



**Australian Government**  
**Productivity Commission**

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**PRODUCTIVITY COMMISSION**

**INQUIRY INTO WORKPLACE  
RELATIONS FRAMEWORK**

**MR P HARRIS, Presiding Commissioner**  
**MS P SCOTT, Commissioner**

**TRANSCRIPT OF PROCEEDINGS**

**AT PRODUCTIVITY COMMISSION, CANBERRA**  
**ON FRIDAY, 11 SEPTEMBER 2015, AT 0.47 AM**

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5       **MR HARRIS:** Good morning. Welcome to the fourth hearing of the Productivity Commission National Inquiry into Workplace Relations. I'm Peter Harris, I'm the Presiding Commissioner, and with me is the Deputy Chair of the Commission, Patricia Scott. The purpose of the hearings is to allow public scrutiny of our Commission's draft report and work today to get feedback on the draft report itself on the submissions from all parties. Following the hearings today in Canberra, we'll be in Adelaide, then Sydney, Ipswich and then possibly Melbourne again. We will then be working with the final report by the end of November.

10       Participants who have registered for the inquiry will be advised via email of the final report release. That final report release may be up to 25 sitting days after the government receives it, which means, effectively, it may be some time next year. All the hearings are conducted in an informal manner but a full transcript is being taken, which means you need to be careful about damning individuals and defamatory remarks generally. For this reason, we're not taking comments from the floor but, at the end of the proceedings, if there's time, we'll allow brief comments from people who haven't registered but have remained persistently throughout the day or, at least, turned up late in the afternoon and we can get short remarks on the record for them. The value for doing that is that a number of participants in this inquiry do track the hearings, so you'll be informing other people who think it's worthwhile.

25       We don't permit video-recording or photographs to be taken during the proceedings because they disturb the participants, but updating Facebook and Twitter is standard practice. All that we otherwise ask is that, if you're using your mobile, can you switch it to silent before you undertake whatever social media updating you're going to do.

30       (Housekeeping matters)

35       I think we have the Master Builders first. Is that correct? Could you gentlemen identify yourselves on the record, please?

**MR HARNISCH:** Wilhem Harnisch, Chief Executive Officer, Master Builders Australia.

40       **MR CALVER:** Richard Calver, National Director, Industrial Relations and Legal Counsel, from Master Builders Australia.

**MS SCOTT:** Gentlemen, the microphones are just for the recording of the transcript, so, if you're keen for other people to hear you, you might need to raise your voice a little.

45       **MR HARRIS:** For those in the back, if we start getting too soft, which I've been accused of, I can't imagine how that could possibly be the case, just

start waving like this and I'll recognise that I need to project.

Do you want to make an opening statement of some kind, something for the record, or do you just want to proceed to ask some - - -

5

**MR HARNISCH:** If I may, just a very short one, with your indulgence.

**MR HARRIS:** Sure.

10 **MR HARNISCH:** Master Builders has very much welcomed the  
Productivity Commission's draft report. We welcome it because of its  
importance as a document that contains very detailed analysis and a forensic  
approach in what is an important area of our economy, or that can be part of  
15 the Australian economy. We have outlined in our summary document to you  
the points that we want to raise today. Master Builders' response to the draft  
report is primarily focused on the particular circumstances of the building  
and construction industry.

20 There is a strong body of evidence that characterises workplace  
relations in this industry as being dominated by building unions that operate  
outside normal community values, and even union values. Master Builders  
must emphasise that the principal rationale for reform in workplace relations  
in the building and construction industry is to ensure that those normative  
25 values return and apply. This was made perfectly plain by Logan J recently,  
where he remarked on the CFMEU's "outrageous disregard in the past and  
also in the present case of Australian industrial norms". Master Builders  
want laws which provide an additional impetus to this urgent reform task.  
That is why Master Builders has given so much attention to the specialist  
30 regulator that is required to have significantly greater powers than those  
currently possessed by the Fair Work Building Commission.

Master Builders wants major changes to the general workplace  
relations system so that the role of unions becomes one of representing their  
members and which stops those unions acting in their own interests rather  
35 than the members' interests. There's plenty of evidence to support our  
contention. This is the concern that is reflected in our recommendation, for  
example, that employer greenfields be reintroduced. We note that the  
Commission appears to be satisfied that the general workplace relations are  
far from dysfunctional but we would contend that this is not the case in the  
40 commercial and civil sector of our industry.

Workplace relations in the building and construction industry is failing  
the community and the economy. The community pays taxes, for which it  
expects governments to deliver vital community infrastructure, such as  
45 schools, hospitals, aged-care facilities, sporting facilities, et cetera, but it's  
clear, the evidence is there, that the community is not getting value for  
money from the taxpayers' dollars that the government is investing in in such

community infrastructure. We would contend that the community is short-changed on its taxes, and the government's ability to deliver the full range of community services that it urgently needs.

5           Where we disagree with the Commission, in one respect of its report, or seek the Commission to recommend more robust reform, is driven by the desire that the building and construction industry is changed so that the Australian industrial norms do apply to our sector - the point I made a bit earlier, that our sector is unique in terms of the sectors in the economy. As  
10       the Commission itself has noted in the public infrastructure report, the sector is far too important to the economy for reform not to be effective, and if you'll allow me to quote here:

15                     *Any inefficiencies in public infrastructure have major economy-wide impacts. The expected demand for infrastructure construction services over the next decades is high. The construction industry is the major input into many other industries, especially mining, electricity, gas and water, transport, communications services, and property and business services. For example, Independent Economics found that a hypothetical industrial-related improvement in labour productivity of around 10 per cent increased value added in the construction industry by around 2 per cent but also increased value added in the mining industry and the electricity, gas, water and waste service industry by 1.2 per cent each.*  
20  
25

          This is the quote from the Productivity Commission itself. Having said that, there are good proposed reforms in the draft report, two which I particularly want to highlight. One is related to remediating awards. We  
30       contend it is essential for the industry and I now table Master Builders' Modern Award Manual, 6th Edition, which deals with that particular matter. Two, the other proposed reform is making unlawful clauses in enterprise agreements and imposed restrictions on the engagement of contractors, labour hire and casuals. This was a matter we particularly emphasised in our  
35       written submission, as we believe it will have a real impact on the industry and it's having a negative impact in terms of its productivity.

          Commission, they are our opening comments.

40       **MR HARRIS:** That's very useful. We've got some general notes we've put together from discussions with you - not just, therefore, on the original submission, but I could be wrong about that because we've got lots of notes that we've put together from, maybe, comments that are made in the newspapers and stuff for each of the participants who are prepared to come  
45       along to hearings. Can I just start out with a sort of general perspective? You quoted the infrastructure report. I worked on the infrastructure report. You're not going to get any disagreement with us about our own words and,

therefore, about the importance of industrial relations in this sort of sector. It is one of the profound difficulties of looking holistically, as we planned to do and were asked to do under this inquiry, at workplace relations.

5           Noting continuously that there is a persisting problem in areas relating  
maybe not all of building and construction but a substantial part of building  
and construction. As you can see from our draft report, we have indicated  
some interest in specialised institutions potentially dealing with this but I just  
want to ask your opinion on that, holistically, because it is a sort of choice of  
10 pathways, potentially. Have you given consideration at all to the concept of  
not just the Fair Work Building Commission or its actual altered forms but  
the whole question of whether workplace relations in building and  
construction deserves separate attention? In other words, rather than trying to  
drive the possibility of some variations that would apply across the board to  
15 the Australian workplace relations system, is it plausible to consider that  
specialised arrangements are required for this industry because of its  
persistent history of problems, without attributing them to any particular  
party but just a persistent history of problems? Has that ever occurred or  
been discussed? I'm not asking you to speculate here. In other words, I'm  
20 trying to say, let's go beyond the investigative and prosecutorial activities of  
a particular inquiry group, like the Fair Work Building Commission, or  
something like that. Let's look at the whole question of workplace relations  
in relation to construction. Does it deserve special attention?

25       **MR HARNISCH:** In an ideal world, we would argue that we would not like  
the building and construction industry to be singled out. That's on some  
strong assumptions. The strong assumption, as I said in my earlier comment,  
was that the building unions behave normally. Many Royal Commissions,  
inquiries, Court findings, over the last two decades and in recent times, show  
30 an incapacity or an unwillingness of the building unions to behave even to  
normal union standards. Hence our contention that, over two decades or  
more, demonstrated that the fact that even a Labor government the BLF at  
that time - when you look at the Gyles Royal Commission, when you look at  
the Cole Royal Commission, when you look at the evidence provided by the  
35 current Royal Commission, when you look at the Court findings and the  
findings that have been found against the CFMEU, when you find all sorts of  
other Court actions that are currently in place, when you look at the visual  
evidence that has been shown on ABC Television and when you read the  
Court reports, it's very hard to form an opinion that the building unions are in  
40 any way capable of, or willing to, behave to normal community standards.  
That is the contention we have. Why? Because of the peculiar nature of this  
industry, by the demonstrated lawlessness and inability, despite all the Court  
findings, to behave normally. We contend that, therefore, regrettably, we do  
need a specialist regulator to contain such industrial behaviour.

45       **MR HARRIS:** Would that extend to a specialist arrangement within the Fair  
Work Commission?

**MR CALVER:** No. What we would prefer would be, as we've said in our submission, that there be a greater level of integration of some aspects of the general workplace relations system with the specialist industry circumstance.

5 One of the things that we note is that on page 66 of the draft report you say you're excluding the institutional arrangements in the building and construction industry. What we'd prefer would be that they were not excluded but they were interspaced between your more general recommendations. In the notes we've given and in the substantial written

10 submission, which will follow, on the draft report, we're showing why building and construction is distinct in certain areas but how changes to the general workplace relations system can either be distinguished from what's required in the building and construction industry, or better integrated.

15 We commend highly the two recommendations that stand out from chapter 13 of volume 2 of the public infrastructure report which specifically deal with the Productivity Commission's ideas about how to solve the problem in the building and construction industry. Those recommendations, 13.1 and 13.2, basically - the first one is that the Australian Government

20 bring in a building code along the lines of the Victorian code, which uses the government's purchasing power to effect workplace relations. That has been fabulously successful under the 2006 implementation guidelines that were introduced, it was very successful in Victoria and, overnight, the Andrews government abolished that code. That was very disappointing, in the face of

25 your recommendation in that regard.

The second recommendation is that the penalties for unlawful industrial relations conduct in the construction industry be increased. That fits in with the recommendation you've got in the draft report about increased penalties

30 for lawful industrial action. So that, even if it was footnoted that that was part of your public infrastructure, just an acknowledgment of the meshing of those two is something we think would reverberate very well with our stakeholders and shows that, rather than exclude the work in the public infrastructure area, you've given consideration to it and there are things that

35 match up.

The second part of recommendation 13.2 from the public infrastructure report was, "Ensure that the specialist regulator has adequate resources to give genuine and timely effect to the enforcement regime." One of the things

40 we emphasised in our submissions is that FWBC in particular is operating with one hand tied behind its back, and that relates particularly to sections 73 and 73A of the Fair Work (Building Industry) Act.

Those two provisions were opposed by the Law Council as being a

45 completely unnecessary constraint on an agency. What those provisions say is that FWBC can't commence or continue litigation where litigation on the same subject matter has been discontinued because the building industry

parties have settled. So, if there's a settlement amongst the private parties, even if it were to be in the public interest for FWBC to take the matter forward, those two provisions, which were included by way of amendment at the last minute when that legislation was being introduced to displace the Building and Construction Industry Improvement Act, which was as close as we've come to a specialist, separate regime for the building and construction industry and was working well - it was a last-minute amendment to the Fair Work (Building Industry) Act and one which has been universally condemned.

10

I think, in a recent speech, you said that this area of the law, or this area of the economy, is suffused with politics, and that is no more evident than in the building and construction industry, that is no more evident than in that last-minute change to legislation to hamstring a specialist agency.

15

Mr Harnisch and I are exactly on the same page here. The building and construction industry is distinct in its industrial relations; that's the first proposition. The second proposition is that we fully commend the public infrastructure report, it's an excellent piece of work, and we'd like to see some more integration between that and this current draft report. The building and construction industry does need specialist agencies, specialist arrangements but mostly in respect of having proper powers to investigate and proper enforcement regimes, with higher fines, just as the Commission has recommended.

25

**MS SCOTT:** I was going to take it in a different direction.

**MR HARRIS:** That's fine. I'm out of that one anyway. I needed to look at the holistic-visions kind of change. As you know, some people have suggested that there is a lot of deregulation activity that could be undertaken and, as we've tried to point out, I think, most people are calling for specialist regulation of some kind or other, or, if it was deregulation, it's in a particular form of replacing one with another. I was just trying to get a clear view off you, so thank you for that.

35

**MR CALVER:** Thank you.

**MS SCOTT:** I want to take you to your comments in opposition to what I understand is recommendation 15.5, that:

40

*A person can only be a bargaining representative if they represent a registered trade union with at least one member covering a proposed agreement or if they are able to indicate that at least 5 per cent of employees will be covered by the agreement - nominated them as a representative.*

45

Could you outline what your concerns are there?



**MR CALVER:** Certainly. The Fair Work Act privileges unions in their own right, rather than as representative bodies, and Master Builders are concerned with that. We have concern with that emanating in particular from the default-bargaining status of unions. We think, if you're going to appoint a bargaining representative, there should be an active step, and that active step should be, as in a democracy, something which is done consciously. We don't like the current arrangements for a bargaining representative because it privileges those who have a representational role. It links also to the privileged status of unions in section 172(1)(b) of the Act, which says that permitted matters and agreements can be based on a relationship between a union and an employer.

The point we make is that, in a representational role, as an agent of those people that it represents, there is no relationship in a formal sense in that way, so that privileged status means that the competing theories about the role of unions in the economy, the role of unions in a reform as entities that should be taken into account on their own succeeds by implication rather than expressly. In other words, there's a body of theory that says that unions should be recognised as more than a representative and there's a body of theory that says that that should be their role. We pointed out that in our original submission to you, the divergence in theory in that regard, coming down on the side of the representational role as being necessarily reflected in the Fair Work Act. When we carp about draft recommendation 15.5, it's because we believe there should be an active step before somebody is appointed as somebody else's representative, and that's what should underline all practices of that kind in a democracy.

**MR HARRIS:** I see your perspective on that. You would see this extending, therefore, across all industries?

**MR CALVER:** Yes.

**MR HARRIS:** It's not a specialist proposition for the building industry; it's something that - you think that the principle needs to be more clearly established.

**MR CALVER:** Yes.

**MR HARRIS:** There is not a default guarantee of representation.

**MR CALVER:** That's right. No other representative body, including employer groups who are of equivalent status, are given that level of privilege by a statute. In other words, unions have been elevated by the Fair Work Act not only in default representation and not only as having a specialist relationship which founds an extension of permitted matters and brings it into a number of grey areas but they also are privileged to be able to

be parties to enterprise agreements in their own rather, again, than as representatives. I suppose what we were looking for when we raised it in this way, with respect, is we wanted the Commission to come down one side or another of that divide: What is the role of those intermediaries? Have they  
5 achieved a sufficient status in the workplace relations system to be recognised in their own right? We say, no, that goes beyond the whole notion of representing a class. Or are they representative bodies?

Clearly, from my comments in answer to the Commissioner's question, we  
10 are of that view. It makes things a lot cleaner and it's also associated with the discussion that the Heydon Royal Commission are having about the role of fiduciaries because of some very excellent work that's been promoted in the interim report of the Heydon Commission about the notion of fiduciary duties better informing the relations of unions and their members.

15 **MR HARRIS:** Can I ask a question in relation to the enterprise contract in that context?

**MR CALVER:** Yes.

20 **MR HARRIS:** Would I be right in assuming that you would be, therefore, reasonably attracted to the concept in the enterprise contract, in part, because of that?

25 **MR CALVER:** We note the safeguards that are associated with the enterprise contract, and one of them is that it has a default period of 12 months. The principal problem that Master Builders has with limited periods of operation is that our members cry out for certainty over the life of a project and, if they have to renegotiate arrangements after 12 months, the  
30 feedback we get is that they're unhappy with that. As you know, as economists, having the cost of a project made certain at the outset, so that the investors can be satisfied that those costs can be properly budgeted for, are available, is very important. That 12-month period is one of the problems we have with enterprise contracts.

35 The other is that, as the Commission has recommended keeping awards, we think that they should be a lot more facilitative and that, if they were at the level of facilitation that you've proposed in the context of enterprise contracts, then perhaps their ongoing use would be justified. I  
40 must say that our view of enterprise contracts and awards is coloured by the prism of our rather difficult and outmoded modern award. Those are all the things that are in the mix with the enterprise contract.

45 **MR HARNISCH:** The practical outcomes of this is that contractors essentially price in this risk and, of course, that increase in pricing that risk means that all tenderers, including the successful tenderer, therefore, would put up a tender price higher than it normally would be, without that risk being

in existence.

**MR HARRIS:** Can I stick with enterprise contract then for a second.

5     **MR CALVER:** Sure.

**MR HARRIS:** The concept really was that the employee has the choice after 12 months of defaulting back to the award, from the enterprise contract.

10    **MR CALVER:** Yes.

15    **MR HARRIS:** Thus, if the employer had offered something that was, by definition, more attractive to the employee, the only logical reason an employee would go back to the award is if in fact that promise hadn't proved to be valid, so it would seem to us. In other words, this was an incentive in order to encourage employers to perform as they said they would perform under their contract and supports the fact that therefore the thing is not being validated in advance by the Fair Work Commission; in other words, it's linked, mentally at least, to the lack of a prior approval arrangement, it's an incentive to ensure reasonable behaviour. If you were a building contractor and you had succeeded in getting such an agreement in place, I would assume you wouldn't necessarily presume that it will disappear after 12 months, because that's not the concept. The enterprise contract is not limited to 12 months. It had a safeguard in it that, after 12 months, an individual could choose to put their hand up and say, "I want to default back to the award."

20    We've put this up for genuine debate, which is why I want to ask all the participants, whenever I get a chance, about it, as to how they perceive it. My question, if I could extend this, is, why would a building contractor naturally assume that after 12 months the thing would disappear? It's not quite the same as the Greenfields agreement option we had, which did have that 12-month provision in it.

25    **MR CALVER:** That's right. Unions would use this as an industrial weapon. Any contract that ends after 12 months where they can get leverage - and I was just checking my notes. "Employees could exit the arrangement after one year and return to the award or any other agreed contract" is what's in the report. That would also, I would imagine, permit them to start to bargain for an enterprise agreement. At that point, the ability of the unions to use that as a way to leverage additional costs, as evidence for our sector in respect of Greenfields agreements clearly shows that they do, would mean that that is a risk, as my CO has said, it's a risk, that builders would have to price in, it's a risk that would be very difficult to cost and therefore that uncertainty would militate against it. That's not saying we don't like the idea of facilitation which the enterprise contract encapsulates, we do, but it's that safeguard that raises a red flag for us, particularly in relation to the ability to enter into what might be lawful industrial action at the end of that 12 months.

**MR HARRIS:** I understand. Thanks.

5 **MS SCOTT:** The same concern, I imagine, Richard, applies to your comments on Greenfields.

10 **MR CALVER:** Yes. It does. That's one of the reasons that we think that the old system of almost, as it were - like your enterprise contract, saying, "If you come and work here, these are the conditions that will apply under the enterprise contract allowing employers to do that." We think that that worked for Greenfields. It worked because in our industry you don't get skilled people unless you pay the market. A lot of Greenfields projects need highly skilled people. There is certainly no evidence of wage amelioration under those Greenfields agreements that were posted by employers, so we think that that's - that didn't induce any of the unfairness that some people allege attended those.

20 **MS SCOTT:** On pattern bargaining, you're proposing that a requirement that those proposing the pattern have to demonstrate that they're not applying undue influence or coercive conduct.

**MR CALVER:** Yes.

25 **MS SCOTT:** Would that actually be effective in your sector, that you could have the union itself saying that they're not applying coercive conduct? How rigorous and robust would be the requirement which says to the proponent of the pattern bargaining, "Are you behaving yourself?" I would have thought they'd say, "We are."

30 **MR CALVER:** Yes. What we've done is outlined some safeguards, in response to your information request, to be put in place that would assist with carving out pattern bargaining from what we believe is genuine bargaining. We've got a number of considerations. One is that, if there's positive evidence that they're not applying undue influence and coercive conduct - and, as you say, that, as a matter of proof, might be difficult but - - -

**MS SCOTT:** Especially to get, say, employers to put their hand up to come to give counterevidence, I would have thought.

40 **MR CALVER:** That's right. A lot of our members are shy of giving evidence. We find it very difficult when we're mounting cases because the risk of reprisals is very high and has proven very successful. I'm afraid that in our industry those people who aren't compliant often commit commercial suicide. We find that out amongst our members, that they don't want to embrace that choice, so compliance comes.

The real nub of the argument in pattern bargaining is that, if the union

5 wants an industry agreement, rather than a tailored enterprise agreement, we say, protected industrial action should not be available. If you come along with an agreement, "Sign up or else," which is what we experience on a daily basis, if you do that, fine, you can bargain for that but you can't have protected industrial action.

10 **MR HARRIS:** But you do still have the capacity for people to deeply disturb a workplace while perhaps dancing on the fine legal line of whether they have breached - - -

**MR CALVER:** Yes.

15 **MR HARRIS:** We are very conscious of that. The pattern-bargaining request was really to work out whether we had knocked out, whether the legislation had knocked out, what could be an efficiency tool. In other words, in circumstances where there wasn't substantial industrial or, generally speaking, market power in the competition policies able to be exercised, that this might actually be an efficiency tool. Indeed, we've asked  
20 some other participants from the employers' side, "Don't you do this anyway?" and of course they say they don't, and of course they shouldn't because that would be a breach of the law. The logic is, there's an efficiency tool here that looks like it's banned and it's banned for particular circumstances in, again, a particular set of industries, so it would appear.

25 If I could extend the Deputy Chair's question a little bit, what happens if the declaration of whether a pattern bargaining was an efficiency tool or not available because of fears of, let's generally say, poorly-competitive circumstances? What if that was simply a decision by the ACCC, doesn't require evidence; require the ACCC just to determine the sense of this and to  
30 publish a list which said, "In these industries, we don't think there are any competition concerns and therefore pattern bargains may be a tool" - not authorising the use of them; it's just saying it may be a tool that is therefore no longer barred. It didn't require you to submit evidence, it didn't require anybody else - it was just the general sense of the industrial structure now.

35 My hypothesis behind that question is we all sort of know where this stuff could be a problem. We don't really require an individual industry inquiry to have a guess at that and, moreover, if we ask the competition regulator to have a guess at it - I guess part of the query against that is, "But  
40 they're not labour-market specialists." I might, extending my hypothesis, say, "Yeah, but they do have a sense of this and they do manage an issue that is related directly to the labour market, which is secondary boycotts, so one would assume they would have some capability, not perhaps as good as, say, the Fair Work Commission but I'm deliberately choosing the ACCC here  
45 because of the nature of the instrument. What do you think about that?"

**MR CALVER:** The ACCC jurisdictional boundaries would, first of all,

need to be extended; secondly, I'd imagine them screaming for a huge number of more resources because it would be a task quite legion; thirdly - - -

5 **MR HARRIS:** It's a list once a year - it's a list published once a year, "These industries - we don't think pattern bargains should be acceptable for these industries."

10 **MR CALVER:** I suppose that one of the good things about your report is that you say that process shouldn't be the king, it should be the servant. That, with respect, sounds like it could become very process-oriented. Part of the issue with a pattern - - -

15 **MR HARRIS:** I was intending them to have the amount of process the ACCC, in its wise judgment, decided was necessary, which, I agree, could be massive or it could not be a lot.

**MR CALVER:** Yes. I think that we'd have to give that some additional consideration and I think we'd have to - - -

20 **MR HARNISCH:** It depends on which prism you're looking through. What I'm hearing is that you're looking through a so-called prism of efficiency.

25 **MR HARRIS:** Yes. That's correct. I am, anyway.

**MR HARNISCH:** We're looking at it through the ugly prism of industrial relations and how it's used as an industrial weapon, and how it's used constantly for the unions to exert their, what we'd consider, illegitimate power.

30 **MS SCOTT:** I think, effectively, the underlying premise of the question is, pattern bargaining only achieves efficiency gains when there aren't cartels operating and there is a highly competitive sector in both quarters.

35 **MR CALVER:** Yes. That proposition is one with which we agree, yes.

40 **MR HARRIS:** I'm just putting the issue out because you are squarely in the area where concerns about pattern bargaining would be reasonably obvious. You are an ideal party to ask this question of because you can mentally weigh up efficiency versus exposure. If you could think about it and, before you do your final final final, let us know. On the other hand, if you choose to have no view at all, that's fine.

45 **MR HARNISCH:** We certainly have a view.

**MR HARRIS:** Thanks.

**MR CALVER:** Thank you.

**MS SCOTT:** You've passed over your Modern Award Manual.

5 **MR CALVER:** The sixth edition, yes. How depressing.

**MR HARRIS:** It's a source of useful light commentary as we go through here, it's got "how to interpret this".

10 **MR CALVER:** It's our best seller, yes.

**MS SCOTT:** We got a very positive reaction at the stakeholder meetings to the idea that we're not recommending the continuation of the four year reviews of modern awards. You clearly have a considerable dissatisfaction with the current award, its complexity and the way it's drafted and updated in parts.

**MR CALVER:** Yes.

20 **MS SCOTT:** I don't know what your reaction is to our suggestion that the four-year reviews don't continue but, given the circumstances you're in, what would you like to see happen in relation to reviews? We've suggested examination by the Minimum Standards Division of hotspots, where - possibly across a range of awards or even in particular awards - there are significant issues that need to be addressed, rather than going through the whole 122 all again. Could you give us a reaction to that, from your particular set of circumstances?

30 **MR CALVER:** As you know from our first submission, our view is that, if awards become a safety net, the form in which they are encapsulated is irrelevant and will make them more amenable across the board to all of businesses' needs and make them form part of the safety net. We think that would be a first preference. As a second preference, we commend your proposals to remediate them. The way in which that would occur would be, in accordance with my understanding of the draft report, more forensic examination from the lenses of economists rather than lawyers and cutting the umbilical of history of how these awards were formed.

40 One of the propositions that Master Builders came to this whole modern award thing with is essentially that putting the National Building and Construction Industry Award 2000 in amber and melting it to become the modern award didn't work. That's why we have to publish a 200-page manual, so that the person picking up our award can say, "What the heck does that mean?" and, even then, with the commentary, sometimes you go, "Well, we were wrong about what it meant," and it's a disgrace - the litigation on adult apprentices, which we've drawn to your attention in the submissions, was attenuated, it was difficult getting witnesses. We were

5 arguing that it was ambiguous. The Commission said it was crystal-clear. Yet, what now has happened in the building and construction industry is that a first-year apprentice gets the same minimum wage rate as a final-year apprentice if they're an adult, because of the ridiculous terms of clause 19.8 of that modern award.

10 What we'd like to see is burning down the house and rebuilding, to put a metaphor there, yes, get the four-yearly review of modern awards. From my CO's point of view, they take up a huge number of our internal resources unnecessarily. I'm often at the Commission doing litigation when we could be doing other things. It's very resource-intensive, the outcome is uncertain, we find it difficult to get witnesses to come forward because of fears of reprisal, and proceedings, as we say in our submissions, where they might be able to be discussed across a table with a union, as soon as you elevate them to the Commission, all of the adversarial differences become extraordinarily stark. We support any moves to remediate.

20 **MR HARNISCH:** We talked about high-level comments in terms of context. As an economist, the modern award is almost a misnomer. The award should be looked at in terms of the context of the modern economy. What the review actually does is entrenches unproductive awards or unproductive behaviours in the economy. I'm going to ask my eminent colleague here to talk about tuberculosis. There are provisions in the modern award that should be just consigned to the dustbin because they don't apply in a modern economy, yes, as Mr Calver has said, when they come to the Commission, they're elevated to such a level that it makes it very difficult for reform to be undertaken.

30 **MR CALVER:** You do cite the example of the tuberculosis hospital in your report and say it's one of the benign anomalies. It is benign but when we sought to remove it during the 2012 review the CFMEU said no because there were these new strains of TB coming out of Papua New Guinea that might come to Australia. That's the sort of adversarial differentiation.

