement.

In a recent application for approval of an enterprise agreement, CCER completed and filed the F16 & F17 forms as the nominated bargaining representative of a number of employers. After the application was filed, CCER was contacted by the FWC registry staff, who advised that the FWC member who would be hearing the application had raised a concern about the fact that CCER, as the bargaining representative, had completed the F17, rather than each employer covered by the agreement completing their own separate F17 forms.

The source of the FWC members concern was sub-rule 24(1) of the Fair Work Commission Rules 2013, which states that except for greenfields agreements, ‘*each employer that is to be covered by the agreement must lodge a statutory declaration.*’ This is inconsistent with the FWC approved Form F17 which states on the front cover page (i):

*The Fair Work Act 2009 allows you to use this form if...you are an employer **or a bargaining representative who has been appointed by an employer (s. 185)***
(our emphasis)

Furthermore, at the bottom of page (i) it states:

2. If you are a bargaining representative appointed by an employer – lodge a copy of the written instrument of appointment at the same time as this statutory declaration.

3. As soon as practicable after it is lodged with the Commission, serve a copy of this statutory declaration on:

- **each employer that will be covered by the agreement** (our emphasis).

CCER completed the F17 in line with the instructions on the form developed and released by the FWC ‘the approved form’. As you can see from the above, it specifically states a bargaining representative can complete the form on an employer’s behalf, and refers to the FW Act as authority for the statement. In particular sub-section 185(1): ‘*if an enterprise agreement is made, a bargaining representative for*

the agreement must apply to the FWC for approval of the agreement.'

In any event, CCER did not breach the FWC Rules as the note under sub-rule 24(1) states *'the statutory declaration must be in the approved form—see subrule 8(2).'* As the F17 completed was the approved form, there could be no breach. This however shows an inherent inconsistency between sub-rule 24(1) and sub-rule 8(2), not to mention the inconsistency of the Rule with the Act and the approved form. After raising these points, the FWC member advised that he was willing to dispense with the specific requirement of sub-rule 24(1).

CCER supports the Act and F17 in that a bargaining representative is able to complete the application. It would be impractical, where a bargaining representative is appointed, to impose this administrative burden on every employer particularly given the strict 14 day timeframe.

CCER has also identified further inconsistencies between the F17 and the FW Act. These are:

- The instrument of appointment for an employer's bargaining representative is not referred to within the F17 itself, nor is it a requirement of the FW Act or FW Regulations that it be attached to the application. Nonetheless it is listed on the cover sheet (page i) of the F17 as a document that must accompany the F17;
- Question 2.4 in the F17 only references s. 180(2)(a) of the FW Act (including mirroring its language), when s. 180(2)(b) can also apply but is not referred to in language or by citation. This has caused confusion when trying to ascertain if the correct process had been undertaken.

Recommendations

To rectify these concerns CCER recommends the following:

- (1) The F16 & F17 forms be significantly streamlined and rectified to ensure that they are consistent with FW Act, FW Regulations and FWC Rules. This will save employers valuable time trying to ascertain inconsistencies and from having to read numerous source documents to ensure they are completing the form correctly. Stakeholders should have confidence in the accuracy of approved forms, and ideally only have to review and complete the form itself to ensure a compliant and accurate form is submitted.
- (2) The 14 day timeframe for filing an application for approval of an enterprise agreement be extended to at least 21 days, and preferably 28 days.
- (3) Sub-rule 24(1) of the FWC Rules 2013 should be amended so that an appointed bargaining representative for an employer can complete an F17 on their behalf.

DRAFT RECOMMENDATION 15.4

The Australian Government should amend the *Fair Work Act 2009* (Cth) to replace the better off overall test for approval of enterprise agreements with a new no-disadvantage test. The test against which a new agreement is judged should be applied across a like class (or series of classes) of employees for an enterprise agreement. The Fair Work Commission should provide its members with guidelines on how the new test should be applied.

SUPPORTED

CCER supports the introduction of a no-disadvantage test (NDT) to replace the current better off overall test (BOOT). CCER has a unique and balanced perspective as we actively represent the interests of employers in enterprise bargaining, while also recognising the importance of social justice in accordance with Catholic social teaching. Drawing on our experience in bargaining, and considering the interests of all stakeholders and the objects of the FW Act as a whole, we believe an NDT is a superior regulatory standard for the reasons that follow.

A strong safety net is retained

An NDT retains a strong safety net for employees, as no proposed enterprise agreement can result in an employee being disadvantaged overall, compared to the modern award which may apply to them. We understand the only difference between the NDT and the BOOT, is an NDT permits an enterprise agreement which may produce an overall result for an employee which is neutral compared to the modern award.

