



**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 GRACE HOTEL, SYDNEY**  
**ON THURSDAY, 17 SEPTEMBER 2015, AT 8 AM**

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5 **MR HARRIS:** Good morning. Welcome to the sixth of the public hearings for the Productivity Commission National Inquiry into Australia's Workplace Relations Framework, following the release of our draft report in August 2015. I am Peter Harris, Presiding Commissioner of the inquiry, and Patricia Scott, as Deputy Chair, will be joining us in a moment.

10 The purpose of this round of hearings is to facilitate public scrutiny of the Commission's work, get comment and feedback on the draft report. Following this hearing in Sydney, we're going to go to Ipswich and then back to Melbourne, having done five other centres, I think. We will then be working towards completing a final report to government in November 2015.

15 All participants in the hearings and those who have registered their interest in the inquiry will be advised via email of the reports released by the government, which may be up to 25 parliamentary sitting days after completion, that is, after November 2015, which effectively means it may be sometime early next year.

20 We like to conduct all hearings in a reasonably informal manner but I remind participants that a full transcript is being taken, which means, please don't defame anybody because it will be on the transcript. For this reason, comments from the floor can't be taken but at the end of the proceedings for the day there will be a brief opportunity for any persons who are persistent enough and wishing to do so to make a brief presentation; if you've managed to hang out the whole day, you deserve a reward.

25 Participants are not required to take an oath but should be truthful in their remarks and are welcome to comment on the issues raised in other submissions. The transcript will be made available to participants and will also be on the Commission's website in a day or two following the hearings, and submissions as well.

30 We don't permit video-recordings or photographs to be taken during the proceedings because they disturb the participants but social media, such as Facebook and Twitter, maybe updated throughout the day, although we do ask all members of the audience and the Commissioners sitting at the table to please ensure that their mobile devices are switched to silent.

35 (Housekeeping matters)

40 I would now like to welcome Gerard Phillips. Gerard, are you presenting today?

45 **MR PHILLIPS:** Yes.

**MR HARRIS:** Could you identify yourself for the record, then, please?

**MR PHILLIPS:** Yes. Gerard Phillips, partner, K&L Gates.

**MR HARRIS:** Do you have an opening statement or comments that you would otherwise like to introduce with?

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**MR PHILLIPS:** Yes. Thank you. The topic I'd like to discuss with the Commission this morning really is about enterprise bargaining and is a subset of that protected action, how it works in practice and perhaps some changes which the Commission might consider in terms of making that system work better for the participants and, particularly in respect of enterprise bargaining, the whole sort of vexed issue of Greenfields agreement, which really are an issue on large projects around the country.

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**MR HARRIS:** Sure. First off, enterprise bargaining.

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**MR PHILLIPS:** Enterprise bargaining is curious. It's been part of the landscape of the law here for some time. It's replaced, really, the old central wage-fixation function which the old Commissions carried out when they made awards but in some respects some of the problems which you lost with the central wage-fixation system - we've encountered a whole range of new problems with enterprise bargaining. I think part of the problem is how the architecture of the Act is structured so that the parties, when they engage in enterprise bargaining in the way they go about it - for example, whilst productivity is mentioned in the Act in two places, it appears at the commencement of the Act, in section 3, and then in section 171, the enterprise bargaining section, it's actually given no teeth. So, when one goes to bargain a new agreement with a group of employees, you can leave productivity or efficiency of the business at the front door because, really, at that point - because, when the Commission approves the agreement, they are not required under the Act to have regard to that.

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What it means is that the agreement becomes a bit like the negotiation for buying a house; it's what you're want, what you're prepared to bear. This takes place in a circumstance where you have a threat - I normally act for employers; I'll just put that out there. It's a big law firm; my practice is an employer one. The moment the agreement falls out of term, really, the playbook for organised groups of employees is to have a protected action develop so that the employer is then under pressure from that point, and very few - if you are a manufacturer of brake pads in Western Melbourne or something like that, you can't afford to go down that route. So, what it means is that, if the protected action starts, you as the employer inevitably have to give in and concede terms in the agreement which, in a perfect world, you would not be conceding. We know the way that this area of the law works; once something gets into an agreement, it's well-nigh impossible to extract it at a later date during the next set of negotiations.

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Just going on to the whole Greenfields issue, one of the problems is this:

when clients of not only my firm but other firms who act for, say, large employers - if you're going to do a big project, it's a big infrastructure project, a big mining project, the money behind it will expect you to have locked away, at the commencement of it, an enterprise agreement. We know the Act says, "Okay, the longest term you can have is four years." If you're building Sydney's new airport out at Badgerys Creek, if that's a 10-year-plus project, you could have multiple agreements expiring at any time during the project. What it means is that at the commencement of the project it becomes devilishly difficult for any of the estimators to work out what will the price of labour be for that project, particularly where - as you know, in construction contracts, the way it normally works for the government - if they're building Badgerys Creek, will have a design and construct contract with a big builder. That will contain terms for liquidated damages, which are very large. So, you will be under the hammer when the agreement expires, to avoid action which would engage the liquidator-damages provision of the agreement, so you're kind of over a barrel at that point and that's where the potential for a wages breakout and the cost of the project spiralling occurs, at that point. The bigger the project, the more difficult that becomes. Some clients try and break those things up into packages so that they minimise their exposure to that type of circumstance but it's not always possible.

I think one of the issues that is worthwhile to look at is really that whole question of life-of-project-type agreements. Normally in enterprise agreements you will be agreeing to wage increases of some descriptor during the life of the agreement, so it's not suggesting for the period a wage freeze. The real issue there is the certainty that the project and the money behind the project needs to be able to conduct the project in the way that I think the public would expect, particularly if they're big public projects.

