



Australian Government
Productivity Commission

PRODUCTIVITY COMMISSION

**INQUIRY INTO WORKPLACE
RELATIONS FRAMEWORK**

MR P HARRIS, Presiding Commissioner
MS P SCOTT, Commissioner

TRANSCRIPT OF PROCEEDINGS

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INDEX

	<u>Page</u>
SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION: GERARD DWYER JULIA FOX JHOANA GRAGEDA	166-187
AUSTRALIAN INDUSTRY GROUP: INNES WILLOX STEPHEN SMITH DR PETER BURN	188-209
AUSTRALIAN CONSORTIUM FOR RESEARCH INTO EMPLOYMENT AND WORK: GEOFF MCGILL JULIAN TEICHER	209-223
NAME WITHHELD	224-229
VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE: WILLIAM CHESTERMAN LEYLA YILMAZ NIGEL MULLER	229-252
AUSTRALIAN SERVICES UNION: MICHAEL RIZZO	252-267
TEXTILE, CLOTHING AND FOOTWEAR UNION OF AUSTRALIA: MICHELE O'NEIL REG CARMODY SHARON DILLON HA TRAN	267-286
MARY O'CONNOR	286-291

MR HARRIS: Good morning. I'm Peter Harris, the Chairman of the Productivity Commission. This is Patricia Scott on my left who's Deputy Chair at the Productivity Commission, and we're the Commissioners on the Workplace Relations Inquiry. The purpose of this round of hearings is to
5 facilitate public scrutiny of the Commission's work and to get comment and feedback on the draft report. Following today in Melbourne we will be in Canberra, then Adelaide, Sydney and Ipswich, and we've been in Bendigo and Hobart.

10 We will have a final report done for the end of November 2015, having considered all the evidence presented at this hearing and in submissions and other informal discussions that are going on at the moment, as well as general feedback on the draft. All participants and those who have registered their
15 interest in this inquiry will be advised via email of the report's final release by the government, which may take up to 25 Parliamentary sitting days after the report is delivered to the government, which means effectively sometime early next year. May take that length of time.

20 We like to conduct all hearings in an informal manner, but I remind participants a full transcript is being taken which means for all participants your words are recorded. For this reason, comments on the floor can't be taken but at the end of proceedings for the day I've been making an opportunity for
25 persons who wish to make a brief presentation and have managed to sit through the whole thing to get up and make a few comments if you wanted to do so. So that opportunity will arrive again at about four or 4.30 or something, for those who've got that level of persistence.

Participants are not required to take an oath but should be truthful in their remarks, and are welcome to comment on issues not just in their own
30 submissions but obviously in other submissions and in the draft. The transcript will be made available to participants and will be up on the Commission's website, probably a couple of days' time. Submissions are also available on the website. While we do not permit video recordings or photographs to be
35 taken during the proceedings because of the disturbance that might take place, social media such as Facebook or Twitter may be updated throughout the day.

We do ask all members of the audience to ensure their mobile devices are switched to silent.

40 (Housekeeping matters)

I think we're going to start off with the Shop, Distributive & Allied Employees' Association. Please feel free to take any one of the seats that's
45 available up there. Once you've settled yourselves, if you could identify yourself for the record so we can get the transcripts right.

MR DWYER: I'm Gerard Dwyer. I'm the national secretary of the Shop,

Distributive & Allied Employees' Association.

MS GRADEDA: My name is Jhoana Grageda. I work at Zamel's, Gungahlin.

5 **MS FOX:** My name is Julia Fox. I'm a national industrial officer for the Shop,
Distributive & Allied Employees' Association.

MR HARRIS: Do you have any opening remarks to make or do you want us
10 to just start off with general questions based on previous submission, or what's
the process here?

MR DWYER: Chair, I would like to make some opening comments.

15 **MR HARRIS:** Go for it.

MR DWYER: I'd note the SDA's submission filed in March 2015 and would
just this morning like to make some supplementary comments on that
submission. But particular reference today, we'd like to touch on during the
course of the proceedings this morning Chapter 14, which is the penalty rates,
20 and also enterprise contracts which is called out at Chapter 17 of the draft
report.

I guess in opening I'd say that the penalty rates in particularly the retail
industry have been a feature of the Australian industrial relations environment
25 for over a hundred years. But I guess there has always been a tension in any
labour market between wages and - or around wages. But I think our system
has shown that that tension is managed and we've arrived at a space where the
system or the current workplace relations framework provides some certainty
for employees as well as for business.

30 We're concerned that the current attack on penalty rates is part of that
ongoing tension, but it seems to us that there are - this desire to reduce penalty
rates, particularly in the service sector which is what we understand to be
proposed, the reduction there, we believe that penalty rates unfortunately are
35 quite identifiable and they are exposed components of what, in our view, is
really a total weekly wage, a take-home pay.

So for business I guess it's the total wage bill. For employees it really is
about their take-home pay and we'd note in our submission the take-home pay
40 for retail workers with a complete reduction of penalty rates could total up to
25 per cent loss, and we don't believe that that is fair for those individuals, and
we don't believe it makes for good economics for the community generally.

45 We'd also note that the existing framework of penalty rates particularly
in retail is a result of the 2010 modern award review which was quite a
substantial process with wide consultation, enormous amounts of hearings, and
we'd note that the penalties adopted usually reflected either a mid-point across

the country in terms of various State awards or the most common.

5 I guess one of the items attracting most attention at the moment is the Sunday penalty rate, and that Sunday penalty rate as reflected in the General Retail Industry Award actually reflects what was in place in Victoria, the ACT, Queensland for non-exempt stores, Western Australia and Tasmania. So it was very much the dominant position and we'd also stress the fact that the award arrived at was actually a package. Okay, so it's a package of total take-home pay and associated conditions and entitlements.

10 We'd note that that package, having been put in place so recently and put in place in what was then a deregulated trading market, so there has been no change on that front, we have a penalty structure put in place recently and put in place in a deregulated environment; and we don't believe that in that package one item should be taken out in isolation like the Sunday penalty and therefore modified.

20 I'd note that there were a number of things in the development of that award that formed part of the package but weren't of or didn't arrive at a position which was pleasing to the SDA. The 33 per cent casual loading in Victoria was lost for example. The other thing that was lost was standalone overtime hours in terms of the spread of trading hours. We now have a retail award which permits 24 hours a day trading, seven days a week in terms of with no overtime being applicable to any given hour. Overtime is only
25 attracted by the number of hours an individual may work.

30 But anyway, all of that we say is settled and was part of a package in 2010 that was the result of an enormous amount of work from all parties and enormous amount of consultation. We'd also say that particularly the employers at the moment are giving enormous focus to the issue of extended trading in retail and that somehow because of extended trading we need to bring about changes to the existing penalty structure.

35 We'd submit that the penalty structure put in place now was done at a time when that deregulated trading was in place, and we'd also say that that issue of the prevalence of the use of extended trading shouldn't be given primacy over other aspects of the workplace which need to be considered, and a lot of those are obviously situated - or, sorry, focused on employees.

40 The fact is that there is still an impact on those who work weekends and late nights. There's an inconvenience and in our submission we framed that using the research language of disability associated with working unsociable hours, and I'd just note that we deal with that in some detail on page 27 onwards and one of my colleagues will go to some of that research later.

45 But there's also the issue of taking into account the needs of the low paid. The total award rate for a full-time shop assistant at the moment does sit just

under \$38,000 a year which by Australian standards is low pay. So the conversation around penalty rates needs to be appreciate that this conversation is taking place for employees who are already amongst the lowest paid in the Australian community.

5

I've already called out the fact that the existing penalties were set in a deregulated trading market in 2010, but I'd remind the Commission that in 2012 there was an extensive review again in the interim award review, and again our existing penalty rate structure was deemed to be fair and relevant. In closing I'd just say that this issue of employees will agree to work or have agreed to work so therefore that lessens the disability or adverse effect, we don't accept that.

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People are often in a position where they have to take what they get, but that doesn't remove the size of the impact on those individuals as family members, as members of friendship groups and as members of their communities, and civic participation is an important component of this.

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We'd also state that there is some focus on students and young people, and in our submission we've called out some research from Dr Woodman, but Jhoana is with us today and she is someone who is young and is a student and we believe would add something in terms of the Commission's understanding of this issue. So they're my opening comments.

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MR HARRIS: Okay, do we want to go to Jhoana next or do you want to - I don't mind if you guys want to work out a way to do this?

25

MS GRAGEDA: Yes, hi, my name is Jhoana. I work at Zamel's Gungahlin and I'm also studying part-time at the University of Canberra. I'm studying architecture. My family came to Australia in 1991. We came to Australia with nothing, to improve our lives, and about seven years ago I moved to Canberra to study. My family was supporting me.

30

My father was paying for my rent, my internet, my food and everything, and then that was causing a lot of problems between my parents, because my sister was also studying at university and we had a younger brother as well. So it caused a lot of conflict so I decided to apply for Youth Allowance and that wasn't very much. So I decided to stop studying full-time and I started studying part-time and in order to do that I had to work Friday nights and weekends so I could support myself.

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So it might not seem too much money for companies to take away the Sunday rate but for me it affects my entire life. I honestly don't know what I would do if they did take that away because that's how I want to support myself. I want to contribute to society in a positive way so yes, it impacts quite a lot.

45

- MR HARRIS:** How many hours do you work on a Sunday?
- MS GRAGEDA:** Six and a half. So we open at 9.30 and close at 4.15.
- 5 **MR HARRIS:** And on a Saturday?
- MS GRAGEDA:** On Saturday we open at 8.30 and we close at 5.15.
- 10 **MR HARRIS:** And Friday night?
- MS GRAGEDA:** I work from 1 pm to 9.15.
- MR HARRIS:** And those are the three days you do a week?
- 15 **MS GRAGEDA:** Yes.
- MR HARRIS:** And the rest of the time you're a student?
- 20 **MS GRAGEDA:** Yes. So it gets very tiring and I have to make different sacrifices. For example, this Father's Day I couldn't see my dad because it was I have to work or do I go home? So it gets really hard.
- MR HARRIS:** So the pay level you're suggesting is sufficient to compensate for that, the current pay level?
- 25 **MS GRAGEDA:** Yes, because on Austudy you didn't get very much. So by working myself and making sacrifices and working on that Sunday, it means I can save a little bit more and if those penalty rates weren't on Sundays I would have to work an extra day, which would mean I wouldn't be able to do as many
- 30 units. So I wouldn't be able to complete my studies in the same amount of time.
- MR HARRIS:** Do you know what your penalty rates are between Saturday and Sunday?
- 35 **MS GRAGEDA:** Yes, on Saturday it's \$23. On Sunday it's \$35.
- MR HARRIS:** So there's \$12 an hour difference, and that's six and a half hours that you work, so \$70-odd.
- 40 **MS GRAGEDA:** Yes.
- MR HARRIS:** From your perspective you're saying if the rates change - sorry, it's 23 on Saturday, have I got that right?
- 45 **MS GRAGEDA:** Yes.

MR HARRIS: Yes, and so that's quite a big jump for the Sunday rate.

MS GRAGEDA: Yes.

5 **MR HARRIS:** All right. Thanks for that.

MS GRAGEDA: I also volunteered for St John Ambulance for eight years. I was a cadet leader so I'm always trying to help the community, but because I'm working weekends now I can't do that as well. So I've had to make a lot of sacrifices to try and improve myself and get a degree.

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MR HARRIS: How far are you through the degree then?

MS GRAGEDA: So I've been doing part-time or just doing one or two units so I've completed one year.

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MR HARRIS: I thought you said you went up there seven years ago.

MS GRAGEDA: Yes, so I've been doing one or two units and I had to stop so I could work because it was too hard. I was too tired and I couldn't complete everything because it was just too stressful.

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MR HARRIS: But the other four days a week, one unit is not four days a week, is it?

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MS GRAGEDA: Yes, so I stopped working at one time. Like right now I'm working part-time.

MR HARRIS: Okay, but you're still doing the same course you went up there to do?

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MS GRAGEDA: Yes.

MR HARRIS: Right. Did you want to do research outcomes? I think you mentioned, Gerard, some research outcomes?

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MS FOX: Yes. Thank you, Chair. Sorry, are you finished?

MS GRAGEDA: Yes.

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MS FOX: I think what's important is to look at the proposal to carve out the retail and hospitality industries in particular, and with the change to the Sunday rate. I guess that seems to reflect that the Productivity Commission accepts that there are arrangements in place for other industries such as nursing, emergency services, manufacturing, where there is a penalty rate which is similar to what we have in retail, whether it be 50 per cent or a hundred per cent in various awards, depending on the structure, that are a fair match between

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the inconvenience experienced by the worker but also the expectations of consumers, and there is an expectation that emergency services operate 24 hours a day, nursing does, et cetera.

5 It's difficult then to see the logic that somehow retail and hospitality is different in that those inconveniences and those expectations of consumers are somehow unique or different. I think as Gerard went to, the Victorian award prior to award modernisation had a Sunday rate of 200 per cent. That's a State that has had Sunday trading nearly for 20 years. So I think it's not a new
10 experience that consumers go out and shop on Sundays. It's not a new experience that retail workers work on Sundays, and they have had that same rate of pay of 200 per cent.

15 It, I think, also is interesting to look at the research, which our SDA submission does go to. In particular, if I can just draw your attention to some of the key findings which I think again tend to contradict the Productivity Commission's findings about night time work being the biggest inconvenience or the biggest impact on health, I think is where the focus of the Productivity Commission seems to be.

20 I note the evidence of Associate Professor Lyn Craig. We also refer to evidence and research done by Associate Professor Sara Charlesworth. Also Dan Woodman from Melbourne University and various others, and I think what is clear in that evidence which we've put forward and has been tested in
25 two cases now before the Industrial Relations Commission is that Sunday is the least usual and the least popular day on which to work.

30 I think when we go to putting in further submissions that are due next week to the Productivity Commission we'll be providing more detail about some of the statistical analysis that the Commission has relied on versus the work of these professors in these areas, which for us clearly highlights that Sunday is the biggest day of inconvenience and it's not only the health impacts, it's the social impacts: the impact on family; the impact on older family
35 members; it's the most destruction to - family time, spouse, children and family and friends happens on a Sunday. Time spent with others is even more negatively affected on a Sunday than it is on a Saturday and that is the findings of the research done by Professor Lyn Craig in that regard.

40 It's also interesting to note Professor Lyn Craig's research in that the child and father play in physical care is also highest on a Sunday, so that's an important day for fathers as well. If we then look to other research of Professor Lyndall Strazdins', weekend disruption again to the family, social and community engagements; and I think as Jhoana said, her social and community engagement in being a St John's Ambulance volunteer has all but disappeared
45 because of the requirement that she needs to fulfil to work on Sundays to meet her financial obligations and continue to study.

Also, we look at Dan Woodman and I think again that is useful when looking at the impact of working on weekends for students, and the need to try and manage the needs of study which are quite high. I think architecture is one that has some strong demands on time and ability to be successful in completing that degree, but being able to sustain yourself and pay your rent, that's not an option to just rely on the family income as such.

I think Jhoana has gone to that point about the impact that had on her family if the family unit has to just be the sole provider of that income. She had to go out and make sure all the needs of the family were met; her sisters, her brother and her parents. She has to take on some responsibility in that and work to sustain that. She has moved from her home to Canberra to do that, as well. They're real issues for people working in retail and students in particular.

I think from our point of view there is a clear difference in Sunday work and I think the evening work - and we acknowledge the evidence filed by those experts in those areas will show that night work is an issue. We're not saying that that's not at all and there is mental and physical health impacts of working nights, rotating rosters and shifts, et cetera, but it cannot understate the impact Sunday work has on family, community, health and social impacts. If there are any questions in regard to some of that evidence, but it is contained in our submission and we would like to - - -

(Proceedings interrupted)

MR HARRIS: I suspect someone is broadcasting outside and we're picking it up. I'll go on. In our draft report, we used what I consider to be an example. Every individual example is going to appear to be an extreme case because we're talking here about the possibility of shifting the price paid for Sunday work. In our report, we did use the example of a pharmacy assistant and their rate of additional compensation on Sunday leading to a position where the shop assistant could be paid more than the pharmacist - - -

(Proceedings interrupted)

MR HARRIS: We should turn off the broadcast if that's going to be the case, I think. Anyway, I'll keep going. Did you read that?

MS FOX: Yes.

MR HARRIS: Did you note the pay level and the comparison with the trained pharmacist and the shop assistant? Again I'm not going to rely on individual cases. I understand why Jhoana is here and we're not making our proposition based around individual cases, but I was wondering whether you had a response to that.

MS FOX: Certainly. I think it goes back to the issue of the take-home pay. The pharmacy assistant is not paid the same as a pharmacist when you look at their take-home pay.

5 **MR HARRIS:** Their total weekly - - -

MS FOX: That's right. Total weekly earnings. Absolutely.

10 **MR HARRIS:** In terms of additional hours, we put forward an argument which suggested - and there is reasonable backing for this in our view, but I'd like to get your response to it - that if the pay level varies and so the Sunday rate becomes more like the Saturday rate, there will be the opportunity for additional hours for those businesses that only operate part-time on Sunday, for example. What is your union's response to that?

15 **MS FOX:** The reality is trade hours have been extended. I come from Victoria, so I guess I have that hat on when I'm responding, but the trade hours in Victoria and Sunday work has not lead to an increase in the numbers of people hired. It hasn't.

20 **MR HARRIS:** Not the numbers of people. The hours of work. Definitionally, if you worked, you had no time available after 12.00, for example. If a premises then opens for longer, until 4 o'clock in the afternoon, there are four extra hours for some employee to work or for an additional employee to be employed for that period. Do you not see any value in that?

25 **MR DWYER:** That's based on a premise that a number of businesses are actually choosing to close at 12.00. I guess our union position is that that is actually not borne out substantially in the real word. We would cite, for example, the Easter period just passed. There was a campaign by some organisations about promoting this issue of penalty rates on weekends and putting up signs to say you're closed because there is a problem. So we had people in the field just having a look at how that was operating and I, myself, went to a couple of centres in Sydney which I think are quite representative in terms of - one was Ryde. You've got Chatswood, as well. We didn't see that played out.

30 What we saw was extremely active businesses on those days and I'd note that, for example, Easter Saturday is not just a Sunday rate; it's a public holiday rate of 250 per cent. Enormous commercial activity. We would say that the commercial activity is to be endorsed, but the employees giving up that Easter Saturday are also entitled to fair compensation and where we're at at the moment, be it that or the Sunday, the employees were getting what we would say is fair and reasonable compensation for that work and we could see no inhibition on commercial activity.

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That is borne out Sunday after Sunday after Sunday in the suburbs of our cities in terms of be it hospitality, where I guess we can be consumers or participants in our trade in retail, where they are important trading days and there is an enormous amount of commercial activity. The stores and outlets
5 did not close in that campaign on Easter Sunday by and large. All we saw was enhanced commercial activity. A number of retailers shared with me in the months after that, that that Easter period was actually better than Christmas and that's good. That means there are more hours there, but what we'd say is that the hours - some sort of constraint on hours after midday on Sunday or
10 after midday on Saturday, we don't see that by and large in the commercial centres across this country.

MR HARRIS: In perhaps the large centres, which you've used an example, but more through suburban shops, that sort of thing, there seems to be a
15 reasonable amount of closed businesses in suburban locations versus in maybe - I think you used an example of a large retailing centre. There are obligations on retailers in those centres to operate those hours, aren't there? When you're a large - I can't remember the big retailers, but Westfield kind of thing, you're obliged to open certain hours, so we can understand why they would be open,
20 but where people aren't obliged to open certain hours, there appear to be businesses that do not open on Sundays or part of Sundays.

We were suggesting in a report that it's likely if the price changes for labour in those, that you will get an increase in operating hours from those
25 businesses and I was interested in those ones.

MR DWYER: Again, we don't accept that there is that substantial impact, because we have officials in large centres and also regional centres who work across weekends. That's not reported to us as a union. The other thing I'd say
30 is that in terms of, yes, those businesses being required to open on those weekends, that is a common feature of leases. I accept that, but in a jurisdiction where I've spent a lot of time in New South Wales, they have legislation in place which suspends those provisions in leases on key days during the course of the year. The suspension of those provisions in those leases, we have
35 observed no impact on trading. When given the choice, those stores in those centres on what we've seen, continue to open.

MR HARRIS: Before I go on to Patricia, can I finally ask you then about this history of development of the current award arrangements where you cited a
40 2010 merging of awards and an acceptance of rates as being derived in a balanced form from a combination of sources. In our draft report, we have noted that in fact the history of the development of penalty rates on Sundays has been one where historically the intention was to deter work at all on Sundays. Going back not the last 20 years, going back 60 or 70 years, the
45 concept was to deter work; to provide a price in which it was extremely unlikely that anybody would work.

5 In our report, we have noted and provided quite a bit of statistical support for the fact that that has changed. Community attitudes in terms of - I think you mentioned yourself Sunday is now a very active trading day, whereas once upon a time not only wasn't it a very active trading day, but the price was set such as to discourage it from ever being a very active trading day. We're suggesting that social factors have altered substantially and that the price has been mis-priced because of that. In other words, it was set once as a deterrent and now we don't want to deter work. Can I get your response to that general argument?

10 **MR DWYER:** I think Higgins J in 1909 first put in place the penalty for the Sundays. My understanding, Chair, of that decision, is that there were two components to it. One was partly compensation for the work. The other was, as you say, the deterrent factor. Now, the deterrent factor was certainly a part of it, but the other part, the compensation, was seen - the framework for that was if there is the requirement to work on that day, then this is the compensation. It was always working as both compensation and deterrent. We accept now that the commercial reality is that Sunday is a key trading day in our industry, but all that has happened is that now what justifies that is more compensation rather than deterrent, but it doesn't change the actual figure as the outcome.

25 The other thing that we say has not changed is the value of Sunday. We would submit, and quite respectfully, that the value of a Sunday if I am a parent or a citizen, for a shop assistant should not be seen of lesser value than if I was a nurse. We don't accept that the service sectors should somehow be carved out and the value or the compensation for Sunday should somehow be reduced. The "disability" that a retail worker suffers by working on Sunday in terms of loss of spouse time, loss of family time, loss of time to be participating in civic functions, is no different.

30 Our communities still have their key celebrations in the course of the year; be it Father's Day, be it the local fetes or the celebrations associated with any community, by and large tend to be Sundays. We submit that Sundays remain different. The compensation component now is what is driving that rate as opposed to the deterrent, but we would say the end figure is the same.

35 **MS FOX:** Chair, if I may just add in the 2010 review and also in the 2012 case that again looked at penalty rates, the Fair Work Act does not have "deterrent" as a means to which they can apply their decision-making. The decision-making in the Fair Work Act requires them to look at the needs of small business, the needs of the low paid, productivity; a whole range of issues that they have to consider in the context of deciding a rate of pay on a penalty rate.

40 I think when you look at the way historically it may have been determined and looked at, that has now had the opportunity twice in the last five years to

be considered from a much broader context about balancing the various needs of community, employees and businesses of all sizes, small, medium and large. I think the deterrent factor may historically have been an issue, but it's not really the way it has been considered from recent years.

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MR HARRIS: We have noted though that the Fair Work Commission has made a regular statement of how much it values precedent in establishing these numbers. In other words, the case has to be made to vary from the precedent. Whilst they may not formally attribute it to the deterrent value, the fact is that the precedent was established a long time ago at a particular level. The price, in other words, was established by precedent. That precedent has been maintained even though community circumstances have changed quite significantly.

15 I don't think we would necessarily disagree with you that the Commission hasn't really adopted a view which says it's our job to look at this in the context of the communitywide arrangements. They have instead quite clearly focused on the award and its historical context, and whether anything has changed in the evidence in front of them that would make a variation to that. They seem to have been very specific about saying, "The evidence in front of us in relation to the award," rather than a broader view about how pricing might be varying within the economy.

25 **MS FOX:** But also, in 2010, they had to bring in several state awards to make that decision, which all had various differences in them, et cetera. They still had to look at the appropriate rate at that time to work out what was going to be the rate when you looked at the whole wages and conditions of that award. In making one award, you still had to look at all the various aspects and the history within each award, which they did do and still came out with the rate of 200 per cent in the retail industry.

35 **MS SCOTT:** If might just direct my question to Mr Dwyer. You made the comment - and I've seen it made a number of times by other people - why would Sundays be different for retail workers than for other workers. Can I just draw your attention to the fact that penalty rates do vary across different sectors and different awards for the same Sunday. Could you comment on the fact that penalty rates are different for different workers if Sundays are valued by people the same?

40 **MR DWYER:** Yes. I guess part of that is also the history of the industry and I would submit that in our industry the compensation/deterrent value was established at a particular rate. We say, as Ms Fox has said, in terms of the recent reviews in 2012 or the creation of the award in 2010, that when looking at this industry - and every industry has its own differences, and there are a whole lot of differences in awards other than just the penalty rates, but the total value package for people in retail in terms of take-home pay, Sunday was set at double time. I think that's what we need to be cognisant of when we're

looking at various awards. It's not to just pull out items in isolation, but rather the entire award has a value.

5 The Retail Award in value was seen and compared with other industries at the time and our Sunday penalty as part of that package was deemed to be 200 per cent, but that meant the package was then on par with the value package of awards in other industries. I think you'll find that right across industries.

10 **MS SCOTT:** I'm interested in exploring this a little bit further. In some industries people on rotating shifts and so on - so they may be working a Saturday shift and then a Monday shift and so on - and in other sectors you get a higher level of casuals and part-timers and people who are working more frequently on the weekend and less during the week, how do you react to the
15 fact the emergence of these part-time casual workers are not necessarily enjoying the sort of rolled in value of the total award, but are more specific like Jhoana's case and how that relates to Sunday penalty rates?

20 **MR DWYER:** One thing is looking at that as the cost of labour in that business, be it Jhoana or some other individual, or the hours across the week. Those rates are set so that labour put into this industry has a certain value across the week. Yes, some individuals may work on hours that attract higher penalties, but you'll have other individuals who will work a combination of
25 non-penalty hours maybe exclusively, others will have a combination of that plus some, or some may be exclusively penalty. The penalty has been associated with the hours worked, because that is the social dislocation for that particular hour and that's why that rate has been set.

30 Your reference to shifts and rolling shifts, in our industry it's always - despite attempts to try and get shifts and loadings for shifts, that was something that was always vigorously opposed by the employer associations. I guess those particular hours are given those values because of the social dislocation.

35 **MR HARRIS:** In your original submission, you suggested there was no place for individual flexibility agreements in the workplace relations system, which seems a rather sweeping proposition. Can you explain to me why you think that flexibility arrangements are not a matter that can or should be negotiated between an individual and employer?

40 **MR DWYER:** Chair, one of the issues we have in our industry, I guess comes to the bargaining power of the parties. We would cite real life experiments in this area of individual arrangements and we would cite WorkChoices as an illustration in point where we had retail and also hospitality, but in our industry where the brunt of the negative impact on Australian workplace agreements
45 was felt. I think we had over 50 per cent of those AWAs that were struck. There was no compensation for changes to the penalty structures. That's because in our industry there is, unfortunately, a lot of take it or leave it.

At the end of the day, as I've cited before, it's at the lower end of the pay spectrum. The skill entry level is quite low, but that doesn't take away from the fact that these hours are important to those people who work them, because
5 they do remain citizens and family members, et cetera, but the real life experiment of WorkChoices was extremely difficult for those individuals working in retail, which I just think underlined the power imbalance between the employee and the employer in our sector.

10 This problem of the take it or leave it - and I'm not saying it's exclusive to retail, but it is certainly a feature of our industry because of that low skill entry level. We have issues at the moment in terms of a large convenience store chain where people are being taken advantage of in a number of sites because it's a take it or leave it basis.

15 **MR HARRIS:** Take it or leave it under individual arrangements that apply today, because I'm talking about individual arrangements here. When you say take it or leave it, I sort of don't understand how that is possible under an arrangement which says in today's mechanism there is a limited amount of
20 time that an individual flexibility arrangement is available for. It can be terminated by the employee. I'm trying to work out why you are so opposed to IFAs, because there are protections available in the current arrangements. You seem to be saying almost you can't trust those protections.

25 **MR DWYER:** Chair, I would phrase it a little differently. I don't think in the real world there is the capacity for employees in our industry to utilise those protections. That comes back to the power imbalance. I can refer to individual flexibility arrangements where if you look at the words on the page, yes, the person should have the right to elect to opt into those, should have the right to
30 exit with a certain notice of time and yet companies will turn those into a form that you sign at the beginning of your employment. So the person is just - they take that, as well. There is no negotiation around that individual flexibility agreement. It is take it or leave it.

35 Now, as I said, the most extreme playing out of that was in our experience in WorkChoices, but that is a recent experience in a modern economy and in our industry it was shown quite clearly that that power imbalance led to significant losses of take-home pay for individuals working in retail.

40 **MR HARRIS:** But we are beyond WorkChoices now, so the constant referencing of WorkChoices is almost like creating a bogey, isn't it, that doesn't exist any more?

45 **MR DWYER:** I think the convenience store example today in 2015 is quite stunning for people, because you'd like to think that in 2015 we are beyond that. Again, there is a power imbalance which is being taken advantage of. With regard to WorkChoices somehow being a bogeyman, that was an

incredibly healthy economic set of circumstances and I think it has been referred to as one of the best macro-economic circumstances in a generation when WorkChoices was launched, and what we saw in retail was significant losses in take-home pay across our industry in the non-organised sector.