In addition, the FWC will assess each proposed enterprise agreement to ensure employees are not disadvantaged overall, in a similar way it currently does when applying the BOOT. The retention of this regulatory oversight will avoid any potential misuse of the NDT, and ensures a strong safety net remains.

Increased flexibility in bargaining

While the difference between the proposed NDT and the BOOT is a subtle one, in practice we believe an NDT may result in a modest increase in the overall flexibility and scope of the bargaining process and its outcomes.

In CCER's experience, there can be uncertainty for employers in predicting how the FWC may apply the BOOT. CCER has been concerned by certain FWC decisions adopting a line-by-line approach in applying the BOOT, however we note the correct global approach has now been confirmed by the Full Bench of the FWC.³⁴

Nonetheless uncertainty regarding the BOOT still exists, particularly for CCER's members who are largely in the not for profit sector and the social and community services sector, many of whom are heavily reliant on charitable contributions or government funding and have limited financial resources to agree to conditions over and above the modern award.

³⁴ *AKN Pty Ltd t/a Aitkin Crane Services* [2015] FWCFB 1833.

Despite this, where a union claims majority support, the employer is effectively forced to commence bargaining for an enterprise agreement that will inevitably cost the employer more in order to meet the BOOT.

Partly because of uncertainty regarding the BOOT, employers in this situation can be reluctant to propose modest variations in existing conditions to offset the increased costs of having an enterprise agreement. The end result can be inflexible bargaining over a narrow scope, producing an agreement which substantially replicates the modern award. Despite the lack of utility of having an enterprise agreement in these circumstances, the employer bears an additional cost to meet the BOOT, the significant administrative burden of negotiating and drafting the agreement, and satisfying all of the compliance and approval requirements.

CCER believes the introduction of an NDT will provide greater compliance certainty to assist bargaining and not impose an additional cost obligation on employers who are not able to afford it.

Finally, CCER proposes the FW Act should expressly require the NDT is to be applied overall, and not line-by-line.

5. THE ENTERPRISE CONTRACT

INFORMATION REQUEST

The Productivity Commission seeks information on the costs (including compliance costs) and benefits of an enterprise contract to employers, employees and to regulatory agencies. Particular areas that the Commission seeks information on are:

- *additional evidence on the potential gap in contract arrangements between individual arrangements (broadly defined) and enterprise agreements*
- *the extent to which the enterprise contract would be a suitable addition to the current suite of employment arrangements, how it could fill the gap identified, and specific examples of where and how it could be utilised*
- *clauses that could be included in the template arrangement*
- *possible periods of operation and termination*
- *the advantages and disadvantages of the proposed opt in and opt out arrangements.*

In addition, the Productivity Commission invites participants' views on the possible compliance and implementation arrangements suggested in this chapter, such as their impact on employers, employees and regulatory agencies.

CCER has considered the Productivity Commission's suggestion to introduce a new statutory arrangement – an '*enterprise contract*' – that would allow employers to replace or vary an award or enterprise agreement for a group of employees without the requirement to negotiate or to seek FWC approval.

CCER is not of the view that there is an existing gap in employment arrangements such that it warrants the introduction of an enterprise contract. Further, CCER does not support the proposed model due to concerns about additional complexity and regulation for employers, and inequitable outcomes and lack of adequate safeguards for employees.

As an alternative, CCER supports the Productivity Commission's recommendations to improve the current system of individual flexibility arrangements which, in our view, provide capacity to meet many operational needs.

Existing 'gap' does not warrant more regulation

CCER accepts that enterprise bargaining is generally not efficient for small businesses for a variety of reasons. In our view, however, the combination of awards, common law contracts and the option to negotiate individual flexibility arrangements (IFAs) does not leave an existing gap in employment arrangements such that it warrants the introduction of a new statutory enterprise contract. The public policy justification for yet another tier of regulation of employment relationships is a high threshold, which in our view is not met.

Existing IFAs provide an opportunity for employers to negotiate changes to hours of work, overtime, penalty rates etc to meet the genuine needs of both employer and employees.

However, many employers say they do not use IFAs because they do not need them. In a 2012 survey, employers who were aware of, but did not report making IFAs, were asked the reasons why they had chosen not to make IFAs. The most common reason, reported by just over half of employers (51%), was that there had been no identifiable need. Less than 1% believed the provisions are too inflexible.³⁵

It may be the case that modern awards and contracts of employment allow many small employers sufficient flexibility without needing to make further arrangements. As CCER has previously submitted to the Inquiry, as well as protecting the rights of employees, awards provide certainty for employers in determining what conditions to apply as well as a *'level playing field'* for organisations competing in the same industries. If greater flexibility is required, in our view IFAs provide sufficient scope for small organisations to negotiate operational flexibility for working hours and rostering, where negotiating an enterprise agreement is not practical. Employers with multiple IFAs nominate the main benefits as capacity for staff to work hours as needed by the employer and increased rostering flexibility.³⁶

An enterprise contract would not replace the utility of a written common law contract, a practice widely used by CCER members. In addition to statutory arrangements, common law contracts enable the inclusion of express terms about additional matters important to the parties' understanding of the employment relationship, such as conduct, values, secondary employment, compliance with policies etc. For example, it is common among Catholic employers to have a contract provision that requires an employee to respect and uphold the ethos and teachings of the Catholic Church and the values of the employer.