**MR HARRIS:** Yes. In our report we did actually propose that Greenfields agreements, which are not just major construction projects but include quite small projects, could have the option of a life-of-project agreement, which currently is - I think there are circumstances where you could probably try and create that but we have seen circumstances where it hasn't been created. One of the problems, of course, is that life projects are somewhat difficult to define and, even though, as you point out, design and construct contracts do have expectations for completion dates and liquidated damages, which would imply that that is the end of the project, equally, contracts are renegotiated during their course, particularly if force majeure events occur. We didn't go much further in the report but I'd like to see whether we could give you on the record as giving us any advice that you might have on how we would allow that flexibility to equally apply because we'd like to solve this problem properly, rather than leave that - certainly, in my own head, that's identified - as you may know, we did the infrastructure inquiry last year but also my background is in the transport-communications infrastructure, so I know this area pretty well.

What's your view on how we might go about allowing for circumstances where extensions are driven by a force majeure?

5       **MR PHILLIPS:** Assume for the project you have an enterprise agreement in place. If you look at the Act right now, there is a capacity for the parties to approach the Commission and vary that enterprise agreement. The only difficulty is, it is the same process required to get the agreement approved in the first place. It's a problematic process but you could go down a path where you could make the capacity or ability to vary agreement for  
10       unforeseen events easier than it is now.

15       This is not a new concept. In New South Wales, there used to be a concept of project awards. An award would be made under the New South Wales state system for the project. The difficulty with that system was, it covered everybody who worked in the project, so you would have a head contractor and a whole bunch of, say, subcontractors and the subcontractors would be expected to pay the project award because it applied to them all, and we all know how - - -

20       **MR HARRIS:** There are mechanisms now where that's attempted to be translated back into enterprise bargains, although we have a recommendation which says quite the reverse.

25       **MR PHILLIPS:** Yes. That whole, as it were, subcontractors' clause, if you can call it that, or subbies' uplift type of clause, in construction has been the most controversial provision, probably, in agreements for the past 15 years because it causes so many problems on a day-to-day basis on sites between the union, on one hand, and the head contractor and all of the subcontractors. If the subcontractors have agreements approved by the Commission, that  
30       should be the end of the matter, it really should, because they've bargained and done what they've done to get that agreement. Again, the problem with that is contemplating "Okay, at the start of the agreement, if the money is behind the project, what's the price?" That makes it very problematic to do that.

35       Having said that, that old project award system in New South Wales works to an extent. I suppose my point there is that there was a system there which was not perfect but that effectively provided a life-of-agreement approach if one was dealing with a big infrastructure project.

40       **MR HARRIS:** Is it plausible for enforcement of - let's stick with this recommendation that we've made about, effectively, not allowing agreements to require jump-up clauses, if I can use that terminology. The next form of concern with that, though, is, "Well, so it might turn out to be but you'll still  
45       find, in practice, that these things are imposed or attempted to be imposed and disputes then occur and again the project is at risk," and, of course, the impression that's left, and it may be the practice quite often, is that head

contractors will have to just concede because they don't want to miss the deadline. So, the deadline in all circumstances is the driving factor here. Were you to seek enforcement of such a legal provision - let's imagine that the legislation had actually been amended to say you couldn't have a jump-up clause but, nevertheless, the action was occurring to impose such things partway through the project. How does enforcement occur? Is it plausible to consider that the Commission itself should be bypassed and we would go directly to the Federal Court, in those circumstances, for an order, or must it logically go through the Commission? I guess I'm asking for free legal advice here, which is always get; save the taxpayer a few dollars.

**MR PHILLIPS:** If that was to occur now, so, for example, you've got an enterprise agreement with the head contractor and separate ones with the subcontractor, if the head contractor is reaching agreements outside of that, whether they're commercial contracts or common-law agreements with those subcontractors, the Commission may have power, depending upon - as you know, each enterprise agreement has a private arbitration clause in it, you've got to have a dispute resolution provision. Depending upon the width of that, the Commission may be empowered to deal with that dispute but then the problem becomes this, because it's not an instrument - so the agreement to pay over the rates is not, say, a fair-work instrument, as defined in the Act, you've got a real problem with enforcement. So, depending upon the nature of that - you couldn't enforce it because it's not one of those instruments, so then it becomes almost a matter of contract between the parties, which in some respects is pretty unsatisfactory because, if you're one of the workers over here, you're not a party to that contract, so how do you enforce it?

There's a category of industrial arrangements from this case called Homfray Carpets, which are agreements which are meant to have industrial effect rather than legal effect, and there's plenty of them at any workplace. A whole lot of people think they give contractual terms when they don't. The only danger with a provision like that would be if there are trade-offs because, as you know, you can't have the capacity to have opt-out clauses or anything like that. People, when they're thinking of those types of arrangements, don't actually engage with some of these provisions in the Act which could turn around and bite them, so you might find, far from enforcement, you might actually have someone like a fair-work ombudsman taking action against you for breaching the agreement.

**MR HARRIS:** The idea, though, that you would try and use the Federal Court system directly - in other words, for Greenfields agreements, you might create a provision which bypasses the Fair Work Commission because of its difficulty in dealing with these and, because of the level of exposure, some of these are immense projects - some aren't, obviously, but where they're immense projects, changing the nature of cities and things like that, it has been alluded to that it might be desirable to go directly to the Federal Court and be able to get yourself an order because, as you say, this is more of

a matter of contract than it is of an industrial instrument. I don't pretend to be a lawyer but there is this version of events that says, "We need certainty and we need it swiftly in the course of disputes in these very large projects."