35 There are some more-systemic problems with the award. For example, during the formation of modern awards - under our award, you can only pay weekly. A labour-hire company operating in Victoria went to the Commission and said, "Look, we have to pay our people fortnightly. We can't move to weekly. Could you please change the clause?" We commended that. We intervened to support that particular individual. The discussion of that case is under clause 30.13. The way the Commission resolved it was by very detailed legal language that defines the history as to whether or not you can pay fortnightly, whether or not, at the date that the modern awards were formed, the instrument under which you were paying, allowed you to pay fortnightly. What that means - this is clause 31.3 in that manual. What it means is that, when you read it, you don't understand it because it talks - our members ring up and say, "What's a 2B award?" It's an



historical instrument, so the reference to history there, over something as simple as to whether or not you can pay fortnightly, is - and I used the word "gobbledegook" in the notes that I sent you because that's what it is, that's what our members tell us and they don't actually say it as politely as that.

5

It's inaccessible. It's immersed in history. It's got references to things that are completely irrelevant. Even after five years in operation, it's riddled with errors. There's a reference, for example, in the clause relating to RDOs, to a rostered industry day off, which is the old practice of Master Builders and the CFMEU sitting down and dealing with rosters that are applied across the industry. We've pointed that error out but it hasn't been changed because it's been deferred to the 2014 modern award review. It's as much with sadness as anger that we view the modern award process because it's failed the industry completely.

15

**MR HARRIS:** Can I use that to drag you towards this question of reform of the Fair Work Commission? To make the process work, not just, as you say, resetting at amber something that was historically driven but actually looking at the question of the suite of awards that might be relevant to the topic and saying, "What can we do to make these relevant to the modern workforce today and remove things that are no longer relevant to the workforce of today?" Our model has in mind that the Commission will become, effectively, a party capable of doing its own research and publishing that and, effectively, becoming the catalyst or initiator of change, rather than relying upon one or both of the parties to come up with, as you say, an adversarial kind of competition where a Judge effectively says, "Why isn't counsel above it and comes up with - perhaps not always the kind of thing that you've described but something not unlike the kind of thing you've described."

20

**MR CALVER:** Yes.

**MR HARRIS:** There are two choices with reform of the Fair Work Commission, if indeed reform is considered wise or we consider it to be wise. There is the choice of reform via the mechanisms that we've described, which is quite a significant cultural change and adoption of proactivity by the Commission via deep and relevant analysis. The only other alternative is a different kind of body. You, in some of your comments, have talked about an appeals body of the Fair Work Commission.

30

**MR CALVER:** Yes.

**MR HARRIS:** That's not really what we had in mind because it seems to me to extend the whole legal analogy a long way. This was a reform catalyst kind of approach but a well-judged one, with capabilities that the Commission itself has already, capabilities of judging where the hotspots are, if you like. Can you tell anything on the record about how you viewed our version of trying to reform the Commission and making it a catalyst for

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change, versus the alternative, which presumably is something more significant than that?

5       **MS SCOTT:** Just before you do, noting, of course, that we did propose that, while the Minimum Standards Division would undertake rigorous work itself, it would, before it made any determination, have a public consultation process and the process for engagement, obviously - - -

10       **MR HARRIS:** Transference.

**MS SCOTT:** Yes, transference process.

15       **MR CALVER:** The reason that we are talking about an appeals body is because, no matter that the fundamental structure of the Commission changed, which we would support, its decisions would be appellable under the Constitution, and we may as well make it appellable to a Court of record because the way that we have to appeal matters now - the reason we haven't appealed some of these modern awards things is because you're shelling out at least six figures because you've got to go on judicial review and it's a very  
20       expensive process, the writs of mandamus, certiorari, prohibition or an injunctive proceedings. Once you've got a Full Bench decision from the Fair Work Commission, with the limited resources that we have, we don't rush off to the Federal Court. Despite any change to the manner in which decisions were reached, they would still be appealable, so we focused on that end  
25       because we were quite aghast, and we've mentioned this in our submission too, about the way the current Vice-Presidents were put into the Commission; we thought that was a disgrace.

30       There were two Vice-Presidents who had the status under the statute of Deputy Presidents, and then the statute was changed to put two more people, also called Vice-Presidents, above them, undermining the status of the two who were then called Vice-Presidents. It just seemed to us to be an extraordinary way for politics to interact with the law to change an institution in that manner. We don't want those sorts of changes. We would prefer to  
35       see your model of the Minimum Standards Division. What we can't have, though, is to have that Minimum Standards Division to change award wages irregularly and after consideration because our experience with changing wages, as a minimum, outside of the cycle, is not one that we are happy with. We went through a year's litigation in the apprentice matter, where we had  
40       major changes to apprentice wages, in an upward direction, without one jot of evidence about productivity effects, because there was a lacuna in the statute - there was a statutory lacuna that didn't require, due to the 2012 review, the Commission to look at work value. Work value is just another word for productivity, in essence. So, the Commission could set aside the very thing  
45       that underpinned all of its other wage hearings.

      We agree with you, fundamental reform, with the Commission

Minimum Standards Division to look at this, to regularise things, to make things accessible, to make them, as my CEO says, suitable for a modern economy. We absolutely applaud that but, at the same time, because it would still be a body from which appeals at law can be made, let's not forget about  
5 that element, let's not have to deal with judicial review.

**MR HARRIS:** I understand. Thank you.

**MS SCOTT:** What was the response to the changes in the apprenticeship  
10 arrangements that you outlined? What has been the market response to that?

**MR HARRIS:** Numbers have fallen.

**MR HARNISCH:** If we look at the latest NCBR statistics, I think the latest  
15 quarterly data said there was an uptick but the trend is down.

**MS SCOTT:** You attribute some of that to - I guess what I'm trying to - if  
you have a - we've had some other evidence presented to us about changes  
relating to adult apprentices and what they're paid. I'm just trying to see if I  
20 can elicit from you what the response of employers was to this change.

**MR HARNISCH:** The general response was that they were unhappy. It  
takes time for that to be translated into a market response. Certainly if you  
look at the statistics by the NCBR, they clearly show that, for the last decade,  
25 there's a downward trend, and we would contend, as we did when we argued  
the case against the increase, that this can only exacerbate the trend, rather  
than reverse the trend, that's regrettably in place at the moment.

**MR CALVER:** We think that quite a lot of employers are now no longer  
30 paying above minimum. I think the figure was around 50 per cent that paid -  
I think it was 47 per cent the last time I looked at it - paid more than the  
minimum wage to apprentices. We think that that statistic has increased but  
there's not a lot of research that's been done. NCBR, as you know, has some  
data but correlation isn't cause and that study is crying out to be done.  
35

**MR HARNISCH:** The point about the wages increase, you need to  
recognise, in the construction industry, the vast majority of apprentices are  
trained by small businesses and individual owners. So, stating the obvious,  
the cost is more profound, its impact on that cohort.  
40

**MS SCOTT:** Thank you.

**MR HARRIS:** You're aware, of course, that we do recommend, in this  
inquiry and did in the infrastructure of inquiry, that this whole area of  
45 apprenticeship certificates does appear to be in need of holistic review.  
That's not based around any presumptions around rights and wrongs of  
workplace relations issues; it's actually - if I publish again the little bit of

data which shows the downturn in completions, which is very clear in the certificates and most recently has now become clear in apprentices as well. While there may be structural trends in the economy which suggests some of the rationale for that, it does not seem to be sufficient to explain the whole things. We're sort of inviting people to go off the record, since we're on this, again suggesting that this would be a damn good place for a further inquiry.

**MR HARNISCH:** Our industry is projected to be one of the sectors that actually will see positive growth over the next few decades. It goes against - yet you would expect an uplift of employment as a consequence of that. When you look at the future workforce, the trend is clearly down, so that gap between where this industry is heading and where the employment skill pool is at is only going to widen and, of course, in the end you're going to have a major productivity gap.

**MR HARRIS:** Thank you for that. Junior pay rates. This may be my fault in translating my own notes but I've got written down here, "Junior pay rates should be introduced."

**MR CALVER:** Yes. Absolutely.

**MR HARRIS:** Does that mean you don't have junior pay rates?

**MR CALVER:** We don't have them. When the modern award was formed, the predecessor awards, which had junior pay rates, other than for apprentices, were taken out of the modern award. What we're saying is that junior workers are discriminated against because, if you're going to have a labourer employed, you're going to try and have someone who's fitter, over 21 and has life skills and directions that other people - and emotional maturity, all the things that reports have indicated for adults, and that may well preference them. Yes, junior wage rates discounted for those factors would assist the efficiency of our industry.

**MR HARRIS:** We've hypothesised in the report that some other countries actually have junior rates but accept that there will be differentials in experience for people aged the same and that you could have variations, therefore, based around some kind of combination - we don't go much further with that. Without trying to tie you to this as an outcome, if you could get junior wage rates reintroduced but be able to consider a variation of pay based around experience, would you find that, just the principle of that, to be uncomfortable or is it something that's worth consideration?

**MR HARNISCH:** As a premise, it's worth looking at. I think what happens - employers recognise people with higher productivity and higher skills and my experience has been that they tend to pay more, regardless, so you don't need a statutory requirement or environment for that to be enabled. The only other comment about junior wage rates is that they're only temporary.

There's absolute proof that people actually get older each year, so eventually they'll move out of the junior wage-rate category.

5 **MR CALVER:** I think you say in your draft report that it stimulates their ability to get jobs later on and it's a good entrée, and we agree with that proposition, which is why we've called for their reintroduction.

10 **MR HARRIS:** Thank you for that. I don't have anything more in mine. Patricia, do you have anything?

**MS SCOTT:** No, that's fine. Thank you.

15 **MR HARRIS:** Is there anything that we've failed to elicit in our ruthless interrogation from you that you'd like to get onto the record?

**MR CALVER:** No. Next week we're going to lob another 20,000 to 30,000 words in your direction. We thank you very much for today.

20 **MR HARRIS:** I probably don't need to say it to you because you are a regular participant but we do appreciate the effort that people put into submissions, we really do. If the submission process did collapse, it would make our process far worse. Thank you.

25 **MR HARNISCH:** Thank you for the opportunity.

**MR CALVER:** Thank you.

30 **MR HARRIS:** Civil Contractors. If Civil Contractors are available, that would be good.

**MR CARMODY:** Good morning. Mike Carmody. I'm the Chief Executive Officer, National, for the Civil Contractors Federation.

35 **MS McCOSKER:** I'm Nicole McCosker and I am Civil Contractors Federation national office as well.

**MR HARRIS:** Opening statement or jump right in?

40 **MR CARMODY:** A short opening statement, if I may, thank you.

**MR HARRIS:** Fine.

45 **MR CARMODY:** Good morning and thank you for the opportunity to speak with you this morning. On behalf of Ms McCosker and I, I thank you for the opportunity to address the Commission on matters associated with workplace relations and its impact on the civil construction industry. My address this morning will be short and concise. I don't intend to address the

broader holistic matters under both industrial relations and workplace productivity; these have been well-covered previously by our colleagues in the Master Builders Association. I will, however, refer you to the industry's submission, and that submission, I think, was forwarded to you in March 5 2015.

Civil construction is the platform on which our nation's infrastructure is developed. A productive and efficient workplace is essential for the industry to maximise its contribution to the economy and Australia's national 10 interest. The civil construction industry supports a workplace relations system that places primacy on the relationship between an employer and an employee, with those parties free to bargain directly with each other.

In addition to providing for a safe and a harmonious work environment, 15 workplace bargaining should be based on three principles: achieving flexible and efficient outcomes for the workplace; negotiating agreements on an individual or non-collective basis, free from interference of third parties; and, ensuring that agreements are tied to productivity.

Though the industry supports, in principle, the majority of the key 20 points in the Commission's draft report, the industry submission highlights a range of inconsistencies and outdated practices in current workplace relations framework, including the complexity and inconsistency in the Building and Construction General On-Site Award, the negative and costly impact of 25 pattern bargaining by unions, an unfair dismissal process that does not recognise the rights of the employer, and the need to tighten the right of entry to workplace by the unions.

Australia's workplace relations system should be designed as a 30 collaborative framework to improve workplace productivity. There is no dodging the need for workplace reform or room to tinker around the edges. The Commission must seize the opportunity to establish a framework and an industry award that is agile and designed to support the development of the Australian economy and improve the community standard of living, a task 35 that, given Australia's stalled growth, is now critical. Productivity demands change and change requires courage and conviction from our government, the industry and the unions.

Thank you. That concludes my opening statement. I would be pleased 40 to address your questions.

**MR HARRIS:** Thanks. Can we start at the broadest issue that you've 45 picked up, the nature of the enterprise bargaining process and the obvious linkage to the award as the default alternative, and the fact that awards are highly complex and, as you say, in need of some level of greater agility or greater simplicity, that kind of thing. I think you heard our earlier exchanges with the Master Builders. If I could continue on on that theme, in relation to

the Fair Work Commission itself, we have put forward a proposition that says the Fair Work Commission should become its own analysing and investigating agency for the purpose of picking up areas of award reform that require addressing, and that it should undertake that activity via analysis and publication of that and then call upon the parties to give their views about that kind of thing, including not just the parties that are relevant today but other parties that might actually have useful perspectives in the analysis.

Do you see that as conceptually being able to work over time, effectively, to address the kinds of concerns you were talking about, or do you have in mind an alternative process for simplifying awards and/or bargaining processes?

**MR CARMODY:** I think reality would dictate that the approach, in principle, that you're proposing is possibly the only approach, moving forward.

**MR HARRIS:** Possibly the only approach?

**MR CARMODY:** Only approach, moving forward. The Master Builders clearly demonstrated, by that rather thick manual sitting on your desk, that the award, in itself, is somewhat of a disgrace. The fact that you've got to produce a 300-page document that allows interpretation by both employer and employee at the workplace is a significant issue; that goes without saying. The method by which we can improve that particular dynamic, I think, accords with the approach that you've taken, or at least are proposing to take. I think the industry would support, in principle, pending, obviously, understanding the complete terms of reference, and would work collaboratively both with government and with the Commission to move that exercise forward.

I think, more fundamentally, and I believe the Master Builders did a good job at bringing some of these exercises to the forefront, the culture that exists on a construction worksite today, regardless of the Commission, the award or any other apparatus that we're going to put in place, needs significant, significant, attention, without which nothing will work. So, it would be the contention of the civil construction industry that, along with establishing the mechanics around the Commission, around revised award, about more simplistic, better procedures associated with the award, in fact we tackle the broader context of both the union, employer and employee, and that relationship onsite. That's a very difficult issue, as you can appreciate.

**MR HARRIS:** Yes. I think we're getting a sense of consensus around the way the process might operate but possibly some degrees of dissatisfaction based around the quality of what you got out of the previous four-year process. Would that be right as well?

5 **MR CARMODY:** That is correct. It's simply not working. The civil construction industry primarily deals with small-to-medium enterprises, the small-to-medium contractors, who tend to work for larger primary contractors. Their ability to work within a very complex and, in some cases, very dysfunctional award and workplace relations system is extremely limited. We spend 90 per cent of our advice trying to work with our smaller members in trying to interpret that landscape, let alone, at the end of the day, earn a living.

10 **MS SCOTT:** I'm going to go to some specific recommendations. You mentioned right of entry on the way through, and thank you very much for your earlier submission. In response to the submissions and our consideration of the topic, in chapter 19 we look at the issue of right of entry and, of course, we're trying to balance a variety of interests, and  
15 circumstances across sectors are very different, across industries are very different. We came up with a draft recommendation. 19.8 seems to go to the area where you have an interest. I understood that your position was that right-of-entry provisions should only be available to unions that have members employed at the workplace. In 19.8 we say:

20 *The Australian Government should amend the Act so that unions that do not have members employed in a workplace and are not covered by an agreement at the workplace would only have a right of entry for discussion purposes on up to two occasions every 90 days.*  
25

What's your reaction to that recommendation? We're trying to balance a variety of interests and we're trying to make provisions that will apply more generally. I appreciate your circumstances can be quite unique but is  
30 that a reasonable compromise, from your position?

**MR CARMODY:** I would agree with you and I think the industry would support a compromise position. Quite obviously, our preferred position would be perhaps a little further to the right than that but we understand and  
35 appreciate that compromise is required. We also understand and appreciate that on occasion the interjection of the union onto a worksite is fair and valid, particularly when we're talking about significant OH&S concerns. However, putting that to one side, which, I might add, would probably constitute the minority of workplace-entry provision, the majority of workplace entry, as  
40 we all understand - and there's sufficient evidence over the last four to five days, particularly what's being revealed at the moment within the Fair Work Commission, that that is not the case. I guess it gets back to that more fundamental issue of the culture that exists in that workplace and the fact that a particular party is allowed, in many cases, to operate outside the award and,  
45 in fact, the law on many occasions.

Of course, with, again, small-to-medium enterprises working into this



space, their ability to reacted and respond is extremely limited, particularly if you have common bargaining across that worksite and the smaller contractors have to accord or, fundamentally, they lose the tender and move on. It is a difficult situation. There is an understanding that, on occasion, right of entry does serve a purpose and is required but that would be the absolute minority. So, any compromise that would limit the impact of right of entry for scurrilous motives should be eliminated.

**MR HARRIS:** Just to extend that, the obtaining of documents - the model that we have today seems to have been created around a set of circumstances where there were insufficient occupational health and safety inspectors available, and I'll stick with health and safety for the moment because it seems to be common ground that occupational health and safety is a legitimate concern for a union and a legitimate concern for an employer and for a regulator. If I could just use that concept, the obtaining of documents, though, does seem to be something that has great capability of being very ill-defined. Have you had experience in this kind of area? Does it occur very much in the fields that you have covered off?

**MR CARMODY:** It does, and it does, as and when required, as a tool against which the unions will pull down, as and when appropriate. Very much like workplace entry, very much like occupational health and safety, access to documentation is yet just another tool that can be applied at the workplace to gain leverage. I guess, from a personal perspective, I have worked on many, many construction sites in years past, in the very early days, access to documents was often more about payroll, again as a tool to ensure that the books - and the employees were being paid correctly. That's now extended into a multitude of fields. There is a lack of definition in that space with respect to the privacy and confidentiality of some documentation and against what documents fall under certain access or non-access. I would agree with you in a sense that there needs to be far more clarity and definition in that particular issue.

**MR HARRIS:** We have greater investment, do we not, in regulators having the ability to exercise powers?

**MR CARMODY:** Absolutely.

**MR HARRIS:** That was really the nub of my question - sorry, I probably put it quite badly but I'm trying to get a sense of whether in your industry it is a problem today, not a problem in the sense of the principle being wrong but the problem being that practice in the past, when we did not have enough regulatory resources to cover off industries, mean that we'd rely on the union to undertake investigations.

**MR CARMODY:** Correct.

**MR HARRIS:** Today there are increased regulatory resources. The question is, are there enough regulatory resources to relieve the union of the burden of having to undertake that sort of activity.

5 **MR CARMODY:** The industry would support that wholeheartedly. Yes, there are. There are provisions under law by which the employee must abide. You're quite correct; I think, in days past, there was a vacuum in that space that the union readily filled. The day is now where the law should in fact take precedence.

10 **MR HARRIS:** We're looking holistically - you have a particular sector. We're looking holistically. You consider - particularly with the decline in unionisation, relying upon unions to be able to undertake this activity seems to be not necessarily in the public interest either; in other words, that, where  
15 unions are simply not able to extend themselves across the entirety of a particular sector - we have very low unionisation rates in quite a large number of private sector areas now. It's very hard to imagine how they could perform the actions that today, I think, we more expect to be conducted by a regulator.

20 **MR CARMODY:** I think, from a more practical perspective, one would have to question the intent on what's underpinned this.

**MR HARRIS:** Yes. I'm trying not to make a prejudgment about intent  
25 here. I'm really just looking at the question and saying, over time, can you imagine the system being able to cope if we continue to get a decline in unionisation? The idea that, in the public interest of safety, which might be an unreasonable one - it's the idea that we would rely upon the union. There have been more-celebrated examples recently, with the 7-Eleven thing.  
30 Could we have relied upon the union to undertake investigation of pay levels in that industry? Undoubtedly, we couldn't have. The regulator was active and yet we still have a difficult set of circumstances.

We're trying to come up with a design of the system for the future.  
35 One interesting area is this question of, can we continue to rely, for the future, on unions being able, regardless of - dismissing entirely mal-intent, just on principle, can we expect to rely upon them to be able to undertake these sort of these sorts of investigations?

40 **MR CARMODY:** My answer would be no. The Act and the legislation should predominate.

**MR HARRIS:** Thank you.

45 **MS SCOTT:** Unfair dismissal - you may respond in detail in your future submission but can I just take you through a number of the recommendations we made and just see if I can get your initial reaction?

**MR CARMODY:** Certainly.

5 **MS SCOTT:** One of the things we - this is not a recommendation - was the information request about the present lodgement fees, which I think are \$70 per application, and sometimes they're of course then waived. Do you have any views at this stage about lodgement fees? You might want to take that on notice.

10 **MR CARMODY:** No. I'll take that question on notice. We don't have a specific view at this stage.

15 **MS SCOTT:** That's fine. I might then go to the recommendations. You express concern about arrangements for unfair dismissals. We've suggested a number of recommendations. I'll just summarise them briefly for you. You'll see they're in chapter 5, recommendations 5.1, 5.2, 5.3 and 5.4. One is that there be greater capacity for the Fair Work Commission to consider the matters on the papers, on application, prior to commencement of conciliation, or to, alternatively, introduce more merit-focused conciliation  
20 processes. That's something that goes - a preliminary stage. The other one is that matters be based on the substance of cases, rather than procedural requirements, and we've given a number of examples where procedural requirements are sort of seen to outweigh the substance of matters. We've indicated that an employee can only receive compensation when they have  
25 been dismissed without reasonable evidence of persistent underperformance, or serious misconduct, and where procedural areas - why an employer should not result in reinstatement or compensation for a former employee but can, at the discretion of the Fair Work Commission, lead to either counselling or education or, if it's possible, financial penalties.

30 Do you have a view on that? That appears to us to be a tightening of arrangements but you've got more practical experience.

35 **MR CARMODY:** The industry would agree in principle. One of the areas that the members have raised is the fact that, within these particular statements of clear definition, particularly in terms of what's defined as unfair, particularly with relation to the workplace - so, as we move through this process, where we find that there are words and terminology that require clear definition, there would be guidance within the workplace. We would  
40 certainly support that.

**MS SCOTT:** Onto the next one, at the moment legislation provides that the primary goal of the unfair dismissal provisions is the reinstatement of a worker. We have suggestions in the discussion of this that reinstatement  
45 rarely occurs and, also, reinstatement is probably actually quite problematic. So, we suggest the government should remove reinstatement as the primary goal. It still, of course, can occur and it may be appropriate in circumstances

and, of course, up to the Commission. Do you have a response on the suggestion from us, the recommendation in the draft report, that we remove reinstatement as the primary goal?

5     **MR CARMODY:** The industry would agree in principle.

10     **MS SCOTT:** Because we've suggested these earlier recommendations, we then have a suggestion that, on the basis that those recommendations are implemented, the government should remove the small business Fair Dismissal Code within the Act. We have a discussion - a chapter which suggests that in fact the code may give people a false sense of security and it's illusory in its impact. Maybe your members are too big to be relevant to the small business code but do you have a response on that issue?

15     **MR CARMODY:** Our members in fact are relevant to that code. As I indicated, the majority of our members fall within that SME profile. I would like to take that question on notice, if I may.

20     **MS SCOTT:** All right. That's fine.

25     **MR HARRIS:** Right of entry. Again, I think we've traversed this generally. Right of entry provisions, we've recommended some limitations on unions who are not represented in the workplace being able to enter other than on a limited number of occasions. You've covered that already, sorry.

30     **MR CARMODY:** Yes.

35     **MR HARRIS:** I went to right of entry earlier. I just wanted to be sure. That's the only one I've got left on my list, then. The right of entry has been already covered. I haven't got any others.

40     **MS SCOTT:** Do you want to discuss adverse actions, your views on adverse actions? We've made a number of recommendations there. I understand you had concerns about adverse actions. Maybe you just want to talk about how adverse actions affect your sector.

45     **MR CARMODY:** I'm just moving through our submission at the moment with respect to reference. Adverse actions in what context?

50     **MS SCOTT:** A number of people have expressed concerns that adverse actions is an area where people are increasingly seeing activity because - a number of legal firms have seen as an area of potential exploitation, and it relates to complaints being made to employers and then that complaint mechanism being grounds, potentially later, for actions for compensation because a person made a complaint and then they're able to say that their dismissal later was a result of the fact they made a complaint, and then they are able to seek compensation. We looked at this issue, we had quite an

extensive discussion in the chapter, and then made some commentary on the possibility of capping claims, capping compensation under that. I understood that - as you had raised it previously, you might have a response.

5     **MR CARMODY:** Certainly and thank you. From an SME perspective, quite obviously, our industry is especially vulnerable to frivolous claims. It's the view of the industry that termination - recommends that adverse action claims related to the termination of employment should be abolished in their entirety. If the provisions are to be retained, the reverse onus of proof should  
10    be abolished.

**MS SCOTT:** Maybe for your final submission - we do also discuss the issue of reverse onus of proof and present the arguments, I think, of both sides. We did reach the conclusion in the draft report that - because of the nature of  
15    the issues at heart and what was driving the actions of the employer, we haven't favoured the abolition of the reverse onus of proof but we'd welcome your views on our discussion - and see whether you consider it reasonable and whether you need to comment further.

20    **MR CARMODY:** Certainly.

**MR HARRIS:** The only other generic topic is the one we did pick up earlier on enterprise contracts. Do you have a view on the concept of enterprise contracts, as we put forward in the draft report?

25    **MR CARMODY:** From the industry's perspective, we're certainly favourably inclined. We have no disagreement in principle. Quite obviously, the shape and the nature of the contract need to be well-defined, particularly at our end of the industry, but we have no disagreement in principle.

30    **MR HARRIS:** You've got quite a lot of SMEs and our motivation was particularly for those SMEs that are found at, perhaps - are fearful of the enterprise-bargaining process per se, which you've earlier referred to as being complex and intimidating. The model design for your sort of sector - without  
35    necessarily saying, of course - it's not an obligation, it would become an option that's available for you to do that.

**MR CARMODY:** Understood.

40    **MR HARRIS:** All right. I don't have any other questions beyond that, so, if you don't have anything else you need to put on the record today - if you do, now is the opportunity, so that others can read it. We'll ask at the next hearings about yours; that's what we've been doing, pretty much, as we go. Is there anything else?

45    **MR CARMODY:** Thank you. No, that completes our presentation. Thank you for your time and consideration.

**MR HARRIS:** Appreciate it. I think we can have a five-minute break here, he says, optimistically.

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**ADJOURNED**

**[10.13 AM]**

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**RESUMED**

**[10.44 AM]**

**MR HARRIS:** I'd like to welcome the Business Council of Australia. Perhaps you could put your names on the record for us.

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**MS WESTACOTT:** Thank you. Jennifer Westacott, Chief Executive, Business Council of Australia.

**MS KIRCHNER:** Megan Kirchner, Executive Director, Business Council of Australia.

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**MR HARRIS:** Thanks. Do you want to make opening statements?

**MS WESTACOTT:** Yes, if I may.

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**MR HARRIS:** Yes. Certainly.

**MS WESTACOTT:** I've got about a 10-minute opening statement, if I may.

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**MR HARRIS:** Fine.

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**MS WESTACOTT:** First of all, Chairman and Commissioner, thank you for giving us the opportunity to speak with you today. Obviously I'm here as the Chief Executive of the Business Council of Australia, made up of 130 companies across all sectors of the economy. Collectively, we employ more than a million people across the entire country, of all ages, backgrounds, and at all skill levels. We are part of a broader, large business community, which employs 3.4 million people, or 32 per cent of Australian workers, and contributes 44 per cent of Australia's economic output.

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The Commission's inquiry comes at a time of significant economic technological and social transition, so across the country, as you know, we're talking about the need for a whole suite of policy changes that will help us respond to disruption, grow the economy, preserve and improve our living standards, and we believe improving the workplace relations system is a vital part of that. While we acknowledge that workplace relations has become a difficult and ideological topic to talk about, it is still one that we must discuss. As the Reserve Bank Governor, Glenn Stevens, said at the recent

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National Reform Summit:

5                   *There is no avoiding the need to have the right labour market arrangements. The question is how to have suitable rules that offer basic fairness, but with minimum adverse effects on enterprises, employment, and the scope for free agents to come together in ways that mutually suit them - and that grow the economy. Whether we have that balance right is a question you might address.*

10                  From our perspective, the Business Council's perspective, the Productivity Commission, with its long track record of considering difficult reform, is the right institution to consider this question. You are able to rise above ideology and the ideology of a debate and focus on the public policy issues rather than the politics. You're also able to take a long-term and  
15                  future-looking approach. The Commission to date has undertaken a significant piece of work which extensively examines components of the workplace relations system.