5

MR HARRIS: Just to finish on this topic, that says to me that your union would not trust any individual arrangement no matter what form of safeguard was put in place for it.

10

MR DWYER: Our union would say that, yes, the safeguards that are put in place need to be enforceable and the protections need to be accessible. I think every industry has its own differences, but in our industry I think there needs to be greater emphasis on a mandating of those protections.

15

MR HARRIS: Okay.

MS FOX: I think also the concept of individual contracts - and I use the term “individual”, but “individual” is a bit of a furphy, because they’re not individual. What we saw with the last experiments into AWAs or individual contracts, is that they are very much templates handed out to employees on a mass basis. They’re not a negotiation about, “I need a flexibility here and you need that one.” That’s not the reality of an individual contract. That’s not the experience that many, many, many workers had in that system.

20

So we talk about individual flexibility; it’s not. It’s a template to lower terms and conditions of awards and we saw that with the experiment into individual contracts or AWAs. The flexibility is one way, but a genuine - striking a bargain between two consenting parties with an inherent power imbalance is the problem, because that’s not a genuine bargain. I think the proposal around enterprise contracts which we may go to soon is that that’s that same concept; you’re putting out another individual agreement en masse to a number of employees seeking the same thing, so it’s not a genuine bargain about workplace flexibility or productivity.

25

30

MR HARRIS: We’ll come to enterprise contracts, because they’re a bit different, in a second. Did you want to ask anything else?

35

MS SCOTT: I am interested in the 7-eleven case. You referred to the major convenience chain. Mr Dwyer, could you make a few more comments on that. I’m interested in your views about why that situation emerged and your view about the actions or the effectiveness of the current Act and the work of the ombudsman, and so on. Why was that situation allowed to go on for so long?

40

MR DWYER: I guess we have got a number of factors at play in 7-eleven. I accept there is an interaction there of workplace law and also immigration law which creates a particularly extreme capacity for exploitation. I guess the illustration that I think is still valid in terms of our industry with low entry

skills as a requirement, people very quickly are in a position whereby it's a take it or leave it.

5 That 7-eleven case is extreme because of that interaction between migration law and workplace law, but it just reminds us that in the Workplace Relations Framework how people - and we have got some examples whereby people are not exclusively on visas and yet they have been exposed to the same problem of either having to work double the hours for those that appear on their payslips or the other prominent working of it seems to be that you get
10 paid the appropriate rate - which in fairness to the ombudsman, that appears to be correct and it would appear to us to be correct if we were to do the check - but the mechanism used by some then is that you have to pay back half of that.

15 You can only find the trail by going to people's bank accounts, where you'll see the deposit of the wages and immediately after you see a withdrawal of precisely half the amount which we are then told is handed back to the employer as cash.

20 **MR HARRIS:** That would create a serious problem with the Tax Office, I would have thought.

MS FOX: Yes.

25 **MS SCOTT:** Were you aware of these cases before the program and what action has the union been able to take to address these matters?

30 **MR DWYER:** Deputy Chair, the union became aware of the issue after the exposure recently, but we had officials across most branches that had from time to time had dropped into 7-elevens and myself had done this, and we would hand out our information kit and invite conversation on the benefits of joining the union, but almost exclusively we would get no engagement or next to no engagement.

35 It is now clear to us why, because I can see that people in that situation would not want to engage a union official and there's a whole lot of - not want to engage official from any government department, but the lid has been lifted on this now and we obviously have put a number of things in place in the last week and those examples that I've cited have come into us through a confidential helpline.
40

We have spoken to the Fair Work Ombudsman and we are going to be transparent in terms of trying to progress these matters for the individuals, but it comes back to trying to ensure that there is a level playing field in that sector of our industry because retail is a very competitive industry and companies to
45 have a completely disreputable advantages like this need to be addressed and removed from the industry.

MS SCOTT: In terms of remedies and action by the Fair Work Ombudsman, do you feel that there are any gaps that need to be addressed?

5 **MR DWYER:** I won't make direct comment on that, because I know that they've got an inquiry that's ongoing. That has come to light in terms of the conversations recently. So it might be best to make observations on gaps at the conclusion of that, but as this is playing out at the moment the real issue for the union or the Fair Work Ombudsman is people feeling confident that they can come forward. That is the real issue.

10

MS SCOTT: In terms of your helpline and people making calls to you on an anonymous basis, has that identified other chains or stores, or other franchises arrangements where this is also prevalent?

15

MR DWYER: There has been contact from a small number from another chain and we are in the process of now engaging those individuals and testing that.

20

MS SCOTT: Would you propose to take those cases to the ombudsman?

25

MR DWYER: We will be continuing to communicate with the Ombudsman. I guess an assessment will be made how best to progress those cases. Those individuals will have rights in terms of unpaid wages which we would be able to progress. There will be other features, because some franchisees have also approached us through that helpline and the web site and analysis of those cases are being made now and it may be that the Fair Work Ombudsman is better placed to proceed with those. But with the individual employees, obviously we have capacity under the existing framework to pursue underpayments.

30

MS SCOTT: Thank you.

35

MR HARRIS: Since you mentioned enterprise contracts, I wouldn't mind getting your opinion on this. So design of an enterprise contract includes a number of safeguards. On individual agreements, you lack confidence in the safeguards; you say that the individuals are unable to take advantage of those. So, logically, I am assuming your position on enterprise contracts is the same thing. "It wouldn't really matter how many safeguards, we don't like the idea." Would that be roughly the same sort of position?

40

45 **MS FOX:** Yes, I think there's a number of issues with the enterprise contracts. Concerns range from - again, they are not tailored to the individual, it's again a template that applies to a class of workers or a group of workers. They are negotiated with the employees and they are not available to be negotiated with their representatives. I guess the test that should apply is - the no-disadvantage test I think is - the reframing of the test proposes again that the employer be the administer of the test. I think you've seen the 7-eleven, that's an interesting

proposition where employers are testing themselves. I think that's got to come from an independent body who test and ensures the rigour in that enterprise contract.

5 **MR HARRIS:** There is a proposition the enterprise contract that it would be lodged with the Fair Work Commission and made available to the Fair Work Ombudsman, which is a little different with what you've seen with 7-eleven.

10 **MS FOX:** Sure, and then you've got though - but then it talks about an employee being the one who has to make a formal complaint. Now, sometimes you - - -

MR HARRIS: Or the Ombudsman can act.

15 **MS FOX:** If they've - - -

20 **MR HARRIS:** They have it. It's transparently available to them. If it looks inconsistent with their interpretation of the variations to the award, whilst still being consistent with the legal position, they can act as well. So it's another safeguard, but - I think I still hear you're uncomfortable with safeguards no matter what.

25 **MS FOX:** We would probably hope there are some more safeguards, I think. I don't think that the employer should be the one who administers that test. That test should be put at the outset to determine its validity against the award, prior to it going out to people. It doesn't refer to the fact that an employee, if the Fair Work Ombudsman said, "This doesn't look correct, we need to go back to the employer," there is no room - there doesn't appear to be any compensation paid to an employee who has been underpaid et cetera in that context. It happens after the fact, not at the outset. So you are not getting the surety around the contract itself. You are getting it post, so I think there is an issue with that.

35 **MR HARRIS:** I understand. Perhaps there wasn't any specificity around that, I can't remember. The chapter is quite a simple one, but I think the intention was that there would be compensation payable, but the idea would be to act even before that, because it's an offer to a new employee and an incumbent employee would have the choice of taking it up or not. It doesn't have to take up the enterprise contract and if the incumbent employee did take it up, they could still move back to the award after 12 months if they felt that what they thought was going to be an advantageous arrangement in practice wasn't an advantageous arrangement. So there was an incentive there to see whether this would actually be positive for incumbent employees as well as for new employees. But the model is definitely one which has the sequence of safeguards, but you are right, there are periods in which you've accepted an arrangement and you have to comply with it.

5 **MR DWYER:** Where there is a particular culture and I guess I am referring now to organised workplaces where there are HR systems in place and people - it's not just a grievance procedure on paper, but it is one that lives and breathes inside that workplace. You could imagine people activating their rights, but if I understand the chapter on enterprise contracts, these particular templates that were referred to would be lodged with Fair Work, but not subject to approval.

10 **MR HARRIS:** Not subject to approval at that point, no. Would be reviewed, effectively, but you don't have to wait for approval to go out and offer them. It means the regulator would have to act quite quickly if it saw something it thought wasn't appropriate.

15 **MR DWYER:** Yes. Well, I guess, we have reservations just in terms of the size of the industry and the workload that that would present for the various authorities and ourselves in terms of trying to police that, but the other thing that's, I think, a key part of the protections that you emphasise is this capacity to opt out. Anyone that's worked as an official in our industry for a period of time would have had endless examples of people not activating rights to opt out, simply because of that power imbalance again and what's been made quite clear to them in terms of, "Yes, this is voluntary but you need to accept this."

20
25 Now, the gentleman that appeared on the 7.30 Report in relation to the convenience store last week, he went there simply because he tried to activate an opt out provision in his workplace. This story gained some publicity, obviously, on the Monday. He reflected on what was going on in his workplace. He went to his employer and said listen this is going to get me into trouble, I now want to just work the 20 hours. My recollection is he was working 40. He said that to his employer and the response was, "Well, we don't need you tomorrow and that's when he went public. So in our industry, with all its characteristics taken into account, that capacity to activate those protections are very limited.

30
35 **MR HARRIS:** Okay, I understand your position.

40 **MS FOX:** Can I also just ask, Chair: I think the other issue of the enterprise contract is from the way that chapter is constructed is it appears that you can have an enterprise agreement that then sits - so you may have an enterprise agreement in the workplace, but you also can have an enterprise contract. So then you have an award and enterprise agreement and an enterprise contract. So you have gone to your workers, you've negotiated an arrangement that sets in place three years, four years et cetera, a term that's locked in and we all know that, and then the employer comes along and says, "But by the way, I want this one as well." So it just seems to add another layer of complexity to the whole thing.

5 **MR HARRIS:** It's possible, I mean, we outlined an option. We didn't fill in a lot of detail for deliberate reasons, primarily in order to get this kind of feedback. The model was drawn up because of this apparent gap that exists in terms of enterprise bargains not penetrating a particular group of firms, the small to medium enterprises and so if no enterprise bargain has been available for 20 years, this group of firms doesn't seem to take advantage of them, instead they live with the award.

10 So while I note your comment, and it's quite possible that if you had an enterprise agreement there would be these three levels of arrangements, normally an enterprise agreement would extinguish the award and therefore there would be two; a question of an enterprise contract applying over an enterprise agreement is not one that had turned our minds to in the design there. In other words, it wasn't written for that purpose, it was written very much around that set of firms that have otherwise, for whatever reasons, and we think some of those reasons relate to the fear of complexity of enterprise bargaining, have not moved. Thus we don't have a flexibility option for them. This is why I was asking the question earlier about individual flexibility arrangements.

20 The generality of this enquiry the question of saying how can we introduce flexibility whilst maintaining safeguards. So that why all these questions are in that form, but I note your comment about the possibility of having such an arrangement and we would probably want to get further advice on that.

25 **MS FOX:** I think the point you make too about SMEs is particularly important and it goes back to the issue of having the test after you've done contract, and I think the level of expertise, whether it be HR or industrial relations or understanding the laws around workplace rights and entitlements becomes an issue in those SMEs. They don't have the resources for those to understand fully sometimes what they should be paying in the award and the system that exists, so I think then you run into two sets of trouble there. They don't have the expertise, they put up an enterprise contract that isn't tested until potentially later on when the Fair Work Ombudsman may get a chance to look over it.

35 So I think you create a system that is actually only going to make it more complex and uncertain because you end up with employees and I know there are lots of issues about genuine ability to opt out, understanding if you can what that means for your employment relationship, have you mortally offended your employer who says, "Well, I don't want you to opt out, this works for me," and where does that leave you in terms of your employment? But it adds complexity, because for that employer who has gone into that enterprise contract, they may get a knock on the door from the Fair Work Ombudsman in 12 months' time saying, "By the way, you've underpaid and here we go again." So I think it's important to get it at the outset.

5 **MR HARRIS:** The final point I could ask you on this, it has been put to us but informally, no-one will write down a formal submission that there are lots of such arrangements already out there, they're just not documented. In other words, that individual employers do vary from the award by informal agreement amongst them and their employees. Do you see no value in transparency from an enterprise contract in such a circumstance?

10 **MR DWYER:** Sir, I would say that the - and I'm obviously not aware of what type of changes these informal arrangements arrived at, but I guess one thing that we're conscious of in our industry, because it is so competitive is to have a legitimate level playing field for businesses. So if those informal arrangements are taking place, I would certainly have some concern if they were going to value and undercutting what is the level playing field, but I don't know - - -

15 **MR HARRIS:** So this is not, in your view, a common occurrence in the sorts of industries that you are involved in that small employers do actually just come to informal arrangements with people? I would have thought, in fact, it seems to be - perhaps I've been misled, but informal discussion suggests that it is actually relatively commonplace for the littlest employers - the example that was put to us was, when this enquiry was announced, there was a talk back radio program where some employers rang in and said, "No, I don't use the award, I have my own arrangements with my staff."

20 **MR DWYER:** If that's over and above the award, that's fine.

MR HARRIS: Well, that's the point. It's not transparent. I was asking about transparency. An enterprise contract would be transparent. These arrangements, presumably, are not transparent.

30 **MR DWYER:** Coming to our experience with smaller employers, we have engaged the players in our industry in a number of sectors. I can think of enterprise agreements for franchise supermarket operations which were primarily small businesses, but that was entered into and negotiated and we arrived at an agreement that obviously met the no-disadvantage test at the time or in today's terms, the BOOT, and those were quite genuine negotiations with those franchisees in terms of the nature of their business.

40 Now, that can be replicated in a whole range of sectors in our industry. The idea though that you get down to some sort of multitude of individual arrangements, that's not our experience, it's really this example that Ms Fox has gone to in terms of the templates, because businesses want something that's simple and is consistent, but if you're talking about micro businesses, I'm not in a position to comment.

45 **MR HARRIS:** No, that's fine. I am also conscious of time and to keep everybody to it, because we've got a chock-a-block program today.

- 5 **MS SCOTT:** Sorry, just returning to penalty rates for a minute, enterprise bargaining arrangements where people have gone for rolled-in rates and so on, is it correct that people who may - casuals that actually may be working on - well, not casuals, I'll take it as permanent part-time workers that might be working on Sundays, that the Sunday rate that they may get will not necessarily reflect the penalty rate in the award, because of the rolled-in value that then applies.
- 10 **MR DWYER:** Deputy Chair, yes, again it's the total value.
- MS SCOTT:** Yes.
- 15 **MR DWYER:** So the take-home pay and I guess the other dynamic factor in our industry has been the evolution of multiple shifts. When you move to part-time, the idea of a casual who might just work one shift, for example on that Sunday, we're seeing in a large swathe of the industry employers moving more to permanency which has been a conversation between us and employer groups for many years and we certainly endorse a move to permanency and
- 20 more meaningful jobs.
- But what's happened then is that you will have people who are working, not just one shift, but often some companies have you have to be engaged for a minimum of three shifts. Now, the example you give on the Sunday, across
- 25 three shifts with the rolled-in rate, when we are looking at testing these in indicative rosters, the person's take-home pay across those three shifts would exceed their take-home pay under the award with that higher Sunday penalty and there's a whole series of machinations with rosters in relation to that.
- 30 **MS SCOTT:** Thank you very much for that clarification.
- MR DWYER:** Could I ask a question?
- MR HARRIS:** Final comment, yes.
- 35 **MR DWYER:** I am not sure whether in previous hearings a document on penalty rates in rural Australia has been tabled and, if it hasn't, I would like to seek leave to table and leave it with the Commission.
- 40 **MR HARRIS:** Sure, absolutely. I don't think it has been. I'm not personally certain and I know we did a lot of research, so if it is an extant document we probably have noted it, but nevertheless feel free to table it.
- 45 **MR DWYER:** So if I could table the McKell Institute report of who loses when penalty rates are cut and it really is a study using ABS statistics of the impact of removing penalty rates, either fully or partially in regional Australia and the economic impact. There are some variables that are called out, in terms

of what is the degree of outside ownership in that market and also the size of the reduction in penalty rates, because the modelling that's used is a partial reduction and also a total reduction.

5 But it's a real equity issue for us. We're a large union in regional Australia. I think we are the largest, but rural employees in our industry already get paid seven per cent less than their city counterparts and what this study shows is that that pay and equity would be further expanded if there was to be a reduction in penalty rates and it's also obviously a loss of disposable
10 income in those regional economies as the money goes back to head offices in Sydney, Brisbane and Melbourne.

MR HARRIS: Sure. Presumably that date is from before the draft report.

15 **MR DWYER:** This research was done and finalised in April 2015.

MR HARRIS: Right, so before the draft report.

MS SCOTT: I think we've had a couple of other presenters refer to it
20 yesterday.

MR HARRIS: I think the numbers have been quoted out of that in some presentations, but nevertheless - no, by all means, the document - thank you very much.
25

MS SCOTT: Thank you.

MR HARRIS: I think we've got AiG next. Once you're all settled, if you guys could identify yourselves for the record.
30

MR WILLOX: Certainly, Chairman. My name is Innes Willox, I am the Chief Executive of the Australian Industry Group. On my left I have Dr Peter Burn, who is the head of Influence and Policy in the Australian Industry Group, and on my right is - sorry, you two were sitting there a second
35 ago and you've swapped behind my back. This is Stephen Smith, the Director of Workplace Relations Policy at Ai Group, and this is Dr Peter Burn, the head of Influence and Policy.

MR HARRIS: Thank you. I believe firmly that everybody in the world except
40 for me should wear a name tag. All right. Opening comments.

MR WILLOX: Thank you. I will make an opening statement on behalf of the Australian Industry Group and then obviously throw it open to question. Chair and Commissioner, thank you very much for the opportunity to give
45 evidence today and to further discuss your draft report, which was handed down recently ahead of the final report be produced later this year.

We believe the Productivity Commission's draft report has laid the groundwork for a very important public debate about the shape of Australia's workplace relations system and the changes that are needed to remove barriers to productivity, improvement in competitiveness and investment. While Ai Group is not proposing in our submissions or our evidence that the Fair Work Act and the modern award system be scrapped, some major changes are nonetheless needed. Australia's current workplace relations system is not delivering the adaptability that employers and employees need.

Ai Group maintains that more flexible workplace relations arrangements are fundamental to the improved productivity that is so important to our national competitiveness and our capacity to further improve Australia's living standards. In recent years the emphasis on improving productivity performance has lifted as productivity outcomes across a wide range of industries have trended down and particularly in the face of demographic factors, the relative importance of improved productivity as a source of growth has risen.

While the Commission has pointed out that both from a historical perspective and in terms of aggregate measures, including working time lost and economy-wide and sectoral-wide outcomes, Australia's workplace relations arrangements are far from dysfunctional, there are substantial improvements that can and should be made to enable more productive performance in individual businesses.

This is certainly the view from the coalface where, as we pointed out in our initial submission, business owners and managers participating in the world economic global competitiveness surveys consistently rank restrictive labour regulations as leading the list of most problematic factors for doing business in Australia. Ai Group commenced the Commission for opening up the debate about the relative merits of income support arrangements, including possible earned income tax credits and adjustments to minimum wages in achieving some of the objectives sought from Australia's minimum wage arrangements.

For many years Ai Group has argued that using changes to minimum wages as a means of improving household income distribution and improving living standards for the low paid is likely to be of considerably higher social and economic costs than fine-tuning income support arrangements. While income support arrangements had budgetary costs and their financing would require higher taxation and an associated increase in dead weight losses, using minimum wages to achieve these ends has a number of important drawbacks.

These include the degree to which increases in minimum wages are dispersed across the household income distribution, the wedge between the additional costs imposed on employers due to extra costs such as payroll tax, workers compensation premiums and superannuation payments and the actual

change in disposable incomes of low-income people due to additional income tax paid and a reduction in income support entitlements and the risks of adverse impacts in terms of unemployment and under employment on low income earners.

5

We urge the Commission to give close consideration to these important issues. On the report itself, we believe there are some very good proposed reforms in the draft report, including reducing Sunday penalty rates in the retail, hospitality and some other industries. We assume that this would include the fast food section of the retail industry. Discontinuing the four-yearly reviews of awards, protecting employers from increase costs where state governments decide to proclaim additional public holidays such as has occurred recently in Victoria, outlawing clauses and enterprise agreements that impose restrictions on engagement of contractors, labour-hire and casuals, introducing a new form of enterprise agreement called the enterprise contract, reducing the emphasis on procedural issues in unfair dismissal matters and imposing a six-month compensation cap on general protection matters.

20 There are some issues of detail that need to be worked through with each of these proposals, but conceptually we believe that the proposals have significant merit. There are other parts of the draft report which we believe deal with important areas where changes are necessary but we believe that significant amendments are needed to the Productivity Commission's draft proposals, including on areas such long service leave and greenfields agreements.

Further parts of the draft report contain proposal that we have concerns about, given various practical and other implications of the draft report recommendations. These include the proposed restructuring of the Fair Work Commission into two divisions and the changes to section 423 of the Fair Work Act regarding industrial action which threatens to significantly harm the bargaining parties

35 There are other proposals in the draft report that we do not support, including disturbing the existing requirements that protected action ballots specify the type of industrial action, and that industrial action must be taken within 30 days of the declaration of the ballot results, changes around relaxing the current four-hour minimum deduction period when unlawful industrial action is taken, and abolishing the small business fair dismissal code.

40

Finally, there are a number of areas where we continue to urge the Productivity Commission to recommend more substantial changes than those proposed in the draft report. These include tightening the general protection is and implementing additional measures to discourage speculative claims, fixing the transfer of business laws which are operating as a major barrier to business restructuring and outsourcing, tightening industrial action rights so that industrial action becomes more of a last resort during bargaining, outlawing

45

industry-wide pattern bargaining and tightening union right of entry by reversing the changes that the former Labor government implemented from 1 January 2014.

5 We are happy to discuss any of these issues today and endeavour to answer any questions that the Commission may have. Thank you for the opportunity to appear.

10 **MR HARRIS:** Can I just get - I missed one in the last bit. Tighten general protections, transfer of business, strikes as a last resort, something and then right of entry.

MR WILLOX: Outlawing industry-wide pattern bargaining.

15 **MR HARRIS:** Pattern bargaining, okay. We might, if it's okay, work backwards from the ones where you want much more progress, that last set, and see how far we can get in the hour or so that we've got available to us.

20 **MR WILLOX:** Not a problem.

25 **MR HARRIS:** Tightening general protections. There's a lot of phraseology, if I can put it that way, in the original submissions to us around we need to do more on general protections. We found it quite hard to come to specifics other than the ones we did specify; in other words, where we could clearly identify a cause and a change, we put it in the draft report. We understand though that the general protections are still an area of great frustration, but we are searching for specificity in these hearings and in subsequent submissions that might be given to us. "Take this away because of this reason" kind of specificity. Have you got anything today that you can put on the record in relation to that?

30 **MR WILLOX:** Mr Smith is champing at the bit.

35 **MR SMITH:** Yes. One area that would fit very neatly into that category is the list of exclusions relating to general protections matters, relating to termination of employment. If you track back through the history of those laws the Keating government implemented unlawful termination laws that were operative from, I think it was 1 January '94 the actual operative date but they had a list of exclusions that were very similar to the exclusions in the unfair dismissal laws and they stayed there all the way through until the general
40 protections came in and replaced those laws. These are things like an exclusion for high income earners, casuals, fixed termers, fixed task people et cetera. It just looks as though in the Fair Work Act that that section is completely missing, when what that effectively does is that there's a whole host of people who shouldn't have access to this type of remedy that don't have any access
45 under the unfair dismissal laws but just take the action under the general protections because they're excluded under the unfair dismissal laws.

5 It's the similar type of issue to the one that you have identified with the cap on compensation of six months. It's another one very much in the same category. Beyond that our concerns go to the significant breadth of the concept of adverse action because of the possession of a workplace right and then you have identified in your report the range of matters relating to complaints but there's a lot of other issues which we have covered to some extent in our earlier submission.

10 **MR HARRIS:** But am I right then in thinking that when you want to tighten general protections you really want to wind them back to the sole legitimate case being where a person is affected because of their participation or non-participation in industrial behaviour kind of thing? In other words, all of these additional apparent rights are you really saying the best way to deal with that is to simply have one kind of protection and all of the other residual ones included don't exist any more? Or are you prepared to allow for some of them to be incorporated under general protections?

20 **MR SMITH:** The general protections are an amalgamation of the freedom of association laws, the unlawful termination laws, the sham contracting provisions that were there in the previous versions of legislation and they have been cobbled together and called the "general protections," been doing that; the breadth of them has been dramatically expanded and it operates as a major barrier to employers doing anything because regardless of what an employer might wish to do there seems to be an argument that that is taking adverse action against an individual. It's so broad. It really needs to be wound back and the best way of doing that is to really look at the former laws we believe and what they were intended to cover.

30 **MR HARRIS:** Okay. Guys, I was trying to get you to suggest that perhaps all of these - what I call the non-coverage and unfair dismissal - I was trying to find out whether you were really saying, "Look, we just don't believe any of that should exist under 'general protections'". It should qualify under unfair dismissal or not qualify and that's the end of it. And that the general protections should really be about this - what I would call the participation or non-participation in industrial action."

40 **MR SMITH:** Well, the unlawful termination laws were there from - '93 and '94 - right up to WorkChoices and there were almost no claims during that entire period because claims had to be filed in the court for a start and people had to be serious about pursuing those claims. Now, there's a process where someone just needs to pay a very minimal filing fee, it goes to the Commission, the lawyers get involved and what our members tell us is the extent of "go-away" money with general protections matters far exceeds the unfair dismissal matters because one issue is the non-compensation cap. Another issue tends to be lawyers, not unions and employer associations involved.

MR HARRIS: Well, the genie may be out of the bottle now. Something that wasn't used for 10 or 15 years is now perhaps much more clearly recognised as an opportunity.

5 **MR SMITH:** It can be addressed though, being the way that we have suggested, including by looking at the issue of speculative claims. What we have proposed is that form of provision which would impose a civil penalty on a lawyer or adviser that encourages speculative claims. That will be a significant deterrent, because any lawyer when they apply for their practising
10 certificate each year, they will have to identify on there whether they have had any penalties imposed on them. And little things - but important things like that will have a major impact we believe.

15 **MR HARRIS:** Let's do tag in this.

MS SCOTT: Yes. All right.

MR HARRIS: You have a go and then I'll come back with another one.

20 **MS SCOTT:** People are pushed back on the recommendation that we have this cap similar to unfair dismissals for the adverse actions where it relates to effectively termination. But you're suggesting other arrangements effectively replacing the adverse action provisions with earlier provisions. If that wasn't a viable proposition, what is your view on the caps that we have suggested and
25 the changes we have suggested regarding adverse actions. So, if you didn't get your first best option what do you consider - what's your views on our second best options?

30 **MR SMITH:** Well, the cap was an issue that we pushed strongly in our submission. We assume that what you mean is that cap for general protections matters relating to termination of employment.

MS SCOTT: Yes.

35 **MR SMITH:** To us it's a no-brainer. It was there for all those years. It needs to be there for the same reason that the other exemptions need to be there, that if it's not there it just gives this massive incentive for people to pursue a claim under the general protections, rather than where they should be pursuing most of these claims under the unfair dismissal laws. So we cannot see any validity
40 at all to any argument that that six-month cap doesn't belong there. It was there for all those years.

MS SCOTT: Okay. And you'll be able to specify in your submission to us about how you define speculative claims because we're getting a lot of - we're
45 getting commentary on - vexatious claims - the definitions around that but you think there is a speculative claim definition that we can rely on?

MR SMITH: Well, some of the earlier laws were good in this area - the issue. Vexatious is a very difficult test to meet. You know there are decisions coming through, including Full Bench decision just in the last few days about the meaning of “vexatious” but there were some other concepts. You know the
5 idea that if the system stays within an involvement for the Commission, then the Commission after the conciliation should issue a certificate which expresses a view about prospects of success.

There is various other things that could be done to deter speculative
10 claims, including the issue that you’ve raised about the filing fee. The filing fee of such a low amount, in our view, is far too low. It could be significantly higher with an ability to waiver for genuine hardship.

MS SCOTT: Thank you.
15

MR HARRIS: Transfer of business. So there is a apparently a proposition. Sorry, there is actually as I understand it a mechanism in the Fair Work Act which will enable you to do transfer of business by voluntary agreement and, in other words, where two businesses merge that the arriving employees could
20 be made subject to the firm that’s doing the takeover - their award arrangements, as long as it’s by consent or by agreement.

Now, I don’t know whether that is a widely used provision. It doesn’t appear to be a widely used provision and, generally speaking it appears that
25 we’re looking for a different kind of arrangement here in terms of you’re saying you’re looking for something stronger than that sort of arrangement. So do you know the history of this? Is there a - - -

MR SMITH: Yes. We support your recommendation and that
30 recommendation is actually in the Fair Work Amendment Bill, 2014, but it’s just one little issue amongst a vast array of issues. Now, the history to this matter is around ‘99 and 2000, there was a lot of disputation about transmission of business issues. We then had a series of High Court decisions. The PP Consultant’s decision, the Gribbles decision and others, which clarified the
35 case law and a number of key tests came out of those cases, including the character of the business test which, perhaps the best example is a Federal Court decision that flowed from PP Consultants about Stellar Call Centres. It was a company that was providing call centre services on a contract basis to Telstra. So what the court decided is that the character of Stellar’s business is
40 completely different to the character of Telstra’s business and therefore the instruments didn’t transmit.