While it is certainly the case that a contract term will not be enforceable to the extent that it is inconsistent with a statutory arrangement, employment contracts are usually drafted to complement the applicable statutory instruments and in CCER's view do not lack certainty, in any practical sense.

As the Productivity Commission notes, in accordance with the FW Act, some modern awards provide for the payment of annualised salaries instead of certain award provisions such as allowances, overtime, penalty rates and annual leave loading. These annualised salaries, can be reflected in common law contracts and do not undermine the award safety net because the annual salary must be no less than the amount the employee would have earned under the award for work performed over the year. Such provisions provide flexibility to employers as an alternative to the separate payment of wages and other monetary entitlements while ensuring that individual employees are not disadvantaged. CCER notes that applications to include annualised salary clauses in additional modern awards are currently under active consideration as part of the FWC's current 4 yearly review.

Additional layer of regulation and complexity

Notwithstanding the fact that a statutory agreement could replace or vary an award in a way that a common law contract cannot, for many employers a common law contract would not

³⁵ [2012] O'Neill B, *General Manager's report into the extent to which individual flexibility arrangements are agreed to and the content of those agreements*, Fair Work Australia 2009-2012

³⁶ *ibid*

be replaced by an enterprise contract because of its usefulness as outlined above. An enterprise agreement would therefore comprise an extra regulatory layer on top of a common law contract (whether written or unwritten) and applicable legislation and in place of the award or enterprise agreement.

This additional layer of statutory regulation would create further complexity for employers in determining compliance. Enterprise contracts will totally replace an award or enterprise agreement subject to the proposed new '*no disadvantage test*' (NDT). For an employer to develop an enterprise contract and apply the NDT (so that the contract genuinely complies both in practice and in spirit), the employer must by necessity understand the award or agreement. In effect, there is no real reduction in the compliance burden.

While the Productivity Commission proposes that sample templates would be available from the FWC, if enterprise contracts are to meet the operational requirements of individual employers, it seems doubtful that global templates will meet their needs. If standard templates are relevant in practice, this would tend to suggest that the award conditions that employers usually wish to replace or vary are well known. CCER is of the view that this is the case and therefore such conditions could be included in the flexibility terms available for IFAs, rather than through the creation of a new regulatory instrument.

Further, the proposed enterprise contract model also raises concerns about the practicality of managing different classes of employees on multiple employment arrangements and during different timeframes, with employees able to '*opt out*' of an enterprise contract at differing times (any time for an existing employee or after 12 months for a new employee).

This model raises the spectre of employees working side by side on multiple arrangements and potentially significantly different conditions. This would create complex administration requirements, inequity, and potential negative impacts on morale and team cohesion.

Inequitable outcomes for employees and lack of adequate safeguards

The Productivity Commission proposes that, at the employer's sole initiative, an enterprise contract could replace the award or an employer's enterprise agreement and instead be the primary instrument to regulate the employment relationship. Notwithstanding the proposed safeguards - the NDT and the '*opt out*' provisions - an enterprise contract would effectively legalise an employer's 'non-compliance' with an applicable industrial instrument by enabling them to override the award or enterprise agreement.

It is fundamentally inequitable that an employer could unilaterally replace an award or enterprise agreement without any requirement to negotiate with employees, to seek employees' approval, either individually or through a ballot, or to seek FWC approval. In CCER's view, employee engagement and agreement to workplace change is critically important for fostering productive and cooperative workplace relations.

CCER believes that wholesale replacement of an employer's enterprise agreement through an employer-driven enterprise contract fundamentally undermines the enterprise bargaining regime. In effect, an agreement that has been collectively bargained by an employer and employees, presumably tailored to meet the enterprise's particular circumstances, genuinely

agreed to by the employees covered by the agreement and approved by the FWC in accordance with the FW Act, could then be unilaterally replaced by an employer (at least for new employees who would be unable to 'opt out' for 12 months). This approach would essentially undermine the collective bargaining process and negotiated outcomes. It is inconsistent with Catholic social teaching principles that the rights of workers to pursue collective employment agreements are not prejudiced or frustrated.