20                  I'd like to congratulate the Commission on its work and proposals relating to the minimum wage, Greenfield agreements, the suggestion of a no-disadvantage test in place of the better-off-overall test, the appointment process for the Fair Work Commissioners, preventing restrictions on the engagement of independent contractors, labour hire and casual workers, and the focus on the behaviour of parties during the negotiation of an agreement.

25                  While some of the recommendations have not gone as far as we previously have sought, I know that the challenge of good reform is always about finding the right balance. Your recommendations on penalty rates are a good example of this. We believe our proposal is more enduring; however,  
30                  I can be honest and say businesses are at the point across the country where they will accept any step forward on this very vexed issue. Your recommendation is a commonsense, practical step and, as a country, we need to take it and need to take it urgently.

35                  The draft recommendations that you've put forward to date go a long way to answering the first part of Glenn Stevens' question; they will deliver a set of rules that offer basic fairness, and that's why we support them. What I'd like to focus on today is the second part of Glenn Stevens' question, how to have fairness while creating the minimum adverse effect. That also means  
40                  how we position us for the future, how do we give enterprises, large and small, the agility they need to create the conditions for the jobs of the future?

45                  This is an area in which the Business Council would urge you to undertake further work. We believe that the final report needs to give substantive consideration to this and to build this into the architecture of the final report. In particular, our second submission and our request is that the Council believes that additional work is needed on the approach to

legislation, awards, agreement-making - that is, their function and their scope.

5 If I go to the legislation, the Commission has devoted a great deal of attention to the regulator and how the rules of the system are implemented. In your speech, Chairman, you stated that the workplace relations system tomorrow is getting a restructured regulator. There's no doubt we need a restructured regulator, and we thank you for that, but we also need to update the rules so we have a workplace relations system for tomorrow, fit for a modern economy and more agile workplaces. Legislation is the primary lever for governments, and this legislation needs greater scrutiny.

15 The Commission notes that industrial action is at low levels across the country. While this is true, it doesn't mean the legislation is working well. After all, industrial action represents a form of end-game failure. Low levels of industrial action could point to the fact that the system encourages employers to give in to negotiations because of the time and effort involved in getting an enterprise agreement in place. The legislation is so important because it creates the workplace relations system, it drives the culture, it drives the behaviours. Our view is that you simply can't do better with sub-optimal rules.

25 We would ask you, respectfully, to examine the cumulative effect of all of the components of legislation: What is the cumulative adverse effect of the minimum wage, penalty rates, awards, all the matters in agreements on enterprises and employment and overall growth? People can always cite examples of enterprises which work around the system or succeed in spite of the system, and then they point to them and say, "Well, the system is working well." It's true that enterprises can work around the system but is it good public policy to settle for a system that is complex and difficult to use and needs to be worked around? From a public policy point of view, good regulation is transparent, it's easy to understand, easy to use, it's predictable and it's enforceable. We would argue that this should be the aspiration for our workplace relations legislation.

35 In the draft report, the Commission notes:

40 *As is always the case, for regulation to be warranted, it must still be fit for purpose, minimise adverse side effects and be able to cast a broad benefit-cost test.*

45 We believe that this set of tests has not been adequately applied to the legislation, particularly in the area of awards and agreement-making, so let me go to awards more specifically.

We agree strongly with the Commission that awards are part of the safety net. We accept the Commission's statement that awards should be



retained to provide that safety net to address the imbalance of market power. However, we do not believe that the Commission has taken the next step to assess whether awards in their current form are serving this purpose of a safety net. Awards have ventured, in our view, into the territory of issues employers and employees should negotiate.

We have reviewed, as a sample, over 25 awards to gather the evidence that you have quite rightly asked for to demonstrate that awards are going well beyond the safety net. Some include leave loading in some detail when annual leave can be taken. Some specify how and when higher duties should be paid or within what timeframe a worker should progress to the next pay point. Some say how rostered days off should be organised. Some define occupations and, in fact, control how enterprises manage their workplace, and they go to job design.

Take the Health Professionals and Support Services Award 2010 as an example. This includes a minimum pay rate of \$96,127.20 per annum. This is 181 per cent higher than the national minimum wage, clearly well beyond the safety net; it would not pass the person-in-the-street test of a safety net. When you unpack the role associated with that salary, it becomes clear that the award is venturing into job-design territory.

To return to Glenn Stevens' point, awards should offer basic fairness and minimise adverse effects on enterprises. Job design, in our view, is not basic fairness, nor is it the role of the safety net. Restricted job design is not how the modern workforce operates, now or into the future. The modern workforce is about individuals taking on broader tasks, not being confined to a predetermined list. Skills and the demand for skills will continue to change; so too will the jobs that people will want to do.

We don't know what the jobs of the future will be but we do know that, the more rigid the system is in defining those job roles, the more difficult it will be for enterprises to adapt and we need to update our legislation so it supports our changing environment.

We propose that awards be brought back to their core purpose and for the number of awards to be reduced. We acknowledge that bringing awards back to their core purpose of being part of the safety net will not be easy. It's a very difficult public-policy problem to grapple with but we believe it is imperative that the Commission does try and do this in its final report.

The Commissioners argue that, from a public policy perspective, the role of regulation in workplace relations is to address the imbalance of market power. This proposition and the nature and extent of the imbalance could be argued indefinitely. To prevent academic arguments, the Business Council won't contest that this is the role of regulation in workplace relations but we would contest how broad the regulation should be to address that imbalance.

Awards cannot have carte blanche in the employment relationship. There are always trade-offs, and good regulation cannot have the cost exceeding the benefits - be so open-ended. We would urge the Commission to define the appropriate breadth of the safety net. To assist, the Business Council  
5 proposes a set of five principles. I'll table that now and I'm happy to take questions at the end of my remarks.

I turn briefly to agreement-making. The Commission's report has made a number of recommendations that focus on the process during  
10 agreement-making, the behaviour of participants, procedural issues and the creation of Greenfield agreements. Reflecting my earlier comments, some of these recommendations don't go as far as the Council proposed but we recognise the Commission is seeking to find balance between the parties, so we support those recommendations, as I've said, as sensible and practical.

Our concern, however, is that we do not believe that the report has adequately considered the bigger issues in agreement-making. Agreement-making is the fundamental issue for the Business Council and it's because agreements can take so long to negotiate and use up resources of  
20 enterprises, and the negotiations put workers and the enterprise in conflict and, when they finally get settled, they set the rules for three to four years. This is in direct contrast to the modern world in which enterprises operate. Business models can and will change overnight and enterprises can't wait for an agreement to expire to change how they operate. Resources need to be  
25 devoted to innovation, not negotiating constantly the employment relationship. Perhaps most importantly, workplaces need to collaborate, not be in conflict. This is why enterprise agreements are so important to us and it's why we are so firm of our view that the Commission needs to really agonise over this issue about how we improve the agreement-making process  
30 in respect of their scope.

Let me just go to content briefly. Enterprise agreements were meant to be about the unique circumstances of the enterprise and its workers but awards are the starting point for agreement-making. This means that, before  
35 the parties even begin to negotiate, a whole set of arrangements have been predetermined. The interaction between awards and agreements is a reason, we believe, that awards need to be returned to their safety-net purpose and that we need to consider what is in agreements. The draft report states:

40 *Apart from the employment of labour hire and contractors, further evidence is required to assess whether particular sorts of terms should or should not be permitted.*

An enterprise agreement, in our view, is clearly a form of regulation.  
45 According to the Act, an agreement can include matters pertaining to the employment relationship and the relationship between the employer and employee organisation. If the regulation was fit for purpose, all enterprise

agreements would be limited to these matters, and this is not the case. The draft report says the FW Act deliberately moved away from the legislative prescription in previous regimes to reliance on jurisprudence about matters pertaining.

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The Business Council argued in our initial submission that an effective workplace relations system is one where all parties of the labour market have a clear understanding of the rules that govern the relationships and can anticipate the decisions that will be made if a dispute arises. Allowing precedent to build and develop via common law in place of clearly defining the rules fails to give all parties the certainty they need. It's also an open door for regulatory scope creep and the breadth of content in agreements today attests to that.

15 We've trawled through just a sample of 20 EBAs, over 1700 pages, to look at clauses that go beyond the employment relationship. 19 of those 20 have clauses that limit an organisation's ability to make staffing decisions. 19 have clauses that impact on how or when an organisation can operate. 12 have detailed descriptions of the tasks and duties a worker should perform. 13 have clauses that require consultation before the organisation can introduce production, program, organisation, structure or technology changes. We will continue, as you've requested, to gather this evidence for you and we will include it in our written submission.

25 We accept this issue has more impact on some sectors than others but they happen to be the sectors of large employers and parts of the economy in transition. On this issue I would urge you to return to your quite correct first principles approach. Rather than looking at each clause that has already been included in agreement, we believe the Commission should define what constitutes the workplace relations relationship from a public policy perspective and what should therefore be allowed in regulation.

35 The public policy task is not to define what can't be included. The task is to define what can be included and why, and then update the legislation to reflect this. In the Council's submission to the inquiry, we propose seven categories, which I have included in my tabled document. We urge the Commission to consider this proposal for your final report.

40 The second key issue on agreement-making is the lack of optionality. The Council recognises and acknowledges that the Commission has made a range of recommendations to improve individual flexibility arrangements and we thank you for that but our members have very clearly told us that the IFAs do not give them the flexibility that the need, they want to have individual contracts available in the system, so we struggle to understand why there is an objection to both workers and enterprises having this option. If the safety net serves as the starting point and is protected, which it would be with the reintroduction of the no-disadvantage test, what is the rationale for denying

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5 this option within the regulatory settings? The system is set up so that enterprises are forced to engage in negotiation. Even if the enterprise does not want to run their business under an EBA, they are forced to engage in negotiation. Given that an enterprise can't opt out from this, then, surely it's incumbent upon government to create a regulatory system that at least provides for options, options for both the worker and the employer.

10 We ask: what is the justification for forcing an enterprise to engage in negotiation to develop an agreement but not allow options as to the form of that agreement? We believe that the rejection of individual contracts is ideological. That ideology is clear in the legislation itself. The object of the Act states:

15 *ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind, given that such agreements can never be part of a fair workplace relations system*

20 This, in our view, is not public policy; it is ideology.

25 This review is an opportunity to move the workplace relations system away from that ideology. To do that, ideology must be removed from the legislation. Not allowing individual contracts to be an option because they are inherently unfair, or supposedly inherently unfair, in our view, is ideological.

30 Just to wrap up, this, in our view, is a once-in-a-generation opportunity to reform workplace relations. Our workplaces are going to be key to our future productivity growth. We need a system that encourages, rather than stifles, innovation and productivity. As you know, labour productivity growth has accounted for more than 80 per cent of growth in hourly real wages over the past two decades and it will account most of our productivity growth in the future.

35 Innovation happens at the enterprise level. It's people in an organisation who change and it's people in organisations who drive productivity. It's managers and their teams working together to solve problems that supports risk-taking and leads to success. We need to make  
40 sure our workplace relations system encourages this, it needs to encourage collaboration, rather than conflict. It needs to find the right balance between creating a safety net for workers and having sufficient flexibility so that enterprises and people can innovate. Innovation benefits everyone, enterprises and workers. The draft report has built in the safety net and we  
45 support that very strongly but it needs to go further to provide the flexibility enterprises need.

To return again to Glenn Stevens' point, the system needs to minimise adverse effects and it needs to be able to adapt to the challenges our workplaces will confront in the future. In our view, enterprises should not have to work around a complex, rigid and conflict-driven system. The system should facilitate success, not block it. The Commission can contribute to building that system by reforming awards and agreements. I understand the Commission's need to ensure that we don't undertake reform for reform sake and I understand your concern about transition costs but what we are proposing is not reform for reform's sake, and the reform will provide benefits to all. Although transition costs should be minimised, and we agree with the Commission about that, transition costs are a one-off. Failed enterprises, on the other hand, have more enduring and difficult implications for the people who invest in them and the people who work in them. We believe that the benefits of reform would therefore be enduring.

Once again, thank you for the opportunity to present to you this morning and to take questions, and thank you for the excellent work you've done to date.

**MR HARRIS:** We appreciate the statement and the intent to assist the inquiry, so thank you for that too. We want to, I think, devote a fair amount of time to agreement-making, both - and I'm glad that you've, if you like, meshed awards and enterprise bargaining together because one of the conceptual problems I had with some of the things that have been said about altering enterprise bargaining and minimising its capacity is that some people who have made those comments fail to understand that the award will still be there to establish exactly those conditions unless both are amended at the same time. That was part of our thinking for the breadth of change that would be proposed with making this shift and, thus, as you mentioned, the transitional issues, including for those businesses that have told us that they want to retain their award. There are clear differences of approach to this but we'll stick with yours for the purpose of today.

Before we jump on that, the one thing in your presentation I didn't really understand, and that's a criticism of me, I think - on individual agreements, you have made the strong statement in there that you think the barriers to having individual agreements are ideological. I understand that. I'm just not sure what barriers there are to having individual agreements. You've mentioned the objective of the Act, therefore, driving a purpose which says that - your concept, these things are troubling but the Act itself then allows IFAs. It allows IFAs in a very limited form and we've addressed some of the limited form; moreover, it does allow enterprise bargains to in effect trade away the option, virtually, in its entirety and we've tried to address that. Beyond the two things that we have addressed, what is it about the concept of individual agreements that you think is not conceptually well-covered in the legislation?

5       **MS KIRCHNER:** It's that it doesn't allow individual agreements. As you say in the report itself, IFAs aren't an individual contract; they have the award and the enterprise agreement embedded in them. So, what our members are saying is that, if they are going to engage in negotiation, they want options as to what is the form of that contract.

**MR HARRIS:** That therefore does not call up or otherwise reference the award or enterprise agreement?

10       **MS KIRCHNER:** Yes.

**MR HARRIS:** I understand. Thank you. Shall we go to the big-ticket big-picture sort of thing? Do you want to start?

15       **MS SCOTT:** Yes. Thank you very much for your additional tabling of paper and also for your presentation today. Can I just check about this paper? I'm going to turn to the last page. You've got an example of the ANZ Enterprise Agreement having a clause about diversity and pay equity. It reads:

20                               *ANZ will, at the Financial Services Union request, meet twice yearly with the FSU regarding matters such as pay, equity, ethnic, cultural diversity and flexible work policies.*

25               I haven't had the time to read the preliminary paper, so you'll have to help me with the context, but I think, as I understood it, Jennifer, you were saying this is an example of some of the things that you found in agreements that you think, basically, shouldn't be there. Have I got that right?

30       **MS WESTACOTT:** Yes. They shouldn't be codified in an agreement. I think this is the point we keep missing in the public debate. We're talking about agreements - it's not to say that employers shouldn't sit down with people and talk about those things, they should. When we then codify them in black-letter law agreements, we're saying, first of all, the scope of those things that are codified are too great, they go beyond the kind of employment relationship, but they also stifle, therefore, the capacity to do - you might want to meet three times a year or - - -

40       **MS SCOTT:** I guess you can meet more than three but you have to meet at least two.

**MS WESTACOTT:** Yes.

45       **MS SCOTT:** Just on this, is that because - you've used this example and I understand you've trawled through these but are you also advising us - I just want to check - that ANZ now has regrets about this clause?

**MS WESTACOTT:** No. We've just gone through them and said, "Look, what are the things that would fall by way of example outside of what should be in the employment relationship?"

5     **MS SCOTT:** I can understand - in some sectors we've had presented to us  
an argument that there can be a very, very strong union and people feel that  
they might have to accept terms and conditions in EBAs, that, if they had  
their way, they would prefer not to be there, but for this one here what harm  
do you see could come from it? I wouldn't have thought that the FSU would  
10    have been at the cutting edge of militant unions, so I'm just trying to get  
some sense of the productivity downside that would come from people  
meeting twice a year to discuss things such as pay, equity, ethnic cultural  
diversity and flexible work policies.

15    **MS KIRCHNER:** As Jennifer said, employers should sit down with their  
workforce and talk about these issues. That's not the concern. I think, if you  
look at that as an isolated clause and don't see it in the context of every other  
clause that's part of an agreement, you could say to every single clause - not  
really, not to all of them, but you could say to many clauses, "What's the  
20    harm in it?" It's when you put the clauses together collectively that you  
actually go into what is no longer an employment relationship.

**MS SCOTT:** In economics, sometimes we have this concept of consenting  
adults, borrowers and lenders. Here, you've got two parties that have sat  
25    down and agreed to this clause. Under your policy, they wouldn't be able to  
agree to a clause like this in an EBA. Have I got that correct?

**MS KIRCHNER:** Yes.

30    **MS SCOTT:** Now going to the content of the clauses that you want to  
have - - -

**MS WESTACOTT:** That's not to say, though, and it's very important to  
say this, they wouldn't sit down and do that. It's just that it wouldn't be part  
35    of a black-letter law.

**MS SCOTT:** Would it be in the side agreement, do you think?

40    **MS WESTACOTT:** It might be in a side agreement. These are the sorts of  
things that we need to think about going forward: Are there different ways of  
doing this where you're not codifying in these agreements that really are  
quite complex to renegotiate? That's for good reason; I mean, no one is  
suggesting that - we would like to see less complexity but no one is  
suggesting that these things be moveable feasts, I mean, people have to have  
45    predictability on both sides, but, the more you've got in them, the more rigid  
they are, the more inflexibility they create. I guess what we're asking for,  
Commissioner, is, can we have a discussion about potential side agreements,

but it's where things are codified into black-letter law that they become extremely difficult to change. I don't want to give the impression that we don't think people should talk about these things, of course they should; it's when you try and codify them. Then, as Megan says, there are many things that, in and of themselves, in isolation, are fine but when you start adding them up, and you're adding them on top - going to the Chairman's point - of an award, on top of the national employment standards, on top of the minimum wage order, you get this kind of build-up of what is really a constantly expanding safety net. That's really our point, it's that cumulative effect.

**MS SCOTT:** I might, therefore, ask you to consider in your submission - if you could help me out in terms of how people could then have side agreements and what would be the status of those. I have heard, in a different context, how sometimes when there were prohibitions in industrial legislation the prohibition would apply but then people would have these side agreements and, when there was in fact an imbalance in bargaining power, those side agreements actually did impact. Therefore, was it better to have the side agreements or not to have them.

**MS WESTACOTT:** Yes, or better to have it in the agreement.

**MS SCOTT:** Let's just go to the clauses that you think should effectively form the scope of agreement-making. Thank you very much for setting them out so clearly but I just have a few clarification questions. My understanding is that this doesn't include, for example, training - you're not excluding training, but I can imagine there could be circumstances where it could be mutually beneficial that in fact training be part of an EBA, for example, an employer undertaking a major technological upgrade may actually want to stipulate that training be part of the EBA in order to ensure that the training does take place and people have a positive attitude to training, that training might actually be linked to, for example, wage increments. On the other hand, I can see that workers who may be also interested to see training included in an EBA because they want to, over time, improve their circumstances but under your list I can't see training. I can see how it could be mutually beneficial, I can also see how it could be imposed and not be beneficial to one of the parties. Could you talk about the case where it would be mutually beneficial and why you would see that as desirable to see it ruled out in legislation as being part of an EBA?

**MS KIRCHNER:** There are many circumstances where it would be mutually beneficial. Our starting position is that, if it's mutually beneficial, the organisation will do it and they will sit down with their employees and talk about training if - organisations only do well when their workers are doing well. Not all organisations take that attitude but the majority do, so we would see that they would sit down and they would talk about training.



In terms of not having it in the black-letter law, it's more a case of - - -

**MS SCOTT:** Can I just clarify black-letter law? I see, yes, black-letter law in terms of the legislation?

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**MS KIRCHNER:** Yes. In terms of not putting training in there - we used this as a starting point, that these are the seven categories. There are many clauses that - people will say, "Why don't you include them, why don't you include that" and that's where you end up back in the circumstance that we're  
10 in now, where the EBAs cover absolutely everything. I think we also have the position that, if it is mutually beneficial it will happen, so it's not really needed in the legislation.

**MS SCOTT:** I try not to rely on the press, Jennifer, because sometimes they're unreliable but I understood that either you or someone else from the BCA is reported as suggesting that one of the things you saw shouldn't be in the EBA would be Christmas shutdown, that it might hinder what a firm wants to do and if it was in an EBA, agreed, of course, that might not be desirable. Maybe that's not a good reporting of what you said.

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**MS WESTACOTT:** We've cited the Toyota example, where you've got - again it's about - these agreements go for three or four years. Things change. The Toyota example, where you've got a 21-day shutdown as part of the EBA and when the global company looks to where it's going to situate its  
25 operations and finds that the next highest days are 10 days, then, that makes it a very difficult situation for that company to say, "Well, now we've got to renegotiate the EBA in order to actually sort out our Christmas shutdown." I guess, I would ask the question in return, why would annual shutdowns, Christmas shutdowns, rostering, these sorts of things, form part of the legislated requirement - form part of a very inflexible instrument like the  
30 EBA. I, I guess, put back, why would those things form part of the EBA process.

**MS SCOTT:** Maybe we're talking at cross-purposes because your own list says that rostering, subject to certain minimum additions, would actually be  
35 in the legislation for the EBA.

**MS WESTACOTT:** Yes.

**MS SCOTT:** Also I understood - I'm not a lawyer - that, in fact, the Toyota matter effectively has been now clarified and that, of course, people can go back, as circumstances change, with agreement of the workers, to reach a revised settlement. I might go to flexibility later but, on Christmas shutdown, I can imagine, in manufacturing and in other sectors as well, that, again, it  
40 could be mutually beneficial, even more locally, Peter, as sometimes you have said to people, "Look, we actually want to have the organisation closed for a particular time because most people are going to be taking leave and we  
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really don't want to have two people here." I've heard that from employers in the manufacturing sector; they want to shut down in order to do major plant upgrade or reservicing and they really don't want to have 5 per cent of their workers hanging around. If it can be mutually beneficial, why wouldn't you allow to, well-informed, hopefully, bargaining reasonably, reach an agreement to include these things in an EBA? I guess that's another example I have of trying to set down a list, a minimum list, and then finding, "What do we do then if we don't have it as a side agreement" - overanxious me could turn up to want to work and then the organisation could say that's an impractical day for me to be working.

**MR HARRIS:** In fact, we know it's a management-of-leave tool too. In other words, there are benefits to this.

**MS SCOTT:** Do you want to talk about that example?

**MS WESTACOTT:** Yes. Again, it's the rigidities of this. Yes, you can go back and change these things, theoretically, but, again, every time you do that you bring the organisation into a level of risk. You're back into a protracted discussion again, you're reopening something, whereas we might want to, one year, shut down for five days, another year, depending on production and demand, shut down for 10. It's all these things that create this long-term rigidity that we believe, when you put them into agreement and there isn't that sort of capacity for the agility that we need in the economy - but, again, Commissioner, we're saying these things ought to be discussed in the report because - we've put forward those suggestions, we've put them and we're very clear in our submission, "These are our starting suggestions," but the more people add in the more you're back to the system we've got and the more difficult it is to kind of, when we want to do something - and, look, let's take the resources industry - how quickly those prices have dropped, how quickly people have had to change a whole lot of things - to go back each time with what is actually quite an unwieldy process and renegotiate - that's our concern and that's the tension that we want you to explore.

We're not saying the points you're making are not legitimate but we want you to explore this tension of - on the one hand you've got a safety net, on the other hand you've got the EBA forming another part of that safety net. The more that's in it and the more complex and difficult it is to renegotiate, the more rigidity we're placing in the system. We're really asking you to kind of tackle that tension in your final report.

Did you want to add to that, Megan?

**MS KIRCHNER:** If I might just add, enterprise agreements have been around for 20 years now. When an employer starts negotiating - Toyota is a good example, the 21-day shutdown 20 years ago probably was okay, but that's the starting point where they have to start negotiating. They don't get

to start from scratch. That is part of the issue.

5 **MR HARRIS:** Just to correct you on that, I think that you can go backwards. When you say it starts from scratch, it's not a forced obligation. Agreed, it is a rational, logical and default position - - -

**MS SCOTT:** It's not easy to go back.

10 **MR HARRIS:** It's not easy to go back.

**MS KIRCHNER:** It's true. We do have some EBAs where they specifically say, "This is based on a - - -"

15 **MR HARRIS:** "You can't go backwards."

**MS KIRCHNER:** Yes.

20 **MR HARRIS:** So you have to start with getting rid of the "can't go backwards" clause before you can do anything else.

**MS WESTACOTT:** Again, that's another example of things that are there that just reduce flexibility.

25 **MS SCOTT:** This is all very useful. I think, an addition maybe, or a supplement, to this very good set of examples - it might be that - where they're members of your organisation, you might be able to identify where they now regret that they entered into these things because that would be useful to know.

30 On flexibility and risk and predictability, we have had other testimony in the course of this hearing where people have said, "Look, we want longer EBAs, we want these for the life of the project, five years. Please don't - - -"

35 **MR HARRIS:** No limit.

**MS SCOTT:** Yes, no limit - "Please don't suggest 12 months to us because what we want" - ready - "is predictability, we want to minimise risks and we don't want the flexibility that will come if we have short agreements. I guess we're in this position where we're trying to balance all these diffuse voices. I'm not saying it's perfect flexibility but I have seen indications, even in the mining sector, of wages now falling, including through EBAs. I appreciate there can be a delay. Could you talk to us about this issue of what is the appropriate length of term for an EBA in your mind and how we should view your concerns about flexibility and risk as economic circumstances change?"  
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45 We've other employers and employer groups saying to us that the thing they need to manage risk and ensure predictability is to have longer EBAs.

**MS KIRCHNER:** I think the Greenfields we need to treat quite separately to normal EBAs.

**MR HARRIS:** Yes. Leave it out of this.

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**MS KIRCHNER:** When you say “for the life of an agreement”, we like that recommendation - the life of the project, sorry. That is a good recommendation because they are starting from scratch, they don’t have an EBA that they’re building off, so they are having to create a whole new agreement. In terms of what is the perfect time period, I don’t think a perfect time period exists. For us, the flexibility will come with removing components from the agreements. If you have the agreements being purely about the employment relationship, we would be much more comfortable with a different timeframe and agreement. We don’t see that as the big issue about flexibility.

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**MS WESTACOTT:** This is where, I guess, you’ve got, Commissioner, the kind of double bind and this is why we’re saying we just believe - we feel very passionately about this, as you know, and we think it’s not a simple kind of set of answers here and we believe that the final report really has to kind of, as we say, agonise over this bit, because the more rigidity, then, the more inability to have long agreements, the more kind of complexity in the agreements, the more things that are likely to change over time or things that we don’t know will change over time. I’m not aware, obviously, of the testimony people have given but I’d be keen to understand what are the sorts of things they want predictability on. You could understand people wanting predictability for wages and conditions but if you’ve got predictability over things that are subject to constant change and you’ve got that locked into five/six-year agreements, I think, that defeats the purpose of a kind of collaborative process of constantly looking at where the enterprise is and how the enterprise can stay competitive and how the enterprise can maximise productivity. I think that’s the kind of conundrum that, I guess, we’ll try to pull out a bit more in our second submission. I think then the default, to say the current system is okay, is where we contest.

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**MS SCOTT:** I don’t know if I would like to see “My view of the system is, the system is okay.”

**MS WESTACOTT:** Sure. Yes.

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**MS SCOTT:** Just on this, again a point of clarification, use the resource sector as an example of where you do need flexibility, commodity prices have now fallen, one of the things that I think you’re envisaging would be known with certainty to both parties is in fact remuneration, ordinary hours of work and so on, so how are you going to get sufficient flexibility if two of the key elements of an EBA, I think, in your mind, are known with certainty and flexibility?

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**MS WESTACOTT:** That's no different to what is the case now.

**MS SCOTT:** That's right. Then how does it help?

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**MS WESTACOTT:** It's not those things that - it's the other things. We're not for a minute suggesting the basic wages and conditions be constantly subject to change. That is, quite rightly, where people need predictability but, again, and you've addressed core issues, if you can't use labour hire and contract companies when demand peaks and troughs, if you've got EBAs that make it unlawful to use - you've addressed this in your first report and we thank you for that, because it's again - looking at the system, there's a cumulative set of rigidities that we are trying to increase. Again, if you take all these things out as one thing, yes, they're all arguable, it's the combination of all of them and, when you are at the enterprise level, you see that. Then you see that on top of all of the regulatory burden that companies are facing. That sort of thing, we would say basic wages and conditions clearly have got to be predictable and they've got to be subject to the negotiation process. It's when all the side issues such as who you can hire, how you can hire them, how people will work, not just what they will work on, what kind of technology they will use - that is what adds to the rigidities and inflexibilities. We're not suggesting for a minute that those basic things not be subject to predictable circumstances.