So all of that was sorted out over a series of years. We then had
45 WorkChoices that came along which implemented a range of other provisions like where instruments transmitted, they only transmitted for a short period, and in our view there was massive over-reaction to addressing what the Labor Government saw were problems with that.

5 The transfer of business provisions have caused massive problems, and
they're lose, lose, lose because companies that take over outsourced work will
bend over backwards to avoid hiring anyone that was employed by the client.
10 The client often will want those employees to go across because otherwise
they've got to pay redundancy and the employees want the jobs. And this idea
that you can go to the Commission and get an order stopping the instruments
transferring, that then invites unions into the process and most companies are
not going to be interested in doing that. There were very good laws in place
15 for a decade that resolved all these issues and all we're asking for are those key
principles to be put back.

15 **MR HARRIS:** All right. I understand that. Strikes as a last resort. How
would you propose to limit someone's ability? This came up in Bendigo in
our hearings this time. We're talking about the Public Transport disputes here
in Melbourne at the time. How would you propose to be able to limit that and
still allow employees to exercise their most substantial industrial roles?

20 **MR SMITH:** The issue of the test that apply when a protection action ballot
is applied for is the obvious place to limit that and there are a range of good
measures in that bill that's before parliament dealing with the bargaining issues
which, effectively, will put a higher bar there on this concept of genuinely
trying to reach agreement by codifying what those requirements are. If there
was to be a specific last resort test there's various ways that it could be - - -
25

25 **MR HARRIS:** But hang on there. Can I just clarify that first half? It sounds
like you're saying before a union can get an agreement to exercise industrial
action they should have a higher test imposed on them than today is imposed
on them to see whether they are negotiating in good faith. Is that what you're
30 saying?

35 **MR SMITH:** The terminology is genuinely try to reach agreement which is
aligned with good faith bargaining but they've been held to be slightly different
- different things.

35 **MR HARRIS:** Okay. Sorry.

40 **MR SMITH:** But that bill that's before Parliament codifies that concept by
saying there needs to be a number of meetings between the parties, the claims
of each party need to be outlined, discussed, so there's a range of criteria there
that would need to be met. At the moment a union can apply for a protected
action ballot and get that ballot order very quickly in the bargaining process
and you have addressed in your draft recommendations that - that one issue
about the majority support determinations which is a very important issue.
45

45 **MR HARRIS:** Yes.

MR SMITH: Now this whole thing about the bar is a very important one.

5 **MR HARRIS:** So the proposition as were being advanced previously to us was you shouldn't be able to undertake protected action until you have at least met at the table. So without going into legislation that's currently in front of Parliament which we have - I mean - by all means if you're saying, "I endorse legislation in front of Parliament" - fine, I note that. But I'm trying to understand the real test you're applying here. How much more onerous a test do you think is necessary?

10 **MR SMITH:** Well, the idea of just meeting it's never been that lax. Here in Victoria we had a massive battle around 2000 with what the unions called at that stage, Campaign 2000, and they organised a big strike across the whole of the Victorian manufacturing industry and there was a case that we pursued with that. And Justice Munro decided in that case that this idea of genuinely trying to reach agreement means - not meeting once, meeting multiple times - but there's never - that surely is not an appropriate test. Just because you've met a couple of times. There was another - - -

20 **MR HARRIS:** It just doesn't seem terribly objective to me because you can meet many times with no intention of ever agreeing. So we can have standards which are impractical and we're loathe to recommend standards which we can view as being impractical.

25 **MR WILLOX:** But at the same token if there is no meeting or only one meeting, that can also be manipulated.

MR HARRIS: Correct. I'm not disagreeing with you.

30 **MR WILLOX:** Yes.

MR HARRIS: I'm just trying to - I guess our purpose in these hearings is going to be try and drag much more specificity out of it if we are to address an issue that's as I said at the outset. That's really what I'm trying to do here. And I'm not even sure that setting additional threshold is going to satisfy the real intent here. The real intent here of saying that strikes as a last resort is - it's something more judgmental I think, than a set of tests.

40 **MR WILLOX:** May be we could flick it round the other way and not have strikes as a first resort. And that's what we're trying to mitigate against here.

45 **MR HARRIS:** That's clearly a different kind of thinking and plausible so that's actually quite well worth noting because otherwise you just don't want to get into the position where we've simply added to black letter law more and more box ticking. There's a lot of demand obviously for "deregulation" and yet we will appear always to be adding regulation if we had to go down this path, yet it is a highly regulated area and there are only two choices. You can

5 take regulation away or you can add to it. So I'm trying to get to the point where we're not - where we're clear enough on what we can do here - if the case is justified. That's the second thing to look at. But first you have to decide what is the proposition. I am trying to get a bit more granularity if you like around what is the proposition.

MR WILLOX: Yes.

10 **MR SMITH:** Well, some box ticking is important here. Like there was a concept that was there prior to a recent decision in a case involving Esso which was if you are pursuing any claim that is an unlawful term, or not a permitted matter, then there's no right to take industrial action. So one of the criteria to get a ballot order should be that the claims that you're pursuing are all permitted matters. There's no unlawful terms. That should be something that
15 should be assessed at the time that the application is made and then beyond that, we think this idea of a requirement to genuinely try to reach agreement - it's been there since the Keating legislation again - but codifying it in the way that the bill does. The bill really comes out of a decision called Total Marine Services which did codify the requirement to genuinely try to reach agreement.
20 So putting in some criteria there that's not just about, "Have you met once or twice?" but "Have you actually discussed all the claims?" et cetera. At least is an attempt to put some specificity there where at the moment it's far too easy to get that ballot order far too early in the process.

25 **MR HARRIS:** Do you want to pursue anything more in these?

MS SCOTT: No.

30 **MR HARRIS:** Pattern bargains. So the reason we raise pattern bargains as we did is because they appear to be not uncommon amongst many parties without giving them the term that would instantly make them ill-advised or if not illegal.

35 **MR WILLOX:** Template agreement.

MR HARRIS: Template agreements. And so I think we were trying to get to a point where we could actually say, "Look, these things are actually pretty common. It shouldn't really be a problem unless it involves the misuse of a substantial imbalance in power." Now that might be considered to be wildly
40 optimistic but that was the reason it was put in that form. Do you think we should go further but further in terms of burrowing an outline, that they are really too dangerous - - -

45 **MR WILLOX:** We see them as almost as a "cancer" in the industrial relations system because of the pressure it puts on some employers to sign up or then to be excluded and the consequences that they then face as a result of that, when an employee hasn't had a say in the agreement that's being reached on his

behalf or her behalf. That to us is a problem because they're excluding them from any say in the industrial arrangement that's been made. It's just a situation - - -

5 **MS SCOTT:** Yes. I'm sorry, I'm going to interrupt. Innes, people are having trouble hearing, I think. So any chance that you could raise your voice and Peter, I think the same complaint is being made about you.

10 **MR HARRIS:** Me?

MS SCOTT: Yes. I know.

MR WILLOX: Shall we shout it out?

15 **MR HARRIS:** I'm normally - I'm more one of the noisy buggers in the room.

MS SCOTT: I'm sorry. It's just because the microphones give everyone the false impression that they're being amplified.

20 **MR HARRIS:** Yes. They're actually being - yes, sorry.

MS SCOTT: Where in fact, they're just for recording purposes. So I'm sorry about that.

25 **MR WILLOX:** That's all right.

MR HARRIS: Okay. Can I ask you then on patterned bargains, I think organisations like your own do create rough models of what would be a reasonable agreement. No?

30 **MR WILLOX:** Absolutely not.

MR HARRIS: You would never do that?

35 **MR SMITH:** One thing your report rightly does it identifies our argument about projects. If a head contractor on a construction project wants to create some framework for the operation of that project then as long as there's no coercion then that project could be seen as an enterprise and there'll be site specific issues. But what we think is completely wrong is for anyone to
40 develop a pattern agreement for an industry and it doesn't matter whether that's the construction industry, or any retail industry - any industry. It is by its nature anti-competitive.

45 We put our guidelines to our members about how they might draft an agreement. If you're going to look at drafting an agreement you need to think about having an application clause and you need to think about this and that, but what we don't say is, "Well, here is your application clause. And here is

how much you should pay.” It’s a completely different thing. The best analysis probably of all of that is the Cole Royal Commission where after about two years of a lot of focus on it, Commissioner Cole said patterned bargaining should be outlawed. It’s just - - -

5

MR HARRIS: We understand that but if the sourcing of it was from a particular sector which it was the question is what about all the other sectors? Aren’t they assisted by having a - sort of like what I might call - a general understanding kind of agreement? Now, I don’t disagree with your point about competitiveness between firms and I think that’s quite a powerful commentary. This question is one between what’s efficient for a set of firms to understand, what are reasonable arrangements in an enterprise bargain versus something which might actually embed a constancy of conditions across an industry so there’s no competitiveness between firms. So we do understand that. It’s just that we were looking to say, is there an efficiency tool here that’s actually being barred by legislation? And I’m going to take your proposition to be “No.”

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MR WILLOX: No.

MR HARRIS: No, there is no efficiency tool here. It’s far more a problem because it may be imposed by use of industrial power.

20

MR WILLOX: Yes.

MR SMITH: Ai Group has been at the forefront of this debate for many years. After the Cole Royal Commission, we argued that the evil of patterned bargaining is industrial action in pursuit of patterned bargaining, not pattern agreements per se. And so we’ve now got very good patterned bargaining laws that are there and are still in the Fair Work Acts. They were in the WorkChoices legislation. They come virtually straight out of Ai Group’s submissions but they are never used because it’s not about industrial action in pursuit of patterned agreements. It’s about the patterned agreements that parties do and then which are imposed across entire industries and that is a major problem.

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35

MR HARRIS: Do you want to move to other topics in the submission?

MS SCOTT: Unfair dismissals. I understand that you don’t support the recommendation we made of abolition of the small business fair dismissal code. We were advancing that in our draft report on the basis that we were strengthening other elements of unfair dismissal checks and balances. Can I just get your commentary or explanation on that, why you favour retention of the code, because we saw it on the basis of some of the evidence presented and individual comments of Commissioners that it seemed to have rather illusory value for employers.

40
45

MR SMITH: Yes, it's not our experience. The fair dismissal code is relatively easily complied with in that a small business person has to put the allegations to the employee, the person has an opportunity to respond. And if the fair dismissal code is complied with it operates as a complete exemption from the unfair dismissal laws - right from the opening part of the laws. We haven't
5 had a good look at all the stats but it seems to us most unfair dismissal matters against small businesses that are pursued most of them do not succeed on the basis of that fair dismissal code because it's achieving its intent.

10 If you get rid of that there'll be even less comfort to small business people with this area and it is an area that the Labour government were obviously concerned about by implementing that small business fair dismissal code. We just don't see any merit in getting rid of it.

15 **MR HARRIS:** We have found examples where small businesses do believe they complied with the code and yet there was a failure to follow procedure. I mean - so that's the deception - the potential deception here. And just following the code is not sufficient on its own, apparently, according to some decisions that have been taken by the Commission. So I understand the
20 impression can be left - "I followed the code and I am therefore safe. It's not in your interest as putting an unfair dismissal claim." I understand that that impression could be left but the practice doesn't appear to be - well, it's certainly not bullet-proof.

25 **MR SMITH:** The other recommendation that is there around reducing the emphasis on procedural issues - we support conceptually and there are obviously some details that would have to be worked through with that. But the idea - if there's problems with the wording of the fair dismissal code then that should be looked at but it is relatively short and relatively easily complied
30 with. So if there is to be anything done then we think perhaps reviewing the terms of the code, rather than getting rid of it is the way to go.

MS SCOTT: May be this is a similar matter. We did suggest the change on the four-hour limit actually as a means to address employer concerns but I
35 understand you don't think that will actually achieve that intent and actually might have adverse consequences. I guess in your submission if you could explain how we got our reasonings so terribly wrong that would be very useful.

40 **MR SMITH:** Is this the unlawful industrial action for our issue?

MS SCOTT: Yes, this is the idea that - the deduction.

MR HARRIS: The minimum deduction of pay is four hours.

45 **MS SCOTT:** Minimum pay of four hours.

MR HARRIS: For a dispute.

MS SCOTT: But, in fact, it was only a two-minute dispute and then there's a consequence.

5 **MR SMITH:** Yes. Well, we've had about 12 meetings of members around the country. And I've been to every one of those meetings in places like Bendigo, Ballarat, Newcastle, and the capital cities - and to talk about your draft report, and it's been a very interesting exercise. At every meeting employers have strongly opposed that recommendation because those that
10 actually apply it say that the fact that it is hard and fast it stops the lunch-time union meeting going over beyond the lunch break. And even if you make it another 15 minutes it will mean that every union meeting then becomes 15 minutes longer and the employer is coerced to pay for that 15 minutes. So they all had a strong view that it has to stay the way it is.

15 **MR HARRIS:** I think we had some evidence that it was being tactically used for very, very short periods of disputation and as a consequence of that there might be a need to change the law but I understand that there's also the impression that says you've got a very powerful tool here to stop something
20 running on too long.

MR WILLOX: Being dragged on.

MR HARRIS: Yes.

25 **MR WILLOX:** It's being dragged on.

MR HARRIS: It's being dragged on. Yes.

30 **MR SMITH:** Yes. And it was, of course, implemented during the - in that WorkChoices legislation but the Labour government decided to keep it in the Fair Work Act because there was a big debate about it at the time and it does have a significant role to play and we think it's important that it stay the way it is.

35 **MR HARRIS:** I understand that. Section 423 you referred to in dark tones - I think in this - - -

40 **MR WILLOX:** The changes to section 423 of the Fair Work Act regarding industrial action which threatens to significantly harm the bargaining parties.

MR HARRIS: Right.

MR WILLOX: This is - yes.

45 **MR HARRIS:** Can you explain your problem with section 423 changes to me?

5 **MR SMITH:** This idea was put into the legislation by the Labor government and we opposed it because we were very worried about compulsory arbitration and access to compulsory arbitration. Bargaining is not easy. 424 is a very important provision about significant harm to the economy and the welfare of the population, but the idea of harm of the enterprise, we were never enthusiastic about. Originally when 423 was being developed by the former Labor government, the idea was that it as harm to either party and we made lengthy, detailed and vigorously argued submissions saying, “That is a completely unworkable proposition, because employees will walk out on strike, a week later they will say they can’t pay their mortgage and car payments and they will have instant access to arbitration.”

15 So the reason why it says both is because of our strong representations and what we’ve said in our note ahead of this hearing is that if that was to be disturbed in any way it would have to be the case that you couldn’t harm yourself to get access to arbitration under 423. The issue about 424 is a completely different proposition because the interests of the bargaining parties under that provision are always going to be secondary to the interests of the community, but with 423, the proposal is to move away from both. Employees cannot be permitted to take industrial action and get immediate access to arbitration.

25 **MR HARRIS:** I think the general proposition here has been in advice to us that, “Find all the mechanisms you can to limit access to arbitration,” that is not necessarily the - given that the bargaining between the firm and the firm’s workforce is a preferred flexibility mechanism, the more that you are able to access arbitration, the worse off that system can be. You’re saying though that any disturbance to 423 - on balance, it’s preferable to leave it where it is. You are still happy with that option to be open, that you could create an arbitrated outcome by that session.

35 **MR SMITH:** There is certainly support from some employers for access to the termination of the right to take industrial action and access to arbitration under 423, but if it was to be amended in the way that is set out in your draft report, as we’ve said we don’t think that’s workable and we assume that - there is that option that we’ve talked about of saying it could be either, but you can’t harm yourself.

40 **MR HARRIS:** But what about eliminated entirely?

45 **MR SMITH:** We were never enthusiastic about it and we did oppose it, but I think there would be a lot of employers who would like the access to that. You know, to use there are other ways of limiting damaging industrial action, cooling off periods, and there are other provisions in the Act there that have work to do. 423 has been almost never used, because the bar is extremely high

and we can accept some blame or credit for the fact that it is extremely high, because we were the main employer party involved in the debate.

5 **MR HARRIS:** Okay. Long service leave. Portable long service leave. So I thought we had looked at this and expressed fear, but you've interpreted that we have or haven't created a problem for you.

MR WILLOX: If you've expressed fear, that's good.

10 **MR SMITH:** What we will do in our submission is give you a copy of a major piece of work we have done for this Victorian inquiry on portable long service leave where we have done a lot of analysis about the cost, but leaving aside portable long service leave, there are a number of concerns that we've got about the recommendations.

15 One is, yes, we accept that the provisions in the National Employment Standards are complicated, but for industries like the metal industry, the food manufacturing industry, the vehicle industry, there has been nationally consistent long service leave provisions since the 1950s. If at the stroke of pen
20 the NES provisions go, that will mean employers with South Australian operations pay 50 per cent more for long service leave costs and for what gains?

25 So the limited national arrangements that are there in our view need to stay. Also the main way that a company at the moment can get nationally consistent provisions or should be able to is through an enterprise agreement, and the option that was taken away with the Fair Work Act by giving a lot more powers back to the states so that you can't readily override state long service leave laws, we think that needs to be reversed and then beyond that,
30 there are lots of micro issues in the state laws that really need to be harmonised. Issues like how many periods you can break long service leave up into, the definition of "ordinary pay", whether you can cash out; all of these things vary from state to state and they cause major problems for national companies.

35 **MR HARRIS:** Well, that's the last bit that I think we were unconvinced by, "they cause major problems", because the fear here is you do amend the legislation you might create unintended consequences. You referred, for example, to some 1950s periods for arrangements and I am presuming they are preserved in the NES via the transitional arrangements and you're suggesting
40 that if we eliminate that we eliminate access to those things. Is that right?

MR SMITH: Yes, the metal industry had long service leave provisions that came out of High Court in the '50s and they still operate today under the NES provisions.

45 **MR HARRIS:** But under the transitional provisions of the NES.

MR SMITH: Yes.

MR HARRIS: So you are saying keep “transitional” because it’s got some value. Is that right?

5

MR SMITH: Yes. We would, ideally, like to have a national standard, but if we can’t have that - - -

10 **MR HARRIS:** Yes, but I’m trying to get to that. The second issue then is are there really major costs here? Because once you start making changes to long service leave arrangements, because of this variation across the states you will either have to - there are three courses; everybody goes up to the highest common denominator, everyone goes to the lowest common denominator or you pick some funny number in the middle, which is never going to satisfy
15 everybody. Trying to get a common agreement on that, we write up the history in the report and it looks like it’s not very positive, the history of trying to deal with this.

20 **MR WILLOX:** The other option is to leave things as they are and then start again.

MR HARRIS: That’s right. I think on balance you would probably leave it alone if you couldn’t do better. This is this question about all these multiple different state arrangements, can you actually do better than that? Given that
25 the states themselves will have to do the amending of the legislation.

MR SMITH: What it really needs is someone to put a viable proposition forward that people can sign on to. Now, the issue of accrual is a tricky one, because obviously South Australian and the Northern Territory have the 13-
30 weeks after 10 years of service and others with the 13-weeks after 15 and then there are different pro rata cut-in points, but leaving aside the accrual, take cashing out of long service leave, you can do it in South Australia, WA, in Queensland you’ve got to apply to the Commission to do it, in New South Wales and Victoria you can’t do it.

35

People don’t tend to take their long service leave. A lot of people would like to cash it out and go and pay it off their mortgage or ideally put it in their superannuation or whatever. Companies with national payroll systems, it’s not
40 logical to have all of those issues like that, that are different from state to state, which are quite different to the accrual. Even the bit about how many increments you can break it up into, why shouldn’t someone be able to apply for an individual day of long service leave if that’s what they want to meet their caring responsibilities?

45 **MS SCOTT:** Given the success or lack of success of COAG processes and harmonisation not occurring in many areas where there may be gains - economy-wide gains, have you got a suggestion about how this could be

advanced in a way that actually does lead to reforms in a moderate amount of time.

5 **MR SMITH:** Yes, and that suggestion was in our original submission which was a national standard with various elements. To us it's over-complicated with this whole issue of people saying they're going to lose something, because just like when the 13-weeks for 20 years went to 13-weeks for 15 years there was a date, so everyone that had accrued under the old system would get the accrual and then they just went on to a new accrual rate. So they didn't actually
10 lose anything, but even if that can't be harmonised, we think in your report, if you were to recommend enterprise agreements can override the state laws, these micro-issues about cashing out and breaking it up into two different periods and the issue of overseas service is a major problem too, where people transfer staff from overseas and people argue, well, they've got to get the
15 benefit of 20 years of service in the UK or whatever, under our long service leave laws. A lot of those things just need to be addressed.

MR WILLOX: It's just messy and entangled. I think that's the point we're making. You know, just - - -
20

MR HARRIS: Yes, we will - - -

MR WILLOX: Through this report is a way to at least ventilate it and your point about COAG is well made and well taken, but we need to - - -
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MR HARRIS: We're looking for ways though where we can be confident that what we recommend is going to be simpler and can be effectively implemented and this appears to be so complex and the likelihood of a design disadvantaging someone, it's not a total veto to all this, but you would want to
30 know - or do it knowingly - you want to knowingly recognise that you are disadvantaging a person in making a change.

MR WILLOX: We would make the point that it looks complex, because the problem it's trying to solve is a complex one.
35

MR HARRIS: That's right, but then if you move back to simple solutions you can, without knowing, disadvantage parties would could include businesses. There may be some business which will suffer disadvantage is a consequence of that.
40

Nevertheless, I note enterprise agreements overcoming state laws is a proposition that you put forward and we can look further at the possibility of that, which will at least enable the firms themselves to take some responsibility for making the judgments. The National Employment Standards itself - it
45 doesn't seem to be a tremendously effective vehicle for altering these, because some states will still retain the ability to be able to implement their own

arrangements, and so you are not going to get a national solution via that anyway, are you?

5 Constitutionally, we know that states can take this back, they've got the power now and Western Australia retain some powers already under the system and some other states may choose to do it to.

10 **MR SMITH:** With that issue of enterprise agreements, right up until 1 January 2010 - now, even during the six months of the Fair Work Act before the NES came in, enterprise agreements could override state long service leave laws subject to a no disadvantage test. It's just been taken away from that date and it's not logical

15 **MR HARRIS:** So you don't think that it's likely that states would react adversely to such a restoration?

20 **MR SMITH:** Well, it seemed to be part of some understanding that the former Labor government had with stage governments of the time, but it really isn't a logical proposition and it is causing all sorts of issues.

MR HARRIS: Thank you for that. Have you got another one?

MS SCOTT: On a different topic.

25 **MR HARRIS:** Yes, we'll swap topics.

30 **MS SCOTT:** The business has been locked into enterprise agreements, negotiated in more profitable times. We have had a number of employer groups suggest that it would be desirable to be able to, at a later stage when circumstances change, effectively walk away from things. In light of the Toyota decision, does that change your thinking on this matter, given that there is obviously a capacity to go back and either negotiate a new arrangement or effectively note the change in circumstances and so on. We've had plenty of businesses report to us about how in the mining sector workers have willingly
35 accepted changes in hours and in pay rates, reflecting the change in commodity prices. We've noted the flexibility in the report in a variety of sectors, so I am just wanting to get some further clarification on this concern you have.

40 **MR SMITH:** The Toyota decision was about the interpretation of a no-extra-claims commitment.

MS SCOTT: Yes.

45 **MR SMITH:** And it was, yes, the decision of Bromberg J was overturned, but it was overturned on very narrow grounds, really, and it was the proposition that you can go to your employees and ask the question as to whether they would like to support a variation to the agreement. It's an extremely sensible

proposition, but the problem for a very large number of employers is they are locked into these agreements. They will accept them, of course, until they expire but when they expire nominally the union say, “No trade-offs. We are not going to go backwards,” and there is huge opposition in most cases to
5 unwinding the terms of those agreements.

The decision of the Full Federal Court in the Aurizon case was handed down a couple of days ago. Fortunately, the Full Federal Court has supported the company’s applications to terminate those 12 agreements, but that was a
10 two-year exercise with massive evidence and issues to convince - at huge cost - to convince the Commission to terminate those agreements when they had provisions that came out of the public sector that were completely inappropriate to the environment that the company was in.

15 So we think the bar is still far too high, even with the Aurizon decision, and there needs to be some of the steps taken that we’ve put in our original submission to give employers more of an ability to vary these agreements.

MS SCOTT: So in summary, we’re taking far too much comfort from the
20 Toyota decision.

MR SMITH: Yes, it’s a very narrow point and even when you look at the Full Federal Court’s overturning of the Bromberg decision, it came down to the precise wording of the no-extra-claims commitment and the right to ask the
25 question of whether employees are prepared to vary. The company can ask the question, but in most cases they are going to get the answer from the union, “No.”

MR WILLOX: It doesn’t have the broad applicability, I think, that you are
30 sort of driving at.

MS SCOTT: Yes. All right, thank you. Thanks for that clarification.

MR HARRIS: My final question, because we’re out of time actually, so I will
35 do just one more from me anyway. It’s widely suggested that enterprise agreements - it relates to Patricia’s question - it’s widely suggested enterprise agreements have given too much of a role for unions via consultation into matters that might be considered to be “management prerogatives”, quote,
unquote. Even if this were so, how would the options that are available to a
40 government in public policy alter agreements that were struck previously, enterprise agreements that had given a role for a union via consultation into matters that are now considered to be management prerogatives, how would we go about addressing that without potentially undermining the whole
cinematic of enterprise agreements which is - they are bargains struck via
45 concessions on both sides. How would we go about dealing with this question of management prerogatives?

- 5 **MR SMITH:** In our original submission, we had a couple of propositions; one was to have a longer list of unlawful terms and you've picked up on one of them - probably the most important one - about restrictions on contractors and labour-hire, and pleasingly you've added casuals on there, but the other one is that clause that we proposed that we are still hoping that we can convince you of the merits of, which is a positive provision that we are suggesting should be deemed to be included in all enterprise agreements, which gives a right to manage on fundamental things.
- 10 A right to employ the staff that the business wants to employ with appropriate consultation to introduce reasonable changes. Some fundamental rights that employers need to manage their business, recognising that they should do it in a consultative way.
- 15 **MR HARRIS:** I guess I'm trying to say if a firm in an enterprise agreement has conceded something, to insert this really says public policy will choose now to override something that a firm at one point agreed to, presumably in exchange for something else; in other words, that a deal was struck. We don't - we are not able to go back and unpack whatever that deal was. Aren't you really asking for the right to restore something which was previously conceded and therefore the parties might well say -well, one party at least might well say in the future, "Well, how can I trust any other enterprise agreement? You could legislate to take that away or something else away from that one in the future."
- 20
- 25 **MR SMITH:** But we're not suggesting that that applied to the previous agreement. What we're saying is that when that agreement nominally expires, the next agreement - in the Act at the moment there are mandatory content items and prohibited content items. So it should be addressed in that way, and there should also be a lower bar for the termination of expired agreements, because there are many, many companies that are locked into these arrangements that we negotiated in completely different times and they need to be assisted from a public policy point of view to unravel those arrangements, but it plays out with more decisions to offshore and more decision to downsize et cetera.
- 30
- 35 **MR HARRIS:** Okay, but perhaps before you finalise your next submission to us on this, can you look at addressing this question of do we alter the integrity, if you like, of the concept of an enterprise agreement by adding back in what is still going to be quite an ill-defined right. Until somebody fights over it in the Federal Court, it's going to be an ill-defined right and the question therefore is do you gain anything, enough to offset the possibility that you have affected the credibility of an enterprise agreement? This is not me trying to favour one side or another - - -
- 40
- 45 **MR WILLOX:** So are you looking for more definition around what circumstances would allow you to revisit an agreement?

MR HARRIS: A little bit on that - - -

MR WILLOX: Some clarity around that.

5 **MR HARRIS:** But I guess it's a question of has this been thought through
sufficiently from the perspective of the credibility of an enterprise agreement
that the enterprise sits down with its employees, strikes a bargain if the
government comes in, so that's why in our draft report we concede that
10 limitation on the use of contractors is - it is the equivalent of an
anti-competitive outcome. So we can see from the public policy perspective,
you would want all those entities that do want to compete in the labour market
to be able to compete and not be restricted.

15 Fine, we can see the public policy. We can see the practical intent behind your
proposition. We cannot necessarily see the public policy angle of it, and
particularly from the point of view that you are weighing up, an enterprise
agreement which is meant by definition to be struck between a firm and its
employees and the public policy intervention which says notwithstanding that
20 you did that once, we are now going to say you have an ultimate management
prerogative to manage, which in principle sounds fine, the question is one of
this balance in enterprise agreements. So just something on that would be very
useful.

25 **MR WILLOX:** Yes, we get it. Yes.

30 **MS SCOTT:** One other request: it may be not be the case that you are able
to address it, but one of your statements in your opening address related to the
World Economic Forum indicators of the ability of, basically, employers hiring
and firing and so on. In chapter 5 of the draft report, we compared the World
Economic Forum results with ILO results, OEC - - -

MR HARRIS: I was hoping you were going to mention this.

35 **MS SCOTT:** Well, there you go. If it's the case that you are very familiar
with this territory, of course, you know we come to each of these new inquiries
with fresh minds, but it's the case that you've got worlds of experience behind
you, which would eliminate that debate - the debate we have internally about
which figures to use and what to rely on. We would welcome seeing
something - - -

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MR WILLOX: We like the World Economic Forum data because we
collected for the World Economic Forum.

45 **MS SCOTT:** Even beyond that, we'd be interested, because clearly you get
quite different pictures. We note the important of the perceptions, but if there
is something you can say that, that would be useful.