5     **MR PHILLIPS:** I've actually had a different view about some of these  
large sort of nation-building-type projects where actually they might stand,  
say, outside the mainstream Fair Work Act provisions, where things could be  
enforced in the mainstream Courts. Whether one would do that by, say, a  
10     minister declaring the project to be of national significance, and therefore that  
has certain things flowing from it - but there needs to be some sort of  
short-circuit there because the contractors, particularly the head contractors,  
are the meat in this sandwich. The clients want value for their money and  
often the big client here is government and it's taxpayers' money. The  
15     problem then becomes actually getting on-time, on-price value for the  
money. If you've got agreements expiring midterm of that project, it's just  
not going to happen.

I think the difficulty with getting this sort of idea to, say, its actuality is,  
20     "What are the circumstances that one would define that would enable such  
enforcement action to be taken," say, in the Federal Court, for example,  
because there will be many things which will happen which one wouldn't  
want to go racing off to the Federal Court to do. You would want to have  
something which is threatening. Projects on the critical path; you would need  
to be able to take action at that point.

25     **MR HARRIS:** Yes. Otherwise, for these other things, they don't tend to go  
to the Commission anyway, do they? They tend to be matters between the  
parties. I take your point; you don't want to create a special kind of contract  
that has a special kind of division in the Federal Court which gives  
30     everybody the right, for some trivial breach, to go off and get an order, it  
wouldn't be good use of the Justice's time, I'd assume, as much as anything  
else, but it was in our infrastructure inquiry, and it remains in the front of this  
inquiry, and it is a highly problematic area because of the exposure of  
leverage which says, "Once I'm starting a very, very big project, I actually  
35     have no leverage at all; I can't respond readily to a set of demands made upon  
me and I rely deeply on the contract itself being our primary protection - the  
agreement itself being our primary protection, and there appear to be minimal  
ways by which this could be managed."

40     I guess, if you envisage trying to do something to provide that  
counterbalance, because all the way through this inquiry we're looking at  
what are effectively safeguards against the exercise of very substantial  
industrial power, either by an employer or an employee, and in this case it  
looks like the potential is more for the employee than for the employer. It  
45     doesn't appear to be an effective safeguard.

**MR PHILLIPS:** No.



**MR HARRIS:** The choices, therefore, are the Fair Work Commission or the Federal Courts directly, or - we can't envisage a third path but if you've got anything to offer on that, again, I'll take the free legal advice.

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**MR PHILLIPS:** I think the third path will be this - and all of this is arising, really, in the context of protected industrial action; that's when the leverage is being exerted. If you look at how it's set up, a group of employees can take protected industrial action. If you see the types of orders which are sought, they'll go for pages, they cover a whole wide range of different types of activity, which the employees can then partake in, so whether it's a 12-hour stoppage or a refusal to perform different parts of work or whatever. The employer, though, is limited to response action, which is effectively a lockout. It's back in sort of the dark ages of industrial actions, you know, locking a whole bunch of folks out.

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I think, if you were to consider a widening of the suite of actions that an employer could take, that tends to - at the moment it's very unbalanced in that situation. If the employer's options are increased, it means that it might make (a) the taking of industrial action to start with and (b) the nature of the industrial action which is actually taken - it might make more thought to be put into that because one is actually levelling the playfield there. It is thought by particularly a lot of legal commentators that - and, unfortunately, this is a capital and labour argument, it goes back to that. They think that the group of employees need to have some sort of advantage because they don't have the same power as their employer. I don't know how true that is in practice because most employers can't bear that type of action.

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It seems to me that, in answer to your question, a third consideration might be actually widening the type of action that an employer could take. I actually think, if an employer can take things other than a lockout, that's actually better. I actually think that's part of the - - -

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**MR HARRIS:** Have you got any exceptional ideas, because we did do an information request on just this?

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**MR PHILLIPS:** I think you could consider a whole range of things. You could have the employer give notice that they'll suspend or cancel parts of the existing, albeit expired, enterprise agreement, they could stand down groups of employees so that you don't have to actually go to the whole lockout provision and you could stand sufficient numbers down but you could still carry out your day-to-day functions. I think the issue about suspending or cancelling parts of the enterprise agreement for the duration of the action would be something which would be worthy of some thought because it means that there's a whole lot of action within that one could take which is short of, really, the nuclear option that Qantas took by shutting the whole shooting match down.

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**MR HARRIS:** It was suggested to us, again, informally, so off the record, but I'll put it on as a question to you, that you could actually create a default option, such that the then pay arrangements or condition arrangements under the enterprise bargain that was now in dispute - you could allow an employer to default to the prior enterprise bargain or indeed some, I guess, exceptional circumstances if the prior arrangement was the award. In other words, it would be a reduction in pay and conditions. It does seem quite a - it would be a very brave step, without a doubt, but it would be less than a lockout. So, you would default for the period while you're in dispute. It would be not unlike if you were going to have a one-day stop-work; you could have a one-day "default to previous arrangements" kind of option. Aside from the deep complexity of such an arrangement, how does the principle of that strike you?

**MR PHILLIPS:** I think the principle is fine because these are the types of things that need consideration but, bear this in mind, in every agreement there are two types of terms: there are the money terms and then there are the non-monetary ones. The non-monetary ones are the ones which - if I was an employer thinking, "I'm in industrial action here. What do I want to do? All right. Look, I'm going to suspend," for example, "the private arbitration provision", so any disputes that you have - or it reverts to the private arbitration provision in the modern award. Most unions want a private arbitration provision and even a consultation provision which are far in excess of what the model clauses in the Act are or what is in the industry's modern award. That would significantly curtail the capacity for disputes to be dealt with. You might even limit the rights of entry at that point, as well, or be able to suspend it, things like this, because one of the problems, particularly some of my clients say they want to do - they desperately want to actually resolve this dispute, settle a new agreement and get on, and they still want to maintain the goodwill of their workforce. So, it's a balancing thing there.