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**MS SCOTT:** I guess, then, I need, as part of your response, how these side deals, for example, that might relate to training or some of the other things we've discussed - if they're still off to the side, how they're also not cumulative.

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**MS WESTACOTT:** Yes. Let's have a look at that. What you say is legitimate, you want people to sit down and agree things. It's the issue of codification of them that we're pushing back on and maximum flexibility. What I need to train people on this year might be massively different if I adopt new technology within three months - and, I guess, having just spent a month in Silicon Valley, the speed of adjustment is just going to get faster and faster and faster, so the more that's kind of like "We'll do training on this thing twice a year" - it's not going to hold. So, if you're actually having to renegotiate your EBA to say, "Actually, we're going to have to retrain, retool, reskill people," that's a very different thing to, obviously, the natural collaborative process that should occur about, "If we're going to adopt this new technology, we're obliged to give people appropriate training." It works both ways, I think, Commissioner; it's not just for the employer's benefit - it's clearly for the employer's benefit but let us take this issue because what you don't want is lack of transparency either.

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**MS SCOTT:** No, and I guess we wouldn't want to give people false hope if side deals become, then, commonplace or becomes - how, for example,

unions may react to taking things out and they end up saying, “Fine, we’ll settle the EBA but, while we’re at it, let’s set aside five days for side deals.”

**MS WESTACOTT:** Yes.

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**MR HARRIS:** We do know, even under the current system, that there are agreements which have things in them which are invalid by law but are still observed by both the firm and the union. Clearly, the signalling is, “Well, if you mess around with this, some other issue that is legitimate will become the cause of the dispute.” We all know there’s scope here to play tactical games and, as I think the Deputy Chair was saying, we don’t want to give people false hope and delude them into thinking, just by black letter law acting, we are going to alter behaviour in the workplace. It cannot be the case to imagine that and it would be a serious mistake. This is the thing about vesting too much credibility in what you can get out of regulation, not to dismiss at all what you’re saying, but - - -

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**MS WESTACOTT:** That’s our point. That’s precisely our point.

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**MR HARRIS:** Yes. That’s what we don’t want to do. It would be relatively easy for the Productivity Commission to come out with a bunch of slogans, as some commentators have, and call that an industrial relations policy. We’re not going to do that. We’re going to provide some clear basis under which regulatory structures could change, and that’s why when - we asked earlier for regulatory and you’ve put some down, and that’s what - great advantage. If we can get to specifics, we can investigate the specifics and try and find a way by which we can give a policy prescription to a government.

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**MS WESTACOTT:** That’s exactly our point, Chairman, that we think you can’t regulate the natural conversations and dialogue that you want a collaborative workplace to have. You can certainly, and you should, regulate a safety net. Obviously we’ve said there is discussion about this scope. You absolutely should regulate that, and the BCA has never contested that. The BCA has never contested the minimum wage, we’ve never contested the principle of penalty rates; we’ve just contested the way they’re currently designed. Our contest is what is prescribed and the scope of that prescription, which is why we say you prescribe what’s in an EBA, you limit that to the employment relationship, and other things are not prescribed. It would be like trying to prescribe what’s not in the bill of rights, for example. You prescribe what’s in and why, and I think the “why” is important, I think some of the questions the Deputy Chair is asking are absolutely right, but you don’t try and prescribe what’s not because that’s the natural endless conversation that we want managers to be having with their teams about “How do we increase productivity,” et cetera, et cetera.

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**MR HARRIS:** Can I take one of Patricia’s questions to you and take it

further? Can you conceptualise this: remuneration is in, organisational structure is out; remuneration as currently described, particularly in awards - probably, hopefully, less so in enterprise bargains - is actually highly prescriptive. We have the metal workers levels - I don't know whether it's 1 to 10 or 1 to 15. They were long used as being benchmarks and are still written in in awards, so you end up with organisational structure contained as a consequence of remuneration; one is in and one is out. I'm not trying to ask you to solve this and certainly not in the course of hearings today but this is, I think, a good version of what we would then have to do if we took your proposition away.

We would have to comfort ourselves, and subsequently the government because we're not really doing this to satisfy the Productivity Commission, we're doing this for the purposes of public policy design for a government, of how that would work in practice. I wanted to note it because it goes, I think, with the thematic. If you have ideas for how far that would go, that would be very useful but, if you don't, it's also on the record here today for subsequent submitters. I'll try and ask multiple people this question, now that we've got yours on the record. It was a little harder for me to do it - although you had spoken publicly, I thought maybe that's unfair to ask so many people prior to this but, now I've got you on the record - I'm interested in the proposition - we don't have to go to incredible levels of detail but this whole question of moving public policy design, as put to a government, to a form where people can conceptually see how this could work in practice.

The second thing I want to ask about is transition. We have said this publicly and it is a significant issue, and the transition in particular because, as I think we've agreed today, these changes aren't to enterprise bargains per se and leave awards alone. If you vary enterprise bargains and awards remain in place and awards regulate those conditions that you're now saying should go out, they are the law and firms will have to observe them. Perhaps they will have fewer leverage points in them that might have been created by subsequent enterprise bargains but the bottom line is that things are in there, so you will have to do this, in some form, holistically, enterprise bargains and awards.

That's quite a significant transition for - those firms that have depended on awards for a long time really haven't jumped into the enterprise bargaining space and, as you know, we have our enterprise contract concept out there because we can see this as being a very significant number of firms, perhaps not as large in employment as those firms that have gone off with enterprise bargains, and, while it would be legitimate to say no one is quite sure why they haven't jumped, the bottom line is, if this change was made in black-letter law, those firms would then have to make this choice, "Do I go to - I must, by law, go to the new model. Do I stick with the denuded award or do I go to enterprise bargains?" We consider that to be a transition. The transitional cost is not just "These issues have been eliminated from

enterprise bargains and that is a cost to someone who found those causes to be of value to them.” That is a transitional cost.

5       Probably the bigger transitional cost is enforced change by black-letter law on firms that have yet to make a choice, even after quite a few years. I’m interested in your reaction to that because I strongly doubt you will have failed to have considered it. Is it, on balance, “This is going to be a better system. Yes, you need to design transition arrangements”? If you would agree with that, can you perhaps say something on the record that we can use  
10       for our own purposes in asking other people, “How would you transit?”

**MS KIRCHNER:** If we take a small enterprise who have relied on awards, if there are clauses that were useful to them, that were mutually beneficial and they came out of the awards, I would see that enterprise as putting them  
15       into their policies. Like, they’ll have a, you know, “How we run our organisation”. There’s nothing to stop them having those clauses as part of their day-to-day practices. They’ll have some form of, even if it’s a single page, approach to how they manage their business, so they could always put that into that.

20       In terms of the transition costs, I don’t think there are a great deal of transition costs embedded in that. Bringing the awards back to their core purpose of the safety net will have quite significant transition costs but we think, on the whole, the benefit to it is greater.

25       **MS WESTACOTT:** We’re happy in our second submission to actually kind of spell out what we think would be the kind of core steps in transition in both the awards and the EBA process.

30       **MR HARRIS:** Yes. You understand my concern is, for smaller firms, that don’t have HR departments and legal backup and you are changing a world which for them is of certainty - and we have testimony on the record, without going - I’m not trying to set up a contest here between one set of firms and another but we have clear testimony and submissions on the record of people  
35       saying, “I value my award and I’m not actually proposing it be massively shifted.” If I can use an example that has come up, without actually going into it - you can find it quite easily if you wanted to look at the record but it was training and it was agreements between, effectively, unions and - at the industry-wide level, between a set of employers and unions about how a  
40       training matter would be undertaken, and quite a long-term and important training, like the question of apprenticeships.

45       I think there is a public interest in apprenticeships, which we have also simply tried to identify - - -

**MS WESTACOTT:** Which we agree with, yes.



**MR HARRIS:** - - - in the report, even though we seem to fail regularly because we failed infrastructure last year, he says, making a clear add again for this, to get any agreement to give anyone else the chance to look at this - - -

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**MS WESTACOTT:** You won't get any argument from us.

**MR HARRIS:** There is a public interest in this area because, if you look at it, an individual employer does not have the strongest incentive to train people up under apprenticeships for four years because they may lose that training at the end of that period quite readily. We're interested in this. I would call that, again, a transitional arrangement, which - and, as we all know - and the great danger for the Productivity Commission in doing design work is that you fail to appreciate that level of detail, which is why the hearings are so valuable. It would be worth it if you could look at that.

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**MS WESTACOTT:** Sure. Absolutely. Yes.

**MS KIRCHNER:** Just to be clear, we actually do have apprenticeship requirements in the award. We have kept that as a category, so we recognise - - -

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**MR HARRIS:** Perhaps I picked a bad example but there are clear parts of the employer sector who probably, on balance, value the certainty they get from their current award arrangement, notwithstanding that every one of them will tell us that they are deeply complex and hideously drafted, et cetera, et cetera. That's the transition - that's not to say I'm accepting their proposition as being better than yours; it's just a question of trying to deal with this and if I can get some - - -

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**MS KIRCHNER:** Yes.

**MS WESTACOTT:** I think, with all this, Mr Chairman, it matters in some sectors more than it does in others.

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**MR HARRIS:** Quite.

**MS WESTACOTT:** We're now seeing the pain, and you rightly call this out in your report, of a very, very antiquated apprenticeship system. Given this incredible speed of adjustment that's happening in Australian companies, be they large or small, how do we get the system to keep pace with those? That's really our fundamental proposition to you. We're not trying to eliminate the safety net or the fairness or predictability aspects and we've been very clear about that. What we are trying to do is say, "How do you get a system that allows for that agility, so that you're not having to always go back to first principles and first base, every time you want to adjust what you're doing?" Apprenticeships is a classic example of that. I couldn't agree

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more with your recommendation that it needs a complete overhaul. As Megan said, we have apprenticeship conditions as part of the awards.

5 **MR HARRIS:** Can I ask you, even though it is possible that our proposition on how to undertake reform of awards, which is this idea of cease the four-year review process once its current phase has been concluded, replace it with a reformed Fair Work Commission, which will undertake what we might call issues-based reform of awards, not necessarily limited - in fact, in concept, probably not limited to a single award but to a collection of awards.

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15 Without asking you to endorse either of those two concepts, because the two do fit together, would you say that your revised model of black-letter law shrinking the matters covered by agreements and awards - would you see that this would mean it's unnecessary to reform the Fair Work Commission itself?

20 **MS WESTACOTT:** No, not at all, and we'd acknowledge that, that - it's about getting the system to work, of which the Commission is one very important part, as you say, but if a reformed Commission is still dealing with, in our view, a sub-optimal regulatory environment, then it's just doing better in sub-optimal laws. That's not, in and of itself, no reason for not doing it, so we strongly support the recommendations you've made; we just don't believe it will be enough to get the system to do the things that we will need to do to keep the economy competitive and people in jobs. We're certainly not - we know from history that, when people try to reform institutions and they're still up against poor regulatory arrangements, you can have the best governance model known to man and still be hitting up against these regulatory barriers. We're certainly not suggesting these things are either/ors at all.

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35 **MR HARRIS:** Would it be possible, in your conceptual thinking, for the sorts of things that we have talked about earlier as being - I just go back to my remuneration versus organisational design.

40 **MS WESTACOTT:** Yes.

45 **MR HARRIS:** Would it be possible for you to find a bridge between that which is done in black-letter law and that where it subsequently requires a level of detail that black-letter law is not capable of handling for those things to be the subject of a revised review arrangement by the revised Fair Work Commission? In other words, what we can call hotspots, without actually being able to come up with a better terminology - I'm sure we will - hopefully - but, you know, that was our model, "Cease four-year reviews on an holistic basis. Pick issues, hot, damaging issues, which are inconsistent with modern workplaces and for a revised Commission to attack them. Would it plausible for me to think that maybe in this question of organisational design versus remuneration - perhaps, if that couldn't be

defined in black-letter law, it could be given as a task to the Commission itself in its new form to have a go at.

5       **MS WESTACOTT:** Yes. Let's have a look at that. I think, again, we know  
that there are kind of histories to the kind of structure and composition of  
these Commissions, and you've gone a long way to addressing some of the  
issues that we've constantly raised about it, but, again, you want the system  
to be kind of future-oriented and you want the system to be predictable. If  
10       that's subject to kind of constant review by the Commission, given some of  
the issues about composition, have we got that predictability? Let's have a  
look at that but that's, I guess, the challenge, how do you get that level of  
kind of certainty that we're looking for?

15       **MS SCOTT:** On that theme about award reform, I have to say, when we  
outlined to the stakeholders, at the release of the report, that we were not  
favouring the continuation of a four-year award review, the response was  
spontaneous clapping from that first group of people. We got a sense that  
people were heartily relieved. On the other hand, we do know that there are  
20       problematic awards, and that's probably both sides seeing those awards as  
problematic and so on. We have thought that the focus on the number of  
awards is not a profitable area to go, relative to hitting what we're calling  
hotspots. Could you comment on that?

25       **MS WESTACOTT:** I think that's probably sensible. We use the 122 just as  
an illustrative thing. I think our issue about the 122 is this issue of narrowing  
jobs and narrowing occupational activity. That's our concern about the  
numbers. If you say it's 122 plus multiple, multiple, multiple clauses that all  
seek to narrow how people work, again it goes back to this point about  
cumulative effect but, you're absolutely right, I think if we're going to the  
30       Chairman's point about transition, you would start with the hotspot issues,  
you would start with perhaps across - you could look at numbers and we've  
said maybe look at industry formation, and we know that's not - industry  
sectors may be - we know that's not without its complexity, or maybe you  
come in at it from a set of kind of hotspot clause-types, as you've said, and  
35       you come in at it from that perspective. I think that's equally as valid and  
sensible. We'll do a bit more thinking for our final report but they're the  
sorts of things we would encourage the Commission to do because the kind  
of clunky review, as you rightly say, is not working, so is there another way  
that we can come at this? We came it from numbers and industry types.  
40       You're coming it at it from hotspots. I think they're both valid. I think the  
hotspots may be a really important thing for us to look at but we have to do  
something, is our point.

45       **MS KIRCHNER:** Yes. If you did bring them back to a set of clauses, the  
way that you'd get fewer awards is you'd see what was consistent across  
them. A lot of the inconsistency across 122 come about because they're  
going far beyond the safety net and, if they get removed, you will

automatically have a reduction in numbers.

**MS SCOTT:** Yes. There's a variety of ways it could be done.

5 **MS KIRCHNER:** Yes.

**MS SCOTT:** I want to pick up on something that I think I heard you say, Jennifer, and I just want to check I got it right because it would allow us them to go in that direction of the conversation that way. What you had proposed and what you're still proposing is that there be a limitation on the scope of what can be in enterprise bargaining agreements.

**MS WESTACOTT:** Yes

15 **MS SCOTT:** One of our recommendations goes in the other direction but I think you're happy and you commented, possibly, as you went into this - we've actually said what shouldn't be, we actually have specified a number of things that shouldn't be subject to EBA, the contractor, casual and so on. Let's, for the moment, assume for a second that we go in that direction rather than in the limited scope of the EBA direction. Are there other things that you would like to see added to those things? I appreciate that writing these things can be just as problematic as writing the limited scope, in our chapters we discuss the positives and negatives of each approach, but I thought I heard you say that one of the things that could be ruled out was not just specifying terms and conditions of contractors but specifying who the contractor is. Would that be something - - -

**MS WESTACOTT:** Yes. That's a classic example of total - beyond the scope of what an EBA is, that we say who the contractor can be versus the principle of contractors and labour-hire firms because, again, you have to say, "Why would that be in an enterprise agreement?"

**MS SCOTT:** You might want to give, as a fall-back - - -

35 **MS WESTACOTT:** Yes. We'll give some examples.

**MS SCOTT:** As a fall-back.

**MS WESTACOTT:** Yes. Sure.

40 **MS SCOTT:** Of course you want to prosecute your best case but, if it turns out you weren't persuasive, what else would you like to see, taking into account all the complexities that come whenever we write a word down?

45 **MS WESTACOTT:** Yes. I think, again, just to kind of labour the point, our concern is that, if you try and codify what's not in the agreement, by definition, you're going to have some difficulties, as opposed to codifying

what is and why - is our starting point but we'll certainly come back with a list of things that we think are the most egregious problems.

5 **MS SCOTT:** I guess what I'm looking for is a small list rather than - - -

**MS WESTACOTT:** Yes. We can give you the long, medium and short list.

**MS SCOTT:** Okay.

10 **MR HARRIS:** Sometimes comprehensiveness is the enemy of effective-making policy.

15 **MS WESTACOTT:** Agree but, again, we've got to come at this from public policy needs. What's the problem we're trying to solve here? We're trying to solve not a principle of the preservation of rights and conditions and the safety net. We're trying to solve the problem of rigidity, lack of agility, lack of adaptation. When we look at this, we look at the kind of huge problems that some of our companies are trying to keep pace with and we say it's these sorts of things. We're not doing this just as lists of kind of - just for  
20 the sake of it; we're saying it's these sorts of things that are going to impede agility and it's these sorts of things that don't make sense to be in an EBA.

**MS SCOTT:** Thank you very much.

25 **MR HARRIS:** In the time still available to us, there are some specific other amendments that you foreshadowed that you'd like to consider. While we won't be able to go to all of them in the time, there are a couple of them that struck me as being - I couldn't work out the rationale. Who sits at the table as a bargaining representative? We suggested that there is a role for the  
30 union that's relevant to the agreement and unions, in many cases, I guess, but otherwise that representatives are currently allowed to be just about anybody, including self-nominated representatives. There should be a limit of - which encourages them to be genuinely representative of the workforce. We came up with a notional 5 per cent but we said there's no science there and - the  
35 feedback I have here is that you're more interested in workers providing written notification of who is their representative. What happens then if you get a hundred notices from a hundred separate employees or a hundred separate representatives? It seems somewhat inconsistent with what we were trying to do, which was simplify the bargaining process.

40 We looked at the bargaining process. Wherever we could find a substantial complexity that had no apparent effective rationale, we said, in principle at least, "What shall we do about it," so we put up some changes. Why are you so keen on written notification of representative?

45 **MS KIRCHNER:** We are fine with your recommendation. This predates - that was in our initial submission. The reason we were looking at written

notification was that the issue of all bargaining representatives being equal and the size of who they were representing - so we have - - -

**MR HARRIS:** So it was a different way to achieve the same outcome?

**MS KIRCHNER:** Yes.

**MR HARRIS:** I know it was your original one and I wasn't sure whether you were happy with ours or (indistinct). I remember the rationale wasn't actually obvious to me at the time.

**MS WESTACOTT:** We're supportive of your position.

**MR HARRIS:** Okay. The other one I want to ask you about - we've had a number of propositions put to us about how to make a business transfer work more effectively when an individual business has been taken over, the business taking it over inherits the workplace relations. There are, as we understand it, unused, or virtually unused, processes which might enable the firms to roll the agreements one into the other. Not so much even in your original proposition but in things that have subsequently been said, at the time - this hasn't really been raised by too many people as being an issue until the hearings, where we've had a couple of examples come up of this being a problem.

You're representatives of the firms that are often undertaking a lot of these kinds of activities. Is it a large impediment today? Is there more that we can do than what has been sort of relatively briefly said in the report? It wasn't really that prominent in the original submissions but it has been put to me orally as being quite a significant issue, and we've had examples of firms effectively stripping employees before they did takeovers so that they didn't actually have to inherit the workplace relationships, which seems an extreme, rather unsatisfactory position.

**MS WESTACOTT:** Yes. We did have a recommendation, 22.1, so that the government would amend the Fair Work Act - - -

**MR HARRIS:** For voluntary?

**MS WESTACOTT:** That is true - that employees' terms and conditions of employment would not transfer to the new employment when the change was at his or her own instigation.

**MS KIRCHNER:** We support that recommendation and think it's a step forward but we did recommend that it needs to go further in our initial report and we will in our final report, that we should be returning to the 12-month sunset clause that has existed in the past.

**MR HARRIS:** The history here is the bother, that it has been used in the past to, effectively - it certainly created a legal dispute about what the intent was. I'm assuming no one wants to go back and replay that kind of - - -

5 **MS WESTACOTT:** No.

**MR HARRIS:** Anyway - - -

10 **MS WESTACOTT:** It is a big issue.

**MR HARRIS:** It appears to have been a sleeper issue in here and in our draft report we picked up what we could from what was given to us, this is this desire to pick up some evidence along the way, before you suggest a change. Certainly in oral contributions, to me and to others in the  
15 Commission, not necessarily in submissions - but this does appear to be more of an issue than is being raised in submissions, so, since you're in a position where, hopefully, you've got recent background on this, we wouldn't mind seeing something in the final one.

20 **MS WESTACOTT:** Yes. Sure.

**MR HARRIS:** Everybody is happy?

25 **MS WESTACOTT:** Yes. Thank you very much.

**MR HARRIS:** Anything we haven't asked you to say that you'd really like to get onto the record?

30 **MS KIRCHNER:** There is just one thing around right of entry. That is quite a significant issue for our members, particularly around communal spaces and lunchrooms. We put a recommendation in the initial report, so we're supporting your recommendations on that issue, but we think you need to go further and deal with the communal-space issue. This is an issue that affects not all of our members but, the one that it does impact on, it impacts  
35 significantly on their workforce.

**MR HARRIS:** I guess we worried a lot here of increasingly defining in regulation what was and wasn't acceptable. When you looked at this whole lunchroom thing and you looked at the kinds of regulation that's in place, it  
40 looked rather deeply prescriptive. I understand, in certain circumstances it might be quite a problem for both the unions and the employers but I guess finding a black-letter law way to solve this does seem almost - I think, it says we've given up on commonsense and rationale. Anyway, we remain interested in the issue, we haven't dismissed the idea of doing more, but -  
45 when you put in your proposition if you could ask yourselves at least the question, "Is this really amenable to a regulatory solution?" Might it not be a standards matter or something like that for the Commission to opine upon?

That is, presuming we're considering the kind of Commission in the future that we're hoping to have for a future kind of workplace.

**MS WESTACOTT:** Yes.

5

**MR HARRIS:** I look askance at the very detailed kind of black-letter laws which say what and should - how should - because we all know, of course, once you do that, it affects not just the subset of firms that might have this problem very seriously in particular regions of Australia but all firms.

10

**MS WESTACOTT:** Yes. It's a fair point. We'll address that.

**MR HARRIS:** Thank you.

15

**MS WESTACOTT:** Thank you.

**MR HARRIS:** Thanks very much for the effort you've made and particularly with the specificity that we've got down to here because I think that's going to be very useful to us to provoke further thinking.

20

**MS WESTACOTT:** Terrific. Thank you very much.

**MR HARRIS:** CPSU. Once you've settled, if you could identify yourselves for the record, even though I think we've previously dealt with both of you before. Nevertheless, for the record.

25

**MS FLOOD:** Nadine Flood, National Secretary, Community and Public Sector Union.

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**MR WATERS:** Alistair Waters, National President, Community and Public Sector Union.

**MR HARRIS:** Opening statement, if you have one. Otherwise, we can go straight to questions.

35

**MS FLOOD:** Thank you. We welcome the opportunity to appear before the Productivity Commission. The CPSU represents approximately 135,000 members, with 55,000 in the Commonwealth and Territory Government public sector and the remainder predominantly in the state public sector, with some in the private sector, including in government business enterprises and things that are or used to be government-owned, which is a growing list. We don't intend to speak to the full range of issues, given the report is wide-ranging, but would primarily like to speak about bargaining and the provisions of the Fair Work Act in relation to that.

40

Our concern is that the draft report makes a number of recommendations about bargaining which, taken overall, would primarily be



to the benefit of employers over employees, for example, loosening the requirements on employers making enterprise agreements, moving from the no-disadvantage test to the BOOT test, restricting employees' bargaining rights on job-security claims and so on. CPSU is of the view that there are in fact significant improvements that could be made to the bargaining provisions of the Fair Work Act and would be in the interests of both employees, most employers and of the community and the economy.

The report concludes that the good faith bargaining provisions are working relatively well and they're certainly requirements that we supported. However, employers are finding ways to comply with the letter of the law requirements but in fact avoid any genuine bargaining; and that is a serious concern.

In our view, bargaining provisions should be strengthened to take into account those issues and actually support genuine bargaining. I would note that while the example I will discuss is primarily around the Commonwealth Public Sector current round of bargaining, we note that in fact similar issues have emerged in the Victorian Public Sector and were raised in the CPSU SPSF submission and indeed in Commonwealth bargaining in the last round in 2011. So it's by no means a one-off situation.

Public sector bargaining does, of course, include an element of central government policy. In this circumstance, we have government policy which is rigidly controlled and enforced where the primary negotiations are in fact not occurring with employees or their representatives. In fact, the closest to negotiation we are seeing in the Commonwealth is agencies having to negotiate with the Department of Finance, the Public Service Commission and, by proxy, the Minister's office.

Indeed, at repeatedly over more than 80 bargaining tables what we are seeing is meetings do not occur for months because the report back is we're still negotiating with those agencies. When they do come back in they come in and say, "Well, we can't consider your claims. We cannot negotiate on your claims. We cannot do anything on your claims because we've got to go and negotiate what we are able to work from."

Although that is legal and there are limited remedies under the Act for that, they're serious issues for employees. If I take the example of Border Force, we have thousands of employees whose work is dangerous and difficult, many taking on organised crime, bikie gangs, ice importation, stopping guns coming into the country and dealing with terrorist threats. They face having their pay cut by \$8000 per annum, for some highly-specialised officers up to \$20,000 to \$25,000 per annum. Their only avenue to deal with that is through significant industrial action. That seems ill-considered.

Similarly, we face government seeking to strip substantial rights out of agreements and, of course, that would remove protections from employees. And I can give examples of that, if needed. The superficial or surface bargaining that we have seen in the Commonwealth and in other public sector  
5 bargains prevents employees and unions from genuinely negotiating, does not place good faith obligations on the actual decision-makers because they are not the party to the agreement and undermines the integrity of the bargaining process. It's also incredibly unproductive.

10 In our view, good faith bargaining provisions should be enhanced to go beyond mere process. If there is one thing that the public sector is good at it's ticking boxes on process. But that would actually require bargaining representatives to genuinely attempt to reach agreement and require that  
15 those negotiating include decision-makers or have the capacity to actually make decisions.

On intractable bargaining disputes, something close to our hearts at present, the Productivity Commission report also concludes that the avenues for Fair Work to deal with bargaining disputes are adequate. Again, that is  
20 not an assessment with which we agree. Part of that conclusion seems to be based on an assessment of wage outcomes in the public sector versus the private sector.

In our view, that is a narrow measure, but it's also one where the differential is quite limited. If you look over the last 10 years to 2013 when we last reached agreements, the Australian Public Service median movement was 41.9 per cent, the AWE was 40.4 per cent across the public sector. That  
25 compares to a private sector AWE of 37.8 per cent. So it's a 2.6 per cent differential, which is fairly narrow. In fact, they tracked fairly closely together.  
30

We also don't agree with the statements in the Productivity Commission about wages generally being higher in the public sector. In fact, for the Australian Public Service the data from the APS remuneration survey  
35 shows a different picture. There was a comparison done by Mercer for the Australian Public Service Commission most recently in August 2011 that showed that public sector base salaries and total remuneration packages were below the private sector at every classification other than the two lowest.

40 So the public sector might pay better for the lowest paid employees, and that is actually a good thing on equity. But across the board, that's simply not the case. There are, of course, a range of factors that influence wage differentials between public and private sector workers and there are certainly roles and jobs in the public sector which are better paid than in the  
45 not-for-profit sector where they are predominantly also represented. But, in fact, much of that relates to pay equity issues for women in areas such as social work and caring roles that you see represented in the public service in

areas such as Department of Human Services.

5 In our view, the access to Fair Work for bargaining disputes, which is generally only for conciliation, is insufficient and we do believe that there should be a stronger role for the Commission, including arbitration in the intractable bargaining disputes.

10 Finally, I just want to make a comment on productivity. Productivity in the public sector is a vexed question. We acknowledge that there has been significant debate about how you might quantify this in a true approach to productivity. What we would say is this: there are in fact many areas across the private sector which, similarly, have challenges about quantifying productivity.