MR WILLOX: Yes.

MR HARRIS: Thank you very much for your time today and hopefully for the contribution you will be able to make in the future.

5

MR WILLOX: Not a problem. It's good guidance for us, thank you.

MR HARRIS: I think with my apologies for delaying, the Australian Consortium for Research into employment and work is next. We will wander on a little bit into lunchtime, so we are not just going to cut you off. I am not sure how far we will wander, but we will see how we go. Once you are settled, for the purposes of the record if you could identify yourselves that would be great.

10
MS SCOTT: If you are having difficulty hearing, feel free to come forward. We don't do a collection plate at any stage, so it's all right to be further forward than you are.

15
MR HARRIS: If you could do the ID, that would be good.

20

MR McGILL: My name is Geoffrey McGill. I'm adjunct industry fellow at the ACREW at Monash Business School. I have taken up that role in November last year after a long period in both consulting practice and private industry, and also the public sector going back long enough.

25

MR HARRIS: Thank you.

MR TEICHER: I am Julian Teicher. I am currently director of ACREW and a long-term participant in the research on industrial relations/human resources matters.

30

MR HARRIS: Do you have opening remarks to make?

MR McGILL: Yes, we do. We do have just an aide memoire, if you like, of just a simple summary of the points.

35

MR HARRIS: Yes, I'll take a copy.

MR McGILL: You can take those.

40

MS SCOTT: Thank you.

MR McGILL: So there is a little bit of background material on ACREW, which I won't visit now, but would preface, I suppose, our remarks and submissions by what we refer to as some overarching or key assumptions, observations which inform our thinking, both in terms of observations on the operation of the current workplace relations system and, particularly, thinking

45

about from my own perspective participation in industrial relations, both in the public policy level and in large corporations including Rio Tinto, CRA and the CBA over more than the last 40 years, and those key observations and assumptions are that firstly economic reforms drive labour market and industrial relations reform.

This was certainly reinforced, in my experience, working for the Commonwealth government during the 1980s as the first assistant secretary in charge of industrial relations policy and wages and income policy during a prices and incomes accord. Second, a productivity growth is a complex process and it's usually described in simplistic terms. It can never be guaranteed and it's always observed after the event. Thirdly, and I think, particularly important in the way in which the school and Julian and I think about things, it's the substance of the employment relationship, not its legal form which determines whether people are engaged and productive and I'll come back to that.

Productive workplaces are not the outcome of legislation but of the quality of leadership and culture at the workplace. The history of federal legislation in Australia has been punctuated by what's described as swings in the industrial relations pendulum across the political cycle, but very significantly the shift to the predominant use of the corporations power as a basis of regulation in the workplace relations area makes the potential extent and immediacy of impact of shifts in the pendulum far greater than under the conciliation and arbitration power, and I will come back to talk about that, particularly from the research work that Julian has done, the varieties of capitalism literature, Hall and Soskice demonstrate both that differing institutional arrangements can produce superior economic outcomes and that stability is not inconsistent with economic performance.

Second, penultimately, that in the Commission's approach to its task and particularly the focus on some of the longer-term implications of its recommendations, it's useful to make a distinction between what might be described as framework issues in relation to the institutional arrangements and structure of the workplace relations system, and what might be called "operational issues" which are bound to occur over time. That is a key distinction which we'll talk about a little; and that there are also productivity benefits in a more stable industrial relations system, something that has also been spoken about and written about by the former president of the Fair Work Commission Justice Geoff Giudice.

Turning to our focus in our submissions, which I assume that you have seen and read, we placed particular emphasis or draw particular attention to a key term of reference that the Commission must engage with, and that is an overarching principle for any recommendation should be the need to ensure a framework to serve the country in the longer term, given the level of legislative change in this area in recent years.

5 One might say that workplace relations regulation in Australia is in a state of confusion. Part of that is inherently because of the controversial nature of the issues which are dealt with at the workplace at an industry and political level, and which have been exhibited in the swings in the industrial relations pendulum over many years.

10 Certainly if one looks at the research and which was called up in our submission there is a reference to the work of Pittard and Fox looking at swings in the industrial relations pendulum since the boilermakers' case in 1956 through to the period around about the Hancock Inquiry, and that instability in the industrial relations system, then based on the C and A powers, quite apparent; and even instances where the political parties have been on different sides of the same argument if you track it over the longer term. A classic example of that is the certified agreements.

20 But we would submit there's also a source of systemic confusion, if you like, and that the lack of clarity of purpose that currently exists as a basis for industrial regulation, workplace regulation, is an important thing to understand and to tease out the implication. If one goes back to section 51 of the Constitution it says that:

25 *The Parliament shall subject to this Constitution have the power to make laws for the peace, order and good government of the Commonwealth with respect to -*

And placitum 20:

30 *Foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth -*

and of course for all students of industrial relations in Australia, which Julian and I would place ourselves, placitum 35:

35 *Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.*

40 We would submit that these constitutional provisions have now been conflated and that the implications of that need to be thought through, particularly when one is contemplating changes to the workplace relations framework and laws relying on the Corporations power. Of course the shift to the corporations' power is something which has been long in place so we've crossed the Rubicon.

45 There's no sense in suggesting that there's a going back, but it is useful to recall the observation that Kirby J made in the *WorkChoices* case, *New South Wales v The Commonwealth* in relation to the majority decision to

uphold that legislation which was clearly based on the Corporations power, and I refer to paragraph 434 of his judgment where he asks the question:

5 *Was all of this previous work of the High Court of needless exercise?*

And he says:

10 *If 51(xx) of the Constitution now provides a legitimate source for a comprehensive federal law with respect to industrial disputes, by inference it always did. All those hard-fought decisions of this Court and the earnest presentation of cases, the advocacy and the judicial analysis and elaborations within them concerning the ambit of 51(xxxv) of the Constitution are virtually without*
15 *exception a complete waste of the Court's time and energies.*

One of the implications of this has been picked up by Emeritus Professor Ron McCallum, particularly focusing on the potential implications for the working men and women of Australia, and the concern that he expresses that
20 labour laws will become little more than a subset of corporations law because they will inevitably - they will fasten upon the economic needs of the corporation and their employees will be viewed as but one aspect of the productive process in our globalised economy.

25 I'd also submit that there are significant implications for corporations, particularly if the Corporations power is used to introduce or change legislation on the basis of short-term issues that may be confronting industry or parts of industry or various employer groups.

30 **MR HARRIS:** But are we sort of stuck with this? You virtually conceded that yourself in the - - -

35 **MR McGILL:** But the point is there are some things that one can bear in mind which might exacerbate some of the critical issues that might arise if you don't carefully think about the territory you're in. So for instance if one goes back to your original term of reference which is - - -

MR HARRIS: Something to do with the future.

40 **MR McGILL:** Yes, that's right and how we actually promote greater stability over the longer term, then one would be very careful for instance if one was to by legislation under the Corporations power change the existing standard for penalty rates.

45 **MR HARRIS:** Yes.

MR McGILL: Because one could predict with a fair degree of certainty that

that would not survive over the political cycle because each time there was a change of government there would be a different persuasion.

MR HARRIS: They would change it back.

5

MR McGILL: That would be an example of using the Corporations power to deal with an issue which is going to be influenced by relatively short-term labour market and economic circumstances, and is what I would or we would describe as an operational issue and therefore it is quite wise, and we would support your recommendation I think at 14(1) that the issues that you observe in relation to weekend penalty rates be something that be considered by the Commission. Now there's an issue of how you get that submission before - - -

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MR HARRIS: And I welcome your ideas on that. You might have noted in our report that the small gap between the intent and the delivery is still available to be filled with wise contributions.

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MR McGILL: So there is, I would have thought, ways in which - and one would have thought, going back to my public service days, that the relevant department could be an amicus curiae and actually bring those recommendations and observations to the attention of the Commission in its review of penalty rates. But it is a good example of ensuring that one does not stray into territory dealing with short-term issues relying on the Corporations power.

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MR HARRIS: Fair enough.

MR McGILL: That's why we say that predominant reliance on the Corporations power gives additional momentum and mass to the IR pendulum. So if one was to postulate that the mass of the pendulum under the C and A power was X, it's 10X under the Corporations power.

30

MR HARRIS: Yes. now you make this point a little further on, a couple of pages in further from where you are right now, this idea that change is not all down to government, which I think is a point - sorry, to try and skip you ahead.

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MR McGILL: That's all right.

MR HARRIS: I'm very interested in this. you might have noted in the earlier discussion with AIG we were pointing out if you were to use legislation, which definitionally I think is going to be the corpus of all powers because, once it's established, it's established as a utilisation tool - - -

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MR McGILL: Yes, it's there, a cross - - -

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MR HARRIS: - - - and you can't really put the genie back in the bottle. This idea of addressing - restoration of management prerogative, if we were to think

about it in that same way, did you hear their exchange?

MR MCGILL: I did hear it and I listened and I do have some comments on it'd like to make.

5

MR HARRIS: Would you have a view on this? It would be worth hearing.

MR MCGILL: Julian, please come in.

10 **PROFESSOR TEICHER:** Yes.

15 **MR MCGILL:** But my submission would be that the development of good employee relations at the workplace ought to be a source of competitive advantage to the enterprise. It is absolutely appropriate to create incentives for great attention to be paid to the development of employee engagement at the workplace, and this is why I say that engaged employees are a function, engaged and productive employees are a function of the quality of leadership and systems and the culture of the workplace.

20 So I can readily think of examples where previously working for CRA Rio Tinto some quite innovative arrangements were put in place in Western Australia in relation to the operation of tug boats, which its key competitor didn't introduce for reasons of its own judgment and particularly the different relationship enjoyed with the unions at the time. But that was a source of competitive advantage over many, many years.

25 There was a particular approach made - and I won't go into details now - to get us out of this mess and it was an approach the government, the Minister of the day rightly said, "That's a deal you made. You live with the consequences". Now that is not to say that the issue that you called out in relation to anti-competitive behaviour and abuse of power, that clearly does have to be dealt with but we must not create a system where the decisions that the enterprise makes in relation to what it puts in place with its employees it is not accountable for those things.

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MR HARRIS: Yes.

MR MCGILL: So that would be my response.

40 **MR HARRIS:** Okay, thank you.

MR MCGILL: Now going on to the point about it's not all just down - - -

MR HARRIS: To government.

45

MR MCGILL: - - - to government, made these observations a number of years ago but the process that the Commission is currently engaged in is one which

is part of a wider public policy process. We see almost daily now issues being raised about the lack of progress of reform on a number of fronts, and we had for example in recent times the National Reform Summit. These are initiatives which I think are to be encouraged because they do add to a wider spectrum for the economic and workplace reform debate.

The Commission itself can support that but at the end of the day it is what the community is articulating, business and employers and the various other community groups that is potentially very influential of government and very influential of the next elected government in terms of what it does with these questions if it's going to be interested in getting them in place over the longer term. But the framework for that dialogue we do have to recognise has fundamentally changed.

MR HARRIS: Yes.

MR McGILL: To what existed in the period in the early '80s, and I was a part of the government team at the National Economic Summit. You can recall at the time the ACTU and the employers were in strong institutional positions, the level of union membership was much higher, and very importantly the government of the day was very much dependent on the ACTU, for example, to deliver wage restraint as part of the accord bargain.

The reality is that the institutional arrangements are no longer as strong as they were. The zenith, if you like, of the authority of the Commission as it then was has long past, with probably the wages pause of the early '80s which was the zenith of its influence, and there's no real incentive for government to be relying on something with the ACTU to restrain wages because basically the wage inflation bias that we had to contend with throughout the '70s and '80s are gone, and what is more the ACTU isn't in a position to deliver that sort of restraint and wouldn't want to anyway.

MR HARRIS: No.

MR McGILL: So one of the questions that arises, not only for the Commission but for institutions such as ourselves, is how do we support a public dialogue and also exchanges at the industry and workplace level about a sustainable workplace relations system. Because as we said before harking back to those basic principles and observations, that productivity is essentially a workplace phenomenon and focusing purely at the national level will not of itself achieve the sort of broader based consensus that is exhibited in many other countries.

In our submission we do point to the fact that Australia is somewhat unique and peculiar. The extent to which the basic principles around which employers and the union movement have agreed for many years - and Scandinavia, one can go back to 1898 or 1938 in Sweden and other countries

are documented in our submissions. A lot of those issues have been largely settled whereas in Australia they remain issues of contention.

5 Now if we go back to the history, the C and A power in fact developed far more than I think was originally anticipated. It was a federal system at the time but what you saw was the significant growth of the federal jurisdiction and the evolution of very significant aspects, institutional aspects, which had significant economic implications. And so it was in particularly the government's interests to actually allow that to develop because it allowed it to be able to use the Commission as a source of influencing economic policy, even though that was not its original constitutional intent.

15 But what happened subtly in what I call this process of constitutional drift was that the significance and importance of the national system was less effective because of a lot of the artifice that was required to give effect to the creation of an interstate industrial dispute which could then become the basis of a national wage case.

20 **MR HARRIS:** I think we covered that in some detail.

MR MCGILL: Yes, so - - -

25 **PROFESSOR TEICHER:** Before you go on just let me cut across and sort of pull it back a little bit, if I can. when we look at this inquiry, your terms of reference are basically as you noted correctly, focuses on the long term and the future and then of course the terms of reference draw you to specific issues, penalty rates et cetera, et cetera, and that of course necessarily means that you've have a large number of submissions which are very much the sort of pursuit of vested interest amendments to the law.

30 This inquiry is a unique opportunity to not just evaluate the mechanics but to step back, and this is what Geoff's really addressing, and say what should we be thinking of in terms of a system? How do we try in a general environment where there is relative stability in the industrial relations arrangements, so that we can get on with - well, organisations can focus themselves on as it were improvement.

40 You noted correctly of course that - we don't have accurate data on this - the costs of adjustments are huge with each iteration of the legislation and also that there's relatively little work, except for Peetz's 2012 work, which actually looks at the benefits, the productivity benefits associated with legislative change.

45 **MR HARRIS:** Yes.

PROFESSOR TEICHER: Too much is put on, "Oh look, we can get a short-term advantage" but it's very much at odds with your terms of reference

and the charter of the Productivity Commission which is to think about the broader national interest rather than a whole series of sectional interests. I think that's - well, that is where we're coming from.

5 **MR HARRIS:** Yes.

PROFESSOR TEICHER: And that's why we've tried then to zero in on some other issues later on.

10 **MR HARRIS:** That's right, and you talk about an employee relations charter.

MR McGILL: Yes.

PROFESSOR TEICHER: Yes.

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MR HARRIS: But really what's behind even the description of the charter, which I don't think we with the time we have available to us - to go through it in detail. But the concept is one of engagement.

20 **MR McGILL:** That's right.

MR HARRIS: If I correctly identify here you're really talking - so this linkage you've got is between - well, first off you say it's not actually all about black letter law. It's about the working relations - - -

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PROFESSOR TEICHER: The systems and culture of the workplace.

MR HARRIS: - - - in the workplace and your suggestion appears to be along the lines of greater engagement between employer and employee. But I guess for us we can make advocacy, which we have done in the sort of draft report to some extent, particularly in the overview section we've tried to look out at the bigger picture. But necessarily everybody who reads the report will look for their bit in it and not really very interested - now this our job and therefore we're not expecting sympathy or anything else, but our job is to talk about this issue. But how do you think we could integrate the concept that you've got here with the general need nevertheless to recommend changes. This is not really something that fits a recommendation, does it?

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MR McGILL: Right, but - - -

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MR HARRIS: It really fit's an educative - - -

MR McGILL: No, it's a process issue.

45 **MR HARRIS:** Yes.

MR McGILL: Anything you can do to encourage that wider public policy

process is to the good.

MR HARRIS: Yes.

5 **MR McGILL:** But what we would say is that you test both your submissions you receive and the recommendations you make against this criteria.

MR HARRIS: This kind of benchmark.

10 **MR McGILL:** Of is this an operational issue or is it a framework issue? Because it's like Deming's distinction between special and normal variation.

MR HARRIS: Yes.

15 **MR McGILL:** If in fact you start to recommend legislation about an operational issue there is the potential that can actually increase instability in the system, and I gave you the penalty rates example.

20 **MR HARRIS:** Yes. So what you're really suggesting "Here is here is a way of thinking not just about individual perspectives put to you. Here's a way of thinking about the holistic framework". Because is what we're adding by the development of this report going to increase the likelihood of engagement at the workplace level.

25 **MR McGILL:** Yes.

MR HARRIS: Between employer and employee, or is it likely to decrease it.

30 **MR McGILL:** Yes. Now there are some things consistent with this framework concept that we talk about that you do have to engage with and one is, particularly given the current levels of union density and the representative role of the union, is what are the rules of interaction between collective and individual arrangements which have always existed and will continue to exist.

35 There has been some exchanges this morning around that and one of the additional options that is I think worth considering and goes to my own personal and practical experience is thinking also about the notion of collective processes to individual outcomes. And the work that I have been very heavily involved with in very major changes in workplace relations, employee
40 relations in traditionally highly unionised workplaces have been through that process, and the focus on potential transaction costs that may be involved in fact is misplaced.

45 Because the work that has to be done to win the trust and a sufficient level of support at a workplace to move from a traditional framework of collective agreements and high levels of union involvement to one of direct engagement requires an enormous effort. But what you can say with real confidence, if the

leadership of the enterprise is good enough then it will win the trust and that's where the productivity comes from.

5 Because our particular cases I've been involved with through these what
are called collective processes to individual outcomes, which have been
strongly opposed both under the legislation of the day or not facilitated by the
legislation of the day and strongly opposed by the unions of the day, have
resulted in 90 per cent plus agreement of people in a secret ballot at the
workplace saying, "No, we believe that a direct relationship with this
10 organisation is in our interest" and they were able to make free and open
choices about that.

 So in our submission we do put a little model which is basically allowing
an organisation to move to that direct engagement and self-regulation. But the
15 hurdle is high. They will have to get more than 66 per cent support under a
ballot at that workplace and that would then allow them to stand outside the
system other than of course the safety net and minimum standards that have to
be observed under the NES. But also employees could at any stage opt back
in if 50 per cent plus one voted to do so.

20 **MR HARRIS:** Yes.

MR MCGILL: I can say - this is documented in one of the works we refer to,
a book by MacDonald, Burke and Stewart, "Systems Leadership. Creating
25 positive organisations" - that the changes there in those various workplaces, in
Aus, in New Zealand, Bell Bay, Weipa mining smelter, resulted in 25 per cent
increases in productivity virtually overnight, with no changes in technology.

 So for instance in the aluminium smelting process the concept of
30 current efficiency, which is a key indicator because it's basically molten
electricity that is being produced, significantly improved because that was
where the operator paying attention to the process and intervening and using
their discretion can make an enormous difference.

35 So these increases in productivity were achieved overnight because of
the significant efforts of the leadership at those workplaces to earn the trust
through the development of their internal leadership capability and the
improvement of the systems that were answering the questions of employees,
"What am I expected to do? How am I going?" and "What is my future?"
40

MR HARRIS: Now I'm afraid, given we're going to have a 10 minute break
before the next group comes in that we've probably only got a couple of
minutes left.

45 **MR MCGILL:** Okay, so I'll pass over to Julian. But just to make the final
observation therefore it's not surprising that when one looks at the introduction
of AWAs, which were low on transaction cost but very low also on the demand

on employers to actually build and change the culture of the workplace, that there's no evident productivity dividend.

MR HARRIS: Okay, fair enough.

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PROFESSOR TEICHER: All right, given the time constraint, I think probably the thing that I'd most want to refer to is the term of reference too, and industrial conflict and days lost due to industrial action.

10 **MR HARRIS:** Is that 10?

MR HARRIS: That's the one I was going to ask you a question about, so that's good.

15 **PROFESSOR TEICHER:** Good, I hope I can answer it.

20 **MR HARRIS:** No, I don't think - I was actually going to ask you, having read quickly while you've been talking to the notes here, you've said here we make a point in the issue paper but don't follow up in the draft report, and I can't quite see the linkage between the two preceding sentences. They stand on their own finding, but it's the statement: "We think it's pivotal the efficiency of organisations and ultimately the performance of the economy and the wellbeing of the population."

25 **PROFESSOR TEICHER:** Yes.

MR HARRIS: What is pivotal? The lack of disputes or the ready ability to be able to induce a dispute?

30 **PROFESSOR TEICHER:** No, no, I was cutting and pasting and that didn't work too well.

MR HARRIS: Okay.

35 **PROFESSOR TEICHER:** What we're really going to is the fact that we need - there are two things I wanted to say, sorry.

MR HARRIS: Sure.

40 **PROFESSOR TEICHER:** Very simply there was less in the report than one might have expected on the issue of industrial conflict, and I searched and searched. I have been trying to make the point over a period of time that we in Australia place too much emphasis on industrial conflict, the occurrence of it. We understand the extremes have to be regulated but the reality is that there
45 has been a fundamental shift in Australia from collective forms of action into individual forms of action.

MR HARRIS: Yes.

PROFESSOR TEICHER: Which you note also, and it's reflected in a range of data not just the Fair Work stuff, and where we were trying to take that is that how we manage conflict is absolutely a key source - coming back to the quote - of efficiency and productivity in our society, and that links back to our stuff on voice mechanisms. On conflict, what I was trying to or wanting to do was to direct your attention to two surveys that we conducted, but there are others also, which highlight the prevalence of individual forms of conflict in organisations in Australia - I don't need to recite that - and the amount of time that it reportedly takes to resolve.

The other point then was that, of organisations where employees have been involved in conflict, overwhelmingly it results in a loss of trust, a loss of confidence in the organisation and an increased intention to quit. So where we were wanting to take that was to say to the Commission what happens at the workplace, consistent with what Geoff has been saying, is actually very, very important and organisations need to become better in how they both cultivate employee voice, which is probably a precondition for reduced conflict, but also then how they manage disputes, and that's about training of managers, training of employees.

There is another study which we've done based on the Australian Workplace Relations Survey conducted by the Fair Work Commission, 5000-odd employee responses and a large number of employer responses which actually highlights the power of employee voice in terms of not only building trust, but job satisfaction, but also productivity, it leads to productivity improvements. That's using effectively multilevel analysis. So that was where we were going with that - - -

MR HARRIS: Is it a thematic for the report or can it be turned into something where we could propose action. I think you can draw attention to this, and the data is quite useful.

PROFESSOR TEICHER: Yes.

MR HARRIS: We may follow up on that particularly if there's if you like a benchmark from 10 years ago to see where there's a variation, or something like that.

PROFESSOR TEICHER: Yes.

MR HARRIS: But anyway, we'll probably follow up on that with you.

PROFESSOR TEICHER: Yes.

MR HARRIS: If that's all right.

PROFESSOR TEICHER: Of course.

5 **MR HARRIS:** But it seems more of a thematic, if you like, rather than a recommendation.

10 **PROFESSOR TEICHER:** It's a difficult one for you to make a recommendation on, but I felt that perhaps that discussion is one that warrants more attention. There could be a recommendation actually. The recommendation is that with the increasing focus upon the workplace that has been the dynamic of the system, that the government could usefully increase the remit of the Fair Work Commission or the Fair Work Ombudsman to enhance management and employee training in the management of disputes.

15 **MR HARRIS:** I see.

PROFESSOR TEICHER: Because it's overwhelmingly the failing area.

20 **MR HARRIS:** Yes.

PROFESSOR TEICHER: And we've been running a big - a long term project on conflict resolution. We've spoken to a lot of Fair Work Commission and additional surveys. We're about to move into case studies. This is where we could advance the culture of the workplace. So I think you could have a recommendation in that space and not just have it as a thematic.

MR HARRIS: Okay.

30 **PROFESSOR TEICHER:** But I would hope that at the very least you really say, "Guys, we're about improving productivity and there's a hole here that you want to think about".

35 **MR HARRIS:** Okay. Now I'm afraid I'm going to have to stop so that our operator can have a bite of lunch, and Patricia and I can as well. But thank you for making the effort to come in and particularly if we can take you up possibly on that opportunity to talk about data.

MR MCGILL: Yes.

40 **MR HARRIS:** Because as you know, you're on the research team too, but data, any data source, we're looking for it. So you've got an interesting set of surveys there which - - -

45 **PROFESSOR TEICHER:** Okay, we're happy to assist in any way we can.

MS SCOTT: Thank you.

MR HARRIS: Thank you very much.

MR MCGILL: Thank you for the opportunity. We do appreciate it.

5

LUNCHEON ADJOURNMENT

[12.54 PM]

RESUMED

[1.16 PM]

10

MR HARRIS: [Name withheld] can you come up and we'll start?

NAME WITHHELD: I will.

15

MR HARRIS: We ran a little over so we've taken 15 minutes, and we're still over.

NAME WITHHELD: That's fine.

20

MR HARRIS: I don't know what we're going to do. At some point we're going to catch up. When you've settled yourself if you can identify yourself for the record. These microphones just go direct to our recording device. They don't actually tell people in the room who's speaking.

25

NAME WITHHELD: All right.

MR HARRIS: So if a vast audience turns up, we'll shout at them.

30

NAME WITHHELD: Okay.

MR HARRIS: We had quite a group here before lunch.

NAME WITHHELD: Yes?

35

MR HARRIS: Clearly we've bored them silly and they've gone home, but.

NAME WITHHELD: Perhaps they're taking longer for lunch.

40

MR HARRIS: That's always possible too.

MS SCOTT: [Name withheld], just as you go, if you could just give us a bit more about your background that would be very helpful for my circumstances?

45

NAME WITHHELD: I will.

MS SCOTT: Thank you. Thanks for that.

NAME WITHHELD: Most definitely. You probably don't remember me because of my new first name but I'm [Name withheld] and you would - - -

5 **MS SCOTT:** Heaven's above. I haven't got my glasses on. [Name withheld]?

NAME WITHHELD: Yes.

MS SCOTT: Is that right?

10 **NAME WITHHELD:** Yes.

(Personal discussion with NAME WITHHELD)

15 **MR HARRIS:** Fine, let's start up.

NAME WITHHELD: Okay, sorry I've just got these extra pages here. Would you like a copy from me, or you have them?

20 **MS SCOTT:** We've got a set here.

MR HARRIS: We've got a thing here.

25 **NAME WITHHELD:** All right, my name is [Name withheld] and I've put forward a very brief, really dot point, submission on some areas of the workplace relations framework draft paper.

MR HARRIS: Yes. Do you want to make some opening comments in relation to that or do you just want us to work through the queries?

30 **NAME WITHHELD:** I'll make some opening comments. As you will see by the comments I haven't covered at all the breadth of the report that you put together, but just put forward a few points and solutions in the areas of minimum wages.

35 **MR HARRIS:** Yes.

NAME WITHHELD: A small amount on wage bargaining and some small points about ways to reduce unemployment. The first point that I make about wages being different to products is perhaps the most different one, which I might need to explain a little bit to you. My reason for making that point is that often it's - well, in practice you speak about it, you write about it in the report that people consider people to be the same as products.

40

45 But in fact wages are different to payments for products from a couple of viewpoints. The first is a product is a separate item by itself and people often think of labour as people employing an employee, whereas really you're

just employing their skills. So labour is a bit of a funny term. But also the point that if you're looking at product, the price of a product can go up and down without having a major effect necessarily on the entrepreneur that provides it and within the price for the product is a component for the ups and
5 downs of a market that an entrepreneur takes. Whereas, an employee isn't an entrepreneur and there are material effects on the employee if there is great downward flexibility of prices.

10 So I just think it's a very small element but it does make a difference when we're looking at - the difference between product prices and employee prices. Product prices are taken by an entrepreneur who takes that risk in the market, whereas an employee isn't an entrepreneur and is not expected to take that risk in the market.

15 If you're happy for me to go through these or if you prefer to ask questions that's fine.

MR HARRIS: Just pick out the things you would like because we get to read them on the record here and then everyone else gets to read them when the
20 record is supplemented.

NAME WITHHELD: Okay.

MR HARRIS: But just the things you wanted to pick out.
25

NAME WITHHELD: All right. There were a couple of things. One in relation to minimum wage earners and increasing the incentive to work, the incentive to work longer hours, by reducing the marginal tax rate for people on the minimum wage or low wages it's currently 19 cents, reducing it to 15 cents,
30 adds \$3,638.00 a year. For a person on a minimum wage you speak in the report about a social wage for someone who is on the minimum wage and that's a practice that's not uncommon and is reducing marginal tax rates. It's usually for everybody but for someone on a minimum or a low wage it adds more to their disposable income.

35 The second point is about child care fees. Women who are earning a low income, and their husbands are working or they're single parents, pay child care fees. Admittedly the rates quite reduced for low income earners, but to include child care fees up to the - so a person who is paying child care and on
40 a minimum wage gets that \$18,200.00 which is already tax-free, tax and child care free. So there's no impediment to receiving that minimum amount from work alone. Whereas, at the moment, someone who is paying child care fees has a reduced amount when the person takes into account the costs associated with employment and doesn't receive that \$18,200 cash in hand. Whereas, if
45 it's after child care fees it is cash in hand for the parental carer who is earning a low wage. They're my two points.

MR HARRIS: How would you like to see that paid though? Who would have the responsibilities? So currently there's a tax payer funded child care subsidy.

NAME WITHHELD: Yes.

5

MR HARRIS: Which we've got a separate report on and there's a separate legislation floating around on that. Is your concept there should be an employer responsibility as the minimum wage is?

10 **NAME WITHHELD:** I didn't see it that way, no.