Some of those provisions which I was just referring to then, I think, your normal worker wouldn't be particularly fussed by them. If it is a unionised area, it will actually have a direct and immediate effect upon, say, the union officials which are promoting or provoking the industrial action. If you're making, say, their job a little bit more difficult, by, for example, cancelling their rights of entry or things like that at that point, that's, I think, a measured and moderate response.

**MS SCOTT:** You don't think that would provoke the dispute more, you know, the situation where tension is building and suddenly there is a withdrawal of rights?

**MR PHILLIPS:** In construction it would but usually in construction, or even mining, some industries like that, feelings are normally running pretty

high anyway. At the moment that action can be taken at no risk for either the unions or the people taking that action. I just think there's a balance to be restored. You won't get a perfect balance but I just think that having the lockout as the sole response means it's never used.

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**MR HARRIS:** Effectively, you're proposing a peeling-away of provisions.

**MR PHILLIPS:** Yes. It might be that they are suspended - so, just like the protected action only takes place for the period the Commission orders or for the period that the employees feel they need to take it, likewise, that would have a defined period when you give them a notice, "These are the things we're going to do."

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**MR HARRIS:** Fair enough.

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**MR PHILLIPS:** I do think one of the issues with the architecture of the Act is, as it sits right now when it comes to the whole thing of protected industrial action, employer response, you've got this architecture of conflict which has been created there but, effectively, there is no Court mechanism - every dispute in our country, if you can't resolve it, goes to some form of Court or Tribunal to get it resolved. This is a different area, as far as the law is concerned, because you arm the parties with the capacity to take action against each other but, unless they agree in terms of a protection 240 bargaining dispute, there is no Court you can go to to bring that dispute to an end. The circumstances where a Commission can end protected industrial action under section 424 are very circumscribed; you've really got to have fairly significant action being taken before that power comes in. Within that context, you could say, "Well, the circumstances where it's cancelled or suspended under section 424" - you lower the bar.

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**MR HARRIS:** Can I take you back a little bit to something you said earlier, when we were talking about proceeding potentially directly to the Federal Court and the Greenfields arrangements? You noted that this might primarily occur - these disputes that might have been relevant might primarily occur in a protected action period. I guess we can envisage the circumstances, though, can't we, when we're dealing with the question of subcontractors, that it isn't actually a protected action period at all, it's a dispute during a period when the head contractor has his enterprise bargain and therefore has his protection from industrial action, but the subcontractors don't because they're not parties to that agreement - perhaps they could be added, I mean, there are, I guess, legal solutions, but imagine the circumstances where - particularly in the circumstance where, if we translate it into black-letter law, you can't in any way impede the utilisation of subcontractors, and yet pressure is brought to bear subsequently on those subcontractors, can you envisage that limited circumstance being one where we could proceed directly to get a Federal Court order, in other words, for an unprotected party that's suffering action, and it's not in the protected action period, it's actually during the course of

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the agreement, so it would be quite narrow and defined?

5 Some people say, "This sounds like a very regulatory solution to a tiny problem," but, I guess, in the context of Greenfields agreements specifically, this has historically been seen to be a problem.

10 **MR PHILLIPS:** There is no doubt that's a problem. Where you've got multiple entities on the site, some - the head contractor, with an agreement which has fallen out of term and action taken - the action being taken, then you've got the subcontractors, who are really victims from that because -  
15 what happens in that circumstance happens on every big project. A lot of pressure is brought to bear on that subcontract workforce to actually not cross a picket line or not do anything which would undermine the protected action being taken. I think the solution probably sits within the nature of, really, the Greenfields agreement, so that everybody coming in to work on that site - the capacity for their workforces to take protected action during the period of that project is somehow circumscribed or eliminated.

20 The problem dealing with that is, "Okay, well, what are the rates that the subcontractors are being paid?" That's really where one would need to look at that type of mechanism because, as I think you said before, one of the difficulties is, really, pressure being brought to bear for them pay other rates outside of the industrial framework. I think the starting point of the consideration is there; it is really, "Okay, once I walk onto this major piece of  
25 public infrastructure, major mine-site development, the arrangements which apply here mean that I can't take protected action." How you then work out the rates with that is really the next and perhaps most-vexed question.

30 **MR HARRIS:** We're open to suggestion, if I can put that in exchange with you now, so that it goes up on the website. We're open to suggestion about how to deal with this. In infrastructure we did say we would try and deal with this in workplace relations, so we are going to try and deal with it in workplace relations. We just don't want to create such a thicket of laws around one particular suite of activity, so there is a self-discipline that's  
35 going to be applied here, but the concept seems to be quite an important one.

40 **MR PHILLIPS:** Yes. One of the difficulties you'll have is this, that the subcontractors - that won't be their only job. If they're of a fair size, they might be working on five or six sites. What you don't want to be doing is making recommendations or laws which might affect their industrial agreement but which will have a knock-on effect with other jobs. I think the starting point is needing to concentrate on, "Once you, as it were, come through the gate into this big infrastructure project, you are actually playing by different rules from what the normal ones are, and you sign up to that,  
45 firstly, in the contract that you sign with the head contractor," but also that there's back-up from the law - whether it's in the Fair Work Act or somewhere else, there's back-up from the law in relation to particular

5 projects which might be so designated. I think what that would mean is that you would only have that law applying, affecting, amending or whatever, to the industrial agreement once you've actually walked onto the site. It will leave that agreement - if it's being used elsewhere - I mean, a lot of these contractors will have a state agreement which covers 20 sites. It remains unaffected at their other sites and, if action is taken, it can cheerfully be taken in the normal course, but I think that you need a different legislative regime for these big projects.