While '*existing employees could not be forced to enter into an enterprise contract*', new employees could be required - on a '*take it or leave it*' basis – to accept potentially unsatisfactory arrangements for at least 12 months with no redress before they could 'opt out' and revert to the award or agreement. In CCER's view, this is not an adequate safeguard.

Even if, as suggested by the Productivity Commission, prospective employees could in theory use the FWC website to check on enterprise contracts as the '*spectrum of offerings provided by various competing businesses... that could influence their choice of employer*', for award reliant, low paid employees this is not very practical or realistic, particularly if the alternative is unemployment.³⁷

Although the Productivity Commission states that the employer could not '*cherry pick*' parts of an enterprise contract,³⁸ presumably the employer could '*cherry pick*' parts of the award or enterprise agreement it wishes to replace, even with the NDT.

It seems implicit that disadvantage can occur if an added incentive of the 'opt out' provision is required for employers to offer wages and conditions that do not disadvantage employees. A 12 month period during which a new employee could be disadvantaged is a significant period of time. In addition, assessing disadvantage will often depend on individual circumstances. An enterprise contract that meets the NDT based on a holistic collective assessment may still negatively affect particular employees, for example those with family responsibilities.

While employers would have access to a template enterprise contract on the FWC website, structured to satisfy the proposed NDT, the NDT would not be applied to enterprise contracts in actual practice. Without any requirement for agreement or approval, it would be up to the Fair Work Ombudsman to conduct compliance campaigns or for an employee to complain that their enterprise contract does not meet the NDT before any scrutiny is applied or compliance tested. Again, in CCER's view, this is not a real safeguard against the unscrupulous avoidance of award protections by some employers, particularly for more vulnerable employees.

The Productivity Commission states that an enterprise contract would '*effectively amount to a collective individual flexibility arrangement*'.³⁹ In CCER's view, the proposed statutory collective enterprise contracts appear to combine elements of enterprise bargaining and individual agreements without the actual bargaining or the individuality.

³⁷ [2015] Productivity Commission *Draft Report Workplace Relations Framework*, p622

³⁸ *Ibid*, p624

³⁹ *Ibid*, p37

Enterprise contracts are reminiscent of former Australian Workplace Agreements (AWAs) which, even when they were subject to a NDT prior to the introduction of WorkChoices, could be imposed as a condition of employment and were shown to lead to lower pay and conditions. Most research on pre-WorkChoices AWAs found that AWAs provided wages and conditions less than those achieved through collective agreements. Despite the application of the NDT, research indicated that while most collective agreements sat easily above this safety net, AWAs were sometimes approved despite falling short of minimum entitlements.⁴⁰

During the WorkChoices period, research showed that smaller firms were more likely to use AWAs as a cost minimisation tool, presumably through cutting penalty rates, overtime pay and other 'protected' award conditions.⁴¹ Pre-WorkChoices AWAs, however were required to be filed with and approved by the Employment Advocate which formally checked that the agreement met the NDT and the employee's genuine consent. This safeguard is missing from the enterprise contract, which will not be subject to scrutiny by the industrial watchdog.

CCER is concerned that employers could unilaterally remove or vary these kinds of award entitlements through enterprise contracts (notwithstanding the NDT) without employee agreement or external scrutiny.

Support for reforms to IFAs

As noted above, in CCER's view the existing availability of IFAs provides capacity for an employer to implement flexible work hours and rostering to meet operational needs, by agreement. We acknowledge that IFAs are not required to be lodged with the FWC or subject to routine external scrutiny or approval. IFAs are also restricted in their terms, but in our view, IFA flexibility terms are most likely to be award conditions that an employer would wish to vary for operational reasons, and employees for family responsibilities, without undercutting wages and conditions.

As an alternative to the introduction of enterprise contracts, CCER supports improvements to the current system of IFAs. CCER supports the Productivity Commission's proposed recommendations intended to promote and improve the use of IFAs by:

- extending the default termination notice provision to 13 weeks (Draft Recommendation 16.1);
- replacing the BOOT test with a new NDT test for assessment of IFAs (Draft Recommendation 16.2). Further comment is provided in this supplementary submission in section 4 in relation to Draft Recommendation 15.4 (implementing the NDT for collective agreements); and
- providing better information to small businesses on IFAs (Draft Recommendation 16.3).

⁴⁰ [2006] Van Barneveld, K, *Australian Workplace Agreements under Workchoices* -ELRRRev 8; (2006) 16(2) The Economics and Labour Relations Review 165

⁴¹ [2009] Peetz, D & Preston, A, *Individual contracting, collective bargaining and wages in Australia*, Industrial Relations Journal, 40(5), September 2009, 444-461