MR HARRIS: No. So, you're really saying make child care costless in the hands of a person who seeks to work?

15 **NAME WITHHELD:** A person on a low wage, yes.

MR HARRIS: Via a tax payer level of support.

20 **NAME WITHHELD:** By that child care being free. So, yes, a government cost.

MR HARRIS: You'll be familiar then since you've talked about child care with this other - the size of the childcare tax bill that would be - or tax payer funded bill that would be developed as a consequence of that? There will be quite a large number of - billions.

25

NAME WITHHELD: I didn't. I didn't estimate that but I am aware it can make a difference to the budget of course.

30 **MR HARRIS:** You've seen that.

NAME WITHHELD: Yes. Yes.

35 **MR HARRIS:** We're talking five to seven billion for the current sort of subsidy arrangements. So presumably if you make it free entirely it's an increasing number of billions above that.

NAME WITHHELD: I wasn't thinking entirely for all people who received the child care subsidy.

40

MR HARRIS: Fair enough. Just for people on the minimum wage.

45 **NAME WITHHELD:** Yes. Or close to that. There are some studies which suggest that about 22 hours of child care - after 22 hours of child care, not all children's development is as equal to the development of children who are at home or who are in child care for about 22 hours. There is some decrease. So there's some argument as to whether child care beyond those hours is a benefit

to the child as well. So what I put in here I didn't put in for full time work but part time work.

5 **MR HARRIS:** Right. And your expectation, obviously, is that this will get an increasing participating rate, particularly from mothers.

NAME WITHHELD: Yes.

10 **MR HARRIS:** Do you have any idea of the sort of participation rate of improvement that might occur?

NAME WITHHELD: Look, I'm aware that to do one - something thoroughly one would go into that in detail.

15 **MR HARRIS:** Sure.

NAME WITHHELD: But I didn't.

20 **MR HARRIS:** No, no. I'm asking this because I don't know what you've got, you see?

NAME WITHHELD: No.

25 **MR HARRIS:** And we're always interested in data.

NAME WITHHELD: Yes. I didn't. I didn't go into those data.

30 **MR HARRIS:** Everybody who comes near us and proposes something gets asked the data question.

NAME WITHHELD: Yes.

35 **MR HARRIS:** So if there was any data, we're very interested in it. Okay, in terms of the concept of - that wages are different to prices of other factors in the economy. I think we did acknowledge in the issues paper something not dissimilar to that and I don't think we'd really departed from it in the draft report but if you believe we did it'd be useful for you to - if you gained the impression that we didn't actually accept the logic that there is more to a workplace relations system than simply establishing a price as if it was the price of a commodity we do, I think, in the issues paper accept that broad thematic. And we have adopted it for the purpose of this report. So I could take it that that's the sort of general statement of support for the concept.

45 **NAME WITHHELD:** It is, with the addition that within - you've taken it very much also from a social perspective - but within economics alone there is that difference that a product price does include the entrepreneurial's return or loss. So the entrepreneur takes the brunt of the higher or lower prices in the

market. Whereas, an employee is not an entrepreneur and not expected to bear the brunt of that kind of flexibility in prices.

5 So I know that isn't standard economic theory but I think it's probably not brought - it's not standard accepted thought. It's not something people talk about much but I think it's not really brought out that there is that difference in a product price. There is the return for the entrepreneur, which of course can be a loss, but for an employee the employee is not expected to be an entrepreneur. So that flexibility is lower. In altering prices is lower.

10 **MR HARRIS:** Regardless of whether it's - well held or not well held in theory, the purpose, ultimately, of public policy, is design. And for design you've got to take into account that characteristics of the market and the good and the circumstances in which they're likely to be disposed of or otherwise allocated. So these factors are all relevant and they all become relevant ultimately of public policy design, if not any other point in our process. Patricia, do you have?

20 **MS SCOTT:** Well, just one question to [Name withheld]. I think you're sympathetic to the idea of having lower penalty rates but you're suggesting that we look at Saturdays, rather than Sundays. And, primarily, because of the sanctity you associate with Sunday as day of religious observance, is that basically right?

25 **NAME WITHHELD:** Yes.

MS SCOTT: Okay. And so in basically in concept you see a reduction of penalty rates - a Saturday as employment creating - sort of the arguments where you apply to Sunday, you'd apply to the Saturday.

30 **NAME WITHHELD:** Yes.

MS SCOTT: Right. Thank you for that clarification. I don't have anything else to question you on, it was clear. Thank you for the paper in advance of presenting today. It certainly helps.

35 **NAME WITHHELD:** Okay.

MR HARRIS: Thanks very much.

40 **MS SCOTT:** Thank you.

NAME WITHHELD: Thank you.

45 **MR HARRIS:** Yes. The next? Why are they sitting outside? I just thought they would - they could have been here as our audience. That's disappointing. People have chosen to sit outside. The main table - force your way through

the crowd. We were very popular before lunch but it seems lunch is calling, no one came back.

5 **MR HARRIS:** Once you guys have settled there could you identify yourselves, please for the purpose of the record.

MS YILMAZ: My name is Leyla Yilmaz and I'm the Deputy Executive Director at VACC.

10 **MR CHESTERMAN:** My name is Bill Chesterman and I'm the industrial relations manager at the VACC.

MR MULLER: Nigel Muller, manager for VACC auto apprenticeships and group training.

15 **MR HARRIS:** Would you guys like to make an open statement? If so, feel free to lead off. If not we can ask you some questions.

20 **MS YILMAZ:** Perhaps I might make an opening statement. Perhaps a little bit of background to the Chamber. VACC is an employer organisation which has more than 5,000 members across Victoria and Tasmania. Our members employ over 50,000 employees across the two States. Our Auto Apprenticeships Program is a group training operation and we employ currently 460 apprentices and trainees directly and we place those apprentices and trainees with our member host. So that's where they get their workplace experience. However, as I said, VACC actually employs them.

25
30 The vast majority of our members are small employers. Some 90 per cent have less than 20 employees and around about 80 per cent have 10 or less employees. The automotive industry is very diverse. It covers all businesses that have anything to do with the motor car once it comes off the production line. So new cars, used cars - all those that service and repair, including fuel outlets, auto repairers, tow truck operators and passenger vehicles, recreational vehicles, trucks, commercial, motor cycles, farm and plant is the whole breadth of automotive in our industry.

35
40 The industry itself is heavily regulated around particularly safety and motor vehicle standards. We also have licensing, such as licensed motor car traders. Towing is licensed in Victoria. We also have other types of licensing around gases and so forth. The industry itself is heavily reliant on traditional trades training. So, therefore, the employment and investment of apprentices is vital to our industry, however, I should note for the record that employment costs may cut the vast majority of costs of a business in our sector.

45 It is our experience that the workplace relations system and the training system directly affects decisions of employers around employment and our research is supported by the evidence also presented by Auto Skills Australia

and the Australian Chamber of Commerce and Industry. Critically, most importantly, of recent times some 53.2 per cent of employers in our industry have decided they would no longer employ apprentices. Most notably, 30 per cent of those employers have traditionally employ apprentices have indicated
5 they will not employ an apprentice in the next 12 months.

MS SCOTT: Can I just get the last figure again, please?

MS YILMAZ: Thirty per cent.
10

MS SCOTT: Right. Thirty per cent.

MS YILMAZ: Yes.

MR HARRIS: And was there a “why”?
15

MS YILMAZ: Most of it is in relation to the red tape. Red tape. Confusion around employment conditions, the difficulty around employment and costs associated with employment.
20

MR HARRIS: And does that mean, in practice, you’ll be reducing your 400 down to a much lower number?

MS YILMAZ: No, interestingly enough, what we are finding is that as
25 employers are stepping away from employing directly apprentices they are asking us to actually engage apprentices and have them placed with them. And of course we can’t keep up with demand and that’s difficult. They are actually walking away from employing apprentices because of the complexity around the apprenticeship system. And as I mentioned - as employment costs are
30 extremely high - and we’ve had the most recent decision around apprenticeship wages, particularly, for those over the age of 21 that particular group is no longer employable. Employers can’t absorb that kind of cost in their business because they are very small employers. Their profit margins are pretty small - anywhere between two and five per cent in the industry.
35

MR HARRIS: So that means your 400 might go up?

MS YILMAZ: Well, we have 460. Well, we’re hoping that it would go up but, of course, depends on whether we get the right candidates and as I
40 mentioned earlier on the 21 year olds are quite costly and even ourselves being a not for profit organisation is quite difficult for us to absorb those costs.

MR HARRIS: Right. Now when you lend your apprentices out for that in workplace training purposes to particular firms do you have a selection process
45 for that? Or is there - - -

- 5 **MS YILMAZ:** Yes, we do. Yes, VACC actually employs them and then we actually select employers based on a range of criteria - host employers - and we place those apprentices. We actually match our apprentices with the right kind of host employer where they will gain the workplace experience.
- MS SCOTT:** We might - if you don't mind - just follow this as we go.
- MS YILMAZ:** Sure.
- 10 **MS SCOTT:** So, effectively, your organisation becomes the employer of the apprentices. You're also an RTO in your own right, aren't you?
- MS YILMAZ:** No, we're not an RTO.
- 15 **MS SCOTT:** You're not. So you're then having the RTOs provide the services. Yesterday when we were in Hobart there was debate at the hearing about whether employees should be trained for the industry or to be trained for the enterprise and it seems to me that you've got clearly your training for the industry in this case but you've got the benefit of the enterprise contact when
- 20 it comes, I imagine, to then individual placements with a variety of employers. Is that - have I got that right as a characterisation?
- MS YILMAZ:** Yes.
- 25 **MS SCOTT:** That you would attribute to it?
- MR MULLER:** Yes. The overall is that they're trained to an industry standard but that's customised per the individual enterprise.
- 30 **MS SCOTT:** Okay.
- MR MULLER:** Through a training plan.
- 35 **MS SCOTT:** Effectively, you overcome the problem of the red tape, the complexity for the individual employer and so on because you've developed expertise at your level that enables you then to effectively apply all that understanding over and over and over again with your 460 apprentices. Okay. And that having developed, does that then mean that you've actually hit on the ideal arrangement? Do you understand what I'm saying? Or is it in fact just a
- 40 work around that you think is sub-optimal but you've had to do it because of the circumstances the industry has found itself?
- MS YILMAZ:** Well, Nigel might add to it but I'll start off. VACC commenced in group training back in 1983 and that was predominantly
- 45 because we knew going forward there was going to be substantive skill shortages in the industry. And in many years gone by, many apprentices used to come out of the old instrumentalities, the SEC and so on.

MS SCOTT: Yes.

5 **MS YILMAZ:** Employers in our industry have always employed apprentices directly as well. However, given the fact that they are small employers and particularly if they are in the regional areas then they are, in fact, affected by their local environment. And being a service industry there are many employers in our industry that cannot necessarily commit to a full four-year term of an apprenticeship.

10

MS SCOTT: Yes.

15 **MS YILMAZ:** So the group training idea was obviously implemented back in 1983 and it has grown quite significantly since then. In our view it helps but is not the full answer. Employers in our industry still need to employ apprentices directly as well.

MS SCOTT: Okay.

20 **MS YILMAZ:** But even though it is becoming extremely difficult we're finding that it's not just small employers that are walking away from employing apprentices. It's larger employers as well - purely and simply because of the complexity of - around the traineeship program and the apprenticeship program, training issues, award issues and so on.

25

MS SCOTT: And the salary now at age 21 relative to what it was before? What sort of increase were you probably talking about?

30 **MS YILMAZ:** Do you want to answer that one, Bill?

30

MS SCOTT: I'm happy for you to take it on notice.

MR CHESTERMAN: Yes.

35 **MS SCOTT:** Just include it in your - - -

MR CHESTERMAN: It might be better taken on notice. I think the bottom rate is fairly close to a level one adult - level one classification under the Vehicle Manufacturing and Repair Services and Retail Award.

40

MS SCOTT: Okay. And the move to competency based pay where students can be undertaking sets of competencies, rather than a full apprenticeship, has that had a positive or negative impact on the use of trainees?

45 **MS YILMAZ:** There might be some confusion about how that actually works in our industry. In terms of the training packages that we apply.

MS SCOTT: Yes.

MS YILMAZ: It has been a competency based progression system for quite some time and the training packages themselves we have two entry points.
5 You can either come in as a trainee and actually complete a qualification. That's competency based progression through that program as well, and that could be anywhere between 12 and 18 months to two years, depending on the qualification and how quickly they can progress through. The alternative is that they can come in as an apprentice and commence at level one and work
10 their way through to the end of level four.

We also have our Certificate II qualifications - our traineeship qualifications - which actually articulate into a trade. So in our industry it's quite common for a lot of young people who are in Year 11 and 12. They can
15 easily complete a Certificate II qualification in Automotive Servicing, for instance, over the Year 11 and 12 of their studies and then when they come into articulate into or transition into an apprenticeship they will actually get credit for the training that they have actually completed. So that's the kind of structure we have implemented in our training packages. In terms of this
20 question, do they do only sets of units? We don't - - -

MS SCOTT: Don't worry about that. I think that - - -

MS YILMAZ: Is that what you're referring to?
25

MS SCOTT: No, no. Don't worry about that.

MS YILMAZ: Okay.

MS SCOTT: We've heard in some cases that when students complete say a Cert II that under - now it may not apply to your sector, so I'm just clarifying here, that then when they're taken on by or they approach an employer with their Cert II qualification the employer, knowing that they then have to pay -
30 based on competency - that they may, in fact, find that worker is not attractive because of a Cert II qualification which they may not value. I don't know if I'm making myself clear.
35

MR MULLER: No, no. You're right.

MS SCOTT: You're nodding. So I'm just trying to - - -
40

MR MULLER: That's common with the building. We had that issue.

MS SCOTT: But you fixed it?
45

MR MULLER: We fixed it through the Skills Training. Yes, the Skills Council.

MS SCOTT: Right. Okay. So I think this is interesting, Peter, because it's either a training issue or a wage issue and you're fixing the training effectively.

5 **MR MULLER:** Yes. Yes.

MR HARRIS: So it's not necessarily a wage issue.

MS SCOTT: Correct.

10

MR HARRIS: But it may vary by industry.

MR MULLER: Training side though.

15

MR HARRIS: So some industry - in other words where you can clearly show to a - let's say an employer's workplace - whether directly the employer or not that this person with Certificate II straight out of high school has not nevertheless got skills and therefore could be immediately applied to get a transfer or whereas in some other industries if it isn't self-evident that the skill is available and tested in the workplace for many months and prepared to believe this then there's a doubt created as to whether or not you wouldn't be better off with an enthusiastic 18 year old versus a slightly higher cost, Certificate II trained 18 year old.

20

25

MR MULLER: They start at the different level which is the issue that the employers are not - is unsure and in many cases they aren't at that level.

MS SCOTT: Yes. Okay.

30

MR HARRIS: Yes, and this is why because of this complexity we actually think it's worth having a proper examination of this because it appears to apply in some industries. But the really interesting thing in yours is you're overcoming this model of the lack of an incentive for an employer to take on an apprentice for fear that the apprentice, once qualified even - after many years of working with them - will, of course, not necessarily work for that employer but would remain in the industry but wouldn't necessarily work for that employer once qualified. Because you've inverted the model around no employer has a reason to be bothered by the fact that that trainee - that apprentice - might work for another employer because they can't really go work for him. So he's not losing anything by participating in the training arrangement.

35

40

MS YILMAZ: Well, yes and no.

45

MR HARRIS: Yes and no. Okay, good.

5 **MS YILMAZ:** Because it's a partnership between ourselves and our host employers training itself is extremely expensive in our industry and we are finding that because training institutes are unable to deliver the full breadth of training required many of our host employers are also investing in training up apprentices to their standard by sending them to specific brand-type training if you like.

MR HARRIS: Yes.

10 **MS YILMAZ:** And these are provide providers and so on. We also invest heavily ourselves in addition to the training they would normally get through a TAFE institute. So in the old days we used to actually rotate our apprentices every six months, 12 months. And they would get a full breadth of experience
15 - a range - at least four employers or host employers and then they would select where they would like to end up in the industry. Because of the cost involved in training an automotive apprentice these days we've had to move away from that model. And the host employers are saying, "Well, if I'm going to invest in this young person then I would like the opportunity to offer them a permanent position on completion of the apprenticeship." And that's the
20 model we have adopted since. But just in relation to the point you made earlier on around whether or not it's - whether it's a wage issue or not.

MR HARRIS: Yes.

25 **MS YILMAZ:** This is an important point because when we reviewed our own industry award we were very careful to ensure that we didn't put too many training issues into the award, embedding them into the award. Otherwise that creates restrictions. What we're finding is training is evolving on a regular basis based on the needs of industry. And if you restrict it through an industrial
30 relations system you're creating problems for yourself. So the award, itself, currently only has level one, two, three, four rates of pay. It does not specify how you measure competency or how you progress through the apprenticeship. That has to come down to the individual training system and the training plan that's entered into between the employer and the apprentice.

35 **MR HARRIS:** Right.

MS YILMAZ: That's our view. And that's how we're able to resolve many of these inhibitors.

40 **MR HARRIS:** So you can make the payment arrangement match the competency via that mechanism.

MS YILMAZ: Yes. We are not using the industrial system to prohibit that
45 form of progress.

MR HARRIS: It's not embedded.

5 **MS YILMAZ:** Whereas, we have found in other industries and we did at one point in time have a recognition of a rate of pay when someone completes an equivalent Certificate II program.

MS SCOTT: Correct.

MS YILMAZ: And they end up in a level two.

10 **MR HARRIS:** That's the problem.

MS SCOTT: Yes, that's the problem. That's right.

MR HARRIS: That's the key.

15 **MS YILMAZ:** And that was a problem and that was an inhibitor. So we removed that.

MS SCOTT: Because that's what we've been hearing from others - - -

20 **MR HARRIS:** That's what we've been hearing.

MS YILMAZ: Yes.

25 **MR HARRIS:** And clearly if in other words if it's the automaticity of saying, "Have the qual, must be paid this level." You're saying, "No. There's some judgement to that. I'll say whether the skill has actually been achieved before we do that."

30 **MS YILMAZ:** Our view is - - -

MR HARRIS: I think some industries haven't been able to make that.

MR MULLER: Haven't caught up.

35 **MS YILMAZ:** That's right. And progression - the problem we find - when people talk about competency based progression they often do not understand what that really means. It is the accumulation of the theoretical knowledge but it is also the capacity to demonstrate the skills in the workplace to the

40 workplace standard or to the industry standard.

MR HARRIS: Yes.

45 **MS YILMAZ:** So there must be the work placement as part of that training. It's not just the theoretical knowledge which a lot of training providers tend to tick to get them through.

MS SCOTT: Yes.

MS YILMAZ: But they're not competent.

5 **MR HARRIS:** And that's quite consistent with what we're hearing yesterday and we have heard separately on other occasions.

MS SCOTT: Yes.

10 **MR HARRIS:** We've diverted you from your otherwise opening statement. So we can let you go back now.

MS YILMAZ: Okay.

15 **MR HARRIS:** But a very interesting issue. So thank you for that.

20 **MS YILMAZ:** I should add more than half of applicants to our Auto Apprenticeships Program are over the age of 21 and because of the cost involved we're unable to offer employment to the vast majority of those and for employers who employ directly the cost of a 21 year old apprentice or above is too difficult for them to absorb into the business. And as a consequence, our view is that this is an area that does require a lot more work because there is a need, in our view, for some form of incentive to engage these young people. And we're finding that many of these young people will finish high school. They might leave school. Might go to uni and then decide well a trade's the way to go but they're age 21 or over and that's an inhibitor to their employment. And so we believe that that is a critical issue that needs to be addressed.

30 Employers see the employment of an apprentice as an investment, however, sometimes the system itself can be a disincentive and of course what employers is a return on investment. So, serious issues there are clearly having the apprentice complete the full term and hopefully stay with them for a short period after completion of training. What we have found is with a lot of changes around apprenticeships and so-called expert panels that often look into these areas, a lot of these individuals do not have a clear understanding of how apprenticeships work and do not understand what industry requires in order to invest in training of an apprentice, and then sometimes decisions are made either for political reasons or knee-jerk reactions.

40 For example, in 2011 we had an expert panel that looked into apprenticeships into the 21st century, and one of the decisions that came out of that review which was adopted by the government was the abolition of Certificate II qualifications. Now for us that was very detrimental because that was in fact a pathway into a trade qualification particularly for those who are aged 21 and over, and that effectively abolished that entry point into the industry.

MR HARRIS: That was a State level decision?

MS YILMAZ: No, Federal.

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MR HARRIS: Federal.

MS YILMAZ: Our view is that there is a need to improve the confidence of employees and to provide support to industry with industry-based programs and we need a return to industry-led rather than supply-led solutions. We are keen on perhaps the abolition of payroll tax because we believe that's a tax on employment. We have in our submission identified a number of key industrial relations or workplace relations issues, such as the safe job leave provision, general protections, unfair dismissal.

15

We also refer to the four-year review, the importance of awards in our industry, enterprise bargaining, trade union entry. I won't steal Bill's thunder but I know that they are issues very important to Bill because he deals with those on a regular basis. We have a team of industrial advisers that regularly advise employers, and these are common issues that are raised on a regular basis, and we also do represent our members in tribunals so we have firsthand experience on these issues. Thank you.

20

MS SCOTT: Thank you.

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MR HARRIS: Do you want to talk about unfair dismissals now, or is that?

MR CHESTERMAN: I'll talk about them if you like or have you got specific questions, or would you like me to give you a general overview?

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MR HARRIS: Well, we know what we put forward.

MR CHESTERMAN: Yes.

MR HARRIS: And I guess the most contentious element of that appears to be, if I'm going to presume that - - -

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MR CHESTERMAN: Yes.

MR HARRIS: So we're trying to actually change or recommend the change to the unfair dismissal provisions, to say the Commission should be able to judge on the papers before it involves an employer in issue and make a decision as a threshold whether or not this has got a capacity to even proceed; and then beyond that to look through process matters and see whether there is a primary rationale for a dismissal, and having passed those sorts of tests then it might involve an employer having to provide information and all that kind of - well, more than information but having to be directly involved in an arrangement.

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MR CHESTERMAN: Yes.

5 **MR HARRIS:** So conceptually we're trying to preserve the principle for unfair dismissal but ensure that the process is not one which creates the kind of contention that appears to have emerged in this area.

10 **MR CHESTERMAN:** Look, can I start by saying one of - Leyla has already referred to the fact that we represent small to medium size business and most of our members are less than 20 employees, and I've been on record as saying this before, that one of the most contentious issues for our members is that they scratch their heads when they read outcomes of unfair dismissal cases where the termination is valid but subsequently the procedural defect of harsh, unjust and unreasonable overturns what is a valid termination.

15 That's great source of frustration to our members simply because they believe that even though they have our support, that you find with - I've worked in larger industries where you have a very big HR backup, right? But for small employers you find that a lot of them are working alongside the
20 particular employee who might be a problem to that business and also to other employees within that business, and one of the frustrating things for some of our members is that we always tell them to ring, and when they don't ring and they - well, they don't ring initially when they terminate the employee.

25 **MR HARRIS:** Yes.

MR CHESTERMAN: But they ring after they've got the unfair. Sometimes we can be a little bit harsh with them and they will say "Well, the problem is that I'm running a business and I'm on the floor, also basically performing my
30 role with my other employees and I've got other employees telling me that if I don't get rid of Bill Chesterman then that employee or other employees are going to resign"; and that creates a dilemma for that owner.

35 Instead of having to go through a long-winded process of warnings and the procedural fairness requirements then he has to make that decision as to what he's going to do. Is he going to let other people who are skilled go, or is he going to go through a long-winded process which could result in a skilled person leaving anyway. So that's how our members perceive the unfair dismissal process.

40 I do think that the approach of having an assessment done on the papers is a good idea and I can give you an example why, because when you go through a conciliation process by phone - which personally I don't have a problem with. Some people like to have the face to face context so they know
45 - they're basically going there to settle. So they basically like the face to face contact to determine what they believe is an outcome that's sustainable, but for me I think it's better because you don't have to go into the Commission.

But the problem is that once you have the outcome of a conciliation process and you don't get a settlement of it - and in a lot of cases we believe that a lot of the evidence is fabricated so personally I like to try and run the matter if I can to the next stage. The next stage unfortunately as it stands now will mean that in the case of a particular unfair dismissal I was involved in recently, that the service manager will have to drag four or five trained mechanics out of his business to go to Court.

Basically I think when we were doing this unfair I said to him, "Don't settle it because I don't think there's any substance in it at all" and he said, "Well, I have to because I can't have four or five of my staff out sitting in the Fair Work Commission waiting to give evidence", and so that's the frustration. As an industrial relations practitioner it's a frustration for me too, because over the years I always thought or worked on the basis of if I didn't think there were grounds for a settlement of an unfair I would want to run it.

The number of times that you go through a very long-winded process in getting the evidence, getting the witness statements prepared, all the submissions. and then you basically settle going up the Court room steps is very frustrating because of that very factor. And the factor is that at the 11th hour if the lawyers makes an offer knowing that probably he's going to lose, or they're going to lose, but my member says "Well, I've got seven people I've got to run through this Court hearing so I'll take the money, right?" Sorry "I'll settle on the outcome of the" - - -

MR HARRIS: So deciding it on the papers means basically having some statements of that disturbance in the workplace.

MR CHESTERMAN: Yes.

MR HARRIS: And then having the Commission make the decision without pulling people off the workforce.

MR CHESTERMAN: Yes, and that involves - to be honest my view and my department's view is we like to be very proactive in getting people to ring us first before so that we can take them through the process. But certainly we could be very helpful to our members if we had that sort of process, because we would go out to them and write up the statements and get the statements, get the evidence that's required to be put to the Commission. So I think that would be a good, positive step for us.

MS YILMAZ: There is some experience actually in this area. When we used to have the old Victoria Industrial Relations Commission we actually went through a process of the Commissioner at the time, the head Commissioner, I can't recall the title we had - it was Registrar, I think. Matters would come to the Registrar and the Registrar had the capacity to make decisions on the

papers.

5 Unfortunately what happened was that it was too difficult for the Registrar to actually make decisions on the papers because you had one statement and then the other statement and they couldn't really make a decision based on the statements. So they ended up calling them in for evidence regardless before a member of the Commission.

10 But there was something that came out of that process which I think was very helpful at the time and that was that for the requirement for the complainant who's lodging the unfair dismissal application to actually stipulate what their claim actually is. The number of times that we have unfair dismissal applications and you don't even know what the claim is until you end up in the Commission is problematic in itself, and it can be a moving feast.
15 So putting it on paper is very helpful for the parties concerned.

MR HARRIS: So you're suggesting really that our final report needs to describe in some - I won't say detail but enough details so there's no doubt at all what on the papers actually means?
20

MR CHESTERMAN: Yes.

MS YILMAZ: Correct, yes. Thank you.

25 **MS SCOTT:** Just on this matter, Bill, I've got two questions. In your submission you gave us a case study and you might not recall it, but it was about an apprentice that was dismissed because he was found by his employer to be at work on Good Friday working on cars and drinking alcohol.

30 **MR CHESTERMAN:** Doing the donuts.

MS SCOTT: Yes, and so on. You might have read in our report about consideration of matters being on the substance rather than on the form. In this case you indicate that the matter was settled for four weeks' pay and you
35 decided it was too expensive in time to go through a hearing. If you had things where there was a clear articulation that procedural matters may not overturn the substance of a matter do you think it would change the employer's outlook, or do you think things are so entrenched, margins are so tight in small business, the time of a manager is so intense, that in fact it wouldn't get any change and
40 we'd still get the settlement and the go away money.

MR CHESTERMAN: Right. No, if you're talking about the concept of harsh, unjust and unreasonable.

45 **MS SCOTT:** Yes.

MR CHESTERMAN: Is that procedurally what you're talking about?

MS SCOTT: Yes.

5 **MR CHESTERMAN:** I would be the greatest fan of getting rid of harsh, unjust and unreasonable.

10 **MS SCOTT:** Well, not getting rid of it but the way we put it in the draft report was that in some ways the Commission could almost see through accidental non-observance of right procedure.

MR CHESTERMAN: Right.

15 **MS SCOTT:** If there were multiple cases where time after time they hadn't followed the procedure then clearly there should be penalty arrangements. But if there was a case where there was a clear-cut issue for dismissal but people hadn't followed the right procedure.

MR CHESTERMAN: Yes.

20 **MS SCOTT:** Then that may be overlooked.

MR CHESTERMAN: Yes, I've read that. I did read that.

25 **MS SCOTT:** Yes.

MR CHESTERMAN: And yes, I think that ties in with my opening statement that the frustration is there's a valid termination but that it's overturned by the procedural requirements not being strictly adhered to.

30 **MS SCOTT:** Yes.

35 **MR CHESTERMAN:** I think that if there can be some degree of flexibility with that then I think that would be - from my point of view anyway as an industrial relations manager that would be positive in terms of how I could advise our members in terms of how they would approach matters. I would always operate on the basis of telling them to go down procedurally the correct path.

40 **MR HARRIS:** Yes.

MR CHESTERMAN: But as I say, sometimes you can't be perfect.

MR HARRIS: Sometimes it's too late for it.

45 **MR CHESTERMAN:** Yes.

MR HARRIS: Just too late.

MR CHESTERMAN: Unfortunately what has happened with a lot of the decisions is I believe that the procedural requirements have become so sacrosanct to the Commission.

5

MR HARRIS: Yes.