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

15 **MS SCOTT:** The Commission, in its draft report, raised the issue of moving from a BOOT to a no-disadvantage test, it made that as a draft recommendation, and then made an information request on what issues and what should lead our thinking if we did go down the route of recommending a no-disadvantage test in the final report. Given your breadth and depth of experience, do you have a view about the sort of no-disadvantage test we should consider?

20 **MR PHILLIPS:** I actually think it should be able to look at, say, the conditions, really, in a global sense. If you're out with either a group of employees or employers bargaining for an agreement, which I'll be doing later today, the BOOT test most folks in the room find dreadfully difficult to contend with, and in fact you'll find in negotiations that it is often used as a  
25 reason to say no to something. I think, if the test - really, when one looks at, say, the history of industrial relations, you've had this conflict between sort of strict legalism and the industrial realities of things, I think this is exactly the type of area where, really, one shouldn't be hidebound by strict legalism. There should be a capacity for people bargaining an agreement to be able to  
30 say, "Well, look, everything taken into account, this isn't too bad." By having a legalistic line-by-line look as to whether it satisfies the BOOT - I don't think is in anyone's interest. You can actually have a group of people who want something in an agreement but it doesn't satisfy the BOOT test.

35 One of the reasons why we went down the enterprise bargaining point to start with was to allow employers and the employees to actually agree things, not from a central-wage fixation point of view but agree things which are relevant and proper for that workplace. I don't think the BOOT has worked  
40 terrifically well in practice.

45 **MR HARRIS:** I guess that's a really important point that hasn't been brought out afore, that this test is not just how the Fair Work Commission mentally applies itself to NDT versus BOOT; it's actually how it applies in a negotiation, which is what you're describing now. Conceptually, what you're saying is that it's easier to envisage during the course of a negotiation whether something is net-disadvantage or not than whether it is better off overall or not. It's conceptually easier because one appears to have a dark

line around it and the other is that some people may feel they're better off and some people may not. So, particularly where there's a collection of negotiators across the other side of the table, it can be quite difficult to work out, for them. If I take what you said, you're saying there's greater clarity  
5 actually in the negotiating room when you're thinking "no disadvantage versus BOOT".

**MR PHILLIPS:** Yes. People instinctively know whether - if I'm prepared to trade off X for Y, your normal worker will know whether they're  
10 disadvantaged or not by that, whereas, the BOOT test, "Hang on, can I just get my lawyer in here to run a line over that?" Not everyone can do that. My memory, and I might be wrong, the BOOT test came from an interview with Peter Reith before, I think, the '96 election, when he said, when it came to workplace relations, "No, no, no, we will make sure nobody is worse off,"  
15 and that became reflected in the BOOT test. I think it was something that was done on the run like that and we've been stuck with it ever since.

**MR HARRIS:** That's been useful too. Not being a lawyer, I notice that a number of times you've mentioned particular sections of the Act, and there's  
20 one in some of your comments to us, which is where you refer to section 424. You say:

*Very few orders are made under that because most employers are not able to satisfy the test set out in that provision.*  
25

Because I'm not a lawyer, I don't know, have we covered this area or can I ask you to cover it if we haven't covered this area in our earlier discussion?

**MR PHILLIPS:** Let me just make some brief comments on it. 424 is the  
30 power of the Fair Work Commission to either suspend or terminate protected industrial action. To do so, you've got to have significant harm being occasioned to either the country's economy, or a significant part of it, or a risk to the health and safety of the country, or a significant part of it. I go back to my example before, if I'm manufacturing brake pads in Western  
35 Melbourne, I never get near that, in a million years. There will be certainly industries only where that will occur, particularly health - I think the Victorian nurses dispute, there was a 424 order at the end of that. In the electricity dispute here in Sydney earlier this year, because of - I had no idea how many thousands of people were on life-support things in the community;  
40 that was a risk to them. In Qantas - that only arose, actually, when Qantas took their action in response.

**MR HARRIS:** After the event, yes.

45 **MR PHILLIPS:** Yes. It is a very, very rare circumstance where you'll have a coincidence of protected action in an industry which is likely to have that effect.

**MR HARRIS:** Yes. When we were talking earlier about protected action, I don't think we got into this question of the very significant or very high hurdle. In our report we're pointing out that - it seems to work both ways. It seems to be able to be used against teachers in the Northern Territory, if I - is that the example we used, Patricia?

**MS SCOTT:** Yes. That's right.

**MR HARRIS:** It seems to be able to be used against teachers in the Northern Territory, which hardly seems to be a threat of a significant kind, and yet, in other circumstances, it can't be used, as you said, or appears not to be able to be used, even in circumstances which subsequently resulted in the shutdown of a national airline. Clearly there's something funny with this test but it's not clear where the solution lies because you could lower the hurdle and create more "teachers in the Northern Territory" kind of problems, or you could raise it even further, eliminating the teachers kind of problem, but make it even less likely that it could be used for a Qantas kind of problem. It doesn't seem necessarily able to be solved readily.

**MR PHILLIPS:** You know the submission that - say, for example, if you are bringing an application 424, the first submission which comes out of the mouths of the employees' advocates is, "Don't make this order because you will change the bargaining dynamic." Where it goes back to - I think, if the employer's able to do something in response, it might change that dynamic because that is their worry, "If you make this order, our leverage which flows from the protected action goes up in smoke." So the employer can then sit there, on the expired agreement, and not do anything to seriously press the bargaining on.

It is a difficult thing and I do think it could be calibrated to have more regard to the damage which is being done to the employer. If the employer is saying, "Listen, if this goes on, I will breach contracts with," say, for example, "suppliers I'm with", or "I'm going to have to be able to downsize half my workforce or do something because I can't bear to go on with this," I think it would sit within that where the Commission could be charged to look at the direct economic effect on the business and if it's a severe enough effect upon that - I mean, in the teachers example you give, you've probably got a big state education department sitting behind that and they would have pretty broad shoulders, in that circumstance. I hadn't heard that one. I'm surprised to hear that. I would guess that there's an idiosyncratic circumstance sitting behind it.