15 There are many parts of the economy in Australia, particularly with the increasing services sector of the economy, which are simply not about producing widgets. Measuring productivity in service areas can be challenging and, of course, across a broad range of areas of the public sector such as health outcomes, education, social services and so on, that is a challenge.

20 What I think we can say is that it is very difficult to find an economist in Australia who defines productivity as solely employee-related savings in reducing conditions rights and real wages, which would be the definition that we've predominantly dealt with under the current government's bargaining policy. That is short-sighted and ill-considered and, of course, has related strongly to an increased focus on job cuts.

30 So a better approach to productivity and public sector effectiveness is to actually treat it as we do across other industries in the economy as needing to involve innovation, investment, the development of human capital, management capacity, ICT and other systems and a range of those other issues that are actually about delivering genuine productivity, which in the public sector is about providing better services and outcomes for the community and better policy advice to government on complex problems facing Australia and our community.

40 I thank you for your consideration. There are a range of other issues that I haven't covered, but I hope that gives you some sense of our key concerns.

**MR HARRIS:** Thanks for that. Do you want to start off?

45 **MS SCOTT:** If I may. Thank you very much for your attendance today. I'll draw your attention to an information request we had in the draft report. You don't need to respond now, but you might want to take it on notice. It related to section 424 of the Fair Work Act. We're seeking views of

interested parties about whether the Act should be amended to allow industrial action to proceed where the Fair Work Commission is satisfied that the risk of a threat to life, personal safety, health or welfare is acceptably low.

5           We have a discussion of that in chapter 19. It may relate to some of  
your – I'm not too sure – state members, but you mentioned Border Force in  
passing. Although that doesn't specifically – I suppose it could relate to  
health or safety. This element may be of interest to some of your  
membership might wish to comment on. You didn't raise it and it could be  
10 relevant to your interest.

**MS FLOOD:** We did make some comments in our submission about  
industrial action, given that we currently face the largest round of industrial  
action in the Commonwealth in 30 years. We have over 30,000 members  
15 who currently are taking or eligible to take protected industrial action, which  
in fact is the largest single group of industrial action anywhere in the  
economy.

20           There are already significant restrictions and requirements around  
industrial action. I would say we've lived and breathed them over the last 12  
months. This area is particularly relevant to the Commonwealth and, in fact,  
it has been a matter of consideration and undertakings across a range of those  
protected action ballots and orders.

25           In what is now the Department of Immigration and Border Protection,  
including Border Force, over a hundred separate elements of undertakings  
have been made that relate to dealing with border protection, national  
security, terrorism and so on. In the Bureau of Meteorology it has come up  
around the provision of emergency weather warnings. In the Department of  
30 Human Services, in Centrelink, it has come up around the emergency  
management. In the Department of Agriculture and Quarantine and  
Biosecurity it has come up.

35           In fact, there are a range of issues there and I think it's important that  
the Act reflects that protected action should not put the community or  
economy at risk. But it's also important to recognise that the mere fact of the  
scope of a public sector employer can lead employers to argue that any form  
of industrial action inherently involves some element of risk. I think a  
40 sensible balance needs to be found on that.

**MS SCOTT:** If that's your area of interest, then I think you'll find our  
discussion around that topic very relevant to you.

45           **MR HARRIS:** Can I ask you about the generality? Noting that we're all –  
well, we're sitting at this table somewhat conflicted and discussing public  
sector pay arrangements. So I invite a no conflicts interest. I consider it to  
be a complete and utter protection from then being able to delve into

whatever I want. But we could think of this as not necessarily involving the current Commonwealth government policy but generically public sector pay arrangements. We could think of circumstances where, on macro policy, it's long been argued that – let's take state government – state government should  
5 maintain a level of discipline over public sector pay arrangements, lest they can create for themselves fiscal circumstances that they can't really manage in the long term.

It's been suggested – you can pick your government where it's been suggested this is an issue. In the draft report we did at the same time say it would seem from as far as we have gone with this area that public sector pay arrangements could probably be better negotiated at the agency level than being driven via such a centralised arrangement. It seems to me not  
10 impossible that you could serve both purposes.

You could support agency-level negotiation whilst still making and meeting a fiscally-determined central government requirement. For example, whether a state should – I'll just take a hypothetical number – have no greater than a 3 per cent wage increase for a particular significant public sector  
15 group. But you could then allow agencies to do the negotiating of how they actually achieve that kind of outcome.

Since we have you here today and since it therefore seems that you could actually meet a central requirement and yet allow agencies, as you've argued, I think, to have the ability to be a genuine negotiator at the table rather than the representative of the real decision-maker, can you comment  
20 on that? I mean, I guess I'm trying to get you on the record as sort of looking at what might be considered both sides and saying whether it is or isn't plausible to imagine that occurring.

**MS FLOOD:** I think one of the challenges in the public sector is considering what actually is the enterprise. If government, as governments do, move functions, create agencies, abolish agencies, you actually have to consider about what sensibly sits at the whole of government level and what  
25 sensibly sits at an individual agency level. We have 25,000 out of 160,000 Commonwealth public sector employees who have been subject to machinery of government changes in the last two years where agencies have been merged, moved, abolished, et cetera.

They are on separate agreements which have some commonality and some difference. I just think it's an interesting example to think about in this. In some cases agencies are trying to negotiate agreements with up to seven different existing sets of conditions and agreements, which is incredibly complex even without the restrictions of this particular bargaining policy.  
30

What that says to me is it supports a CPSU view that there are logically a range of matters which should be considered at a government or whole  
35

5 service level. For example, on parental leave, it took the best part of a decade to move Commonwealth government agencies from 12 to 14 weeks parental leave because those agencies that had the highest proportion of women of childbearing age were the most resistant to moving because it would cost them much more.

10 Well, that's a decision that, in my view, it probably should have been made at a government level at some point where you assess, "Is this a standard we seek? Should it be different in Treasury to Centrelink?" Probably not. "And at what point do you do that?" So it may be that there are some common matters that sensibly are negotiated at that service-wide level.

15 The policy view the CPSU has had for some time is that agreements should sit at the agency level and agencies should have the capacity to negotiate on a range of matters that logically fit within their remit and that allow them to genuinely negotiate. So if you take, for example, the agency I was talking about earlier, Immigration and Border Protection, it's an immensely complex area of work with a range of very different specialist roles.

20 It's absolutely nuts that those agency heads cannot actually sit down and sensibly work out how do we make this work in airports, ports, mail centres, joint operations with other security agencies and so on. I think our view is that some combination of both of those would be the most sensible arrangement. Certainly the current arrangement is not working for either agencies or employees.

30 **MR HARRIS:** In testimony just prior to you arriving for this, we were talking to Business Council of Australia about the idea of limiting coverage of awards and bargains to a specified list of factors, one of which was remuneration, so that it would have remuneration in awards and enterprise bargains under their model, but organisational structure was not. I asked them the question about how they would put the two together given that in many awards and quite often, I would assume, in enterprise bargains the two are currently together; that is, the pay level belongs to a particular specified level in the organisation and someone quite prescriptive – presumably some aren't – but some are quite prescriptive.

40 Do you have a view on how we could potentially create greater flexibility in this area if we move to having organisational structure as primarily a sort of managerially determined arrangement but still have remuneration as a topic to be covered in awards or bargains?

45 **MS FLOOD:** I think it's a little disingenuous to characterise pay classifications as organisational structure. I would have some serious concerns that if you actually put further restrictions on what can be in

agreements and what employees can bargain about, in fact what you are very likely to see is a driving down of wages, a driving down of the wage share of national income, which is not only inequitable, it's not actually in the interests of the community, because you could very easily see employers being able to designate, "Well, that work in call centres," for example, which is tens of thousands of Commonwealth employees – if we take that example – "We'll, we've now decided that we're going to change the organisational structure that no longer sits in agreements."

That means that new employees, transferring employees, promotional employees are all going to actually be paid 10 or 15 thousand dollars a year less. We are in fact seeing some challenges currently around declassifying roles. The major protection for maintaining the wages of those employees is in fact that those elements sit in agreements. Alistair might want to comment on that because I think that is a very serious concern for employees.

It's not necessarily concern for their own interest because they're not going to have their actual pay cut; it's a broader concern about equity and whether it's appropriate for that.

**MR WATERS:** We do see in the Commonwealth where the classification structure, which I would say is a different thing to the management structure of the business, sits outside and is covered by delegated legislation. The APSC has been going through a process of standardising or adjusting that structure, that classification structure. That certainly is leading to significant pushes to push work down or change the level at which the work is done. I think there's a fundamental impact on employees of requiring that those elements be taken out of an enterprise agreement, which would, again, shift the balance of power.

**MS FLOOD:** Can I make a comment on restricting the capacity to bargain over broader arrangements around employment? We're seeing a growth of insecure work in the public sector. One example is in the Department of Human Services what's called IIEs – irregular and intermittent employees – where we have very significant numbers of people who have been employed as IIEs over the last 12 or 18 months, except that their work is neither irregular or intermittent. They're required to be at work every day and doing a full-time job in what was ongoing employment.

That group of employees, predominantly women, many of them in regional economies where the other employment prospects for women are limited – generally retail and hospitality – they cannot get personal loans. Most of them can't afford home loans because they're low-paid workers, they're below-average weekly earnings. Their single biggest concern in bargaining is whether there's any capacity for them to have a permanent ongoing job.

5 I think that is a legitimate and appropriate matter for them as employees to be able to raise with their employer. Instead, I guess what they are seeing is not only is there negotiation over those matters, they face further cuts to their income through proposals to strip rights and cut a range of conditions around penalty rates, control of working hours and so on and so forth.

10 The stories I hear from those people about what their lives are like I guess is the sort of thing that drives us that this is not a merely technical discussion; it's a very real world one.

15 **MR HARRIS:** The circumstances in which – leaving aside whether an intermittent employee is actually intermittent or not, nobody found inconsistency between the terminology and the reality. But what you therefore have is what we otherwise call a temporary employee, presumably on a contract arrangement. We did actually ask for information in the draft report about new forms of work and – although I don't think we quite specified this kind of new form of work. But that was about my threshold question; is it a new form of work or is it just new terminology for a temporary employee?

20 **MR WATERS:** It's probably new terminology for a casual employee and seeing greater use of – we're certainly seeing much greater use of labour hire and casual arrangements throughout the public sector. I think, in our view, there are very strong reasons why there are benefits in public sector work being predominantly full-time or – sorry, not full-time, being predominantly ongoing work. Seeing increasing use of both labour hire and casualisation of the existing workforce raises a range of risks, both for the employees themselves, which Nadine outlined in terms of the DHS example, but also in terms of the way the public sector operates and transparency and merit principles that underpin public sector employment.

35 **MR HARRIS:** You couldn't be arguing, surely, to go to the reverse situation which says we can't have such employees, because then you'd be putting an awful lot of pressure on a permanent workforce. If you couldn't in a budgetary sense as a department justify taking on a permanent employee because the work itself is unreliable, you'd then just encourage the permanent employees to try and cover for that as well. You need some scope for temporary employees or casual employees, don't you?

40 **MR WATERS:** Clearly there is a role at some level for both temporary and the use of casual employment for genuine surge capacity. But what we're seeing in DHS at the moment is in no way, shape or form addressing surge capacity. There's a clear ongoing need for the performance of work and there is a decision being made to use casual employment for that work.

**MS FLOOD:** For example, with the statement you just made, that would be



a statement that would be broadly acceptable to many of those employees, that you actually use those forms of employment for that form of work. But I think what they're seeking is the capacity to have the dialogue with their employer in some meaningful way where that is not in fact the case.

5

**MR HARRIS:** You're saying there may be a need and we're not unhappy with you satisfying the need – need to be convinced perhaps that there is a need – but accepting there is a need, then the question is, can these people obtain the benefit of potentially finding that as a transition pathway to permanent employment?

10

**MS FLOOD:** Where this is being used there, in fact, isn't a need. So the Department of Human Services staff has been reduced by more than 5000 over the last five years. In fact, thousands of these employees are actually doing what were permanent ongoing jobs. They simply now do not have the benefit of that.

15

Can I also just mention the issue of enterprise contracts?

20

**MR HARRIS:** Yes, no, I want to get it to it at the end. I tend to leave it to the end primarily because – well, you can call upon other arguments. But, no, let's do it now. Let's do an across-contracts now. So you've made some rather sweeping statements, in my judgment, about how these are individualised pay agreements, which we're at pains to describe a model that wasn't about an individualised pay agreement. So can you tell me how you've made the mental leap from one to the other?

25

**MS FLOOD:** We were concerned in looking at the draft report that while it was characterised as being another avenue particularly for small and medium enterprises, that in fact this could open the door to some of the challenges that we saw in the Commonwealth public sector with Australian Workplace Agreements. I guess reading the report the very strong concern that what would there be to stop, particularly given the limits of the good-faith bargaining processes, a Commonwealth government going to major agencies, to their employees, and saying, "Well, the only way there's a pay rise on offer is if you sign this template enterprise contract, of which there are 3000 identical ones," which is the sort of thing that did happen with AWAs.

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35

The notion of them as being negotiated was extraordinary. Once you've seen a thousand that look identical and where employees are told there is no capacity to negotiate or change anything in that, it does tend to colour your view somewhat.

40

**MR HARRIS:** But we did actually deeply consider just that issue and so the enterprise contract is for new employees, not for incumbents. Incumbents have the choice of taking up the enterprise contract, can't be obliged to do so. If they take it up, after 12 months' experience, they can pull out and go to the

45

preceding work arrangement. It seems to be quite different from the model of – and the analogy of drawing it towards an AWA does seem – as I said, it seems quite a leap to me, given the way that it was consciously structured.

5           Now, I do understand other limitations with an enterprise contract and they've been made plain to us by other representatives of unions. Indeed, on the other side, a couple of employers have told us that they're too restrictive in their descriptor.

10       **MS FLOOD:** Of course they have.

15       **MR HARRIS:** That's not unusual for something where we've effectively created a model and asked a question about it. So no party but us can be accused of having initiated this. But I was particularly taken by the parallel you were drawing because it is not a mechanism that I think any employer would find easy to use as a way of inducing existing employees to take up an arrangement.

20           Leaving out extreme bad behaviour, in other words, everything is exposed to trim bad behaviour, nothing that is designed in regulation can prevent extreme bad behaviour. You just have to wait for it to occur and find somebody – discover them, find them guilty, which is a different matter entirely whether you discover or not, as we know from 7-Eleven, if nothing else.

25           I guess the reason I wanted to raise this as explicitly with you as I have is we've tried quite carefully to be wary of arrangements which are of an extreme nature. I think I've tried to make that transparent not just in the inquiry documents itself but in the speech as well. We're not saying that the model is perfect. We're up for hearing criticisms of it. But it seemed a big jump to say it can be used to induce existing employees.

30       **MS FLOOD:** Well, I guess the – and perhaps there's something I'm not seeing in the report. But we tracked into well, if you're an existing employee your government effectively refuses to bargain does not resolve enterprise agreements for perhaps let's say 18 months, two years, two and a half years – we're at 18 months now. They go out to their entire workforce saying, "Here's an enterprise contract. That's the only way that you can actually get a pay increase."

40           No, the employee is not obligated, forced to sign it, but effectively, if you have the limit of that on bargaining, combined with an enterprise contract, we can see some very difficult circumstances. I think that does go beyond some of the experiences we had with AWAs where it was a condition of employment, promotion, transfer or change in jobs within an agency. So that does raise a question.

Of course, if that can be a condition of employment for new employees, then you can do what DEWHA did under the Howard Government, which is over successive years with say 10, 11 per cent staff turnover, each year you get 10 to 11 per cent of your workforce off the enterprise agreement simply by that AWA being a condition of employment. Then in that case it was also a condition of promotion, transfer or change in roles. So that gets you up further.

By the time that government lost office, I think 87 per cent of DEWHA staff were off the enterprise agreement and a small group of people had stayed on that at great financial sacrifice and there were serious challenges.

**MR WATERS:** And there were two groups among those AWAs. There were people who had been induced off the enterprise agreement in those circumstances by improved pay. There was a huge group of people who had been required as a condition of employment to sign an AWA that were being paid significantly less than the collective agreement rates.

There was just one example that we saw and had direct experience of. There's a number of other organisations, both public sector and private sector, that aggressively used a non-negotiated mechanism. And AWAS were not a negotiated mechanism. I think in many ways - - -

**MR HARRIS:** I see that element of it. It's deliberately designed – we're quite clear about this – not to bore into the formal enterprise bargaining process. It may subsequently provide a pathway to do just that. But, equally, it may provide a pathway never to do just that.

**MR WATERS:** But it does provide a pathway, we say, to fundamentally undercut an enterprise bargaining agreement process.

**MR HARRIS:** It certainly would allow you not to use an enterprise bargaining process or to substitute it for an enterprise bargaining process without a doubt. It's an alternative flexible mechanism designed, as we put it, towards those firms that have never done this. But the proposition at the moment isn't to limit it to firms who have.

**MR WATERS:** In cases where you already have significant market power on the part of the employer, I think the paper clearly identifies that the government is one of those employers.

**MR HARRIS:** It is the party with some power, yes, without a doubt. Trying to avoid conflicts of interest here.

**MS FLOOD:** We'll talk about state governments.

**MR HARRIS:** Yes, I can talk about state governments. You can imagine

the concept. I'd like to look at that.

5       **MS FLOOD:** Yes. I think the serious concern for us is that it would undermine employees' right to bargain collectively, which is a very significant right for all those employees. I understand that there are sectors of the economy and there are enterprises which do not currently bargain collectively for a range of reasons. I mean, we have had areas where we have had to use majority support determinations to force bargaining. That can be quite difficult.

10               We have areas where it is very difficult to bargain collectively such as in the job network of a multitude of very small outsourced providers. It is very difficult for those employees to organise collectively and to be able to do that. In those sectors is probably where we've seen some of the worse employer behaviour and treatment of employees.

15               We have seen it – I mean, we've also seen it – we had this experience in Telstra, although I am pleased to say that Telstra has taken a different path with their workplace relations and we now have a modern and productive role which is a little bit different to that we're experiencing in the broader public sector. But there were certainly attempts there with the use of AWAs and with changing the scope of enterprise agreements to undermine that capacity to bargain collectively. So I guess for us it does somewhat come out of lived experience, particularly with AWAs which were more prevalent in

20               the Commonwealth public sector than in other areas.

**MR HARRIS:** Thank you for that.

25               **MR WATERS:** There is also some similar lived experience I think in Victoria and in the state government in Victoria. There appears on reading the draft report to be an assumption that some of the comments that have been made by the CPSU SPSF group go to what's currently happening in federal government. I think you'll find that they are actually there referring to their lived experience with the Victorian Government.

30               We've got the federal government and the Victorian Government are the two largest government employers in the federal system. Obviously the ACT and the Northern Territory are in there as well. But certainly I think there are some commonalities that can be found between the lived experience of the Victorian CPSU SPSF group in Victoria and what we have experience.

35               **MR HARRIS:** I understand that. Fine. Is there anything that we failed to allow you to get on the record that you'd like to now get on the record?

40               **MS FLOOD:** Look, I think that we've covered a lot of ground. Just probably to briefly mention on industrial action that the right to take action in Australia in the federal domain is already subject to very significant

restrictions and procedural requirements and we wouldn't support any further diminution of that right, including restricting when action can be taken or lowering requirements for when action can be terminated.

5     **MR HARRIS:** That's great.

**MS FLOOD:** Thank you.

10     **MR HARRIS:** Thank you very much. We'll take 20 minutes, I think, for lunch, if we can.

## **LUNCHEON ADJOURNMENT**

**[12.39 PM]**

15

## **RESUMED**

**[1.11 PM]**

20     **MR HARRIS:** I think we have the Federation of Ethnic Communities' Council of Australia. Could you guys please identify yourselves for the record? We are taking a – we do a record and you'll be published and all that kind of thing. So please try not to defame anybody in the course of the proceedings. It's the only worry we actually have. Anyway, if you could identify yourselves for the record, that'll be great.

25

**MS ABBASOVA:** My name is Gulnara Abbasova, I'm the Director of the Federation of Ethnic Communities' Council of Australia.

30     **MS GILLEN:** I'm Erin Gillen, I'm the Senior Policy and Project Officer at FECCA.

**MS MOORE:** Heather Moore, Salvation Army Freedom Partnership to End Modern Slavery.

35

**MR HARRIS:** That's good. Thank you very much for coming along today. Did you want to do any opening remarks kind of thing?

40     **MS GILLEN:** We'll just quickly say that we've made a joint submission on the draft report and that addresses chapter 21 of the draft report on migrant workers. We're happy to take your questions.

**MR HARRIS:** Do you want to start?

45     **MS SCOTT:** I might start. The advantage of us having these hearings and having draft reports is that we can learn as we go. We have had now some clarification on what the powers of the Fair Work Act are in relation to

migrant workers. We were of the impression that the FWA didn't cover all visa classes in terms of the restitution of wages, but we have now been enlightened that, in fact, that's not correct.

5           Effectively, all migrant workers are covered under the Fair Work Act. I think that's an important point to note, including those in breach of their visa conditions. Our recent meetings with the FWO have confirmed this is the case. I think we're part of the general widespread confusion on this point. So I thought I might start there so that might clarify a few matters.

10           We still, of course, have the very substantive issue of what the governments should do because, of course, it's one thing to have a power to recover wages; it's another thing to be able to effectively do that. So we, of course, are very interested in your views about what possible solutions could be. So we might then explore those options.

15           One thing is, of course, information. The other one is investigation. Then the third thing, of course, I guess is legal action. Maybe we would start with any views you have about what could be done on information. I appreciate that that the power and balance is very considerable. The fact that you might know what the minimum wage may still mean that you don't actually go and seek it. But we could we just start maybe in stages: information, your view on that; and maybe the role your organisations can play in that space; and then investigation; and then action, legal action.

20           Would anyone like to start off on the role that your organisation plays, either do play now or could play in the future in terms of information?

25           **MS GILLEN:** Sorry, could we ask who – is that the Fair Work Ombudsman who provided that clarification around - - -

30           **MS SCOTT:** Yes, and - - -

35           **MR HARRIS:** The Ombudsman said so and I think the department has told us that they are agree.

**MS GILLEN:** So the restitution of wages?

40           **MS SCOTT:** Yes.

**MS MOORE:** And have they considered the case law that - - -

45           **MS SCOTT:** They referred to recent case law. I see that's in part why there had been confusion was because there had been some uncertainty, but that recent case law they considered had clarified the matter.

**MR HARRIS:** If you're still in doubt, don't take the fact that we have

5 confessed to our own earlier level of inaccuracy on this as being a basis that you must fall in line. If you still think the law requires clarification, that's fine, stick with your position and outline further. But we, if you will, working on the basis of our draft report, the ombudsman and, I believe, the department have both said, "Look, coverage is there. It's probably not well-recognised as it ought to be."

10 **MS GILLEN:** So I'll take the question about provision of information. FECCA's core work is access and equity work and part of that is access to information about workplace rights and entitlements. We've outlined in the submission that we feel that engagement with workers around workplace rights and entitlements needs to begin at the granting of a visa but then continue throughout time in Australia and that there's often a lot happening at the time of granting a visa and that that information needs to be reinforced and migrant workers need to know where to access that information while they're in Australia.

20 **MS SCOTT:** Can I just pause you there? I'm sorry, you'll probably find this an interrogation but it's our means to get information we require. Certainly feel free to answer that in further correspondence. But in terms of information, I have looked up the website and seen what's available. It's not very specific. I couldn't find a number that I could easily see that would state what the minimum wage is, the national minimum wage. But then I thought about the problem in actually locating these people. I mean, they're moving around. If they're a 457 I guess you can contact them through their employer. But in terms of other visa classes, that's not so easy. So how could information be conveyed to these people effectively or do you have an effective means now?

30 **MS GILLEN:** We've suggested in the submission linking workers in with community organisations when they arrive in Australia for orientation sessions. That's a way not only to get information to workers but also providing them a support network and people to go to if they find themselves in a position where they need assistance.

35 **MS SCOTT:** What do you think is the capacity of your organisations? And I appreciate you're an umbrella group. What do you think is the capacity of your organisations to be able to do this work?

40 **MS ABBASOVA:** Look, FECCA's organisation is the multicultural sector across Australia, but there is a whole settlement sector as well that is also united under another umbrella bodies and we all work together. Essentially, what we are trying to say that a lot is focused on compliance but not very much on empowering the workers themselves. And they tend to transition from one type of these into another and sort of that moving from one type of regulations that they're on to a different one.

45

We think that there is a huge gap in terms of connecting them to the sector that can provide services. There's already very well organised to extend those supports and quite often doing so without formally acknowledging it.

5     **MS MOORE:** But that's I think because this is an additional cohort of workers that are currently not eligible for orientation sessions that are being run now for other migrant types, that this would need to come with some additional funding. I think we would all agree though that the cost benefit analysis for these types of – putting some money behind us would certainly  
10    improve reporting of exploitation and fraud, which I think would – I'm not an economist, that's your specialty, but I would put money down that we would see a far greater cost benefit analysis. Putting some money on the front end would yield good results financially on the back end.

15    **MS SCOTT:** Now, let's move to the middle stage, compliance activity. Of course, you need people to self-report and you've drawn attention to the fact about people's reluctance to report and so on. Could you just outline, I think for the benefit of others as well as ourselves, what you're proposing there and how that could be addressed? Because we have got a significant imbalance  
20    in power.

**MS MOORE:** It's a big question. I guess the two primary recommendations that we're putting forward is that we need to look at whether compliance monitoring is in fact an effective tool to identify  
25    exploitation. You would have seen in the submission that we lay out several arguments for why compliance monitoring does not address the motivations people have for remaining silent in exploitative work. So I think that's the first step is before we look to expand compliance monitoring – I mean, I think we all agree we want to see the Fair Work Ombudsman's resources  
30    increased.

      But we need to test the assumption that expanding their role into compliance monitoring will actually yield the outcomes we want. But I think it also needs to be tested for whether or not compliance monitoring actually  
35    drives people underground. So I think broadly we'd like to see more heavy scrutiny on compliance monitoring as a model and a serious consideration of other models from around the world that may be yielding better outcomes as far as shedding some light on this.

40       I think the second piece of that comes back to how we're supporting workers. Some of this may be drawn into question if the – look, the unlawfulness is another factor that I think we need to look at, we need to get some clarification because the fact that so many workers who are being found to be unlawful are just being deported – and if they are indeed entitled to  
45    wages, Australia needs to – we need to look at whether or not we are helping people achieve that. I think we would argue that if a worker knew that they would be entitled to their wages, that would be another way of encouraging



people to come forward.

5 **MS SCOTT:** I think if we've got well-informed people misunderstanding things, imagine what it's like when you've got language barriers and cultural problems and other pressures on you. Could you comment on the effectiveness and desirability, particularly the effectiveness, of any amnesty arrangement?

10 **MS MOORE:** I think we would support it. It would be a meaningful – look, I mean, I think if we – our specialty is obviously into human trafficking and one of the concerns that I've raised is that even when you might have an operation where you have the most well-meaning agents, the most well-meaning law enforcers and they're really trying to build rapport, word of mouth is a significant factor here and the public discourse around this whole  
15 issue – the workers know, the workers are familiar with these.

20 So if they have any inkling that they're just going to be deported and that their rights won't be protected, there's very little incentive for them to incriminate an employer who actually may have ties back home that could – you know. So I think we need to – we shouldn't discount the very real fear there.

25 But even in a situation where an agent or a group of agents say, for instance, the Taskforce Cadena operation, is endeavouring to build trust, we need to look at the broader culture and the broader rhetoric that these workers will be very familiar with. I think amnesty could be a pretty important mechanism to change the conversation. It would obviously rely on ongoing, it can't just be a one-off. We need to really look at making a meaningful change in direction here where we start to send messages to people that we  
30 do care about your rights, we want to hear what's going on, we will listen to your story and we want to make sure that you're protected so that you can help us fight crime in our country.

35 I think that we made the point in the paper; I'll just take this opportunity to reiterate it. It seems to me that we're so focused on the folks who are breaking the law that we are not protecting the people who are most vulnerable. I think amnesty could be a meaningful change in both how we're talking about this publicly but how the workers might feel they'll be treated moving forward.

40 **MS SCOTT:** Good, all right, thank you. Let's now move to the third stage, if I can. This is to action, legal action. In your submission you draw attention to the fact that there should be enhanced focus on labour hire companies and employers rather than the visa holder themselves. I'm very  
45 interested in this aspect. A number of people have raised with us the phoenixing of companies and it's been reported in the media and so on.