MR CHESTERMAN: That they overlook the substance of the reason for a termination, and there have been a few decisions like the one that always - that sticks in my mind is the ferry driver who was subject to a zero tolerance drug and alcohol policy and ran a ferry into - - -

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MR HARRIS: A wharf.

MR CHESTERMAN: A wharf with it packed full of commuters. Now at first instance that ferry captain was reinstated and then on appeal obviously his dismissal was confirmed. But that's the frustration for us that we get very inconsistent outcomes based on the procedural issue. So in my view that's - what you're proposing, what the Productivity Commission has proposed I think has a lot of merit.

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MS SCOTT: And one other question, given your wealth approach minds to this topic, the point has been made to us that because small business has the opportunity to work with someone for 12 months and still have that capacity to dismiss without unfair dismissal being in scope, that that is quite substantial protection. Now the question I've got to you is from your experience how many problems actually occur with workers who have been with a firm for a long time relative to someone that has only been with the firm for 12 months?

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MR CHESTERMAN: Numerous. You find that there are actually certain jobs in the industry where after a certain period of time employees seem to basically go off the rails a bit. It's after two years. I can give you an example. A car washer, car washer cleaner detailers. There always seems to be an issue - when somebody rings up and says, "I've got a problem. I'd like to terminate a detailer". I say, "Well, how long have they been there?" "18 months, two years."

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So I think personally the 12 month period is meritorious in terms of providing smaller business with an opportunity to have a longer assessment, but equally that's not the end of the story with the unfairs I've been through, and now you're getting situations where there are a number of employees who have been quite long term and obviously because of the harsh, unjust and unreasonable concept you always ask about their economic circumstances probably before - or after you've been told about the incident you check their economic circumstances.

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Because you know that if they're of a particular age or they have children

or they have a mortgage then the harsh, unjust and unreasonable concept comes in and we say to the member - the member will say to us “Oh, have I got a fair chance of avoiding an unfair dismissal?” Not “Have I got a fair chance of terminating this employee because on the overall scheme of things this employee is not a good employee for me?” and I’ll have to say to them “Look, it’s a \$5 each way answer because I can’t guarantee you won’t get an unfair because there is no such thing as a fair termination process”.

MS SCOTT: Okay, got you. Thank you.

MR CHESTERMAN: All right.

MR HARRIS: Do you want to keep going or can we divert into questions?

MS YILMAZ: Yes, please do.

MR CHESTERMAN: Can I have one other - - -

MR HARRIS: Yes, go for it.

MR CHESTERMAN: I’d like a go at one other issue and it relates to the four-year review.

MR HARRIS: I was going to ask about it.

MR CHESTERMAN: Yes. No, well I actually do have some experience in this because I started in June 2008 in award modernisation and I have been in award modernisation ever since except I think for 2011 when there was a bit of a hiatus between the conclusion of the process which resulted in 122 awards to the process which led to the mid-term review, which I was involved in, including the apprenticeship case which went for about a year, and now I ran straight into the four-year review.

The problem I have with these reviews is that I think it creates an event and people feel compelled, particularly unions feel compelled to put in claims and a lot of - in my view, having experienced some of the claims in this process I think they’re frivolous. But they want to be involved in the action so therefore they get involved in it.

The other thing, the other problem I have if I can summarise my views on the four-year review is that because it has taken so long, I think the review process has almost in a way acted contrary to the modern award objectives, and that is to create a stable modern award; and I can tell you why, because our members haven’t seen a consolidated award since 2010 and we put out after the - well, they’ve still got that award but the fact that it has been amended so regularly means that if we were to put out a new award every year, which for us was an extremely expensive process, then that would - well, it would be

too expensive to be honest.

MR HARRIS: So it sounds like you're going to be a big supporter of our recommendations.

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MR CHESTERMAN: Yes, a very big supporter.

MR HARRIS: Since the four-year - once they're done.

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MR CHESTERMAN: Yes. Yes.

MR HARRIS: And move to issues-based reviews of sets of awards. In other words pick the issue and look at that, make sure you've got across a number of awards if indeed - you've got to make the case for the issues that are sufficiently prominent to be worth considering.

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MR CHESTERMAN: Well, that's right. The Act already provides for an opportunity for a party to bring an application for a variation based on anomalies, inequities, uncertainties, four year reviews. I don't have a problem with an award being varied where the need arises.

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MR HARRIS: We were thinking more of the Commission rather than a party putting up a submission. We were thinking of the Commission itself looking at an award to see whether - - -

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MR CHESTERMAN: Well, I'm going through that at the moment and I'm a little bit sceptical about that because - - -

MR HARRIS: Keep going.

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MR CHESTERMAN: Well, because simply put I thought the award modernisation was about creating an industry award for particular areas, right? So in our area it's the Vehicle Manufacturing, Repair Services and Retail Award. Prior to 1 January 2010 we had two primary awards. We had the Federal Vehicle Industry Repair Services and Retail Award 2002 and we had the Vehicle Industry Award 2000. Now the Vehicle Industry Award - - -

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MS SCOTT: Which is a manufacturing award.

MR CHESTERMAN: Yes, it was a manufacturing award. The other award covered repair services and retail work. basically during the run up to the decision on what award should be relevant to the vehicle industry Leyla and I went through about - there were six different exposure drafts put up and in the end the seven member Full Bench decided that they would incorporate the two awards into one, which had been done in the past anyway, and so that became the Vehicle Manufacturing, Repair Services and Retail Award.

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Now I've just appeared very recently in a case which is dealing with the award issues for our award, our particular award, in the four-year review and during the Full Bench proceedings - if I could just go back one step. The award is quite complex because it does have to deal with a great diversity. Leyla said it's a small business environment predominantly.

MS YILMAZ: But it's diverse.

MR CHESTERMAN: There's a diverse range of businesses so the award has to be broad enough and flexible enough to cover all these diverse businesses, and it is fairly diverse, and for someone who picks it up to try to read it, it is quite hard to understand. But during the course of the proceedings the Commission member presiding over the Full Bench said "Would anyone have objection to this Bench taking out one section of the award?" which was the vehicle manufacturing section, "and putting it in another award?"

Well, we would have simply because we went through a very long-winded process and a lot of submissions outlining why we believed and integrated award was relevant to the vehicle industry.

MR HARRIS: Right.

MR CHESTERMAN: And for someone just to turn around in the Commission in a whim and say, "Because this seems a bit complicated for us we might just remove a whole section" and I'm very opposed to that.

MR HARRIS: Okay, but that wasn't really the proposition. Our proposition is you mentioned training, for example. We think by the sound of it you seem to have a mechanism for training which some other awards don't have. Not your industry, different industries, maybe food service for example where there's a lot of Certificate I, Certificate II kind of business and no one is quite sure whether that food service person is up to the standard in the workplace of Certificate I, Certificate II than if they have go the qualification from an institution.

So just taking that, if the Commission were to review training and certification, taking yours - and I would not change your - but take what you've done and think "Hmm, I think I should review 23 other awards that haven't got this", to see whether they couldn't benefit from having your mechanism translated to them. That's what we call issues-based. Now I guess the fear for you is, "Ah yeah, but we don't want to get caught up with that in case we get the reverse happening. We get a worse arrangement transferred into ours".

I would understand that instinctive wariness but the principle we're trying to get to - and I need your reaction to this. This is not just me trying to sell here. This is me trying to say something so you can respond to it. The idea is to find better practice from an award and say "Commission, it's your

job to get that put into 23 other awards” not wait for every individual industry to (a) discover it and (b) propose it. Do you understand that?

MS YILMAZ: Yes, definitely. Yes.

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MR HARRIS: And so that was my concept of an issues- based reform than an award by award reform.

10 **MS YILMAZ:** I seem to think that this is not too dissimilar from the old test cases we used to have. We actually dealt with training actually. We did actually have a test case on apprenticeships and training and traineeships. This has all been dealt with before, whether we could have or should have part-time apprenticeships in awards.

15 The concern that we have is that based on our own experience if you allow the Commission to identify these issues and perhaps furthermore determine, “Well, which awards have these provisions and don’t have these provisions?” and that the Commission is actually directing or is in fact guiding this process, I think there’s an inherent problem with that. It really needs to
20 come from the industry.

This is the approach that we have taken; our industry award has been developed over decades and decades and it has evolved as the industry has evolved, and there are parties have been part of that process. We’ve been the
25 driver of that change. In a lot of other industries they are faced with perhaps a bit more complexity because they’ve had a two tier system. You’ve had a State system and a Federal system and I know from my colleagues in other organisations often they had an active presence in the State system, they’ve had some presence in the Federal system but they haven’t necessarily always aligned, the Federal and State system.
30

Our approach over many decades has always been that in terms of automotive we needed to be the driver of both the State system and the Federal system. So our State awards used to in fact mirror the parent award and as
35 industry progressed we actually merged relevant awards that were important for our industry. As the Commission dealt with test case issues we got dragged into these things, even though we didn’t have any interest.

40 But the Commission seems to take a view generally that there needs to be some consistency across awards and they fail to understand, and they fail to have that intricate understanding and experience in industry to realise the direct implications. We actually feel when that occurs that we don’t really have a direct capacity to influence that outcome sufficiently. We present evidence and we can drag our employers in; sometimes our employer don’t want to be
45 dragged in because then they’re picked off.

So they don’t really want to come in, so at the end of the day the biggest

driver for the Commission in our experience is consistency rather than the specific needs of industry, and for that reason I would have some hesitation with that.

5 **MR CHESTERMAN:** Yes, can I add to that because going back to the four-year review, I always thought the outcome of the four-year review for our industries was that we would have our own award and unlike previous decades where you had comparative wage adjusters and comparative conditions adjusters, and as Leyla said you have test cases and we're dragged in
10 unwillingly and we get an outcome that's not relevant to our award, that's what I thought award modernisation was about.

But now I see that it's going back under a different guise of test cases. It's now coming back under the 4-year review of common award issues. So
15 because we want common award issues everyone is going to cop them. Now I'll give you an example of where we thought we were doing the right thing by our industry, because in the apprenticeship case we were the only employer organisation that argued for an increase for our apprentices. Because when we looked at the traditional trades we saw that we were way out of the market and
20 that we should be not at the top of the market but we should be in the middle.

We argued for increases for our first and second year apprentices but because the ACTU had put in a common claim for X number of awards we were thrown into that mix. And basically what would have happened, the
25 increase would have been less for our apprentices which probably would have meant that we would have been as an industry competitive in terms of maybe - I can't say categorically but maybe, in terms of recruiting and retaining apprentices, in a better position.

30 But the apprentices certainly would have been in a better position because as a result of the outcome of that Full Bench case the only apprentices who got an increase were first and second year apprentices who commenced after 1 January 2014. Whereas our claim would have been for all apprentices. So that's the frustrating thing when dealing with awards and which way you
35 should go. For us I agree totally with Leyla, it should be an industry-based award. We should look at if you're looking at wanting to make variations to the award, it should be based on the industry that the award covers and not just having other conditions dragged in from other awards.

40 **MR HARRIS:** Okay, without wanting to flog a dead horse, so if this option of more consistent arrangements was limited to constructing - let's stick with training as a model - a consistency of approach to training but it became optional to put that into an award, in other words optional would require both the employer and employee representatives to agree, "Yeah, we're going to
45 vary our award to meet the model clauses, if you like, on the training".

So you wouldn't have to do it but there would be a model up there for a

better arrangement, like better as in interpreted generically across the economy, “This would probably be better, but for the circumstances of some industries perhaps it won’t be”.

5 **MR CHESTERMAN:** But it would still come back to the Commission, wouldn’t it? Because if the employee representative says “Well, I want it in” and then as an employer representative I say “I don’t want it in”.

10 **MR HARRIS:** If there was a difference of opinion.

MR CHESTERMAN: Yes.

MR HARRIS: Yes.

15 **MR CHESTERMAN:** It goes to the Commission and they’d arbitrate it. Yes, and you see that’s where I have a - I don’t mean to be negative.

MR HARRIS: Okay.

20 **MR CHESTERMAN:** But it’s just I’m - I would like to be seen - - -

MR HARRIS: You’re quite wary about a change that you haven’t initiated.

25 **MR CHESTERMAN:** Well, I am. I’m just wary that if you go through award modernisation, going from 4000 federal and state awards to 122 awards - surely one of the main reasons why the seven-member Full Bench of the Australian Industrial Relations Commission went that way was because - well, in my view I thought it was - they were creating specific industry awards. Therefore, my view with my experience, I guess, it was thinking, “Wow, this
30 is great, because now if there are going to be variations, it will be relevant to our industry and it keeps out other organisations who are only” - as is happening with four-year reviews - “really opposing some of the things we do because they don’t want to flow on to other awards.”

35 **MR HARRIS:** I’ve got one other very simple question, if I could.

MS SCOTT: Yes, keep going.

40 **MR HARRIS:** The proposition has been put up that we should have fewer than even 122. By the sound of it, you’re not going to be supportive of that idea.

45 **MR CHESTERMAN:** No, because we’ve been through it before and obviously it didn’t work. One of the things you’ve got to understand - and, as I said, I also had experience in the larger industry - in this industry our members, employers, are very comfortable with an award, because it’s a supply and demand thing. It’s market force. It’s a skill shortage area, so they

know they have to pay over-award payments. 99.9 per cent of the time they're very comfortable paying overtime when people work overtime. To them it's basic and simple.

5 I'll give you a classic case with WorkChoices. They were totally lost with WorkChoices because they would come to us wanting to do things that plainly they couldn't do and it confused them. Now they've got their award back, they're pretty comfortable with the award. It's a complication they don't need to have, more opportunity, flexibility if you like, to do all sorts of different
10 contractual things, because the problem is they hear what somebody has done and sometimes the person that they hear it from has done it against the law, illegally, so they come to us and say, "Well, I want to do it, too." We say, "Well, you can't, because you can't pay someone \$10 when the federal minimum wage is \$12.95," so that's why we like the simplicity of an award.

15 **MS YILMAZ:** As we have said, the industry is made up of predominantly small business, but we also do have the imposition of very large business. In our industry, we have this issue of big business versus small - and service stations. Independent service stations are competing with the major
20 supermarkets, which is hugely problematic. When we abolished the old Victorian state awards, there was a huge level of pressure by the oil companies in those days and we saw many independent operators just simply leave the market. We went from 1200 businesses down to 500 practically overnight.

25 We've got insurance companies that are continually placing undue pressure on a vast array of our members; our body repairers and so on. It's all about reducing cost. The award is a safety net not just for employees. It's a safety net for these independent operators. That's why we're big supporters of the industry award.

30 **MS SCOTT:** That's very clear. Thank you very much.

MR HARRIS: Thank you very much for your time today. We appreciate it.

35 **MS YILMAZ:** Thank you.

MR HARRIS: I think it's the ASU next. Mike, please have a seat and identify yourself for the record once you've settled into the chair.

40 **MR RIZZO:** Thank you. Michael Rizzo, national industrial officer with the ASU national office.

MR HARRIS: Do you want to make any opening comments, Michael?

45 **MR RIZZO:** I think I've been told I've got about 40-odd minutes. Is that right?

MR HARRIS: Yes. You've got 40 minutes, yes.

MR RIZZO: Perhaps I'll just spend five minutes introducing where we're coming from.

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MR HARRIS: Sure.

MR RIZZO: Then we can go from there. Is that okay?

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MR HARRIS: It sounds goods, yes.

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MR RIZZO: The Commission will recall that the ASU put in an original submission way back in March and we intend to put a subsidiary or supplementary submission in the next week or so, responding to the draft report. I'll say this about the Commission - and this is a bouquet before we get to the - - -

MS SCOTT: Yes.

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MR HARRIS: We're not used to that. You want to be very careful.

MR RIZZO: Before we get to the brickbats.

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MR HARRIS: Okay. Back to the normal.

MR RIZZO: Back to the normal. The bouquet is this: you haven't succumbed to the normal free market, economic, rationalist orthodoxy of industrial relations. By that I mean - - -

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MR HARRIS: A bit of a back-hander there really.

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MR RIZZO: No, this is a real thing. You see, the orthodox industrial relations is that we don't need minimum wages and you've said that minimum wage is not a bad thing, but the award system is bureaucratic and red tape, and all the rest of it. You said it's not a bad thing. In fact the vehicle people have just said it's not a bad thing. We hear all this propaganda from right wing think tanks about productivity is going down and labour is too expensive and wages are too expensive, and all the rest of it. You didn't necessarily abide by that orthodoxy neither. You said that the system was broken; that it needed repair. Certainly again the orthodoxy is that the system not only is broken, but is anti-business and all the rest of it.

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I compliment the Commission for having seen through the orthodoxy and actually reflected the world as it is. That is that the employers and unions have a vested interest in the system and by and large we think the system works fairly well. That's not to say the employers and the unions don't have criticism of the system or there are failings. Obviously there are, but by and large it's

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not too bad, the modern industrial relations system. Having said that, obviously there were some recommendations in your report that we're not comfortable with. There are quite a number actually, but I'm not sure how much detail the Commission wants me to go through at this time.

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MR HARRIS: I think just pick the eyes out of what you would like to have on the spoken record, because when we put the transcript up on the web site, others see it, it gets reported on, that sort of thing.

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MR RIZZO: Sure.

MR HARRIS: Just pick the things that you'd most like to see up on the oral record.

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MR RIZZO: Okay. (1) penalty rates. You say that we should equalise Sunday and Saturday penalty rates. We oppose that. You also present this dichotomy that somehow in one corner there are these emergency workers, and I imagine you're talking about police, fire, ambulance and so forth, and in the other corner there are these HERRC workers, the hospitality, retail industry sort of people, and we should preserve the penalty rates for the so-called emergency workers but somehow cut them back for the HERRC workers.

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What concerns us is also there are millions of people in between there and a lot of our members are in those millions of people in between. We have call centre people who work public holidays, night shifts, weekends. Are they emergency services workers? Are they retail workers? No, they're neither. Where do they fit into the scheme? In local government we have librarians who work on Saturdays and Sundays. We have parking inspectors who work on Saturdays and Sundays, public holidays and the like. They don't fit into any of those two groups either, but these are real people who work these long and arduous hours in often difficult work.

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For example, parking inspectors have got a pretty crappy job, but your report doesn't really - I understand that you can't cover everything, but what I'm simply saying to you is that you can't set up this dichotomy of these emergency workers who are okay, these HERRC workers, retail workers, who need their penalties cut and then there are all these millions of workers in between who do very worthwhile jobs, sometimes difficult jobs, and we want to preserve their penalty rates, as well. What concerns us is that at page 528 of your report, you say, "Between these two poles lie a range of industries where the case may, or may not, be equivalent to that in the HERRC industries. Based on the improved practices and experience with conducting the award assessments recommended in chapter 12, the FWC should undertake research and seek proposals from other industries in the medium term and," the key bit, "assess whether a similar case can be made for equalisation between Saturday and Sunday penalty rates."

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They don't present the whole show to us. We're not just talking about HERRC workers and emergency service workers. We're really talking about the whole show and whole show is there are millions of people in between these two poles and there are tens of thousands of our members in there, as well. For example, we're the biggest union in electricity and in water. Are they emergency workers? I would have said that they probably are. Power and water are pretty essential services. Are they emergency workers? Are they not emergency workers?

This dichotomy you've set up, we're uncomfortable with. The fact that you've opened it up to the possibility of other people being caught up in this review, we're also not comfortable with.

MR HARRIS: Okay.

MR RIZZO: Just moving on, Commissioners, another area which we're not very comfortable with is the issue of independent contractors, labour hire and casual workers. You make a recommendation that says - recommendation 20.1: "Terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement," and here it's underlined, "should constitute unlawful terms under the Act."

I find this incredibly distressing, to be honest. What we're saying is here are these very vulnerable people - already vulnerable people, contractors, casual workers - but to regulate them should be made unlawful under the Act. As unions, we spend an incredible, inordinate amount of our time trying to protect these people. Mind you, most of them are not our members. Nevertheless, we feel it's our moral duty to protect these people and we regulate these people in two senses: (1) that the casuals don't get exploited in the sense that we try and maintain their casual loadings. We try and get all sorts of leave for them if we can and rights - parental leave and the like if we can, long service leave in Victoria, which we got.

On the other hand, we also want to protect the permanent workforce from not being undermined from the employer simply employing a whole bunch of casuals and therefore making permanency with the permanent workforce somewhat superfluous. When you say that we should not regulate casual labour under the Act or enterprise agreements or awards, that really distresses us. At the moment, as you probably know, we have sensible clauses saying casuals should be used at peak periods. Casuals should not be used to undermine full-time employment. Casuals should be paid properly and given casual loadings and the like. Now, they are all sensible propositions to me and most employers that I deal with think they're fairly sensible, as well, so we are alarmed by that recommendation 20.1.

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MR HARRIS: When you have finished this, I might just go a little further into that because I think that's not quite the representation that we would put on what was recommended; but we'll come back to it.

5 **MR RIZZO:** Yes. Hopefully I'm wrong.

MR HARRIS: I think we had this come up yesterday, as well.

MR RIZZO: Yes.
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MR HARRIS: In Hobart. Anyway, we'll come back to it.

MR RIZZO: Okay, we'll come back to it. Commissioners, also the enterprise contract that you talk about at pages 4 and 615 of your report, again we find
15 this particularly distressing. We think you're coming from a position where you want small and medium businesses to be engaged in the enterprise bargaining process and somehow they're not in the process, and somehow you want to bring them in. Now, that's a laudable sentiment and it's probably a laudable objective, but the way you go about it is you want to bring them into
20 the field, but then you want to change completely the rules that current apply in the field.

The current rules that apply in the field are that there is an enterprise agreement. This enterprise agreement is negotiated between the parties, unions
25 and employers or sometimes employees and employees, and then there are all these safeguards in there. For example, to certify the agreement you have to pass the BOOT test and there are Acts to be aware of and classifications to check, et cetera. In your recommendation you talk about that the employer can unilaterally change the role and the wages of classes of employees -
30 unilaterally. Unions or employee representatives don't have to be involved in this negotiation.

Somehow all of a sudden we've gone from this regulated system where most employers, unions and employees understand the system and participate
35 in the system. There is conflict, for sure, but we understand the rules of engagement largely. What you're bringing in now is a whole different situation where the enterprise contract in our view is going to undermine the BOOT. Yes, you talk about a no disadvantage test, but that remains undefined. We saw the controversy with the no disadvantage test during the WorkChoices
40 regime, where in fact it was abolished.

MR HARRIS: Or it didn't have a test.

MR RIZZO: Yes, didn't have a test.
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MR HARRIS: There wasn't really a controversy about the no disadvantage test.

MR RIZZO: Well, no.

MR HARRIS: The controversy was the absence of it.

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MR RIZZO: The controversy was the absence of it, yes, which was pretty bad. We all remember the people in the video shop getting a free video or something instead of overtime, or free pizza. We're just concerned that this enterprise contract, while you're trying to engage small and medium business - which some of them are involved in enterprise bargaining, anyway - is going to completely change the rules and, we say, disadvantage employees.

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Commissioners, just one more point, I suppose. With enterprise bargaining, obviously it's something that takes up a lot of our time. Again you make some recommendations which we're very uncomfortable with and I'll just go through them very quickly. For example, you talk about at page 53 to give "the Fair Work Commission wider discretion to approve an agreement without amendment or undertakings." As you're probably aware, a lot of the time the Commission does ask for the parties - or the employers in particular - to give undertakings. These undertakings, in our view, are very important. It keeps the parties on the straight and narrow. I include the unions here, because sometimes the unions stuff it up, as well. It's good to have someone impartial like the FWC insisting that the parties understand the agreement and understand that they need to give undertakings if people are being disadvantaged.

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Similarly, you say at draft recommendation 15.2, "Enterprise agreements should not be able to restrict the terms of individual flexibility arrangements." This is again where we're getting to this unregulated territory. The IFAs were introduced largely as sort of a sock for getting rid of the AWAs, to my view. The IFAs are used by employers to try and individualise some arrangements and sometimes undermine the collective.

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I do concede that at times individuals don't mind having these individual arrangements and that's fine, but not to the point now where we're going to talk about that the enterprise agreement should not be able to restrict the terms of the individual flexibility arrangements. I would have thought that if the employer and the employee organisations agree to restrict the use of the IFAs, then we should leave it at that. The current system is that individuals can take advantage of IFAs if they want to, but now to be able to restrict that function is not something that we would support.

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MR HARRIS: All right. That has been useful. On IFAs - I'll start there and work back up the list, if that's all right - I think the logic was what statute provides for an EB to restrict availability of that statutory right. It seems to create a set of circumstances where somebody who isn't at the table, as it were,

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but in the EB circumstances - that is, between organised labour and organised capital, two parties at the table - don't know what they're actually giving up.

5 An individual who subsequently discovers that they are now in a family
circumstance where they would like to have an individual flexibility agreement
can't actually take advantage of it because prior to that, six months ago, in the
EB they lost control of this without realising it. They lost control of what their
statutory right is because the EB had restricted it. The logic we have in mind
10 with this recommendation is one which says inherently if statutorily people
have a right to flexibility, they should be able to take it up. Not just the
employer take it up, but the employee has a right to take up that flexibility.

15 I understand your point which says, well, it's a willingly entered into
bargain, but I guess from our perspective we're suggesting that the parties
aren't aware of what they're giving up at this point in time.

MR RIZZO: Commissioner, you could say that of many different clauses.

20 **MR HARRIS:** But rarely are they statutorily provided. In other words, many
parts of the EB, I agree, are voluntarily entered into where they are the
circumstances of the firm and the union at the time, and that's a legitimate deal
and that's the end of it. This is an opportunity that has been provided by statute
which we're seeing potentially eroded and yet individual employees - one
25 assumes the employer knows what he's doing, but the employees won't
necessarily know what they're doing because their own circumstances haven't
changed yet. They haven't suddenly had a child or needed to pick up someone
after school or whatever and want to change their work times.

30 **MR RIZZO:** Yes, but these things have been around for decades. This is not
a recent - and for decades employers and employees, regardless of IFAs,
because IFAs are very recent - - -

MR HARRIS: Relatively recent, yes.

35 **MR RIZZO:** Yes. These things were negotiated between employers and
employees for years, about school times, about kids and so forth. Also if
someone is really keen on having their employment individualised to cater for
them, there are individual employment contracts which people can enter into
freely with the employer if they want. The point of an enterprise agreement,
40 which is a collective agreement, is that this is the collective set of conditions
that people understand, people know.

45 There is some provision in the statute for IFAs. That's fine if people want
to do that, but to go a few steps further, Commissioner, with the
recommendation that somehow the enterprise agreement should have no role
in controlling the IFA, that's where we find that we've gone way beyond the
scope and we're now undermining the collective agreement.

5 **MS SCOTT:** Michael, why would they always be undermining it? Couldn't they be complementary to it? It's hard to, in any collective arrangement, reflect everyone's individual sets of circumstances. Why do you presume it's the case that it's going to undermine it? It looks anti-competitive from first principles.

MR RIZZO: Because, as I say, (1), employers and employees have always been able to reach these accommodations, anyway, regardless of IFAs.

10 **MS SCOTT:** But you don't have the protections of the statutory arrangement, of course.

15 **MR RIZZO:** Yes, I understand that. (2) there are individual contracts if you really want to personalise your employment. The point is when you have IFAs within the system now, they are in my view available to people to have and use, but to go beyond that and say that the enterprise agreement should not be able to influence or restrict that IFA, I think is going too far.

20 **MR HARRIS:** I understand your point. Enterprise bargains and wider discretion. It's not a dissimilar thing. The intention in our recommendation is that the Commission is able to choose. In other words, not that it's prevented from insisting upon a process that must be followed, but that it has the choice of deciding that it isn't material. You, I'm sure, are familiar with the infamous staple case and we've had a few others given us to since then. It seems such
25 an unusually restrictive arrangement to say the Commission has no discretion to look at a set of circumstances and judge that it isn't material to the outcome. That's the discretion we're trying to offer in this recommendation.

30 As you point out, it may not be just the employer who may have failed the process. It's possible that employee representatives can fail it, too, I guess, but we just see the inherent need in the Industrial Relations system to have the party - in this case the Fair Work Commission, which is the ultimate arbiter of whether things have been handled legitimately or not - given that legal power, which apparently they lack because successive Commissioners have said, and
35 Fair Work Commissioners have said, almost with regret, "I've got to kill this process off and start again." In some cases; not in all cases. What we want to do is give them the discretion to choose.

40 **MR RIZZO:** Let's start from the extreme end. We saw what happened when the no disadvantage test was abolished altogether. There was chaos and exploitation. We liked the idea and I think a lot of the employers liked the idea that the collective agreement, the bargain that it has come to, has to pass a test. That test should be a fairly rigorous one and no-one should shy away from that
45 test.

Now, let me say, Commissioners at the end of the day have their own individual discretion about how they deal with enterprise agreements that come

before them, so they already have a fair amount of discretion about the questions they ask of how they view it, how they read it and how they interpret it, but if they're of the view that a clause is unclear or that a clause may be disadvantageous to employees and so forth, I like the idea that the Commission is able to do that and put it on the parties to demonstrate to the Commission that the Commission is wrong in assuming that the clause is unworkable or unintelligible or disadvantageous.

MR HARRIS: But having discretion wouldn't stop them doing that. It's just additional power for them, not less power.

MR RIZZO: I'm saying to you they already have lots of discretion.

MR HARRIS: But what we know they don't, from these actual examples, is they don't apparently have discretion to ignore a flaw in the process and so consistent with a number of other parts of our report, we're suggesting they should look through it in substance. In terms of applying a BOOT or a no disadvantage test, that would be a matter of substance, I would assume.