**MR HARRIS:** It does actually exemplify the problem quite readily, doesn't it?

**MR PHILLIPS:** Yes.

5       **MS SCOTT:** We did make an information request about 424 and we have had presentations on it in the course of this round of hearings, typically from people who are in the emergency services area. We also made a draft recommendation in relation to section 423. You may have an interest in that as well. Again it goes to this balance relating to bargaining power.

10       **MR PHILLIPS:** I think part of the problem there, and it goes back to that comment I said earlier, is that at that point you're considering 424 orders, you've got an out-of-term agreement, you've got protected action. There's an underlying industrial dispute sitting there which needs to be resolved, which, unless the parties consent to something like a bargaining dispute under section 240, there's no Court you can go to to get that fixed, which is a bit - when you think of any other dispute you have in our community, 15 whether it's with your neighbour over the fence or whatever, there is somewhere you can go to get that fixed, whereas this, to really preserve the bargaining power of, really, the employees taking the protected action - that capacity to go to a Court to get it fixed just doesn't exist.

20       **MR HARRIS:** Let me just hypothesise one aspect of that, then. What if there were, effectively, a period of protected action and, once that period expired, no further protected action? It creates an incentive to settle, then, doesn't it, before the period in which protected action - if I take your advice correctly, and I must say I haven't looked at this closely myself, so this 25 entirely hypothesis, does protected action ever stop?

**MR PHILLIPS:** No.

30       **MR HARRIS:** It could go on perpetually - - -

**MR PHILLIPS:** Yes.

35       **MR HARRIS:** - - - until an agreement is struck, which seems an unusual circumstance. That was the implication of what you earlier had said and what you've written down here. That's probably worth giving some consideration to as well. It's designed to be an incentive by which a settlement would occur. Rather than saying, "Here's ultimately an arbitral figure that you can go to to get your dispute settled," which is, I think, where the legislation has ended up over time, as to be avoiding as much as possible 40 that idea that the omnipotent power does reach down from the Bench and say, "Here is the solution," an alternative might be to create different kinds of incentives, which is what we've been trying to look at as much as we can.

45       **MR PHILLIPS:** I think the issue you'd need to consider there is that there would be some employers who would be able to - for example, in mining, "Okay, I'm going to get a stockpile over there, I'm going to get some contractors in. I will wear the three months that it's on and it doesn't matter



much to me if there's no actual mining going on because I've got my stockpile," which traditionally has been an industrial weapon. One would need just to consider how that would work because - - -

5     **MR HARRIS:** No, I didn't imagine it would be a simple one. It's entirely a supposition on the spur of the moment here, for this discussion. It may have quite significant drawbacks too but I just thought I'd get your comment. Since we are now at the endpoint, I'm afraid, for your testimony - I did say earlier, and it's for everybody's benefit, because we're running back-to-back to back-to-back today, I'm going to have to stop people at the end of their allotted time or destroy someone else's time. Thank you very much for your contribution today and, if indeed you have further comments you'd like to make, we'd be very happy to hear from you further on these issues that we've discussed.

15     **MR PHILLIPS:** Yes. Thank you.

20     **MR HARRIS:** I think we now have Economic Security4Women. Sally, can you identify yourself or the record, please?

20     **MS JOPE:** Yes. Sure. My name is Sally Jope. I'm the Executive Officer for Economic Security4Women, which is a national women's alliance, funded by the Australian Government, through the Office for Women.

25     **MR HARRIS:** Do you have comments to make in opening-statement style?

30     **MS JOPE:** I do, actually. It's really interesting being here for the previous speaker because I - a disclaimer is, I do not have an in-depth detailed knowledge of the industrial relations regulations and law but what I come from is - the National Women's Alliance is an alliance of 22 women's organisations. We consult with them around issues that affect women's economic security, mainly through workforce participation, and, as a result of those consultations, we engage with government and other bodies to raise the issues that women have raised with us. I've got a very broad approach to the workplace relations framework and, probably, it comes in particularly around gender equity. That's our main focus; gender equity through workforce participation.

40     Listening to a previous speaker talking about examples reminded me of when I was a union rep in a feminised industry, negotiating an enterprise agreement, and how useful it was to have union representation in there to support us, as our employers had access to highly-paid industrial relations lawyers. What we always talk about is having a gender analysis when we approach anything because it's a very different story when we talk about women's workforce participation, compared to men's. That is different because of a range of things. One is our social expectation about picking up a lot of the unpaid care work; that has follow-through implications for our

career progression. There are gender stereotypes that affect the work that women do, and that's often significantly in lower-paid industries. Because of our unpaid care work, we're more likely to be in casual or part-time work, accommodating the care needs of families and community. That has an impact on our lifetime earnings and our retirement savings. So, we're very different, unique.

I think it's very difficult to look at the workplace relations framework and say one size is going to fit all. I think it's very difficult to argue for simplification when it's very complex issues that you're dealing with. That's like an opening statement.

A couple of the things - our members are from a broad church of women. We have women from organisations called Women Chiefs of Enterprise International. They're women who sit in the employer roles. We've also got women from Business Professional Women's Association who are also sitting in employer roles. We also have member organisations like National Foundation for Australian Women, who have a, I would say, probably quite a radical approach to workplace reform. On the other end is the national Working Women's Centres, who work with unionised and, often, marginalised women workers. All of those organisations come together and agree that economic security is really important for women, for gender equity, and it's important for the national interest.