Could you elaborate further about the approach that you think we should consider, especially the use of labour hire companies and whether your experience – I don't know if you've got any information on this – whether labour hire companies are effectively embedded in those communities or embedded in the source countries. If you could comment on that I'd appreciate it.

**MS MOORE:** Yes. Our partner, the Uniting Church, who I know put a submission into the first phase and I expect will put a subsequent submission into this phase, will have a lot to say on that. Our understanding is that the labour hire industry – well, first of all, to answer your question directly, we are recommending – but not in this submission but other areas of our work – a licensing program for all labour hire brokers and contractors. I think that is a recommendation that both the – at least from the agricultural industry, the unions and organisations like us all agree on.

I guess to answer the second part of that question around the nature of their operations, I think it can vary, but yet it's not uncommon for them to have connections in source countries or in countries overseas as well as here. So in some cases you've got some fairly elaborate networks of people that – I mean, I think out of the Philippines there are, for example, very well-established networks that help people get work sort of like the shop fronts that can often be facades for illegal activity. Some of them are legitimate, of course.

But as a result of the number of Filipino workers that go overseas, I know the Philippines have a model where they've got support services through their labour attachés around the world and it's well advertised on government websites in the Philippines to make sure their workers know they can go to their own consulates for assistance.

**MS SCOTT:** We took evidence in Bendigo last week. I don't know if you – it sounds like you're familiar with that. But just for the transcript, that drew our attention to the fact that in relation to a enterprise down there, the exploitation reported to us related to the Korean community but now had moved on to members of the Vietnamese community, Cambodian community. So this sort of rolling, you address one area and it rolls onto the next.

That leads me onto this issue of phoenixing where a labour hire firm disappears or goes into liquidation, you don't seem to be able to chase anyone. This issue has arisen for us in another inquiry we're currently undertaking relating to small business entry and exits. In that process we're exploring a number of issues related to how to better ensure that responsibilities can be followed through rather than disappear.

So maybe we'll get into insights into that – that report will be out

shortly. Well, go to government shortly. We'd be interested in your views on the phoenixing issues, if you have any at this stage.

5 **MS MOORE:** I think we would defer to our partners, the Uniting Church, to speak with more – it's not an issue that we know that much about, at least the Salvation Army. I know it's a problem.

10 **MS SCOTT:** Yes. What about the fact that in your experience, have you found employers that have claimed, either legitimately or not so, that they were unaware of the practices that were operating within their business? Could you comment on that and the fact that because of the intermediary of labour hire they're able to – seem to have some remoteness from this problem. Can you comment on that issue?

15 **MS MOORE:** One of the other recommendations that we're making in the broader advocacy space is that the ultimate employer should be held accountable for their supply chain. I appreciate that – I attended a forum that was convened by the National Federation of Farmers a few weeks ago. I appreciate that that burden can be very difficult, particularly for smaller  
20 growers. Noting that, I think some people would certainly need some assistance, some support. I don't know what that would look like necessarily, but I think it's something that would need to get teased out a bit.

25 But I do think it needs to happen because we see this – I mean, it's an international problem, supply chains around the world, is that you've got so many layers in the chain that it's easy for one person to just say, "I didn't know." I think that's another meaningful step that we need to take as far as ensuring accountability across the board.

30 **MS SCOTT:** I know you refer to a number of overseas studies in your submission. I'm sorry, I haven't had time to get fully across all of the recent material. But is there any example that you recommend that we look at in terms of this almost look through the veil of the labour hire company to the responsibility of the employers? It does happen in some instances in other  
35 parts of the law that we're familiar with. But is there a model relating to the use labour hire firms and the exploitation of migrant workers that you think is effective overseas?

40 **MS MOORE:** Sorry, so a model for - - -

**MS SCOTT:** Well, is there a country that has effectively tackled this issue of the intermediary and the problem that the NFF has told you that it's very difficult for individual employers – I'll give an example. Someone's relying on the harvest trail for a group of workers to be provided and those workers  
45 are provided through a labour hire firm. The farmer is managing the operation, but for all intents and purposes their understanding is that the labour hire firm is handling effectively wages and conditions.

Later it's discovered that in fact the workers are in breach of their visa conditions. But for our purposes, what's of interest is that they didn't receive their correct salaries. Do you know of any administrative arrangement that  
5 operates overseas that overcomes the problem that it's hard to imagine how the farmer can know what's being paid to workers without actually having the farmer then take on the administrative burden of the hire company?

**MS MOORE:** I cannot think of anything off the top of my head. But we  
10 can certainly try to find something and bring it back to you. I mean, certainly regulating the labour hire industry would be an important step that would help, I think, a lot of the smaller farmers in particular. I know somebody that presented – I'll have to check my notes – but someone that presented at that  
15 forum – gosh, I'm embarrassed I can't remember, it was a pretty prominent group. They are exploring a model, some kind of like a preferred – some kind of registration. I can get back to you with the details on that.

**MS SCOTT:** Because the labour hire firms are relatively clever in some instances. We heard in Bendigo evidence that you must have encountered as  
20 well where people actually have got payslips that record the appropriate salary, smaller number of hours but in fact there is a complex arrangement where once the workers get the money into their account they're required of course to remit it back to the labour hire company.

**MS MOORE:** It was interesting because I had some conversations at that  
25 forum where I was challenging people to say, "Well, could we just eliminate the labour hire company or the labour hire industry middleman altogether?" There was some appetite for that amongst some growers and others were like, "No, no, no, we have to have that there," because, as you say, they don't  
30 want that additional burden of monitoring people.

Look, I'm not an expert in this area. I wouldn't profess to have all the answers here. But the point that we made at the forum was that we all want  
35 to reduce red tape. We don't want to impose unnecessary administrative burdens. But we can't increase flexibilities without increasing protection. So there needs to be a suite of protections in place where, I guess, sort of a – if we do try to reduce things, if we do try to reduce the burden on employers, that can't be done in a way that increases the vulnerability of the workers.

**MS SCOTT:** Maybe by reputation ultimately firms' directors take  
40 responsibility, even naming and shaming factor, but of course you need compliance activity; to get there you need people to self-report. But anyway, it's interesting what's happened with 7-Eleven.

**MS MOORE:** I would just put out there there's a model – the Walk Free  
45 Foundation out of WA has published a manual, a pretty user-friendly manual, for government, for businesses of all sizes and types to build accountability

in their supply chains. I recommend you take a look at that because I think it offers some very reasonable, feasible advice that could inform what that model ends up looking like and how people can be responsible for their own supply chains.

5

**MS SCOTT:** Okay. That was Walk Free?

**MS MOORE:** Walk Free Foundation. I'm happy to send it to you if you need that.

10

**MR HARRIS:** So you got to the point of directors.

**MS SCOTT:** I did get there. Sorry, I did take people through the steps.

15

**MR HARRIS:** I did see the steps, yes, going through. So we arrive at a point where even with the best investigatory processes in the world, it appears that some firms are able to evade their responsibilities by such means by liquidating the company. Now, I don't know whether this is just a single example in the 7-Eleven sequence or whether it's common enough to be worthy of considering a solution in relation to director's responsibilities. Do you know how common it is for firms upon discovery to avoid their liability by liquidating the firm?

20

**MS MOORE:** No.

25

**MR HARRIS:** We'll probably have to look at this ourselves then to try and get a bit of background on it. Because in the end, it is actually likely to affect the credibility of the visa system itself if this becomes an apparently – whether it's true or not, it becomes a perception that it is a common feature to be able to not just exploit the workers and then evade responsibilities upon discovery. In that sense it probably requires some – this report is obviously not primarily designed to deal with these sorts of issues. But it's going to I think be difficult to avoid dealing with it in the current set of circumstances.

30

35           Do we have anything more for these guys?

**MS SCOTT:** No, I don't think so.

**MR HARRIS:** Have we failed to give you the opportunity to raise anything else that you wanted to raise?

40

**MS MOORE:** I am curious if you had any thoughts on our recommendations towards the second recommendation around the wages issue and if what you found out from the Fair Work Ombudsman has changed that recommendation or the unpaid wages as the means to increase employer fines.

45

5 **MS SCOTT:** As you know, in the original draft we had suggested that we were interested in increasing the fines for employers. Our interest still lies in that area, but await developments of the final report. I have to say in light of the fact that it's now evident that there's such a reluctance of people to self-report, our thinking is more towards the third stage in the process.

10 Information could be powerful. I accept your argument that information can be powerful and can imagine that if the original documentation came with a clear indication what the national minimum wage was, that maybe if people could just have that and a phone number to ring, then it might help, but then – and I've been discussing this with Peter. Of course, as soon as someone's told, "Look, the job is yours, but it's \$10 an hour and like it or lump it," people may well find in their circumstances that being well-informed doesn't actually necessarily help.

15 **MS GILLEN:** Something that I will just add which we did flesh out in the submission is that information available on a website, even if it is in plain English and easy to understand, isn't enough as far as information. We'd like to see the information in the letters rather than just a link to a website and, of course, written – engaging with ethnic media, all those things.

20 **MS SCOTT:** There might be opportunities to take into account not only your community-based organisations but even information sites where people find out about these jobs. Anyway, look, one of the issues we are discussing with WA is compliance and self-reporting activity. It's very good to have your submission. Thank you very much. We'll go through that systematically, we'll follow up on a number of leads you gave and we look forward to hopefully shining a sharper light on this problem.

25 **MS ABBASOVA:** If I just may add very quickly, and that goes to your point, of course. The visas that you're talking about, they tend to be very socially isolated individuals who are in fact on these visas. So that just goes to that need to have the social policy supports around the settlement support as well. Because if you're just looking at compliance issue, that's basically one side of the coin, unless we're actually starting to invest into the people on these visas and connecting them in and helping them avoid the social isolation that they're experiencing with that. Yes, that's only half the issue. That's all.

30 **MS SCOTT:** Very well made. And Bendigo evidence – in fact, it was from one community group as well the union – was very powerful. Thank you very much for comments.

35 **MS MOORE:** Thank you very much.

40 **MR HARRIS:** If you guys could identify yourselves, please, for the record?

**MR CONNOLLY:** Scott Connolly, I'm ACTU Assistant Secretary.

**MR FLEMING:** James Fleming, Legal and Industrial Officer, ACTU.

5     **MR HARRIS:** I should point out to you – and, again, we've got a large  
group – these microphones are for the purpose of the recording and don't  
regenerate throughout the room. So if you have a powerful point you wish to  
make collectively to the audience – and we won't be insulted if you turn and  
10    look at them to make sure they clearly hear the powerful point that you're  
planning to make. It's working quite well for me today but I have been  
counselled in earlier hearings also myself to speak up.

Do you have opening remarks you'd like to make?

15    **MR CONNOLLY:** If you wouldn't mind. Thank you. Thanks for the  
opportunity to appear at today's hearing. We've submitted a detailed  
submission in response to the issues paper and we continue to rely on those  
submissions and we're here today and are pleased to provide some initial  
20    reviews on the Commission's draft report.

I'll just briefly outline some of our views on the draft report and take  
you to some of the particular recommendations that we find particularly  
concerning and we're providing a written submission shortly, I think back  
end of next week.

25    **MR HARRIS:** Thank you.

**MR CONNOLLY:** I'll just begin. I note that the main findings of the  
Commission's draft report is that the workplace relations system is not  
30    systemically dysfunctional but needs repairs. Yet the Commission then goes  
on to make a series of recommendations that, in our view, make substantial  
reduction in workers' rights and a significant skewing of the Fair Work  
Commission's functions and powers in favour of employers.

35    In our view, on almost every topic Productivity Commission has  
entertained a minority of disgruntled employers' voices yelling loudly from  
the fringes, from those that complain that the unfair dismissal laws prevent  
them from hiring and firing at will to those that say that the sky will fall if  
fair minimum wages are paid. In almost every recommendation the  
40    Commission has sided with employers' complaints at the expense of  
employers' needs.

Often the Commission's recommendations do not match the reasoning  
that precedes them and they're quickly lost – and quickly lost are the  
45    acknowledgments at the report start of the importance of our workplace  
relation system of fairness and redistributive justice of addressing the power  
imbalance between worker and employer, the need to balance the needs of

both employers and employees.

5 Much justification for this attack on worker conditions such as fair minimum wages, penalty rates is predicated on a myth that reducing minimum wages and conditions, regulations and projections and expanding managerial prerogative will lead to greater economic growth and higher employment.

10 We say this is because the recommendations are based on an outdated economic paradigm and one that's been significantly discredited since the GFC. Even some of the most conservative organisations, including the World Bank, the IMF and the OECD, have all noted recently that an increase in inequality in many economies in the last three decades has had a negative impact on growth and prosperity.

15 These organisations have each indicated that a new approach based on ensuring more equal distribution of income and opportunity, which generates local consumer demand and productivity, is critical to boosting the economic prosperity of nations and ensuring higher and more durable growth, to say nothing of how wealth is shared within those nations.

20 To put it simply, we say the PC's report and recommendations have missed a core issue that our country faces, being inequality. Australia's workplace relations system is a critical plank in the boardwalk against growing inequality. But we say it needs strengthening, not weakening. It's already been weakened over time due to concessions in the interests of business and insufficient responses by regulators to the changes in the nature of the organisation of work.

30 Australia's retained employer protection is higher than those in the UK and the US which has helped slow the growth of some inequality here and prevented it reaching the levels experienced in these countries. But Australia is still sunk from being one of the most unequal countries in the OECD to the middle of the pack and the gap between rich and poor is widening in this country.

35 Our own ABS stats for 2013/2014 showed the top decile of Australian households possessed an average 52 times the wealth of the bottom decile, and that was an increase from 42 times the wealth just 10 years before. Between 2003 and 2013, Australia's drop in the minimum wage bite was the largest of any OECD country, even while at the same time the minimum wage increased in 15 of the 23 OECD countries in the same period.

40 Not only does the Commission's report fail to address inequality, it proposes a range of measures that would entrance or exacerbate it and hurt the lowest paid of our community. These changes we say would put our social cohesion at risk and accelerate us towards the US model and social



consequences that that entertains.

5 The impact of proposed changes would be disproportionately felt by the most vulnerable and already disadvantaged members of our society. We note that the objects of the Fair Work Act currently provide a balanced workplace relations system framework that is fair, cooperative, productive and socially inclusive and promotes Australia's future economic prosperity.

10 The proposed changes to our system regime undermine these objectives. We also say that the report has missed opportunity to meaningfully contribute ideas for a more productive, inclusive, fairer and equal society to tackle some of the challenges ahead. I had the opportunity to hear some of the comments from the BCA this morning. I agree in this space that we need to do more thinking about how we regulate work and employment going forward.

20 We say we need to have a proper look at future needs in regulating the new workforce and the new economy. The report fails to provide ideas for strengthening the regulatory infrastructure and ensure a proper safety net for these coming changes. By way of example, it fails to address the gender pay gap, growing employment insecurity. It fails to suggest providing for portable long service leave, leave banks, benefit banks and proper measures against sham contracting models, tax transfer arrangements that rob us of revenue, and it fails to address the evasion of minimum entitlements and protection through labour hire arrangements that could be averted by recognising the reality of modern employment relationships.

30 The report fails to promote the labour force participation of women, migrants, including those on visas, and the unemployed. Instead, it takes a view of pitting workers against the unemployed as if reducing the conditions of the former were going to help the latter. In the report the principle of the level playing field for all, for unions and good employers, is overlooked in favour of the fringe and minority interests.

35 The report fails to acknowledge that some businesses are so bad that they should fail and a properly performing workplace relations system should allow for this. It recognises the role of unions and employer groups in enforcement and regulation, yet it fails to make any recommendations for how these are going to continue without any resource commitments. We're disappointed, I guess, in short, with the report and we overwhelmingly reject it, not in its entirety but overwhelmingly.

45 I just want to make some initial comments about penalty rates. I'm sure you've heard much of that from our affiliates, minimum wages, bargaining, and my colleague, James, will make some remarks about unfair dismissals. I won't labour these points. But in relation to penalty rates, just briefly, we say that the modelling hasn't been presented for such a drastic

proposal, that the industries targeted are some of the lowest paid in our community. A lot of the evidence that supports this position is currently before the Commission. We rely on that and at an appropriate time we hope to make that available to the Commission.

5

We say there's no assessment of what a reduction in wages at weekends will do to oversupply aggregate labour demand at weekends. But we say there's plenty of evidence that maintaining a minimum wage, including penalty rates, doesn't lower employment. Employers are paying higher wages to ensure skill supply at weekends and that's supported by the PC. There's no examination of the wage profit share and all lowering minimum wages is likely to do is lower the profit share rather than affect the employment level in any significant way. There's an obvious point that, the acceptance of the Commission, if the quantum of penalty rates in health, emergency services and manufacturing is a fair match on Sundays, it's hard to argue that any other industries are different.

In relation to enterprise bargaining, there's a lot of detail in your report here and I don't want to get caught up in a lot of that. I'm happy to take some questions, but just run through them in terms of the recommendations. 15.1 in terms of the discretion, we just are curious in terms of the detail in relation to this recommendation and question the need for it. I just note that we say a prescriptive approach that does attract some criticism is there we say for a reason.

25

It's actually useful in many cases for it to be so prescriptive. Just in terms of the data of EAs that haven't been approved, for 2013, for example, there's a percentage as low as 2 per cent not approved, four withdrawn, 94 per cent approved. So we question that recommendation. At 15.2 the recommendation for flexibility terms we oppose. We don't think there's a need for this. We think the bargaining framework should provide for the parties to have freedom in relation to what is or isn't included.

Recommendation 15.3 in relation to a term for EAs of up to five years and Greenfield agreements that matches the life of a project, we have some concern about both of those in terms of the length of time and the capacity of workers to access their rights. At 15.4 the proposition to replace the better off overall test with a no disadvantage test we oppose and don't make any recommendation in relation to the no disadvantage test because we think it operates satisfactorily and the Commission is dealing with its operation progressively and adequately.

We just note in that space that out of the 23,000-odd agreements that have lodged, only 67 have failed to meet the BOOT test. That's 0.3 per cent. Your recommendation at 15.5 regarding notice and the thresholds, we're just curious about some more detail with that and to have a discussion. We're happy to address, but we just raise a concern and a question, would a similar

principle apply to the employer's capacity to change their representatives in a bargaining process once it's been entered into? That warrants further consideration.

5     **MS SCOTT:** You're on 15.5 now?

**MR CONNOLLY:** 15.5, yes.

10     **MR HARRIS:** Can you explain that a bit? I must say I know the recommendation and I don't understand - - -

15     **MR CONNOLLY:** I think the principle is you're saying to us (1) that there should be a notice period, which I think warrants some consideration. But you say to us that there's no change. Once there's a lodgement, you notify your bargaining representative, they're locked in going forward. I've been at bargaining tables numerous times where representatives have changed, employers have changed their representatives at the table, which equally frustrates the bargain and negotiation process.

20             I question that – I'm not saying we agree to this proposition. But I think, equally, there's an equity issue about streamlining this process if that's the intent of your proposal about providing the party certainty of who's at the table to facilitate that process.

25     **MR HARRIS:** But the employer can hardly not be at the table.

**MR CONNOLLY:** But who's representing the employer is the question.

30     **MR HARRIS:** You're talking about the individual, the human being?

**MR CONNOLLY:** Well, this proposal – yes, so that there's a law firm representative, there's lawyers representing them, there's consultant firms representing them.

35     **MR HARRIS:** The recommendation is pretty simple. It says promoting those specified as reasonable period, it doesn't say promoting those specified as a human being. The second thing is a person cannot be a bargaining representative if they represent a registered trade union. So you're in. And the employer, equally, would be in. I can put it in there if you want, but I just  
40     thin, it's superfluous and then the 5 per cent limit. So I don't know where you've imported this concept of a human being from, unless there's something in the chapter text that I can't remember, which is quite a lot.

45     **MR CONNOLLY:** Perhaps we'll explore it I think what we're saying to you - - -

**MR HARRIS:** Yes. I've got a couple of queries like that with a number of

the things that have been said, but keep going.

**MR CONNOLLY:** Happy to come back to it. I'll just quickly run through them then. Yes, the Greenfield agreements, I think your recommendations  
5 there are issues that we're happy to take on some queries about the test and what's the appropriate test, the reality of market issues, the rights of the employees, the dealing with of – you make the note of last offer, whether – and many of our affiliates have views about that being an equal right in terms of the capacity of last-resort arbitration. I think it's been raised earlier today  
10 the issues in relation to surface bargaining and what the solution is there.

Just finally, your recommendations in relation to the flexibility arrangements, obviously we oppose this proposition and we say to the Commission that the current regime is of itself not working; and that's  
15 acknowledged. I think there's a figure of some 25 per cent of even the current agreements aren't lawful, they don't meet the required standard now. You make proposals to further expand this regime. We say the current regime is flawed in terms of its capacity to meet the minimum.

20 Equally, your proposal to water down the test for IFAs from the better off overall test to the no disadvantage test is a serious concern to us in that space. Your proposition for enterprise contracts, again, we oppose. We see it nothing more than Australian Workplace Agreements, just with another name but perhaps it's more clear this time in terms of the intent. There's no  
25 pretence of individual bargaining or the capacity for people to bargain. It's very clear that it's nothing more than employer pattern bargaining. It's a take it or leave it basis employment arrangements.

Its effect on both collective bargaining and IFAs effectively would  
30 render them meaningless. The no requirement to bargain, that is a concern. And the veracity of the testing process you're proposing or non-test proposal you propose – but the employer is satisfied that it meets the test – are serious concerns to us in that space. James will just briefly cover off some unfair dismissal concerns we have.

35  
**MR HARRIS:** Thank you.

**MR FLEMING:** So if I could just begin by outlining what we understand are the proposed changes in chapter 5 for unfair dismissal. There's an  
40 information request about getting more information on possibly increasing the fees. I understand the Commission is concerned that there might be an explosion of unfair dismissal claims and wants to reduce that number of claims and effectively by a number of measures: (1) to make conciliation more on the merits, introduce fees, perhaps something like the UK fees you  
45 mentioned of \$480 to lodge and \$1800 to go to hearing.

Want to reduce the remedies so that compensation is only payable if

there's no reasonable evidence of perceived underperformance or serious conduct. You propose removing reinstatement as the primary remedy, just make it one of the remedies available. To remove reinstatement and compensation as a possible remedy for procedural fairness breaches – so instead, to deal with those with penalties paid to a third party but not to the worker and possible employer counselling. You make a recommendation about removing the small business code.

We reject these proposals because the system is working. We say the system is working, the proposals are unfair and unjustified. The report acknowledges that the level of unfair dismissals claimed is very low. The financial amount of settlements is very small, under \$4000. The risks to employers of an unfair dismissal claim is also very low and very infrequent, 5 per cent. The vast majority are resolved at conciliation without having to go to hearing.

What we don't know is already how many people are discouraged from pursuing unfair dismissal because of the very short timeframe in which to file, 21 days, and the existing fee. As to the issue of removing reinstatement as a primary remedy, we think this is misguided. The objective of the Act is to promote harmonious and cooperative workplaces. It would seem that restitution would demand that where someone has been unfairly dismissed the primary remedy would be to put that person back in the position that they were in but for the dismissal and that would mean reinstatement.

Also, compensation is not always adequate. There's a cap in the existing system of you can only get paid up to six months' wages. You can't get paid compensation for hurt, loss or tortuous wrong. So if somebody is put out of work for more than six months, you can't compensate them without raising that cap. If a worker is older or vulnerable, they may perhaps never get a job again. So compensation would be inadequate.

Even if only 9 per cent of dismissals, as you say, end up in reinstatement, we think it's a worthy aim and more should be done to encourage it more often. What we have observed is that the Commission has been pandering to employers' reluctance to reinstate people and we're concerned about this.

**MS SCOTT:** Can you clarify which Commission you're referring to?

**MR FLEMING:** Sorry, the Fair Work Commission in only ruling it in 9 per cent of cases. If I may briefly, an issue with small business code. We agree with the Commission that it is a concern that there are two classes of employees; those that work for small businesses and those that work for larger businesses and the small businesses have inferior unfair dismissal rights and that instead of a code, employer education would be the way to deal with it.

5           However, the Productivity Commission recommends getting rid of the code conditional on reducing everybody's unfair dismissal rights. So we say why not just stick with the existing system if removing it is conditional on those other changes?

10           If I could just speak to the assertion that there's been an alarming increase in unfair dismissal claims. I notice that there's references made to the number of claims during the prior WorkChoices regime. So the current regime is compared to that. Then that's then compared to the regime before that. You can see a big drop-off during WorkChoices and then you can see an increase post-WorkChoices. Part of that would be to be anticipated because WorkChoices severely limited people's ability to make an unfair dismissal claim, both for a while in terms of time limits but then also those that were eligible.

20           What that analysis excludes though is the fact that prior to WorkChoices there were extensive state jurisdictions for unfair dismissal claims. So those figures aren't included and the results could be misleading. I think those are the main points that I wanted to make about those changes. I'm happy to answer questions.

25           **MS SCOTT:** Would you like to comment on migrant workers and actions that are to be taken there in the case of exploitation of migrant workers under visas?

**MR CONNOLLY:** This is your recommendations in this space or just generally?

30           **MS SCOTT:** I'll take comment on - - -

35           **MR CONNOLLY:** I think your recommendations are worthy and they'd be a proposition we would support. An issue we would raise and be eager to explore is what form they would take, how it would be resourced, how tripartite it would be. I think the experience of the Textile Union in this space has been – my experience of that has been noteworthy and they've been very successful, as other unions have been, in terms of trying to shine a light on these concerns.

40           What the solutions are I think there's a series of obligatory frameworks here and I note the inquiry into the 457 visas that's underway. So, if it assists, we'll provide our submissions to the Commission. But haven't given the solutions particular thought but certainly agree that it's an issue that we agree with the Commission that it needs addressing. We're happy to explore that further.

45           **MS SCOTT:** Thank you very much, we'd welcome that.

**MR HARRIS:** Can I just gather the sort of generality of the position that you've put forward; we keep - go to the specifics. You said the bulk of the recommendations favour employers.

5

**MR CONNOLLY:** Yes.

**MR HARRIS:** And you postulated that was inconsistent with the general approach we took which said the regulatory structure inherently, in principle, is justified by an imbalance of power. The logical link you're making there though is somehow that each side should get something from a reform process, whereas surely what we have said is there are idiosyncrasies, anomalies and inconsistencies and they will fall where they fall. That will be our position.

15

So I don't see any logic which says we've got to be giving six reform recommendations to the labour movement and six reform recommendations to employers just because we found that the overall principle of regulatory structures were justified by – well, there was an overall principle to justify regulatory structure. It doesn't seem to me a great foundation for a logical exchange. I guess that's more of an observation than a question. But I was hoping that we could get something from this exchange which would enable us to go forward. But that in itself doesn't really take us anywhere.

20

**MR CONNOLLY:** I think the challenge for us, the premise we struggle with in terms of the recommendations – I agree with you, it shouldn't be an exchange, it shouldn't be this side gets this and this side gets that. It's not about that. But we say that the entire basis of the system itself is to regulate and redress an inherent imbalance which in the employment relationship which we seek a system to – as a society, we built a system to try and redress that in our social cohesiveness and society interests.

25

30

So if we accept and we think the report in some parts certainly accepts that inherent imbalance in the employment relationship and that there should be a system built to go away to address that, that's where we have a disconnect because your proposals do nothing to address the imbalance. All they do is further facilitate the imbalance in favour of the employer. It's not an ask that we need more; it's a concern that should these recommendations be implemented, the imbalance that is inherent is going to get worse.

35

40

**MR HARRIS:** That's really a difference of practice versus principle, because the principle of imbalance is what we're using – we first look at the regulatory structure and say, "Why the hell have you got it?" and that's the answer. The answer is because there's an imbalance in power. Then you go on from saying, "Where are we at the moment and what will we need to deal with future trends in labour markets?"

45

5        So it's probably an interpretation of practice, I hope, rather than principle, because – I'm sure you noted this, but we tried to actually get away from the arguments that are ones where you can't have a reasonable exchange. Not to say people have to agree with us. I'm looking for where we can improve the report really.

10        **MR FLEMING:** I appreciate that. Could I make one comment in relation to that? Just one concern is that there seems to be a readiness – there does seem to be a deal of good faith in trying to address these concerns raised by employers. But our concern is that often these claims, assertions, concerns are accepted as fact and then taken very seriously and acted upon. They have not been tested. They're not evidence, they're not fact and often they're things that are contentious and have already been dealt with in the Commission and tested and been proved to be bogus.