MR RIZZO: Yes.

MR HARRIS: But the recommendations attempt is to give them discretion to look through a flaw in the process. It seems to me these are actually the things that are now used to discredit the system. People regularly put up these examples of areas where the Fair Work Commission was apparently unable to act in a manner that, stepping away from it you would think a reasonable person would have said, "Look, it's fair enough. What difference can a staple possibly make?" That was the intention behind the discretion.

MR RIZZO: Yes, but, Commissioner, when we look at this globally, what concerns us is when you look at things in isolation you get one picture, when you look at it globally, you get a different picture. With the enterprise contract, you're taking the Commission out of the enterprise contract altogether. You're taking the union out of the enterprise contract, then with enterprise bargaining and collective agreements, you're talking about giving some sort of discretion to the Commission and stopping the union or the employer from affecting or influencing IFAs.

Then with greenfields agreements, the employer can unilaterally bring up its own greenfield agreement if it likes and certify that for 12 months, bypassing the union, bypassing the Commission. When you look at that as a package, it leads you down this road that the Commission and the unions are being taken out of the picture and the employers can unilaterally do things as they please. That's the impression I get.

MR HARRIS: Can I ask on the enterprise contracts, since you touched on it then and you did in your opening presentation, you're right in your - some

people have characterised the enterprise contract model in a different way, but the way you characterise it is correct. We came to the conclusion there was a need based around a large group of firms - not a large group of necessarily employees, but small to medium enterprises, large in number, have not
5 apparently taken up the opportunity of the flexibility arrangements that have been put in place for the last 20 years. They're non-participants in the system.

Now, it may be that they are all willingly and happily engaged either in individual contracts or remaining on the award, but it appears from the data we
10 can gather, a substantial number of them are afraid of the enterprise bargaining process. They're not regular participants in this. They don't have human resources departments. They don't have the competence they feel to participate in this. Now, they could be wrong, but in order to encourage them to think you can actually vary your arrangements but you have to do it
15 legitimately, we have designed a model which we thought had a number of safeguards in there to prevent it being significantly misused.

If you don't think the enterprise contract will work without - or if your concern about it is that we've excluded unions and the Commission from the
20 process, we would say in contra to that, we have made it transparent. It will be available for everybody to observe. As soon as one is done, it will be observable because you've got to lodge it with the Commission and it has got to be made available to the ombudsman. If you don't think that's going to work - and hopefully you recognise we've got this group of participants in the
25 labour market who have not taken advantage of flexibility arrangements, I guess your choices are two. One is to say we shouldn't worry about them. The other is to say, well, if not, the enterprise contract model - then what? What can we do to encourage these people to take up the opportunity for greater flexibility?

30 In the end our process is meant to be encouraging people to find ways by which you can innovate in the workplace, lift productivity, get greater returns for the productivity, be able to sustain paying higher wages; that kind of mechanism. We're looking for effective flexibility models to put in place and
35 perhaps, as you say, you think the enterprise contract has flaws to it. You might want to tell me, "We don't think you should worry about this." In the alternative, have you any thoughts on how we could address this reasonably significant group of firms?

40 **MR RIZZO:** My primary view is that you should drop this recommendation. I think it's not going to meet your objective, and if it does meet your objective then it is to the disadvantage of unions, to the Commission, and generally to employees is our view. But I would say to you the status quo would encompass and embrace the small and medium business in the sense there are no barriers
45 to entry about enterprise bargaining. I don't see what the barriers to entry are.

You say to your employees, "I want to come to an enterprise bargain

with you” and you meet once a week for a few weeks or a few months and there it is. There’s no magic to it. Secondly, small and medium business have an award system to regulate what they do and a lot are comfortable with it. I just heard the vehicle employers saying that they are very comfortable with the award.

So that’s okay, and if you want to formalise your arrangement with your employees, again you have individual contracts. Not that I’m a big supporter of individual contracts but the fact is that they’re there. So you’ve got an award, you’ve got individual contracts, and you’ve got enterprise bargaining where, as I see it, there are no great barriers to entry. You only have to sit across the table with your employees and have a discussion and it’s not that hard. So I don’t know why small - - -

MR HARRIS: Well, there is this process issue like we were just discussing; the fact that you have to do everything in a regulated sequence for an enterprise bargain appears to put off some small employers.

MR RIZZO: Yes, but how many other regulations, Commissioner, do small employers have to meet in their everyday life?

MR HARRIS: Apparently a lot.

MR RIZZO: Lots, yes. So this is one of the most important aspects of civil life, and certainly one of the most important aspects of the employee’s life, regulating their wages and conditions. Now these people have to fill in forms every other day; GST, BAC or whatever it’s called and a thousand other forms, taxation and all the rest of it. Now okay you could say, “Oh, this is another red tape” but the fact is this is an important part of their business and it’s an important thing for the employees. I don’t think it’s any great barrier to entry or any great skin off their nose to participate in the system.

MR HARRIS: Okay.

MS SCOTT: Do you want to go back to 20.2?

MR HARRIS: I do want to go back to, yes 20.1 I think, which was this one about where it came up yesterday in Hobart as well, and I think the language has been potentially misread. I don’t think we’re trying to stop - in fact I know for a fact we’re not trying to stop casuals being managed via agreement processes. The idea was to recommend, and on the face of it I can’t see how the misapprehension has occurred but nevertheless the language is intended to say there should be no ability to influence and create restrictions on the use of contractors, subcontractors or casuals.

In other words that all these parties are available to participate in the workforce to the extent that their skills and capabilities allow, and to restrict

them is likely to reduce again the flexibility of the workforce in Australia. That was what it was intended to convey but you've particularly harped upon casuals as if we want to take casuals out of agreement arrangements, which we certainly don't.

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MR RIZZO: Well, Commissioner, maybe I'm failing to understand this but it says clearly to me that it says, "Or regulating the terms of their engagement should constitute unlawful terms under the Act." And when you read the chapter as I have done, it doesn't mention casuals much. It mainly talks about independent contractors and labour hire.

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MR HARRIS: That's right.

MR RIZZO: But nevertheless it puts them in a - it characterises them as the whole issue of being anti-competitive and a restriction in the market and blah, blah, blah. As I repeat to the Commission, these are a highly vulnerable people anyway. Casual workers are vulnerable, labour hire people are vulnerable, independent contractors are vulnerable. They're taxi drivers, they're people who work from home and the casuals, all sorts of different varied people there. So if the Commission - if I've got this wrong then I'm happy to have it wrong.

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MR HARRIS: No, no, that's why we're here. We're here to get the feedback. Clearly you've read it in a particular way. I take that at face value. I'm just trying to say what the intention was conveyed by I thought the language but - - -

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MR RIZZO: Okay, so let me put it to you simply then. Does the recommendation intend to or not intend to say - as I understand it, it intends to say that it would be illegal to regulate the terms and conditions for casuals.

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MR HARRIS: You can't prevent the utilisation of casuals is what we intend to say.

MR RIZZO: Can't prevent the utilisation of casuals?

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MR HARRIS: The utilisation of casuals. In other words an employer has the choice of being able to use casuals or contractors or subcontractors as much as permanent employees.

MR RIZZO: But there's the problem. Yes, you see that's how I understand it and there's your problem because the current clauses in EBAs and awards talk about that casuals should only be used in peak periods and they should be used in times of leave, they should have casual loadings, they should not undermine and replace permanent employees. They're the sort of common clauses that have existed for generations. Now it concerns me, Commissioner, when you say that because it feeds my bias here that what you're saying is that we shouldn't regulate casuals.

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5 **MS SCOTT:** But I don't think there's any suggestion that we're interested in doing away with casual loading. In fact if you read the report in its entirety we make clear that we're interested in seeing what more could be done for casuals where that's possible. So I think you might be over-stating where our level of interest is.

10 **MR HARRIS:** Yes. Our difficulty I think here has been the suggestion that merely discussing these matters is a way of influencing whether they can be used or not, and I think what we're trying to convey in this recommendation we'd rather that the agreements were not able to prevent the use of these parties. But in terms of the benefits that you noted earlier, agreements protecting casuals from abuse and that kind of thing, this is not intended to prevent any of that arrangement.

15 **MR RIZZO:** No, but it deregulates the possibility of being able to contain casualisation of the workforce, which is already way out of control.

20 **MS SCOTT:** That's not what the figures suggest.

25 **MR RIZZO:** Well, the figures suggest that there's somewhere between 25 and 40 per cent of the workforce that are either casuals, independent contractors, fixed term employees. Now that's what the ABS and other figures seem to say, the Brian Howe Inquiry into casuals and the like came up with similar sort of figures. So we're talking about a big chunk of the workforce who are already vulnerable, who are already at the margins, and unions have made it their objective to try and protect these people.

30 As I said, most of these people are not our members but nevertheless we have a moral obligation to help these people and we do, and we don't want that it's illegal somehow that we can't try and help these people while sustaining permanent employment so these people can become permanent employees, if they can, or that permanent employees are simply not swamped by a whole bunch of casuals and therefore lose their permanency.

35 **MR HARRIS:** I think we're all fundamentally agreed on helping them. The question is does it help them to restrict them?

40 **MR RIZZO:** Does it help to restrict them?

MR HARRIS: Does it help a casual employee to be restricted from being able to be employed?

45 **MR RIZZO:** Yes, I think we're at cross-purposes about this, Commissioner. I think we're understanding this differently.

MR HARRIS: Okay, what we will probably try and do in the final report is

make quite clear what we have in mind, but the idea of an agreement helping a casual employee to know their rights and be able to take advantage of them is certainly not something we're going to recommend at this point anyway in favour of, nor was it the previous intention.

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The intention in that point that we've been discussing has been to say restricting the use of a form of employee that is otherwise legitimately available in the marketplace i.e. a casual, a contractor or a subcontractor is likely to alter a workplace paradigm in a way that's not consistent with a flexible workforce. So we're interested in flexibility options I guess is what we're trying to say here, and this looks like a legitimate flexibility option.

In terms of the data that you've noted we did read the Howe report. Its data runs up to a particular point in time which is now out of date and it's pretty clear that casuals as a percentage of the workforce I think have been stable through much of the last decade. It's not growth. I think you did actually put all three together and have casuals and contractors and subcontractors in one category. So perhaps the data is a little different there, but I think into casuals we've had a fairly stable sort of experience.

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MR RIZZO: Commissioner, we might have an argument about the precise figures but the point is that we have the second-highest casualisation in the world after Spain. That is a very high casualisation. Therefore the casualisation problem is real, as identified by the Howe report and these people are vulnerable. I've dealt with the casuals for many, many years over the 23 years I've been in this job and they are vulnerable people. They sit on the end of a phone waiting for a phone call and that will determine whether they work today or not. Now that's not a fun position to be in.

30 **MR HARRIS:** No.

MR RIZZO: And so when we then supposedly seek to deregulate this even already deregulated market even further, that really concerns us.

35 **MR HARRIS:** I understand your position. So Michael, what have we not picked up from your presentation?

MR RIZZO: Well, I think I've got a couple of minutes left. Is that all right?

40 **MR HARRIS:** Yes. Yes, have a couple of minutes.

MR RIZZO: So let me focus on something which you haven't addressed in your report and which we think you should and this is the issue of domestic violence leave.

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MR HARRIS: You did raise this or this came in the ACTU's original submission, didn't it?

MS SCOTT: Yes.

5 **MR RIZZO:** Yes, and it came in the ASU submission and I'm sure it came
in other union submissions as well. Now a few years ago when I used to talk
about this subject, because the ASU proudly was the first union in the country
to introduce a domestic leave clause in the Surf Coast Shire Agreement on the
other side of Geelong here in Victoria in 2010, and up until a few months ago
10 it was like talking to a brick wall talking about domestic violence because no
one wanted to hear about it.

15 The employers banged on that this was not an industrial issue and it was
a social and community services issue or something like that. But since then
you don't have to bang your head against a wall any more because now we've
got Prime Ministers and Police Commissioners and all sorts of people telling
us that this is a real problem. So we have a case before the Fair Work
Commission, as you may know, where the ACTU on behalf of its affiliates is
trying to get family leave in all the 122 modern awards.

20 It's our submission to you, Commissioner, that we should either have
domestic violence leave as part of the 122 modern awards and / or as part of
the NES where it's another one of those rights that are given to people as part
of a statutory regime. Now we're not too fussed about what form it takes but
certainly we think that domestic violence, which is a huge problem in this
25 society, which has now finally been recognised, it should be recognised
officially by being recognised in the awards and / or in the NES.

30 So we would encourage the Commission to have another look at this
because it's not covered in your original nor in your draft report, and perhaps
have a view on it. You will find that the employers are not as opposed to this
as they were a couple of years ago and I think most people now
understand that this is a real problem and that if a woman in particular, because
it's usually women who are probably 90 per cent or 95 per cent of the victims
of domestic violence and therefore the users of such a leave. It makes a hell
35 of a difference if you can go to a lawyer, the police station, if you can shift
home, what have you, with having a bit of leave

MR HARRIS: Yes. Can you just - - -

40 **MR RIZZO:** This leave - sorry, Commissioner, just to finish. This leave is
not going to be abused. If there's a concern it's going to be abused, it just is
not because you'd have to be pretty brave to roll up to your HR manager and
try and abuse the system to say that you are somehow a victim of domestic
violence. It's not going to happen, okay?

45 It's a very private and sensitive matter and people don't want to discuss
it with anybody, let alone the HR manager. But if it is open to them to go and

discuss it with the HR manager and if it is an entitlement for them under the enterprise agreement or the award then this would encourage these women to seek help and it would help them enormously to readjust and get on with their lives.

5

MR HARRIS: I was going to ask you how well scoped is this now, the proposition? By scope, I'm trying to get a feel for is it limited to a number of days? Is it based around a particular size of firm? Have you looked at the small business issue, that sort of thing? You say there's a proposition in front of the Fair Work Commission.

10

MR RIZZO: Yes.

MR HARRIS: So I'm assuming there has been some scoping, but when I last saw this it was more of a question of a principle that was trying to be established rather than something that had scoped detail.

15

MR RIZZO: No, there's a concrete application before the FWC, Commissioner. The concrete application is for 10 days' leave to be inserted into the awards.

20

MR HARRIS: Ten days leave per annum? Yes.

MR RIZZO: Per annum, yes. but I must say to you that under the ASU agreements and many other union agreements around the country, and there are some 1.6 million people now I think covered by such clauses, our standard claim is for 20 days and we do have 20 days in a lot of places, and a lot of employers have agreed to it fairly - how can I say, quite willingly.

25

MR HARRIS: Yes. All right, well we can get hold of something in more detail on that too.

30

MR RIZZO: Yes.

MR HARRIS: Okay, do you have anything more, Patricia?

35

MS SCOTT: No.

MR HARRIS: Okay, thank you very much, Mike. I appreciate your attendance today.

40

MR RIZZO: Thank you.

MR HARRIS: We're going to just take a couple of minutes because we rushed - so while everyone assembles at the table you can take five minutes, Patricia.

45

MS SCOTT: Thank you.

MR HARRIS: I think TCFU next?

5 **MS O'NEIL:** Yes, thanks.

ADJOURNED

[3.05 PM]

10

RESUMED

[3.08 PM]

15 **MS O'NEIL:** I don't want to deprive Patricia, but perhaps while we're waiting for her to come back, if everyone can identify themselves for the purposes of the record?

MS O'NEIL: Of course. Do you want us to start down this end?

20 **MR HARRIS:** Yes, that will be good.

MS DILLON: Hi, I'm Sharon Dillon.

25 **MR CARMODY:** Reg Carmody.

MS O'NEIL: Michele O'Neil.

MS NGUYEN: Ly Nguyen.

30 **MR HARRIS:** Okay, we'll make sure we get some spellings from you afterwards to make sure we don't get the things wrong on the record.

MS O'NEIL: Yes, got that sorted.

35 **MR HARRIS:** The reason everyone is identifying themselves is because we publish the - as I did announce this morning, but because you wouldn't have been here, but everything, the transcript, goes up online so everyone's comments are recorded and so you'll be appearing in word and letter on our website in a couple of days' time. Okay, opening statement. Perhaps if we
40 can have a - - -

45 **MS O'NEIL:** Thanks, Commissioners. Good afternoon. Thanks for this opportunity for the Textile, Clothing and Footwear Union to provide some further comments and evidence in relation to your inquiry, and we're aware that there are many issues of concern to our union and workers in our industry covered in your interim report. We're conscious of a limited period of time today so we've in fact decided to focus on three issues only.

MR HARRIS: Okay.

5 **MS O'NEIL:** That's not to say that we don't have a significant number of
additional concerns that we intend to address in a written response to your
interim report. So I really just want to emphasise that please don't take the
points that we're raising today as indicative of either our only concerns or the
major concerns. But they are important issues, and the three issues we are
10 going to focus on today relate to your proposals regarding enterprise contracts,
unfair dismissal, removal of reinstatement as a primary objective, and the
provisions in relation to home-based outworkers in the textile, clothing and
footwear industry.

15 The people that I have with me today, we appreciate the opportunity for
workers that work in the textile, clothing and footwear industry and who are
on a daily basis affected by workplace relations laws and the proposals that
you're making in your interim report have the opportunity to be heard directly
in terms of their concerns. So I wanted to just give you a quick overview.

20 Our union is the primary national union that represents workers in the
textile, clothing and footwear industry. Our industry has been going through
substantial structural change over a period of more than 20 years, and there's
a range of complex historical and ongoing pressures that have brought that to
bear.

25 It's comprised here in Australia both of what we would describe as a
traditional factory sector where workers work in workplaces that range in size
from one employee through to many hundreds, and also textile mills. So
factories and mills, through to what we describe as the informal or the
30 outworker sector, and concerningly a growing sweatshop sector as well, very
small workplaces that are often hidden from view.

35 It's characterised by widespread non-compliance with legal and award
conditions and systematic exploitation of workers in this industry, and we are
concerned as a union that the future of this industry is one that rather than being
a race to the bottom is in fact one where workers receive fair wages and
conditions as well as Australian companies making great, innovative products
where we can be globally known for not only having an industry that is high
quality and innovative and reliable but also an ethical industry.

40 Much of the work of our union is to try and ensure that the future of jobs
and work in this industry are secure but also are ethical. Some of the workers
in this industry are some of the most vulnerable in Australia. They're also
some of typically the lowest paid and dependent on minimum safety net
45 provisions in the award and the National Employment Standards, and there
have been many decades of research and reports and inquiries into the
systematic exploitation of home-based outworkers in this industry.

5 We have found through that work that the union does but also the work of those inquiries and reports that there's often appallingly unsafe conditions in sweatshops and significant underpayment of workers in the outworker sector, not only underpayments in terms of rates of pay where typically we've found workers receiving a quarter to a half of their minimum legal hourly rate of pay, but also non-compliance with obligations regarding things like superannuation, workers comp, access to annual leave, access to personal leave, overtime et cetera.

10 So we come to this from a position, as you would have seen in our initial submission to your inquiry with a view that the system should be improved to continue to protect workers in this industry and provide a strong and effective safety net and conditions. We're concerned that many of the recommendations we made in our original submission have not been reflected in your interim report and we're further concerned that in fact the recommendations and discussion points raised in your interim report would diminish the protection for workers in this industry if implemented, and would make what is already a difficult and vulnerable position for these workers a lot worse.

20 So we're here today to try and convince you to change your mind on a number of these points and the three issues, as I said, are these. In relation to enterprise contracts the great bulk of workers in this industry are dependent on the award but where we do manage to negotiate enterprise agreements they are agreements that involve covering workers in the whole of a workplace.

25 They often negotiations that are considerably lengthy and take much effort by the union and the workers in the workplace and in fact companies to try and reach agreements that are going to both benefit the workers but also we would hope put the company in a good position going forward in terms of the security of the company and of the workers' jobs within it.

30 We're concerned that your proposal for enterprise contracts would undermine the fundamental protections provided by both the award and by enterprise agreements. The primary concern for the majority of members of our union operating in this industry is fear of job loss. I can't underestimate or overstate to you what a powerful weapon the constant fear that your job may be gone is in terms of regulating what happens in a workplace and what people may or may not agree to when proposed to them by the person that also controls their employment, their income and their family's capacity to eat.

35 The concern we have with the model that you've proposed and with the very idea of enterprise contracts is that they would basically be a take it or leave it type approach, that there's no suggestion that workers would have any right to representation in considering and enterprise contract that would be put to them. This is of concern for many reasons.

Our members, both those that don't have English as a first language, and we have the majority of workers and members of our union don't speak and read and write in English as a first language, but also even for those where English is a first language there's also significant issues with English literacy.
5 Many of our Australia-born members also rely on the union for advice and support in explaining complex documents and issues to do with the award or their agreement or their conditions of employment.

10 So the notion that they could have a contract presented to them without any right to have that explained to them, to be represented by the union in understanding that document or to raise any concerns about it immediately sets off serious alarm bells for us about workers being put in a position of being asked to agree to something that they may not understand or agree with.

15 Secondly the point about the fear of job loss is one where if it's put to workers in our industry - and unfortunately we see this many, many times - that "This is what it will take to keep your factory open" regardless of whether that's true or not, and I have to say unfortunately through my many years of experience in this industry it is a threat that is used on a daily basis in this
20 industry with no truthful substance to it, but a threat that is used to try and keep workers in a position of very little power and compliant to what might be changes that an employer wants to put in place.

25 So if the threat is "Agree to this employment contract or we will have to close the factory" or "We will have to let go this many workers and make them redundant" or "We won't be able to get the order that we're trying to get", if that's the basis of any proposal then many workers in this industry will feel like they have no choice other than to agree to it.

30 So the combination of that powerful weapon of threat or fear of job loss, a lack of detailed understanding of what might be proposed, and I suppose what we know is unscrupulous behaviour that is already rife in this industry, leads us to think that this would just be a recipe for unscrupulous employers, a gift of exploitation to those unscrupulous employers in our industry.
35

We're concerned that the contracts would not have to meet a better off overall test and we're particularly concerned that there would be no scrutiny. So there's no right for the union to be involved, no right to be represented in terms of agreeing to them and then there's no independent scrutiny in your
40 proposal.

45 So it harks back to the times of Australian workplace agreements and the notion that an employer alone would determine whether a disadvantage test had been met or not without any capacity for the union to check that or importantly, an independent body like the Fair Work Commission to check it, of course leads us to believe that many of those enterprise contracts would leave workers worse off.

Worse than that, your proposal is that even if workers were worse off and, say six months down the track they uncovered this, there would be no capacity for them to recover any financial loss in underpayments, any disadvantage they would have faced as a result of being worse off. So no scrutiny, no representation, no right for union involvement in it, and workers left out of pocket with no right to recover that money.

The second issue we want to touch on is unfair dismissal. Unfair dismissal, you've made a number of recommendations we're concerned about but you will hear about our particular concern with the removal of reinstatement as a primary objective of the unfair dismissals provisions of the Act. You will hear today about the concern that delegates of our union have about what happens for workers who raise their head in this industry?

Those that are prepared to take a step forward and say, "I'm going to raise issues on behalf of other workers in this industry". Their jobs are frequently threatened. They are put in a position - and our experience under WorkChoices when the unfair dismissal laws were far worse than they are today, was that routinely workers who raised issues of concern, safety concerns, underpayment concerns, were sacked with no rights to redress under the law.

We think your recommendation again opens up that vulnerability because if an employer knows that there is no capacity for a worker to be reinstated, it's a simple calculation about the cost of what might be at worst case six months' pay. In our industry you're talking about fifteen, sixteen thousand dollars.

If their calculation is that "Six months' pay and getting rid of this worker is going to cost me that much but I'm going to send a message to everyone else in this workplace that this is what happens if you raise an issue. This is what happens if you're the person that raises concerns", then I can see again unscrupulous employers seeing that as a pretty cheap option.

So the last issue we want to take you through in some detail, Commissioner, is the situation of home-based outworkers. I'm concerned that your comments in your interim report don't seem to take into account the substantial evidence we referred you to in our submission. Our submission detailed on pages 11 to 15, 22 different submission reports, inquiries and research into the situations facing home-based outworkers in Australia.

We gave substantial evidence in our submission of the circumstances of these workers and what we believe has been the impact of provisions introduced in 2012 to change the Fair Work Act. But there's one thing in addition, Commissioners, I want to raise with you. I think you have fundamentally misunderstood what happened in 2012.

5 The provisions that go to regulating the rights of what are called contract outworkers in our industry, as well as employee outworkers, have in fact existed in what is now the Textile, Clothing and Footwear Allied Industry Award that was previously the Clothing and Allied Trade Union Award is 25 years of provisions that have said contract outworkers are entitled to the same pay and conditions primarily as factory workers and as employee outworkers.

10 The only thing happening in 2012 was a recognition of harmonising what had been provisions that were both in the award but also had been introduced by the majority of State governments in Australia over a period of more than a decade. You seem to think that the provisions of the rights of contract outworkers in the Act in 2012 fundamentally changed the rights of these workers.

15 What it did was cover off a few areas of the Fair Work Act that had previously been unclear, such as unfair dismissal, but in fact in terms of the pay and conditions of workers merely stated what had been either in the award for 25 years about their right to the same pay and conditions, or had been in State legislation in the majority of States for over a decade.

20 So I might end my opening remarks there, Commissioners. I particularly want you to hear directly from these workers and I'd appreciate the chance for either myself or them to answer any questions you have after you hear from them.

MR HARRIS: Sure. Sure.

30 **MS O'NEIL:** Sharon.

MS DILLON: Hello, how are you going? My name is Sharon Dillon. I've worked in regional Victoria, Bendigo as a machinist and I've there for 20 years. I'm not happy with your proposed changes especially to your proposal of the enterprise contracts. There is no other jobs in Bendigo for machinists, very little jobs for anybody else not just machinists. We live from week to week. Our pay is quite low. We're on 650 a week.

40 So we can't say no to the enterprise contracts because workers know there are no jobs. Bosses would have us over a barrel. We'd have to sign. Without help from the union we would not understand the legal jargon. The bosses have their legal advisers and they're on the company books permanently. In my experience at my workplace they already tried to make me sign an individual agreement. This is going back a few years. They put pressure on me to sign.

45 I would have had my rights taken away. These proposed enterprise contracts would only take away my rights. We already have an EBA through

the Fair Work Commission who checked the conditions. With your proposal only the bosses will have their say. We have 89 people on the floor. That's just on the machine floor. If you start to make some of these people sign contracts it undermines all of our conditions that the workers have fought for, for the last 30 years.

Why would you do this when we have so little? I'm also worried about your proposed changes to the unfair dismissal. Being a union and an OH&S representative, they will get rid of me for not much money and they would not give me my job back. We already have bosses there targeting reps and this has been proven. Like myself, you try to help others at work therefore I will lose my job. We'll be too scared to stand up and fight for other people so bosses will have a free range to do what they want and have complete power.

MS O'NEIL: Thanks Sharon. Reg?

MR CARMODY: Good afternoon. My name is Reg Carmody. I was a long-term employee at the local textiles factory in Wangaratta, a small regional town in the north-east. Up until just over - - -

MR HARRIS: Was that Bruck?

MR CARMODY: Yes, well formally Bruck, yes. Up until just over 12 months ago I was employed there for about 17 years till the company went into liquidation then re-opened a week later under a different name. It was also one of the region's biggest employers. Since then I've found only part-time work in local retail, so finding a full-time job has been a real trial.

Many of the issues we faced during my time there are very relevant to some of the changes this Commission is proposing. One of the biggest fears of a textile worker is the fear of losing your job, and that by speaking out they could be targeted to face the chopping block. The proposal of excluding workers from seeking union advice is, in my eye, very wrong and very dangerous.

Many employees use their union representation as a buffer to not only negotiating EBAs with employers, but also as a tool to help many of them understand wording or legislation that might be over their heads. To remove union negotiation on behalf of their members has many fearful for their rights. We are concerned you are going to divide the workforce by forcing new employees to agree to an enterprise contract in order to get the job.

If they don't agree then they won't get the job, while if they do it will create two separate classes of workers. I personally have seen in the past what can happen when an employer abuses the system. One of my fellow workers was in fact bullied by the then CEO and the matter had to result in Federal Court. Without proper representation he would have just had to have borne

the brunt of the abuse hurled at him.

5 Without the assistance of the union he wouldn't have had the finances to stand up for himself. When an employee is unfairly dismissed what they mainly want is their job. Workers want to work. By increasing the unfair dismissal claim fee, many won't have the money to pursue the claim. Taking the reinstatement off the table; taking the reinstatement off the table will be like robbing those who have been wronged, of the justice they deserve.

10 You will also be setting a bad example that it's okay to get rid of people who speak out, leaving an employer with a workforce that they can bully and exploit without fear of repercussions. It is my opinion and the opinion of my fellow workers that this Commission's proposals are going to hurt workers in the long run. Thank you very much.

15 **MS O'NEIL:** Thanks Reg. Ha? Commissioners, Ha is going to have Ly interpret for her.

20 **MR HARRIS:** Yes. Yes, go as you need to go.

MS DILLON: Okay.

MS TRAN: Good afternoon. My name is Ha Tran.

25 **INTERPRETER:** Twenty years ago when my husband and I started working from home we were told to have our own business name and ABN. We got paid by piece ranged from around \$1.25 or \$3.00 or \$3.50 so with the three we get paid like \$3.00 at the shop. We could see it sold for \$50.00 or between \$50.00 and it sold for \$70.00.