**MR HARRIS:** You talk about amending the objectives of the Act, in advice I've got, anyway, from commentary, and you'd like to have a general equality objective. There's an awful lot of objectives in the Act now. This would be a sort of principle but how would you see that as being effective in guiding another party? There are lots of objectives.

**MS JOPE:** I think one of the main things which needs to be accommodated, and I'm not sure if this is the actual point you're talking about, is about what sort of unit of analysis we look at when we talk about workplace relations? Are we still looking at a male-breadwinner model or do we attempt to accommodate, perhaps, a more gender-equitable model of workforce participation? The male-breadwinner model, which is fairly outdated, relies on unpaid care-work at home. That has impacts on women's workforce participation. Almost half of female employees are working in part-time work. There's a significant number of women working in casual work. That is often organised, negotiated, because of their need to accommodate the unpaid care hours that they put in.

Sitting here listening to the previous speaker really talking about male-dominated industries and occupations where there is very strong union representation - and that's very - I'm not disagreeing with that but I would argue that we don't simplify our response to accommodate one particular type of worker and with underlying assumptions that aren't acknowledged.

**MR HARRIS:** Yes. I think, with the previous speaker, we were concentrating on specific areas of interest, as we will in your case too. In your original submission - some people did give us commentary on objectives. We, in our issues paper, pointed out that there are an awful lot of objectives in the Act as it is today, and quite a few of them are, at least on appearance, internally inconsistent, and adding to them is not necessarily going to solve the problem. I guess that was my observation and I just wanted to get some kind of commentary because it does drive the whole thematic that you've really got in here, that your critiquing of our report is primarily driven on this, as you've pointed out, presumption that we've got some kind of male-breadwinner model in mind. I think we'd actually pointed out ourselves that harvester man is over and has been over a long time and, therefore, not necessarily the kind of imagery that would drive, for example, the minimum-wage consideration, and, in our case, didn't.

That said, given where you're coming from, I was trying to work out - of course most of the hearings process is going to be about people's ideas for solutions to problems and I thought, "Is that the sort of solution that you still have in mind or is there something more specific that you've got in mind?"

**MS JOPE:** I think it's really important, anything that the Commission recommends, that it's really conscious that it may have a - there are two stories, often, and if you disaggregate data by gender you'll get two quite different stories. One of the controversial topics is around penalty rates on Sundays. Those people relying on penalty rates are often low-income earners and they're often women, and that has a significant impact on them. Those stories have to be drawn out. Women are being forced into - and I say "forced" because the options are limited - more-casual insecure work. Possibly one way of accommodating the reliance on penalty rates is to offer people more-permanent part-time work, so they're not on casual rates, so that has a slight difference on the immediate impact. It's still going to have an ongoing impact overall.

**MR HARRIS:** It would be a pay reduction, quite often, for people to go from casual to permanent part-time.

**MS SCOTT:** Casual loading is typically 25 per cent.

**MS JOPE:** Yes, I understand that. I'm on a contract myself. Yes, there is, but there's an argument for predictable hours and predictable incomes and, for a lot of women - they don't want to work full-time but they do want a permanent, predictable working life so they can plan around it. For a lot of us - we can manage that but not everybody, so we'd be looking to the Fair Work Commission to protect probably the most unprotected workers or the most marginalised workers.

5 **MS SCOTT:** In the draft report, the Commission sought information through an information request on whether it would be practical for casual workers to be able to exchange part of their loading, 25 per cent, for additional entitlements, for example, personal or carer's leave, if they so wish, whether such a mechanism would be worthwhile. So, we have actually sought comments back from all interested parties on that topic and we hope to receive some during the course of this process for consideration in the final report.

10 We are conscious of the issue and have done research in this area. We've found that relatively few people do make the conversion, although we're conscious that sometimes casual work is an entrée to more permanent arrangements for other people. It's just the fact that the conversion may be through a change in the nature of the job rather than a change in the actual  
15 status of the worker. Time will tell.

Is there another aspect that you would particularly like to draw to our attention?

20 **MS JOPE:** There's a couple of key ones, especially we've just done work recently around domestic violence as a workplace issue. We've got a paper that we're, because of organisational constraints, are sitting on but we'll be circulating to our members. One of the recommendations of that is to go back to the Australian Law Reform Commission report of 2012, which  
25 looked at family violence in Commonwealth employment law. There's a lot of individual workplace protections being put into enterprise agreements, et cetera, but we would like to raise the issue of it becoming part of the National Employment Standards.

30 **MS SCOTT:** Thank you. In your outline of the organisations that you encompass, you referred to a group who sought to represent marginalised non-union workers. Could you just identify who they are and the sort of work that they do and how they interact with people in these marginal situations, please?

35 **MS JOPE:** Yes. The national Working Women's Centres - I believe they appeared before the Commission on Tuesday in Adelaide.

40 **MS SCOTT:** That's fine. I was just checking who they were. Thank you very much.

**MS JOPE:** Yes.

45 **MS SCOTT:** We've got them already; I just wanted to make sure that we were covering the field.

**MS JOPE:** Yes.

5       **MR HARRIS:** You've got a whole bunch of propositions here about adding, effectively, if I can look from an employer's perspective, to the cost of casual workers, including the right to return to work part-time. It's not limited to casuals, I guess, but then you've got "extend the opportunity of paid annual leave to casual employees on a pro rata basis and a minimum engagement of three hours for casual workers" and propositions like that. This is a question I'll balance. If additional costs are imposed on casual workers, it's likely at some point that there will be fewer job opportunities for casual workers. Relative to I don't know what, that's the question I'm really asking you.

15       In coming up with these sort of provisions, did you give consideration to the possibility that casual workers would become less employable as a consequence of these things, or do you think that there's actually no scope for changes in levels of employment as a consequence of this?