15        **MR HARRIS:** I think we do understand that. I mean, we can be accused of naivety under a number of headings, but I don't think we're under any misapprehensions about how matters are conducted in the Commission and we have done quite a lot of examination of those things. So we say they have been settled. We would not necessarily say they've been settled on the basis that passes a good analytical test.

20        The Commission itself is on record for saying in practice it will take the papers, the submissions from either party and will make a decision on the basis of those rather than its own independent analysis. As you know, one of our great recommendations in some of this – we think it's great anyway, great as in a not insignificant recommendation – is that they should do a damn sight better in that area themselves for analytical development of a position on whether we actually have a problem in relation to, for example, award reform.

25        I don't disagree with you. We have tried in fact in this report to put some in this - into the position of being busted, perhaps not all this that you might say are there. Anyway, I'm quite happy to discuss these individually because that probably helps better. You started off with unfair dismissal. Patricia has just said to me she wants to ask some questions. But I was otherwise going to go to that as being the first example of this. But I'll defer that if you want to start off.

30        **MS SCOTT:** Yes, if I may. I just want to check, Scott, that I didn't miss something on the way through. Did you actually comment on the recommendations regarding institutions?

35        **MR CONNOLLY:** No.

40        **MS SCOTT:** Would you like to provide the ACTU's position on institutions reform, please?



5       **MR CONNOLLY:** We oppose them. But we're happy to give you some more detail. Just bear with me. Just very briefly, we don't accept the premise that the system's in need of improvement in terms of the functionings of the Commission. The recommendations, we say, are concerning, in particular the disconnect that would be created by some of the recommendations that go to your point about analytical skill and those sort of things. I think those things have merit, but of equal merit, we say, is the institutional practices of the Commission and the realities of the industrial relations framework and the skewing of these proposals go to remove that, which is of concern to us in regards to these recommendations.

15       **MS SCOTT:** So in chapter 3 recommendations in isolation, you oppose – I'm just checking I understand it. While you see some merit in having a greater focus on analytical skills, overall, your comfort with the system as it currently is means that you'd prefer to have the status quo?

20       **MR CONNOLLY:** And the ramifications of what you're recommending and their impact, yes.

**MS SCOTT:** Can we go to form over substance?

25       **MR HARRIS:** Yes, go to form over substance. I'll come back to the specifics. It will help when we get the specifics here because I'm hoping to try and draw out some – whether there is any scope for change at all. My generic take, without going back through the record, on what you've said, is very little.

30       **MS SCOTT:** In relation to enterprise bargaining agreements and also unfair dismissals, we put particular focus on concerns that there were problems with form over substance and we cite individual cases, the famous staples case, and then have a remedy for those sort of problems. This is in unfair dismissals where there seemed to be substantive argument for a person being dismissed when in fact the procedural rules weren't followed. In some instances even the Commission has expressed concerns that it would have liked to have exercised discretion but under the Act it couldn't.

40       But in relation to those – I noticed on the way through, Scott, that you didn't support this sort of focus on looking at the substantive issues and not being tied up with undue amounts of red tape. On those two particular issues – I'm sure you had a look at those examples of - - -

**MR CONNOLLY:** Yes.

45       **MS SCOTT:** - - - I would describe it as very strict following of procedure over the substantive arguments. You didn't find those convincing in those particular instances?

5       **MR CONNOLLY:** I think, just briefly – and James wants to add something – but in terms of a principled position in this space, I think the examples are concerning, yes. But we say that the practices of the Commission in its functioning are dealing with them and it's an iterative process. It has continued to do so and improve its functionings and I think it's doing so – sorry, continues to do so. But why we have the position we have in this space is that your recommendations regarding these changes are radical in their effect, in our view, and their impact.

10       They will be across the board and they are in response to insignificant cases in overall terms. So we will effect – because of a minority of examples that we don't express support – that's okay that the system functions that way. But to affect the overwhelming majority because of those examples in the way you're proposing to do is of a significant concern to us, hence our position.

15       **MR HARRIS:** Can I just query you on the radical nature of the following: allow the Fair Work Commission wider discretion to approve an agreement without amendment or undertakings as long as it is satisfied that the employees were not likely to have been placed at a disadvantage because of the unmet requirements. You'd characterise that as radical?

20       **MR CONNOLLY:** I guess the questions will become which requirements, what are the specifics, is it the notice provisions, is it going to be the representational rights provision? So there's a whole series of details that require certification of the agreement process.

25       **MR HARRIS:** You've got a Fair Work Commissioner who's going to have discretion to look at the staple case or the equivalent and saying, "It's not actually made any difference." But then if he thinks it has, or she thinks it has, fine.

30       **MR FLEMING:** But that discretion exists, it's just a lowering of the test from better off overall to no disadvantage. Could I just say – sorry, just before we forget and move on, but just to answer that point. We do not think the staple case is an example of form over substance. If I could just explain why. So basically, for those in the room the case was about an agreement not being accepted because of a copy of a bargaining representative on a nomination form was stapled to the agreement and was found to be noncompliant with the strict rules that pertain to that agreement.

35       But the reason it was rejected is because you're glossing over the reason for the strict rules. An employer can severely limit the power of a union, the default voting representative, by encouraging employees to nominate a bargaining representative other than a union. The most blatant way an employer achieves this is to fail to inform the employees that the

union is a default bargaining representative.

5       The more subtle way is to encourage employees to nominate an  
alternative bargaining representative which might be the worker themselves.  
So this is the evil that the Commission is trying to protect against. So they  
would then be creating a wedge between the union. And this is not a  
hypothetical example. These are real tactics that have been used, hence the  
rule. We appreciate that it's difficult coming from the outside to appreciate  
that full arbitral history that has led to that rule. It's because of these  
10       complex and tactical - - -

**MR HARRIS:** I think we did look at the full arbitral history that had led to  
the rule and what we find in this particular case is it didn't actually have the  
consequence that you've suggested. Moreover, there are a sequence – and  
15       we got them from Launceston again the other day – that because they used  
the wrong form downloaded from the FWC's own website because they  
didn't update it in time – even though it hadn't updated in time – the  
employer had to go back and redo the presentation.

20       The offering of discretion to the people in whom you've expressed such  
substantial levels of faith – and it seems to me – I find it hard to characterise  
it as radical. I can understand that you might be concerned that it might go  
too far but there doesn't seem to be much scope for improving this process at  
all if everything is not worthy of change even though incidents occur on a  
25       basis that does affect the credibility of the system or appears to affect the  
credibility of the system.

**MS SCOTT:** If you couldn't have confidence in the FWC in a matter related  
to something as simple as a staple where they acknowledged that they didn't  
30       see any substantive change, then why do you have such confidence in the  
Commission in more significant matters?

**MR FLEMING:** The question here is that you're unclear in your  
recommendation about how far this will go. So, yes, we are concerned about  
35       how far this would go. The other consideration is, are these requirements  
only onerous? We say in this regard we believe in industrial democracy,  
people have the right to be represented, they should be aware of and involved  
in the bargaining process. Isn't it a right that they should be made aware of  
what's going on and they should be issued with the notices and the forms?

40       **MR HARRIS:** Indeed, and would go up there for the Commissioner to  
discover that they were or weren't disadvantaged. But, as we understand it,  
the Commission itself believes it has no discretion. We're saying with  
something simple as this you should have discretion and people should have  
45       confidence in the system, probably greater confidence in the fact that if  
something is just a process stuff-up that has no implications – I agree if it's  
an apparent process stuff-up and has real implication, different matter

entirely. Presumably the parties will put that in front of the Commissioner and help the Commissioner come to a conclusion.

5       **MR FLEMING:** At the moment it can already be dealt with through undertakings. So at the moment the Commissioner can pull the parties aside, give them free legal advice about how to remedy the situation, they go off and do it and it's resolved. What is the problem with that?

10       **MR HARRIS:** Exactly, and we went through the series of undertakings. It's both time consuming and it's quite legalistic and what it says to the person who believes they have been disadvantaged by the time consumption is, "Gee, this process is incredibly tortuous." As you know from separate recommendations we've put up, there is a chunk of employers who have not  
15       availed themselves of anything to do with enterprise bargaining. We just thought, "Well, looking at it on its face, you can't really blame them if they believe they're going to get into such a system," and they're not well-prepared with people who can write undertakings and they are not well-prepared to deal with the system.

20               I know I'm sounding like – I'm more frustrated by this because these ones we thought were almost self-evident. I really don't understand why they're not. I understand your fear of the black letter law making a mistake when it's actually drafted. We all have that fear. But the principle behind  
25       this of greater discretion seems to be one where, surely, we all want to allow the entity that we've set up to make the judgments – we'd like it to be able to make judgments of a kind that support the credibility of the system.

30       **MR FLEMING:** But there's two aspects of discretion. One, I hear what you're saying about the technical requirements, which we say those strict rules are there for good reason because of the arbitral history and the interests of broad principles of justice and fairness for the parties in the bargaining process. Then the second aspect of discretion is in applying the test, the BOOT test.

35               Partly we take issue with your proposal because it wants to dilute that test. But that aside, the issue of the discretion – we say that the Fair Work Commission has broad discretion to see that overall no employee is worse off and it's been clarified that it's not going through line by line. It's taking  
40       everything into account; and we have faith in them to do that.

              Where the procedural aspects haven't been met, pull them aside, explain to the parties how they can do it and it can be done. We say that's as best you can ask for; it's a good system.

45       **MR HARRIS:** I won't labour the point. You want to go to something.

**MS SCOTT:** Yes. I might go to your comment, Scott, about increasing job

5 security. In chapter 2 of our report we looked at extensive data on job security because we're aware this was an issue. We come to the general conclusion that security of work appears to have changed relatively little in recent years, noting the increases in the rates of casual employment has tapered off.

10 Now, you may have some data sources that for some reason we haven't used. Maybe in your submission you could particularly draw attention to what you saw as the deficiencies in our analysis in chapter 2 on this issue. We'd welcome that.

**MR CONNOLLY:** We're happy to take that on board.

15 **MR HARRIS:** You had a reference, quite an interesting reference, a number of times to opportunities missed. I didn't, in taking notes down, probably get all of the opportunities missed down. A couple of them I think I can sort of see in principle. But a couple of them I sort of didn't understand. You said we missed an opportunity to do with sham contracts. We did actually have a go at sham contracts, we thought. So I'd like to know what more you want  
20 done in relation to sham contracts.

**MR CONNOLLY:** Your recommendations for sham contracting were?

25 **MR HARRIS:** Well, the reasonable test rather than the reckless test.

**MR CONNOLLY:** I think that's a - I didn't comment on it, sorry.

30 **MR HARRIS:** I'm happy for you to have this opportunity, though. If it's - how can I put it?

**MR CONNOLLY:** I'm happy to make some remarks.

35 **MR HARRIS:** That's fine. But if there's something specific, we're quite interested in this because the way we looked at it is we balanced both changes, a better test for that on - quid pro quo being - and greater capacity - - -

40 **MR CONNOLLY:** Look, we'll provide some more detail here, but I think the recommendation is a better proposition than the current requirements in that space. It's more modern - I think curious about the realities of those relationships and I'm sure you're hearing and we're happy to do what we can, but we're also concerned to provide some more detail about the realities in this area, but also concerned about your proposals - and this sort of goes to the point around job security - to also restrict bargaining elements, limit  
45 issues and the realities of the - we say and we note, yes, there's been perhaps a tapering in casualisation, but still a significant proportion of our workforce remain casual.

**MR HARRIS:** At a higher level.

5 **MR CONNOLLY:** At a higher level. So that's a significant proportion of the workforce. This proposal to – and you're balancing, so perhaps it is a trade-off, although you've indicated it's not.

10 **MR HARRIS:** We're trying to look for flexibilities in the system and then the safeguard in the system, as I think I've tried to make transparent multiple times.

15 **MR CONNOLLY:** But our concern is the premise we – and I guess it's back to the beginning. The premise is the requirement to regulate and the whole provide a form to forms of work. We're concerned that hasn't been done. Yes, we can change the test but we're still talking about a test that is applied at law. The mechanisms for it to be affected are unclear. That outweighs and our concern – is outweighed by the removal, we would say, of the capacity of the parties to bargain for matters that – I'm not saying "limit" because I don't think it's a limitation – that secure job security and regulate work within their own workplaces or industries.

20 The (indistinct) about multi-employer bargaining, the capacity to bargain across industries, determine rates or determine standards again is not dealt with. If we have a freeing up of contractors, labour hire firms, that just exacerbates these concerns in our minds.

25 I'd like to add in that space that there is potentially a reality that despite our current concerns – the reality potentially here is that there's another world coming and that's where these things are transactional online. So the third party entity, the labour hire company, is being quickly outdated by online auctioning. It's happening in transport today. You can bid for work right now. How are we regulating that work?

30 **MR HARRIS:** Sorry, I don't want to divert too much but it's been suggested actually that we should and yet when we looked at it we couldn't find the public policy problem behind it. So if, indeed, you can identify the public policy that's behind people taking up short, temporary contracts online of your mechanical kind or whatever they might be, please identify it, because we've said the same thing to some business representatives who've raised the whole digital economy. I can't see the public policy problem, but I'm really happy to have it told to me.

35 **MR CONNOLLY:** I'm happy to get some Uber drivers and get their rates of pay and compare it with taxi drivers' rates of pay, not that they're good either, but perhaps that's a start.

40 **MR HARRIS:** Yes, that would be fine.

**MS SCOTT:** In terms of looking forward, we have got information requests regarding zero-hour contracts, which we thought you might be interested in commenting.

5

**MR HARRIS:** We're just querying how we're going to handle – just for everybody's benefit, so what I've done is I've just taken the notes from your opening statement and wanted to comment on those and then we have a couple of general ones to come out of things that you might have missed. Is that all right for everybody?

10

**MR CONNOLLY:** Yes.

**MR HARRIS:** One other option in this you said was gender pay gap and I'll link it to another comment you made subsequently, promote participation of women. We're in a review of the workplace relations system, but we're not trying to use the terms of reference to limit logically where we can go. There is quite an interest in I think many parties without political limitation on increasing the participation of women in the workforce. But people struggle to find useful pieces of public policy to support this, in part because of interaction with the tax and transfer system. You saw that in our childcare employees and conscious of that.

15

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But I'm interested in knowing what specifically, therefore, in this context you saw as the missed opportunity in workplace relations on gender pay gap and/or participation of women?

25

**MR CONNOLLY:** Just broadly, and we're happy to provide some details and James make comments – I'll just make some broad remarks about the whole – I think the challenges are now I suppose about the regulatory frame, the part-time work, the interaction with the transfer system we've alluded to and leave provisions, flexibility issues for women. I think they're significant concerns that warrant a solution.

30

If we talk about unemployment being of concern, there's an issue about labour force utilisation. As a nation, this is an issue we need to address about how we're actually going to mobilise and effectively utilise this proportion of our population in our workforce. We'll provide some supplementary comments.

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**MR HARRIS:** That will be useful. Penalty rates. So yes, we have heard, obviously, from a number of people about concerns in relation to penalty rates. You link them though to the minimum wage and in a way that I found, again, a little conceptually difficult to follow. We tend to treat them as separate parts of the regulatory system. You've treated them collectively. Can you explain a little bit more how you see the minimum wage and the individual level of penalty rates in awards as being sort of on the same

45

regulatory structure? I mean, I know in general terms they are on a regulatory structure, but what's the linkage?

**MR CONNOLLY:** I don't – sorry - - -

**MR HARRIS:** I may have written my notes and conflated something there.

**MR CONNOLLY:** Yes, I'm not quite sure what the - - -

**MR HARRIS:** Generally, on penalty rates you also made the point in relation to the differentiation. The differentiation we put in place is the shift in community attitude. We no longer want to deter working some parts of the workforce and yet we'd never put a penalty rate in place for emergency service workers as part of a practice of attempting to deter work on Sundays. In fact, we've always wanted them to work on Sundays.

I think you said something to the effect that you thought the analysis hadn't been done to support that. We went out to look for every analytical piece of work that there was available on the topic. If there's something you can contribute to that on the one side or the other side, we'd be very interested in seeing it.

**MR CONNOLLY:** Okay, we're happy to look into that. I think we're also - you're making the point that as a community your proposition that there could be two types of worker, we find reprehensible in this space. So perhaps we'll endeavour - - -

**MR HARRIS:** But there are lots of different penalty rates and therefore there are lots of different types of workers on Sunday. There are workers right now who've got rolled-in rates and therefore there's no differentiation between Saturday and Sunday. There are workers without those in quite high rates. We're talking about getting Sunday rates back roughly towards the Saturday rates so that - - -

**MS SCOTT:** For that particular circumstance.

**MR HARRIS:** There are many, many differentiations. If we're reprehensible, we're reprehensible by adding a 37th to the 36 that otherwise exist.

**MR CONNOLLY:** But we're talking – yes, I accept your objection to me, my expression. I understand. But those things are all creatures of the system. They've been negotiated, bargained, developed or awarded. Their construction – this is markedly different. We're having an authority determining across sectors that whatever you have determined amongst yourselves no longer applies for you as a class of worker. That's the objectionable part of this proposition.



**MR HARRIS:** I understand that.

5       **MR FLEMING:** We would hope that the Commission would look more at  
the impact of that on workers before suggesting such radical changes,  
removing extra rates on Sundays for hospitality, retail workers and so on. If  
you could look at particularly the number of workers that rely on those rates,  
what proportion of their wage that is, what the consequence of removing that  
10       amount from them is going to be. I think you might be surprised. Some of  
this work has been done as part of the penalty rates cases going on at the  
moment. So I'm not in a position to discuss that evidence, but it's publicly  
available.

15       **MR HARRIS:** I think we have had a look; we'll look further. I have asked  
the individual unions who say that they know quite well how many of their  
members work on Sunday, "Can I get that data?" because that data is not  
readily available via public means. Clearly to do an analysis it would be  
desirable to be able to work out how many people would actually be  
20       disadvantaged. We take the individuals who presented here previously and  
noted the disadvantage that they will personally suffer and we don't dispute  
that. The question is the cost versus the benefit and the nature of the change  
within the economic system that we're examining – within the regulatory  
system, sorry, that we're examining.

25       So we're very in the dark – if we can get it – and even if it's only  
partial data, it's going to be better than no data at all. So the number of  
employees that are actually affected by this change within the areas, we have  
heard that information is available from specific unions and we would be  
very keen to get it, if you've got it.

30       **MR FLEMING:** Yes, we'll follow up with the affiliates – I certainly will  
ask them to see what we have.

35       **MR HARRIS:** Because quite a few of the numbers that have been published  
are around the generic model of elimination of penalty rates from that earlier  
debate that you talked about, and that's not the proposition here. But we're  
not saying that means there is no cost to this proposal; we're not saying that.

40       I think I've probably done all of my specifics, other than harmonious  
workplaces. So reinstatement and harmonious workplaces, which is what I  
was going to start out. Our proposition is that giving primacy to  
reinstatement doesn't seem to be met anyway because it's not a common  
outcome of unfair dismissals. It's available but it's not common. But also,  
45       since you said that the purpose of the Act – I think you quoted the purpose of  
the Act was to develop harmonious workplaces – if somebody has been  
dismissed unfairly in perhaps a large organisation, you can imagine it will  
have probably no impact to see them restored in the workplace.

But in small and medium enterprises one would assume it would have quite a significant impact to have a person where there is – where the employer has gone to the extent of sacking somebody and reinstatement has been imposed. It may be just a philosophical difference, but I wasn't sure whether you thought the retention of that objective as being a primacy, restoration of employment, I wasn't sure whether you thought that was desirable in also supporting a harmonious workplace or whether you just thought it was one of those inconsistencies that we have to live with in regulation. And there is an inconsistency, so it would appear.

**MR FLEMING:** You're saying it's a de facto inconsistency in that it's not awarded much. But it's not inconsistency de jour, it's only de facto. We say the problem is the inconsistency de facto, that we should be doing more to see that reinstatement is awarded more often. That's in keeping with the objectives of the Act.

**MR HARRIS:** But how can we create a harmonious workplace and to do reinstatement where someone has gone to the extreme of sacking an employee - - -

**MR FLEMING:** The actual wording in the objective of the Act is "cooperative". So it's an encouragement for the parties to cooperate to resolve their differences. The focus is all on resolving differences, on conciliation before hearing, on getting people to talk. It's just giving up to get rid of that objective.

**MR HARRIS:** It's still available, it just wouldn't be pretending that it's the primacy because the performance doesn't seem to indicate that it could be the primacy.

**MR FLEMING:** But it's in keeping with the design of the tribunal system to get the parties to work together to resolve their differences. It's consistent also with some of the concerns you've raised about the payment of go-away money and compensation. I mean, this is moving away from compensation. From the employee's perspective, it's about restitution, it's about a right to be put back to the position they were in beforehand. When I said that it's not being awarded in many cases and that, nevertheless, it would be at least – wouldn't seem to be a problem in the larger workplaces – I was arguing against the proposition that you put in your report that the trust is irrevocably destroyed after an unfair dismissal. I say that's clearly not true necessarily at a larger workplace for a start. Then it's a matter of fact.

**MR CONNOLLY:** Just briefly, we don't accept the assumption that the fact that there's a return to work of a dismissed worker means an un-harmonious workplace. There's plenty of experience I have where it's proven to be the case. There's no impact on the workplace or its harmony. So we say it's a

false assumption.

5 **MR FLEMING:** Also, we put some faith in the unfair dismissal resolution process, if I could just speak to that. I mean, from personal experience in appearing in the Commission, I've seen people take transient positions and then in the space of a conciliation where there's no risk of – that people can talk freely, there's no risk of things being held against them at hearing, that people do resolve their differences and there is the capacity to overcome disagreements and for the employment relationship to be restored.

10 **MS SCOTT:** Scott, I think you mentioned that you thought there were instances where – I mean reinstatement happens very little – but that there might be evidence that in fact reinstatement was successful. If there was any evidence to support that, it would be very - - -

15 **MR CONNOLLY:** Yes, I can dig up some examples that I'm aware of.

20 **MR HARRIS:** I think I'm out of my ones from the basic statement. Is there anything on a general thing? I think you did mention enterprise contracts in passing. It was consistent with the proposition that had been put by, as you say, a number of affiliates, that kind of thing. I didn't actually write myself down a question in relation to it, but the only other heading that I had left here – look, I'll probably just leave it on record with what you've got.

25 **MR CONNOLLY:** We're happy for you to leave it as an idea too.

**MR HARRIS:** It is an idea, it's not a recommendation. As you know, it's a proposition put up for discussion. If we don't have anything more, do you guys have anything more that you'd like to add?

30 **MR FLEMING:** Just one more point on unfair dismissal. I just wanted to say something about the proposition that procedural fairness breaches should not result in reinstatement or compensation. That's a significant part of the protection against unfair dismissal. So it's an issue that comes up in the case in the media at the moment – if I could just table these media articles for your reference. They're on the public record.

40 The sacked Hutchison Port workers who were sacked by text and email midnight overnight with no warning that they were going to lose their jobs, woke up in the morning and they had no jobs. This is the kind of protection that unfair dismissal is there to prevent. So those workers were unable to re-access their workplaces, were unable to discuss possibility of redeployment, despite the claim for redundancy. We say this is fundamentally unjust and the change should be rejected.

45 **MR HARRIS:** Is it unfair dismissal in this case? I don't know, so I'm asking you the question since you raised the example.

5       **MR FLEMING:** Unfair dismissal is a dismissal that's harsh, unjust or unreasonable. Some of the key tenets of protection are that somebody should be allowed the opportunity to answer the allegations against them. So even if the employer may or may not have a valid reason, for example, say there was an accusation of theft, it should be put to the worker and the worker – basic principles of justice demand that the worker be allowed to put their view.

10       But you're saying in that circumstance because of that, employers would never have to put the reason to the worker and would only face a financial penalty payable to a third party or education.

**MS SCOTT:** I don't think we've actually said that.

15       **MR FLEMING:** You're saying in that situation an employee would not have reinstatement or compensation as a remedy, as an option, if it's a procedural fairness error.

20       **MR HARRIS:** No, I think we're not. I think what we're saying is, again, the Fair Work Commission would have the ability to look through the procedural defect and see whether the sacking was justifiable or unjustifiable in the circumstances. If it was justifiable in the circumstances but the procedural defect had occurred, then the Fair Work Commission is not obliged to award compensation to the employee. But this example that you have raised I had understood – but it's only from my newspaper reading version of this – this is actually not a dispute about unfair dismissals, it's actually a dispute about no rule redundancy arrangements. But I could be wrong here, I don't know.

30       **MR FLEMING:** It does involve redundancy but it can be an unfair dismissal where the obligation to redeploy wasn't adhered to. So that's an open question at the moment. They don't give an example of how a dismissal was communicated.

35       **MR HARRIS:** But, anyway, our proposition is look through the procedural defect and examine the substance of the arrangement. If it was unreasonable, then compensation is clearly payable, or whatever the right legal term is.

40       **MR CONNOLLY:** Could I ask, so we're clear what you're proposing, if the scenario was around this case – so let's say that their workers get a text message notifying them of their termination, there's an application brought. There's a consideration. The argument is they're saying they're redundant. There may be an argument to say they're not redundant. So the question becomes the fairness or otherwise – the analysis is they're redundant or not redundant. That's the analysis in terms of non-procedural.

Is the recommendation you're making – it fails procedurally, I think there's a

consensus that text message is probably a procedural failure. Tick that box. But then the next consideration becomes, is it legitimate termination or otherwise? If it's fair, if it's legitimate, then that would override the fact that they were terminated by text. Is that what you're saying to us, that's the proposal? I think that's what we think it is, but if it's not, then clarify it.

**MR HARRIS:** Well, there's the difference, you see. I'm not a lawyer and I'm not going to try and give legal advice on what propositions are. I think what we're doing is objecting to your original characterisation of this in the terms that you did. Me trying to give you an explanation of what we have characterised – at that point I don't think we're able, each of us having taken a position, to say, "Let's drill down to this particular case and do an analysis of it." I don't know what occurred in these circumstances other than from a media version. You have tabled it. I understand why you would want to table a particular example. But I'm in no position to give you advice on it.

**MR CONNOLLY:** I appreciate that, but I think the point we make is it's a procedural concern that this shines a light on and I think our community expectations of our institutions in this country would be notification by text is fundamentally unfair.

**MR HARRIS:** Because you've tabled it, but, frankly, also it's topical, it's not going to be something that we would ignore in our report in terms of – and a consequence – but I don't know in this specific case enough to be able to make a comment.

**MR FLEMING:** Can I just make a few more comments about that, because I'm a little bit confused about the proposal just to clarify your proposal. Because the actual wording of the recommendation is "procedural errors by an employer should not result in reinstatement or compensation for a former employer", "should not". Then it goes on to say your point about the discretion, "But can, at the discretion of the Fair Work Commission, lead to counselling, education with the employer," blah, blah, blah. So this, to me, says that the Commission – the change is to prevent the Commission being able to award compensation or reinstatement in those circumstances. It seems pretty clear in the wording - - -

**MR HARRIS:** For the procedural defect. But if there was an unjustifiable dismissal, it's a different matter.

**MR FLEMING:** Then we both interpret your proposal perfectly well and we think it's utterly unfair. It's a huge reduction of the unfair dismissal protection right. It's not just a matter, as you seemed to suggest before, of giving the Fair Work Commission more discretion. It's about circumscribing their discretion in those matters where they're procedural.

**MR HARRIS:** Not awarding compensation solely for the purposes of

procedural defect.

**MR FLEMING:** Yes, that's circumscribing their current discretion, not expanding it.

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**MR HARRIS:** I'll accept your terminology for that purpose. I wasn't the originator of the objection so I wasn't closely listening to what you said. I was trying to explain what we had put in place as we saw it. Procedural defect is, therefore, not going to result in an award of money, but the unfair dismissal may still be unfair and can actually result in other – reinstatement or compensation, depending what's relevant to the circumstances according to the Commission.

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**MR FLEMING:** I could talk more about that but - - -

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**MR CONNOLLY:** We understand each other and we're at odds.

**MR HARRIS:** I hope we do. If we don't, I'm sure someone will write up in the newspaper who was wrong. Thank you very much for your time today. I appreciate you coming to Canberra for the trip. Thanks for your time.