30 They said they wouldn't know limit - time limit for work. Average we earn around \$6.00 per hour. The company treat us like the contractors. We have to pick up the work and delivery the orders. We also need to buy the cotton ourselves. At that time both of us worked seven days per week.
35 Minimum of about 12 hours per days. When the union came to visit in 2011, attempted to fix all the problem for us but the boss told us not to say anything to the union or we will lose our job.

40 In 2012 my husband and I heard the news when the union won the hour workers' rights in the Fair Work Act Victoria. With the union's support we signed the written agreement to work from home for 25 hours per week. We get paid a decent wage with all entitlements like the superannuation, holiday, sick leave as same as the factory workers.

45 After signing the documents we thought our problems were fixed because the company just prove to the union on paperwork. In fact nothing changed but we were too scared to say anything. Until the few months later

when the outreach officer from the union came for visit we felt like telling them the truth that the company refused to give us regular work. Very often we had six weeks without work. We didn't receive any superannuation or real holiday pay. Whatever the amount that the company had paid we must record
5 in a book so that we would need to pay the money back to the boss over the number of orders or to put it as a debt.

Finally, we realised that the law was there to protect our working condition and that the union would assist the workers but at the same time to
10 have the company do the right things. So after the union assist to have the problem now we relieved to continue working in the industry that we always love the boss because they're with respect on money orders have been fixed, timing adjusted, regular work is delivered and pick up by the company. We get paid every two - fortnight - and entitled to work a normal in-house worker
15 would have. Our children are very happy that we could spend time with them now. So we thank you; thank you for taking care of the outworkers like us. So it could be worse for us if these conditions are taken away. That means we have to go back 20 years ago.

20 **MS O'NEILL:** Thanks, Ha.

MR HARRIS: Thank you. Thanks, Ha.

MS O'NEILL: We're happy to answer any questions you have.
25

MR HARRIS: Can I just ask about - I'll go in the reverse order I think if that's okay with you. Can I ask about the - what's the fundamental gain from having something that was in the award translated into the Act?

30 **MS O'NEILL:** So, I think, a couple of things. There's, I suppose, a double protection. You have both the provisions of the Act and the provisions of the award and in an industry where non-compliance is rife, having the capacity for action to be taken in terms of rectifying illegal practices, both under the award and under the Act is an extra protection.

35 Secondly, it does go further. So, for example, awards as you know do not deal with some matters, such as unfair dismissal rights. So by extending the provisions of the Fair Work Act to contract outworkers in the industry it added additional conditions that are covered by the Act but are not traditionally
40 covered by the award. And, thirdly, it did - as I said - the majority of States have State provisions for things like recovery of money up the supply chain but not all States. So for the industry we often have the industry say, "Well, we want a level playing field." So where you had provisions, for example, in New South Wales and Queensland and South Australia, where there was a
45 capacity for a worker to recover unpaid money by going up the supply chain to what might be a principal company that it ordered the work, but not the person that delivered the work to the door, that existed in not every State.

So by introducing it into Federal legislation that recovery of money aspect it harmonised across the country a provision that didn't operate in every State. So there's three main reasons.

5

MR HARRIS: Okay. I see that. If I understood Ha correctly, but tell me if I'm wrong, at one point post the legislation being in place - after the legislation is in place - but before she was able to take advantage of either advice from your union, or from another party, I wasn't quite clear on that. She was actually being - or she and her husband were actually being paid, apparently the appropriate rate but then required to repay?

10

MS O'NEILL: That's correct.

15

MR HARRIS: This came up again this morning and I asked the question at the time. The Tax Office has got to take an interest in this because you have to declare an income that you didn't get and pay tax on it.

20

MS O'NEILL: That's right.

MR HARRIS: Well, that's just an observation that strikes me as being - there should be more than one regulatory authority examining.

25

MS O'NEILL: There's very few regulatory authorities that examine this type of work in this country, Commissioner.

MR HARRIS: Okay. I just wanted to get it clear on the record.

30

MS O'NEILL: Yes.

MR HARRIS: Sorry. Do you have anything on outworkers?

MS SCOTT: No, no. That's fine.

35

MR HARRIS: Okay. Well, thank you for the presentation on outworkers and I recognise the significance of what you've been trying to tell us.

40

MS O'NEILL: Commissioner, can I just say that we've brought with us today and we're happy to formally table it here or whatever method you want. Since that you refer in your report to a report that hasn't been released yet that was a post-implementation review of the Fair Work Act TCF Industry provisions and refer to a number of submissions that were put into that report. Not long after the submissions closed for that there was an additional independent inquiry done by Professor Christina Cregan from Melbourne University that studied the circumstances of outworkers in the industry and it does show a pattern of some improvements since the introduction of the Federal law. So we've got a

45

copy. We do refer to it in our submission. But we've brought a copy of that report that we'd like to table for you to have as well.

MR HARRIS: Okay. Yes.

MS O'NEILL: Thanks.

MR HARRIS: We've worked out today that tabling occurs.

MS O'NEILL: On that table.

MR HARRIS: On that table. We didn't know where it occurred prior to that.

MS O'NEILL: Thanks for that.

MR HARRIS: One's fine. Okay, then in the case, Reg of what you were telling us.

MR CARMODY: Mm.

MR HARRIS: You talked about the enterprise contract excluding parties from having union advice.

MR CARMODY: Yes.

MR HARRIS: Now, the proposition agreed we've got a draft report. So, again, perhaps as a drafting issue here but there's no intention to exclude parties from receiving union advice in the enterprise contract proposition. Indeed, I think, the idea is, as I would think I've explained to the ASU before you.

I don't know whether you were here when I explained to them but the idea is that a business may develop an enterprise contract and would have to lodge it with the Fair Work Commission and would provide it to the Fair Work Ombudsman and it would be transparently known, however, that was a proposition for a new employee. Existing employees if they're on the award, for example, which is primarily what we have in mind rather than an enterprise agreement but if they're on the award would be, given the opportunity to shift to the enterprise contract but under no obligation to do so and one assumes would be able to take union advice on the enterprise contract which is, indeed, transparent or publicly available because it's been lodged at the Fair Work Commission and given to the ombudsman and would be public.

So, I think the correct construct, from our perspective, perhaps as I said the language isn't as clear in a draft report but the idea, anyway, was you would not be negotiating with the union. I accept that. It would not be negotiated with the union but it would be transparently available and therefore one

assumes that if a union has members at its workplace they would want to provide advice to their members on the enterprise contract.

5 The rationale for putting it forward, as I was explaining previously to the ASU is there is this quite large number of firms who appear to have taken no advantage at all of flexibility options under the legislation and we were trying to design a flexibility option for them which is one of the things that this inquiry was meant to consider how to offer greater flexibility in workplaces. But I just want to make that as more as an observation.

10

 I don't think there's any intention in the proposition to exclude union advice. I guess I would acknowledge that it could always happen that people were unaware of what was going on but I would have thought that if such a proposition exists and becomes public it would be quite closely scrutinised by all unions.

15

MS O'NEILL: But, in reality, Commissioner, let's take your example of new employees. So in a workplace where there might be some peaks and troughs in work or turnover of staff. So let's say a company makes a number of permanent workers redundant and then picks up a new order and decides to employ new employees. In that case workers coming in would be given no option. It's either take it or leave it.

20

MR HARRIS: A new worker. Yes.

25

MS O'NEILL: Yes. So they're given no option. They're put - the workers in the site would have a certain set of conditions. They would be told, "If you want the job you agree to this." It may well be and we would say, likely to be, a lower set of conditions than the workers in the workplace, otherwise why would it be being proposed. You don't need an enterprise contract to pay people more.

30

MR HARRIS: It might be a swap of conditions - one for the other - because it would still have to satisfy the no-disadvantage test. That's our proposition.

35

MS O'NEILL: Yes. But as you know lodging it doesn't require - well, your recommendation doesn't require scrutiny of that.

MR HARRIS: No.

40

MS O'NEILL: So it's up to an employer and many employers in our industry are not very good at determining what disadvantages of work are. So they say there's no disadvantage. They lodge it. Nobody scrutinises it. The workers are told, "Accept this if you want a job." I stand by my view that they're going to be on a lesser set of conditions, otherwise why would they be doing it? And then they're working alongside people doing exactly the same job. So there's two sets of conditions in the workplace.

45

5 If those workers want to try and negotiate and use existing provisions to negotiate a new enterprise agreement the workers on the enterprise contract have no right to do that so they're locked out of that process. So they're outside the rights that the Act currently provides for them to be able to participate in bargaining. So you're removing their bargaining rights.

MR HARRIS: No, no. I think there's a period for there.

10 **MS O'NEILL:** Twelve months. So they're - - -

MR HARRIS: There's a period.

15 **MS O'NEILL:** So every other worker is wanting to bargain and they're wanting to do it right now. Those workers have no right to participate in that bargaining.

MR HARRIS: Well - and we would say - - -

20 **MS O'NEILL:** It may well be over by the time it's done.

MR HARRIS: We would say that the logic is if for 20 years they've had available to them the option of not doing an enterprise bargain and they didn't do one the likelihood of it happening in the next 12 months is pretty minimal.

25 **MS O'NEILL:** No. That's not at all. We have workplaces that have existed for 50 years that are doing their first agreement this year.

30 **MR HARRIS:** Okay. Well, I'm not saying "won't occur", but logic would dictate that if it hasn't occurred it won't occur rapidly.

35 **MS O'NEILL:** I don't accept the logic of that at all because the things that influence, whether a group of workers are able to bargain and get an employer to bargain with them there's multiple factors to that. Like today we've got a group of workers who were desperately wanting to bargain with an employer in Bayswater. That company has obstructed the union's right of entry, threatened workers that if they attend meetings talking to the union about bargaining that they will be observed and that their jobs will be at risk.

40 The workers are fearful about signing a petition in case the company sees their name on it to be able to get a bargaining order to start bargaining. These are workers who have been wanting to bargain for years and have been frustrated in that process. So that it's not all the sort of picnic.

45 **MR HARRIS:** But that seems to support my argument. That's not likely to see an enterprise bargain develop in that circumstance at all is it?

MS O'NEILL: No. What I'm saying is that if finally those workers who want to bargain get there. So let's say they get a petition they prove to the Commission.

5 **MR HARRIS:** They will finally get order.

MS O'NEILL: So they finally get an order. They've been trying to bargain for years. The employer has refused to bargain. They finally win an order to say, "We're going to bargain in this workplace." But in the meantime the
10 employer's employed 20 or 30 or 40 new employees who are completely locked out of that bargaining process for no reason other than being a new employee. They've got no bargaining rights.

MR HARRIS: Yes. And the same would occur for a new employee if you
15 had an enterprise bargain because they wouldn't have been involved because they're new in that enterprise bargaining.

MS O'NEILL: But if they'd had the rights and those conditions.

20 **MR HARRIS:** So that's still a take-it or leave it. It's still a take it or leave it proposition when a new employee arrives under enterprise bargain, isn't it?

MS O'NEILL: But it's a common set of conditions that apply to everybody in the workplace. So what you're contemplating is - - -
25

MR HARRIS: But it's still take it or leave it.

MS O'NEILL: Well, no. It's a set of conditions that are the standard conditions in a workplace.
30

MR HARRIS: But it's still - it still is take it or leave it. That's what I guess I don't understand.

MS O'NEILL: Well, if you want to describe an award as take it or leave it as well. I mean there's minimum conditions that legally apply.
35

MR HARRIS: Well, that's right. Yes. I would. I would.

MS O'NEILL: So I don't think being in Australia's labour market with a
40 number of unemployed people that we've got that that's quite how it works. The people are desperate to get a job. So it's not like, "Oh, well, you know, I'm going to weigh up this slightly different condition to that." It's about - in our industry in particular with high unemployment people have been losing jobs by the thousands. If a job comes in their industry there's many people
45 looking for it. They're going to want to take that job if it's on offer. They're not in a position to sort of pick and choose about, "Well, there's another one

down the road that's paying \$2.00 more an hour." That's just not the circumstances of how the labour market operates.

5 **MR HARRIS:** No. But most jobs are like that. Most jobs are an employer makes an offer and says, "Here's the job." It might be consistent with the award. It might be consistent with the enterprise agreement. If there was an enterprise contract it might be consistent with that. But it's still take it or leave it: here's the job, and this is the pay and these are the conditions.

10 **MS O'NEILL:** Well, I suppose I'm saying there's a difference between what is a standard set of minimum conditions, under either an enterprise agreement or an award that applies in a workplace and what may be multiple, because under your scheme, you could have one line or section in a factory on one lot of enterprise contracts.

15 **MR HARRIS:** I agree there's differences.

20 **MS O'NEILL:** You could have another shift on another set of - on another enterprise contract. You could have new workers on a third set of conditions under an enterprise contract. So you have no level playing field. You have no minimum set of conditions. Even though every one of those workers may be doing the same job.

25 **MR HARRIS:** And you would have also - have this under individual flexibility arrangements.

MS O'NEILL: Well, under your provisions.

30 **MR HARRIS:** Under the current Statute.

MS O'NEILL: Well, under the current statutes there's nothing that limits us being able to say what are the conditions that may be bargained about? So in workplaces where there's enterprise agreements in place many of our agreements actually do limit the type of things that individual flexibility agreements can apply to. You're proposing removing that limitation.

MR HARRIS: That's right.

40 **MS O'NEILL:** Or the capacity to limit it. The reason we limit is because of exactly what you've heard from Sharon and Reg and Ha today because workers have said, "We don't want companies coming to us and say, 'You agree to give up your overtime penalty in this individual agreement.'" They are fearful of being put under individual pressure to reduce conditions. So something like overtime penalties, we have deliberately - because of the concern of our members - had written in to many of our agreements that you can't do an individual flexibility agreement around overtime penalties.

MR HARRIS: Even though that - - -

MS O'NEIL: For exactly the reasons we described.

5 **MR HARRIS:** Even though under the current arrangement, they would have to satisfy a BOOT.

MS O'NEIL: Even under that.

10 **MR HARRIS:** See, I'm not -I can't see what you're afraid of if it has to satisfy a better off overall - - -

15 **MS O'NEIL:** Because it's not condition by condition. So our experience of how it's operated is that it doesn't operate on just looking at overtime, for example. You would have to make an estimation of how many hours overtime someone is going to do.

MR HARRIS: Yes.

20 **MS O'NEIL:** And that is no exact science.

MR HARRIS: I agree that it could be quite difficult - - -

25 **MS O'NEIL:** So what employers will say is, well, we're paying \$30 more a week in the minimum wage.

MR HARRIS: Yes.

30 **MS O'NEIL:** And we are removing overtime penalties, but we don't expect anyone to do any overtime. So in that circumstance, whether they do or don't do any overtime, they lose the overtime penalty, it's gone, and it may well be that there's an excessive amount of overtime worked and they are worse off, but under the current test that would still be possible.

35 **MR HARRIS:** That's right, but will be cancellable after 13 weeks.

MS O'NEIL: That's right, but not under your provision where it will be 12 months.

40 **MR HARRIS:** Up to - up to 12 months. So still cancellable. If you make a mistake with a judgement, it says basically you can get out of it.

MS O'NEIL: After 12 months.

45 **MR HARRIS:** Well, up to 12 months. It depends on what you put in there. But we are offering an opportunity to go beyond 13 weeks.

MS O'NEIL: But we are saying that there is no demand by employees in our industry for this. So they are not saying, "We want additional capacity to have contracts," or, "We want additional capacity to have individual agreements." There is no demand from the workers side of this. So assuming there's no demand coming from workers, and I'm correct about that, it's a demand coming from employers, and as you've heard repeatedly, if it's put as, "Here's the offer. It's 12 months. It's this reduction, it's this change," then that's likely what's going to be agreed to.

MR HARRIS: Okay.

MS SCOTT: Thank you very much - - -

MS O'NEIL: Sorry, can I check - I responded quite a lot. I just want to check whether any of Sharon or Reg or Ha wanted to respond to the questions the Commission has - - -

MS DILLON: No, we are quite happy for what you said. Like, it would be take it or leave it, but it would be on the bosses conditions, not our conditions, not the workers' conditions, not the workers' rights. It would be, "Take it or leave it", purely from the bosses' side, not from the workers. We would just have to lump it and we are already on low conditions and we would just have to accept it. Why? Because we need to live. Is that fair or is that just unfair that the bosses will then - and I know my bosses and I know what goes on there and it's not nice, it's not pleasant, but it's, "Do it or don't get your pay." There is no other jobs in regional areas and they will have total say, total power. What are we meant to do?

MR CARMODY: As I've seen previously in my former workplace, the place that was formerly Bruck, when it was under AWAs as well as having EBAs, with the two separate workforces sometimes there comes this sort of bitterness between the two where some might have better conditions or some might have worse and therefore they try to undermine each other. It's kind of like playing one side off against the other.

MR HARRIS: Yes, we see that.

MS SCOTT: Could I ask the three - sorry - - -

MS NGUYEN: Yes, if the boss give the remit or something or make the change in our commission or something, so we likely just accept it because we worry that we lose our jobs. So we have no choice.

MR HARRIS: Okay.

MS SCOTT: Thank you very much for your presentation today and coming along. I am interested in three aspects that you may wish to address in your

actual further submission. You make the statement about IFAs routinely abused, so any evidence or case studies that you could give there would be most welcome. The figures we've provided in our report are about how few there are and we wondered why there are few and maybe you will be able to fill us in by providing some evidence about the abuse.

The other one is in relation to unfair dismissal and the primacy of reinstatement. Given the time, we won't have an opportunity to fully explore that issue again or in greater depth, but do you have instances where workers were dismissed because, for example, of their delegate activity or making complaints, or they successfully pursued unfair dismissal and, in fact, got reinstatement because again the report - not looking just at your sector, but looking overall - we found very few reinstatement's and therefore we wondered, because we were thinking about not your issues but about the issues more broadly, it seemed to be the case that in other instances with relationships having broken down, reinstatement seemed a pretty unattractive option. I appreciate in the circumstances you are talking about it could actually be very attractive to the workers, but again if you've got figures or examples or cases that we can look at, that would be very helpful,

I did have a third one and I'm just trying to remember what it was. Unfair dismissal versus adverse action. Again, we probably can't go into the technicalities here, but you're more familiar with the subject matter than I am. If there is a simple explanation why if unfair dismissal wasn't the appropriate course in the case of delegate dismissed because of their activities, why adverse action wouldn't be a better route, but again, you might be able to explain to a layperson why that would be the case, but not now.

MS O'NEIL: Thank you, Commissioner. We are very happy to address those in our response.

MS SCOTT: Thank you very much.

MR HARRIS: I should probably note for the record though, proposition on unfair dismissal and reinstatement wasn't about eliminating reinstatement as an option, it was eliminating the primacy of it.

MS O'NEIL: The primacy of it.

MS SCOTT: Yes.

MR HARRIS: But that said, you can almost make the argument both ways. In other words, if it's very important and likely to work, then it should be an objective. The question for us has always been is it likely to work or do we go through such a process? If you look at the periods, particularly, it's not just what the outcome is but the periods until there is a conclusion. It's very hard

to imagine a reinstatement. That said, it does happen from time to time, but then you have got to imagine what is the workplace like?

5 Now, it may be that the workplace is an absolutely shocker anyway, in which case maybe you say, "I've lost nothing," but I'm interested where - - -

MS O'NEIL: Could I just give you one brief example?

10 **MR HARRIS:** Yes.

MS O'NEIL: If it as the case that, as a result of us pursuing an unfair dismissal for a worker that had been targeted in the manner that we are describing today, it may well be that a company actually makes a decision that the manager that was responsible for that is the one that has to go. So if the unfair dismissal is 15 proven and it's the fact that they have been treated badly and targeted in that manner, then why would you remove the primacy of the notion that that worker should go back and, in fact, the person that had treated them unfairly is the one who should be leaving the workplace.

20 **MR HARRIS:** Yes. No, it's this question of primacy.

MS O'NEIL: Yes.

MR HARRIS: But I note your point. Okay, I think we are at the end of the 25 allotted time and I'd like to thank you for, particularly, the effort you made to get everybody to come along, because it really is very good for us at hearings to get everybody to come and do their own thing, and I know sometimes it can be quite stressful - I can imagine what it's like - so hopefully it hasn't been too stressful for everybody, and we appreciate you having made the effort. Thank 30 you very much.

MS O'NEIL: Thank you. Thanks for your time.

35 **MR HARRIS:** I think next we have - is Mary O'Connor here? Mary, up the front. Any chair is yours or microphones. For the sake of the record, could you please identify yourself.

MS O'CONNOR: Mary O'Connor and I work in an aged-care facility in 40 Melbourne.

MR HARRIS: Mary, you've got a little background here for us. I would probably invite you to read a little bit of it out onto the record so that when people read our record on the web site they can see why you are here and what you had in mind. You don't have to read all of it, just - well, whatever. 45

MS O'CONNOR: Penalty rates take poverty-level wages up to the subsistence level. I have heard the argument that it is a 24/7 society now and

working weekends and holidays is all part and parcel of the modern economy, but I wonder how many of the people making those arguments have had to work on Christmas Day in order to buy presents for their children. I have, and that's why I have felt compelled for the first time in my life to join a rally. This
5 would have been a few months back now.

MR HARRIS: Yes.

MS O'CONNOR: The attempt to whittle down our wages and conditions -
10 I've never protested before, but it was amazing to stand there with 50,000 people with the same fears. Despite some sections of the media painting us as serial militant ratbag protesters, we were a diverse cross-section of working people, people standing together against the chill wind of poverty and standing up for ourselves. I don't earn a lot. I support my family with what I earn and
15 I contribute a far higher percentage of my earnings in tax, than many of the biggest companies operated in Australia. I don't understand why the government isn't arguing for a wage increase for me, given I don't have an accountant squirreling away money into a Cayman Island bank account and the more I earn, the more revenue they get.
20

I'm not covetous, so I don't begrudge anything to anybody. The rich can Scrooge McDuck swim in their pools full of money if they want, I don't care, but please don't covet the pittance we workers get for the jobs you don't want to do at the time when you are relaxing enjoying your weekends and holidays.
25

I would also like to add that the amount we're talking about on the Sunday is \$30. For \$30 an hour, we feed 150 people five meals in the day and I think we deserve \$30 an hour all the time. I don't think it's an obscene amount and I think it is been exaggerated in the press as some outrageous
30 amount and it just isn't that. It's \$30 an hour for people in the food services industry.

MR HARRIS: You work providing food services to an aged-care facility.

MS O'CONNOR: Yes, and if we left, which we wouldn't because we would just have to work more hours to make up for the money we've lost - if we left we wouldn't create more jobs, the people that would come in to replace - because we're the A team - they would have to hire double the amount.
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MR HARRIS: How many people do you - can you give me just a rough feel for what you do on a weekend? How many meals would you serve on a Sunday? You said five - - -
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MS O'CONNOR: We serve breakfast, like your bacon and egg - - -
45

MR HARRIS: But is it 50 people, is it 200 people?

MS O'CONNOR: No, it's 150, all the time, all day.

MR HARRIS: 150 people.

5 **MS O'CONNOR:** They get breakfast, they get brunch, they get lunch, they get afternoon tea, they get dinner, they get supper and then they get late supper.

10 **MR HARRIS:** Right, and I just want to hypothesise here, because I want to get a feel for how you would see this; if your employer had a proposition for rolling-in rates - this concept that says for a seven-day week, and it does apply in some industries, it's not an unusual thing, "We will pay a flat rate per hour, rather than a differential penalty rate on weekends," because, from what you have described, you're in a business that says, "Well, I have to be there all day on Sunday anyway." As you point out, it's not like there's extra hours to be
15 gained from varying the wage rate.

In an all-in kind of proposition, would you be in favour of that or are you in favour still of having Sunday different to Saturday, different to Friday?

20 **MS O'CONNOR:** Well, I'm in favour of having every day \$30 an hour. I think that's just - I think that's survival rate in this modern economy. By the time you pay your rent and your utilities and your food, that's is just survival money. That's not - - -

25 **MR HARRIS:** So if it rose to \$28 dollars an hour, because we're going to flatten it out across the week, sort of thing, that would make any difference as far as - - -

30 **MS O'CONNOR:** It would, but I don't trust them to flatten it out. I trust them to take the money first and then "Arrivederci, baby."

MS SCOTT: So Mary, you're definitely on the award, not on an EBA then.

35 **MS O'CONNOR:** No, I've found out that we are just a little bit below the award.

MS SCOTT: You're below the award?

40 **MS O'CONNOR:** Yes.

MS SCOTT: Okay.

MR HARRIS: That's curious. We are very interested in people who are below the award, because you show up in the statistics and yet you shouldn't.

45 **MS O'CONNOR:** Okay.

MR HARRIS: The award should be what you are paid.

MS SCOTT: So you're probably going to talk to your union about that, I'd imagine.

5 **MS O'CONNOR:** Yes.

MS SCOTT: Okay. So the rate for Saturday, can you just tell us what the rate for Saturday - - -

10 **MS O'CONNOR:** It's 24-something. 23.75 or something like that.

MS SCOTT: And is it the case that you have choice about - to any degree - in what days you work in the week?

15 **MS O'CONNOR:** Not really, because if you don't work the Saturday and Sunday, you can't make a living. You basically can't.

MS SCOTT: Yes, okay. So would I be right in thinking that you take on Saturdays and Sundays in order to get a few - - -

20 **MS O'CONNOR:** In order to survive. I've got two children to support. I've got one going through uni and another one. Excuse me, that's mine. I forgot to turn it off.

25 **MR HARRIS:** I wondered why someone wasn't answering it. That's okay, we can cope. Given that - I mean, the proposition we've got in mind may not be, in fact, terribly relevant to you in your circumstances anyway, you're working a seven-day week by the sound of it.

30 **MS O'CONNOR:** No, no. I'm working weekends. I work weekends and a Monday.

MS SCOTT: So you are working part-time, those three days.

35 **MS O'CONNOR:** Yes.

MS SCOTT: That's very good, that clarification, because we are interested in the people that - so when you look across the working week and what work you could do or that would suit you, you are taking advantage of the penalty rates to maximise your income as a rational person would do.

40 **MS O'CONNOR:** That's it, yes.

MS SCOTT: So the reason why penalty rates, particularly, have a bearing on your work is because that have a disproportionate impact on you relative to someone who was doing Monday to Friday.

45

MS O'CONNOR: Yes.

MS SCOTT: Got you.

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MS O'CONNOR: But everybody gets a chance at doing the weekend besides being. I'm like a permanent on the weekend, but everybody gets a chance as well to do the weekends if they want.

10

MR HARRIS: Does the rate attract enough people? You're saying it's barely enough. Does the rate of \$30 an hour on Sunday attract - like, is there a queue of people waiting to work Sundays?

15

MS O'CONNOR: No, there's people that want to work, but there's a lot of people that I worked with that do still do the religious thing on the weekend and they don't work the Sunday, they just really will not touch the Sunday. They're just barely surviving too. I know that just got mortgages and they are just like rats on the treadmill, they are just running. They cannot make ends meet.

20

MR HARRIS: The reason I was asking that question is to see whether your employer is in a position where even if these rates were varied, they would have to pay a higher rate on Sunday, because there's just not enough people who would work.

25

MS O'CONNOR: That's it.

30

MR HARRIS: We had that put to us as a criticism, and yet in practice, we see that as being quite probable. For example, the New Zealand case, in New Zealand they abolished awards and yet still employers pay penalty rates in some industries at least, even though they're not obliged to do so, because they otherwise can't get - - -

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MS O'CONNOR: Well, that's it. Why would you if you - - -

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MR HARRIS: You're not necessarily going to get a big cost saving in some industries where, clearly, the pay rate is only just enough right now to attract people to the work and if it vary downwards, it wouldn't attract enough people to work on the weekend.

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MS O'CONNOR: Also, if you've got skilled and we are - I don't like the idea that we are not considered skilled. We are the A team. We are skilled and if we're not to work on the Sunday, you would need to put in five people to take over the two people's position, I am telling you now. I am fair dinkum. I am.

MS SCOTT: Mary, you said that you have got to people doing the tasks - - -

MS O'CONNOR: Plus the chef. Two people, plus the chef.

MS SCOTT: And on a weekday, what would be the level of staffing on a weekday?

5 **MS O'CONNOR:** Same. It's the same.

MS SCOTT: Okay.

10 **MR HARRIS:** It's just a question of getting - - -

MS O'CONNOR: But we are really skilled. We have got it down pat.

MR HARRIS: Well, if you're doing 150 people and you said you do five meal services a day, that's a fair task.

15 **MS O'CONNOR:** We don't stop. We just go. Sometimes we work through lunch, but that is not our complaint, because we just want to get on top of it. We don't want to be hanging around. The quicker we can get out the better.

20 **MR HARRIS:** I appreciate you making the time to come here today too, just as we do everybody. I don't know how long you sat through this afternoon, but I am sure you had other things that you could have been doing. So I want to thank you on record for making the time and putting forward the submission.

25 **MS O'CONNOR:** Thank you for listening.

MS SCOTT: Thank you.

30 **MR HARRIS:** Now, that's then end of the people who registered, but I said as the start of this morning, anybody who didn't register but has been waiting patiently all day to come up and make a pitch, the opportunity is now available to anybody who wishes to do that, he says looking around the audience.

35 **MS SCOTT:** For a few minutes.

MR HARRIS: I've got no takers, I don't think. So this is the first time. I did this in Bendigo and we had takers, I did it in Hobart and we had takers, and this time we've got no takers. Anyway, thank you very much for making the time today and we are adjourned until we are in Canberra, I think next. Thanks a lot.

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45 **MATTER ADJOURNED AT 4.09 PM
UNTIL FRIDAY, 11 SEPTEMBER 2015**