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**ADJOURNED**

**[2.49 PM]**

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**RESUMED**

**[2.58 PM]**

**MR HARRIS:** We're starting again, please. Rob, would you like to identify yourself for the record, please?

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**MR BRAY:** Yes. Rob Bray from the Australian National University and I'm appearing in a personal capacity. As a matter of background, I spent a long time in the Australian Public Service, around 30 years, working in areas of employment, health, housing, social security, very much on the interaction between welfare system and the economy and various dimensions of that. I've been at the ANU since 2010 working mainly in the areas of valuation and research into a fairly wide range of social issues and also currently enrolled in a PhD looking at the history of the Australian minimum wage and some of its interactions.

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With regard to the draft report, I've put in a detailed response to the draft report already. As I indicated in the introduction to that, I think there's a lot in terms of the broad principles that the PC has got correct. I think it errs a bit in recognising the imbalance of power and the need for that to be redressed. And it's just too sanguine about what's actually occurring.

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5 If we look at the cases of SA Baiada, the poultry processes, we look at what's happened in 7-Eleven, the evidence is that there are major problems with the existing systems. Abuses do occur. Abuses occur over an incredibly long time and they're not redressed. So, therefore, I think there is – and I do not get that sense at all from reading the report that there are phenomenal abuses that need to be addressed and the system is not addressing those. So I think that's one area it's erred.

10 I've raised two issues in my submission in response. The first one is the minimum wage, and I'll talk more on that and a few issues. But primarily my concern there is that the PC has avoided the most important issues and challenges. The second is I think there's overreach in the report. Often the recommendations are really getting into micromanagement and often not always well thought out. I've given a number of examples of that.

15 Now, I get a sense that it's almost coming from a degree of frustration. You want to achieve a lot of things and you're racing in to achieve them. At times, and in particular, given the massive gaps of data, which you yourself admit, you may in fact be better off taking a little bit of a step back and saying, "There is an issue and the issue needs to be looked at properly," because I think in a number of cases you have not gone through the work in depth. At times you've almost resorted to making cases for a direction you think is right rather than providing a solid analytical basis.

20 **MR HARRIS:** It's always an exposure in all reports with even – I agree this one is 10 months and pretty swift. But it's always an exposure. It can get to that position of seeming to see the policy and finding all you've got available to you are instances that might support it.

25 **MR BRAY:** Yes, and my argument would be is you're looking at the framework and there may be cases where you say these are the comments on the framework which we are going to look at in great detail and these are issues of the detail or particular aspects of things operating within the framework and we recommend that those be looked at in more detail in the  
30 separate phase rather than try and take everything on board at once.

35 In saying that, I'd also say look, with a thousand-page reports, as a private individual working on this, there is no way I've got across all of the recommendations of the report and I've been very selective.

40 Turning to the minimum wage, and the real crux there is the productivity position and the statements which is effectively there three times in the report. Over the long run it could be expected that minimum wages would grow approximately in line with economy-wide productivity levels and maintain roughly fixed ratios of median wages. I argue that that's not  
45 correct. I contest that assumption and I provide in my submission detailed empirical data to suggest that is not the case and has not been the case in

Australia, at least over the last 30, 40 years, and also that there are very strong economic theory grounds for that not to be the case.

5 Now, I can accept – and I haven’t gone into detail there – that you can conceive of a broad macro picture and think of industries rising and falling and new growth industries having this massive demand for scarce labour bidding wages up. But to a degree that’s almost a macro fantasy and I think about timing. That is a long-time model and, as Keynes said, in the long run we’re all dead.

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It’s certainly not the medium-term experience in Australia. So there’s no basis for that, for assuming that, in particular when we’ve had now 30, 40 years of high unemployment. There’s no evidence of the bottom of the wages distribution being bid up through the successive demand from industry. It makes an enormous assumption about the capacity of individual employees to operate at a level of productivity to justify a much higher wage.

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**MR HARRIS:** We should come back to that.

20 **MR BRAY:** Yes, and that’s one of the issues I raise when I spell out the four options. And it’s got big industry restructuring implications. I noted in another inquiry, the one into migrant intake, we have National Farmers Association stating for many farm businesses, low margins limit the capacity to offer higher wages as a mean of incentivising agricultural work. Basically, we’ve got a major industry sector saying, “Look, we recognise the wages are too low, but we can’t pay anything higher.”

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If you’re to assume this model, then you’re making a really big assumption about what’s going to actually happen to some of those industries in that mix. I’m really interested to hear what the rationale of the PC was in coming to this - - -

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**MR HARRIS:** That I think I can help you but I’m interested in more about productivity and training.

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**MR BRAY:** If I’m right – and what I’m saying is I’ve basically drawn the picture that says the minimum wage has been dropping relative to other earnings. That has really been one of the microeconomic reform success stories of Australia in that we achieved that without really great harm because what we’ve done is massively stepped up transfers to payments to families and maintained their living standards.

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The single people relying upon very low wages where the minimum wage was just a little bit above have basically been slowing eating away the fat that was in the system by the fact that those wages had originally been set as a family level. That’s really meant that we’ve had a long period of stability, no great wages pressure. I’d argue we’re now coming towards the

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end of that period and we have to think of what are the next steps, what are the next options?

5 In my submission I basically lay out four pathways. The first one is that we set the minimum wage in line with other earnings. Largely the hypothesis put up by the PC we increase it with median earnings, average earnings, productivity and everyone just shuffles up along. I think the bottom line from that is that will put wages pressures on and will pick up the minimum wage and will create unemployment, because I do not believe that  
10 all of the industries can sustain that as an outcome.

The second option is you say that and say, “Well, that’s okay and what we’ll do is we’ll give all of these people training and boost their productivity so they can now receive these higher wages without industry having any problems.” That I think is an enormous step of faith to believe that that will  
15 be done. If we look at the farmers’ case they are certainly not saying, “Look, our problem is that our workers don’t have enough training,” its, “We can’t afford the wages.” What we know from the massive literature on training programs is they have a very mixed success and often a very marginal success. So while that one is most probably the pathway we’d all love to achieve, I honestly don’t believe it’s one which can be successful.  
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The third one is that we maintain the minimum wage around its current value and just allow the gap between minimum and other low wages and  
25 other wages to increase, to expand over time and just have an increasing gap between the higher and the lower paid within our society. Eventually I think that becomes unsustainable.

The final option then is to say, “Well, look, we will keep wages down to try to maximise employment opportunities.” We have to then think about  
30 how else we can compensate people in receipt of low wages. Hence, my sort of favouring going towards the EITCs. But the point I make is that we’re not having to do something tomorrow on this, but we have to think about what we’re going to be doing in say five, 10 years’ time.  
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If you’re doing a report on the framework, then that’s one of the ideal opportunities to expand upon that. It’s not going to be easy. I mean, the institutional lock-in of the minimum wage is phenomenal. We basically had Higgins in mid-20s saying in fact, “Now I’ve seen these ideas such as child  
40 endowment, we may not have gone down the path we originally did.”

**MR HARRIS:** Precisely. When we’ve got a transfer system, perhaps I didn’t need to go through the wages system in the way that I did.

45 **MR BRAY:** Yes.

**MR HARRIS:** Although, as you know, that’s still deeply contentious even

today.

5       **MR BRAY:** But that locked us in until the last few years. It locked out equal pay over a phenomenal period. So whilst I'm saying to address those the issue of process, how you bring people together and build faith that you're actually going to come up with an option that's important or that will work and where people are not going to be losers is phenomenally important. It's something we're not particularly good as a country. As I said, we've got a period to do it in.

10       **MR HARRIS:** Yes.

15       **MR BRAY:** That's basically introductory comments. As I said, I haven't made comments on the detail.

20       **MR HARRIS:** First off, it's a really good submission, even though it does say you think we've made errors, and that's fine because we can talk about those. I think in part – I hope you'll find it's a misconstruction of language. Whether it's ours or yours, it doesn't really matter. I think we can explain half of this position. But the second half and the thing I'm particularly interested in is your outlook for where we might go as a consequence of this.

25               Our version of explaining minimum wage in the future was not trying to hypothesise that we could find this in the past record. We weren't. And you've got some very good representations obviously in the data. We weren't trying to say we could find this in the past record because, of course, minimum wages is a regulated system and so not necessarily amenable to any – even our perception of how the system could work in the future and be consistent with reasonable economics.

30               What we were trying to say in practice is if the minimum wage that exists in the future gives greater attention to the position of the unemployed in downturns and represents itself as otherwise trying to preserve some reasonable relationship with the median wage – and we do notice the differentiation that you're putting on that – if that happened, it would imply that there was a sort of standard relationship between the minimum and the median in some form that otherwise only just kept dipping down every time there was a downturn.

40               We logically looked at saying, "What would our advice be in these circumstances to the regulators setting the minimum wage?" The answer would be pay more attention to productivity in the upturns and create the potential to restore relationships over time. That's what we were trying to say. We weren't therefore trying to propose this as being a clear-cut hypothesis that you could rely upon this occurring without constant oversight and intervention by the regulator, which links mentally, in our view, to the position which says, "You're going to have to get a lot better at this kind of

stuff in the Fair Work Commission.”

5 Even then, I don’t doubt that it would be anything more than a very rough relationship. So we weren’t trying to create an hypothesis that this would occur without otherwise active intervention. That said, your own data does show that it isn’t necessarily probable that this will occur even with the most active intervention. I found that the most interesting representation of all in your data and we want to pay quite a bit of attention to that. So we will continue to do so.

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**MR BRAY:** I think in what you’ve said then though that there’s still that contradiction. If you think that regulating the minimum wage can in general move up the productivity of the workforce as a whole and you’re saying you have to pay more attention to the unemployed, my suspicion is that you have a contradiction.

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**MR HARRIS:** Precisely. That’s why we are very interested in your fourth representation, your fourth thing, and, as you know, we did look at the EITC and in a threshold way to start with. I think we got to the point can’t see the EITC making a complete replacement for the minimum wage. But we do try and say in the chapter we’re still very interested in this prospect. Although we didn’t make the logical link that you have, that you’re going to have to find some supporting mechanism to deal with the potential gap that might be established over time, the fact is you’ve made it explicit and transparent in your document and that, as you know, is a very worthwhile thing to do.

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We ask people if they can’t give us evidence, give us a fine logic arrangement to try and follow and we’ll try and solicit some evidence for the purpose through other sources. That’s what you’ve done under your page 8(b), (c) and (d), noting your criticisms of (a). So although our language may not have conveyed to you what we intended to convey, that is the model we had in mind. This is therefore not an economic relationship that we can expect to see happen regardless and a benign regulator can just sit there and keep observing it.

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(a) They’ll have to become much better as a regulator in setting this. They’ll have to adopt these principles. They’ll have to look through the analysis. But it is plausible, as you’ve pointed out, to say that even that may not be enough, in which case we’re happy to look at this idea. I note also your other comment which says – and this is not necessarily a problem for today and we would probably concur at this stage with that. But it’s potentially a problem if you, for example, did adopt our system, you need to know that our system may have this exposure created over time, which you’ve done quite a bit to clarify.

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It therefore does say – and I’m on record elsewhere saying we’re still very interested in people’s submissions on the EITC. In your original

submission you actually said to us you haven't got the time to work out an EITC in a 10-month inquiry. Although we were deeply offended by that, I think – speaking humorously there – the bottom line is it is a task of a highly complicated nature to try and introduce this, given all of the other aspects of our tax and transfer system. I mean, low income tax offsets and interactions with – how do you position people in receiving an EITC versus their family tax benefits and things like that.

I know I'm telling you something that you're probably more expert in than I am, but sort of more putting on the record saying we're not therefore just glibly wandering into the an EITC kind of discussion. We know that there are problems here in doing it, but what you've brought out in your submission is something quite transparent, quite crystal clear.

**MR BRAY:** I bring just a couple more points there. I mean, (a) I've criticised my option (a). I would love option (a) to be true, but I don't believe it is. But when we're talking about the system it's also an issue of government. This is the question of how does one get parties to conceive of some of these issues as part of a workplace relations system run social security system?

I've given some of the data on what's happened to family tax benefits. Because of some – I mean, they were developed very much initially for – sorry, I won't go through the whole history, but one of the phases was recognising needs of the low paid and they enabled that change that we've seen in the minimum wage. However, all of a sudden, government starts seeing (indistinct) being welfare, don't see any connection with the wages system and say, "We niche from our welfare budgets, we'll freeze this payment, we'll change the indexation of this payment," without any understanding that they actually also form part of the workplace relations framework.

The answers are not simple in that sphere and it really does require a very big mindset and very clear sets of understandings across all of those parties. I do feel sorry for the Commission because they've recognised this. They've called on the parties and the parties have basically ignored them. The employers said nothing, the union said, "Yeah, look, we agree with you in principle and we're willing to accept what's in the legislation, but we're not going to just accept odd words of promise," and the government said nothing.

**MR HARRIS:** That's why we want to diversify the parties submitting and we want to change the cultural nature of the Fair Work Commission over time that it has a way in which they might receive – I won't say "third party" – other party opinions and treat them seriously, having done the work in advance themselves to see why that might matter. A bit like us in receiving your submission today.

5 I mean, if you sent this off to the Fair Work Commission today, it continues on, the minimum wage panel is in exactly the same form and you said to them, “Even if you apply the logic of the PC, you’ll need to consider these sorts of things in the future,” what would they do? They would say, “It’s beyond our capacity,” wouldn’t they?

10 **MR BRAY:** Yes, and that’s what I’m saying, a system-wide approach is needed, but it has to be done on the basis of building some trust between the parties. Where you get arbitrary cuts to the family tax benefits, that doesn’t build trust. When you have the Commission saying, “Well, this has to be considered,” and everyone ignores them, that doesn’t build trust.

15 **MR HARRIS:** Fair enough. Patricia, do you have any questions for Rob?

**MS SCOTT:** No, thank you.

**MR HARRIS:** You had some other - - -

20 **MR BRAY:** Yes, I read through quite a number of other issues there. There is some discussion about the rationale for the minimum wage, and I think I’ve covered that. But just to say look, you can’t say sweating is something of the past.

25 **MR HARRIS:** And I noted that you put that in there.

**MR BRAY:** If you’re working in 7-Eleven if your boss then – you finally get paid and then the boss comes around and says, “Give me the cash back,” sweating is not over and done in our society.

30 **MS SCOTT:** We have got some recommendations regarding migrant workers you might want to have a look at.

35 **MR BRAY:** Yes, but it’s not just migrant workers. It’s a lot - - -

**MS SCOTT:** You mentioned 7-Eleven.

40 **MR BRAY:** Yes, but it’s the fact that the whole system and the tendency to sweat by some employers has not disappeared.

**MR HARRIS:** It’s a curious thing – and you’ll probably be aware of this but only in the course of this inquiry did I become aware of it – there is a group of people apparently, according to the HILDA survey, that are paid below the minimum wage for reasons that aren’t obvious.

45 **MR BRAY:** It’s one of those mysteries and it comes to the very final point I make, that you have to be a lot stronger in your recommendations around

data because all of these areas are hampered.

5       **MR HARRIS:** We do intend to – in the draft report we didn't really run down the data path because people tend to then go, "I've already seen that," when the final comes out. So we will go quite – we do know the limitations of data. I think you probably heard earlier me asking the ACTU to talk to the unions about the specificity of data that they potentially may hold. They may hold better information, they not may not too, but they may hold better information than is currently available to the formal - - -

10       **MR BRAY:** Yes, but it's unfortunate a lot of these employees are outside the scope of unions.

15       **MR HARRIS:** They are. But it's the only institution that's active in the field and we know they must have some data source. It would be great to get a hold of their data. But I agree with you, our difficulty – and we've noted it in a few places, but we'll bring it together in the final report. Everybody working in this field feels the limitation of data. Even by comparison with what you'd get from overseas, the US national labour survey, they have some  
20       fantastic information that we don't seem to have as readily available here.

**MR BRAY:** Running through a couple of the other ones, the representation of the unemployed, that's in my mind and historically has always been the responsibility of government in its submissions. I think if you've seen  
25       there's a problem there, it should be one of reminding governments of what their responsibility is. That discussion about prudent policy, there was something that worried me about language such as the considerations suggest Fair Work Commission should give significant weight.

30       I mean, they've given enormous amount of weight to those issues. Read their decisions. That really just seemed to be like it's castaway snide slur on the Commission and its work. There are a number of cases where that sort of thing just crept in. I noted the fan charts and you'll see I put in some technical details around that. The solution you suggest doesn't really quite  
35       seem jolly. You either do a one-off reduction to compensate for future risk or you reduce every payment because – the regional variation – as I said, I think you've picked up the wrong end of the story.

40       Most of these decisions are retrospective and the clause that you're getting concerned about as being inconsistent is really one of those things that sits in the industrial relations system to basically help the system work in the sort of capacity to provide exemptions for particular industries is there so – where there may be a well-established case, it doesn't stuff up the system as a whole. To actually start saying that you start delivering disaster relief  
45       by cutting the wages of these well paid is absolutely horrific to my mind and is - - -

**MR HARRIS:** We didn't recommend that. We just noted that they should have the power to consider it because currently they believe they didn't have the power to consider it. I think that's really where we went to.

5     **MR BRAY:** No, they've got the power to consider it in their decisions which tend to be made retrospectively over the experience. As I said, that's there very much as a get-out clause so that you have one disaster in one area, it doesn't say the whole national wage case gets held up. That's why you have this little escape clause sitting there. What you're trying to suggest is  
10    this little escape clause should be expanded into a massive we can dispute every national wage case over the next year by raising particular circumstances in our industry.

15    **MR HARRIS:** Look, if the drafting implies that, it's not the intention. The intention was – it's like a lot of things, like some of the ones I was discussing earlier with the ACTU. You want to give them the ability to consider something where they have said on the record they don't think they have the ability, even though some people have told us they do. All we were trying –  
20    that would be a subsidiary rather than a major open-up kind of recommendation. Because just to give the Commission the ability to consider that – as you know, they haven't actually ever – regardless of submissions being put to them on this, they haven't actually drawn upon them. So I don't think we were trying to open something up. But, again, we'll look at the drafting on that.

25    **MR BRAY:** In discussion with junior rates, yes, I agree they need to be looked at. I think some of your analysis is a little bit weak. Some years national comparisons – things such as the age 18, which is in fact the adult rate in most of the other countries, not all, but in most of them. So you draw  
30    upon the international experience where it seems to bolster one case and then you ignore the international experience where it runs contrary to your case. As I said, I think in those sorts of areas you seem to be making a case rather than doing hard analysis.

35    **MR HARRIS:** And this is, as you and I were talking about right at the start, the sort of thing that you can get into when you are recording what you have at a point for publishing a draft. So you're right, and that's worthy counsel, and it's something we could look at. Clearly, we can't be in a position of, as  
40    you say, drawing upon data in one circumstance and not in another circumstance.

45    **MR BRAY:** I won't go through all the rest of them, but just mention the casual loading because it is a big issue. I do believe the analysis there is, once again, somewhat thin. There are a few misstatements such as where it had (indistinct) loading is described as a penalty - - -

**MR HARRIS:** We're always going to be at risk of this.

- MR BRAY:** - - - which it definitely is not. The difference is about 20 per cent. I don't think the case for the limited sectors, the selected consumer services is at all well-made and - - -
- 5 **MS SCOTT:** Rob, what page are you now in your submission?
- MR BRAY:** Page 19.
- 10 **MR HARRIS:** In that one where you mentioned where we got the descriptor wrong, the casual - - -
- MR BRAY:** Yes, that's page 18.
- 15 **MR HARRIS:** Did you specify where we got – because we are in desperate need of people helping us out.
- MR BRAY:** I think I do.
- 20 **MR HARRIS:** If you didn't, if you can send it through by email.
- MR BRAY:** Yes. In figure 7 on page 26 it describes casual loading of 25 per cent.
- 25 **MR HARRIS:** Thank you for doing that.
- MR BRAY:** Then other issue is that what is this new consumer 24/7 life about and what utility do people get? Now, if people really value shopping on Sundays and value cafes on Sundays more than they value them other days, then why would that be paid for through a wages system rather than consumers paying for it? I think there are a range of these options that need to be considered.
- 30
- 35 We talk a lot of this is about the restaurant industry. That's an industry that's always amazed me. When the complaint is about wages, then when you go there they actually say, "Well, look, we know we're not paying our staff an efficiency wage. Give them some tips to make sure they treat you nicely." Doing the economic analysis on that sector, those wages are well below the efficiency wage the sector should be paid.
- 40
- MR HARRIS:** In the case of that, I think that's where we're actually saying we're going to do the best we can to create data around which we can catalyse, if you like, debate at the Fair Work Commission. The Fair Work Commission itself should be looking at this and we do actually say the
- 45 penalty rates variation even though we – we put forward the principle that they go from Sunday to Saturday, we're actually saying we do think they'll vary. Hopefully that analysis, again, it hangs together with our



recommendation that the Commission itself could undertake an analytical task or contract people to do so.

5       **MR BRAY:** I think this comes back to my view of sort of somewhat of an overreach in this current report. I think that is most probably the correct perspective of a framework report is identifying the issues rather than solving them all.

10       **MS SCOTT:** Rob, just on that efficiency wage issue, aside from your conversations with café owners, do you have any other evidence that suggests that the wage is not – the diversion is from an efficiency wage?

15       **MR BRAY:** Well, approaching it from an economic perspective, why do you pay a tip? Because you believe the person is underpaid, you believe that the person, if you provide them with the money, will provide you with the level of service that you're wanting. So what I'm saying is you can approach this from a pure economic analysis and say, "Why in these sectors do we have this practice?" The practice said is because the wage is below the efficiency wage.

20       **MS SCOTT:** What about in the retail sector, because we've made the comparison?

25       **MR BRAY:** Yes, and that's the interesting thing. The retail sector - - -

**MS SCOTT:** I'm not aware of any tips there.

**MR BRAY:** No.

30       **MS SCOTT:** So could you help us - - -

**MR BRAY:** But what I'm saying is that from the big push from the café upmarket accommodation sector, et cetera - - -

35       **MS SCOTT:** What about retail?

40       **MR BRAY:** - - - theirs needs to be questioned really hard. On the retail one, that's simple. If retailers believe that people want to shop on Saturdays and Sundays and that that is where their highest profits are, then, quite simply, they have to decide whether on Saturdays and Sundays they charge more, they offer a lower level of service or whether they shut their shops on some other days when there's not the same consumer demand.

45       If the retail sector is saying they are responding to consumer demand by opening, then they need to think about how the sector responds to that consumer demand in pricing, in service levels and everything else. We all accept it to a degree. You could walk into a store on a Sunday and you know

that you may have to wait longer at a cash register than you happen to nick out on the Monday morning at 10 am and quickly buy something. You know as a consumer you're paying a differential price because that means then that on a Sunday stores don't necessarily staff up to the same levels they would staff up if they were trying to provide exactly the same level of service they were providing on the Monday morning.

So what I'm saying is that not every one of these solutions is found in the wages system, because there's also the pricing and the servicing system of stores and other sectors in the economy. So if you only approach it from one side, of course you can never find all your solution from that side. But if you approach it more generally you may well find the solutions elsewhere.

**MR HARRIS:** Thank you for putting in not just one but two useful submissions and for your chance to come along today and have this discussion. I appreciate that.

**MR BRAY:** Thanks.

**MR HARRIS:** This is the chance in the 15 minutes or so remaining, if there's anybody in the room who has managed to persist throughout the hearings and would like to come and just make some brief remarks on the record, it's your chance to do it. Can I point out to people that we're going to shut down at 3.45. So if you could please make your remarks in a couple of minutes kind of thing, that would be really good. Please take the chair and identify yourself for the purpose of the record. If anybody else would like to speak after that, just put your hand up so I know how many people there are.

**MR MITCHELL:** My name is Joseph Mitchell, I'm a student and a waiter, full-time student and a part-time waiter at a local restaurant. I'm concerned with the Productivity Commission's report surrounding penalty rates for hospitality workers and for retailer workers and other consumer-based services. While studying full-time I've been working part-time, about 20 hours a week outside normal hours, outside 9.00 to 5.00 hours, in order to support myself. I currently rent and about half of my income goes to rent and the rest of my income goes to essential services as well as some casual social activities. Out of that I don't get to save very much. So I live sort of week to week, fortnight to fortnight on the things I do.

Supposing there was a cut to my penalty rates or my weekend rates, it means that I would have to work more.

**MS SCOTT:** Do you work Sunday now?

**MR MITCHELL:** Yes.

**MS SCOTT:** What are your hours on Sunday?

- MR MITCHELL:** Only a few hours a week.
- MS SCOTT:** A couple of hours?
- 5 **MR MITCHELL:** Yes.
- MS SCOTT:** Your other days you're working?
- 10 **MR MITCHELL:** The night-times.
- MS SCOTT:** Your night-time penalty rate?
- 15 **MR MITCHELL:** The same as what is quoted in the report, 1.15. What the report – so the report's figures are very accurate as to what I receive when it comes – so 1.75 on a – yes. If I were to lose my Sunday rates I would have to work more. It means I have to sacrifice study and I would also have to sacrifice - - -
- 20 **MR HARRIS:** If your Sunday rate was to go back to your Saturday rate.
- MR MITCHELL:** That's correct, I would have to work more in order to sort of keep myself - - -
- 25 **MR HARRIS:** Keep the same income in.
- MR MITCHELL:** Yes. So essentially quite a significant impost basically. It would have to eat into either my study time or my social time to see my family and friends and that sort of thing. What I do note though is that the
- 30 Productivity Commission's report noted that it didn't want to treat those on the minimum wage or those young and vulnerable people – you wanted to have (indistinct) when it came to altering their conditions. That was on page 12 under the section of apprentices.
- 35 What I find though is that you if you alter the Sunday rates you are significantly altering the young and vulnerable people's wages. Most people I work with are either students or they're below the age of 18 or they're highly unskilled and need to work in cafes and restaurants in order to support themselves. Also, the Productivity Commission says that it's a demand-led
- 40 reasoning behind altering the Sunday rate. In order to accommodate what is a consumer demand, it is taking away the Sunday rate in order to make it a more 24/7 economy.
- 45 The problem there is that it does acknowledge the fact that health services demand is higher overall and has been growing at a higher rate than most other sectors of the economy but still neglects to say that the 24/7 demand is there and should sort of take away the Sunday rates for those

workers rather than leaving them protected. I do acknowledge that there are variations within industries over Sunday rates. However, the specific attack on hospitality, retail and other workers that is seemingly unwarranted.

5     **MR HARRIS:** I think the argument that we probably haven't pulled into  
that suite of comments is the difference between them based on which you  
were setting emergency workers' wages originally and the basis on which  
you were setting retail and restaurant workers originally, which was one  
10     penalty rate was set for the deterrent purpose, deterring work on Sundays,  
and the other was set for the purposes of actually compensating people that  
we really, really, really wanted to work right from the start. So we're  
suggesting there are historical anomalies in the system and the rates appear to  
be quite anomalous here based around the original expectation for having set  
such a rate quite a long time ago.

15     But the Commission itself will have to decide that. We're just trying to  
put up a basis on which they can at least make a case or decide the case is not  
made; one or the other.

20     **MR MITCHELL:** Just one more comment before I finish. A lot of the time  
people are complaining that it's the wage cost which is a deterrent to opening  
up on Sundays. In my time working in hospitality, I find that Sundays are  
often the most busy days for cafes and restaurants. You find that they have to  
be fully staffed and the only impediment for them to make money is basically  
25     capital constraints.

So they have like too small a seating plan, they need a bigger kitchen,  
they need more ovens. Often they deal with the problem of increased wages  
by either supplying a different menu, which is shortened, in order to reduce  
30     the amount of products they serve in order to serve them more efficiently or  
they increase the prices of their menus through a surcharge or, again, offering  
a different menu which has a different price structure through it.

35     You find that these increased prices aren't a deterrent to consumers.  
They're much more willing to pay these increased prices because they do like  
the opportunity to go out on a Sunday, which is quite a nice social day.

40     **MS SCOTT:** Another way, of course, to address capital is to use it longer.  
You might look at what the report says about New Zealand restaurants and  
cafés when you get a chance.

45     **MR MITCHELL:** But there's also the thing that there's peak times for  
restaurants and industries. So like at 10 am is always the best time to get  
brunch. So the only way you can increase service then is by increasing your  
capital amount rather than using them for a longer period.

**MR HARRIS:** Thank you very much for – I think you did persist for quite a

few hours sitting here. So I appreciate your effort to get on the record. Anybody else? No? All right. I thank everybody for making an effort again to participate in the process of the Commission's inquiries and hearings. If you don't come to our hearings and don't give submissions, we are much the worse off. So I thank everybody for making the effort today.

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**MATTER ADJOURNED AT 3.41 PM UNTIL  
THURSDAY, 17 SEPTEMBER 2015**