20       **MS JOPE:** I would say that I think, for a significant number of women who are employed at a casual level - a lot of them would like to go to a permanent position. I would say that, if you offer that opportunity to convert from casual to permanent after six months' regular and systematic casual work, that is a significant issue for a lot of women, especially for women who maybe have returned to work after considerable time with family responsibilities and they're in, say, that 45-to-65 age range. It's a particularly good time for them to boost their retirement savings. For a lot of those women - the Human Rights Commission is looking at mature-age discrimination at the moment. It's very difficult for them to get secure work. They pick up bits and pieces of casual work and that's not sufficient for that long-term economic wellbeing. I think that, of course, you wouldn't be - my personal thinking - adding onto casual work rates the other; it would be a negotiation.

30       **MR HARRIS:** These will be opportunities to negotiate improvements in condition which would take into account the employer's circumstances.

35       **MS JOPE:** Yes.

40       **MR HARRIS:** I see. I don't know that I had anything else because my other thing was more drawn from your original submission than from your subsequent comments. Primarily, my interest is around this question of objectives, which I've already asked you.

**MR HARRIS:** Sure.

45       **MS SCOTT:** Can I ask you about your views on the status of migrant workers being underpaid in positions? Have your organisations, or your members' organisations, provided you with any commentary on this subject

or would you feel free that you could comment on it now?

5 **MS JOPE:** I think the Working Women's Centres - and I've spoken  
in-depth with Kerriann Dear from Brisbane Working Women's Service in  
Queensland, as well as with South Australia and Northern Territory. We  
would talk about emerging issues and it's particularly people on the different  
visa classes, the more temporary visa classes, and being kind of blackmailed  
and held to ransom in those jobs, that the employer would withdraw their  
support for their visa and they actually want to stay here. That's hearsay;  
10 that's from their work and we haven't actually done any significant research  
on it.

15 That mixes up with a conversation I had with the multicultural women's  
health centre in Melbourne, and this is from work they did some time ago,  
about that debt trail from country of origin to Australia, into these  
employment jobs, with these visas. So, not only are they reliant on the  
employer to remain in the country but they've got a debt and in some cases  
they've got moneylenders back home that threaten life and limb of their  
family. There's probably an area that needs a bit more examination and it  
20 does impact significantly on women.

**MS SCOTT:** Thank you.

25 **MR HARRIS:** I don't have anything else.

**MS SCOTT:** Thank you very much for your time today.

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

30 **MR HARRIS:** We really appreciate you coming along.

**MS JOPE:** Thank you.

35 **MR HARRIS:** Do we have Restaurant and Catering Australia? If I could  
ask you to identify yourself for the record, please.

**MR HART:** John Hart, Chief Executive, Restaurant and Catering Australia.

40 **MR HARRIS:** Do you have an opening-statement kind of thing, John?

**MR HART:** I do, thanks, Chairman, if I can. These comments in an  
opening statement-type format are not a reflection on our submission, more  
some comments on the draft report itself. The comments are drawn from the  
result of discussions we've had around our policy committees and our  
45 various regional council meetings for the association.

The draft report, first of all, talks about some overseas worker-type

issues, and we acknowledge that of course there are many overseas workers working in our industry. We'd just like to make the observation that many of these overseas workers are skilled workers and many of those skilled workers, far from taking jobs away from locals, are in fact facilitating jobs for local workers because we need those skilled employees in order to employ less-skilled employees; we need to have a chef in the kitchen in order to employ apprentices and kitchen hands and the like. There's this sort of perception that that is not the case but that's the way our labour market works.

10 The draft report refers a lot to past employment growth and some growth statistics across various industry groups. I'd draw the Commission's attention to some of the growth projections, particularly those by the Department of Employment, that cite restaurants, cafes and takeaway food as the highest growth subsector in the economy. Our projection now to 2019 is that we need to engage an additional 90,000 people in our subsector; that's a very large projected growth number and certainly the largest in the economy.

20 The reflections in the draft report in relation to long service leave provisions: we certainly support the harmonisation of long service leave arrangements, providing that harmonisation could get us to a point where there was one jurisdiction, one arrangement. If we can't get to a simplified harmonised approach, like we've had in some other areas, we think it could be counterproductive to have a partly harmonised long service leave approach. We made lots of comments in our submission about the overlay of various pieces of legislation in this area, of course, that being one.

30 Portable long service leave is certainly not a concept that we would support, on the basis of the additional cost that that mean would be borne by employers. Obviously that additional cost in that case comes without the longevity that the current long service leave arrangements recognise.

35 We're certainly supportive of the concept of limiting public holidays on which additional penalties apply to a number in the SES. The recent spate of gazettals that we've had in South Australia, Victoria and the ACT certainly places a lot of pressure on our business operations and that pressure comes about because many of the businesses, of course, close on those days and then that means fewer operating hours for the business and fewer hours for the staff that potentially would work on those days.

40 We note the commentary in the report on the appropriateness of some additional protection for small business in relation to unfair dismissal. Our businesses are of course predominantly small businesses and our businesses don't have the sophisticated HR departments to deal with matters like unfair dismissal, although, as labour intensive businesses, we have a relatively large number of employees versus the size of supporting structures like HR structures. We certainly agree, and in our submission we note, that the Fair

Dismissal Code has not worked as intended, albeit we are part of the group that designed the supporting materials and the like. We agree that the overriding of clear exemptions under the Code, via procedural-type aspects of employment relationship, makes no sense and does lead to the payment of go-away money. At the outset of the Code, this was one of the objectives, to stamp out some of that go-away money, and it certainly hasn't happened when that framework has been implemented.

We believe, on minimum wages, that the commentary is very useful in the draft report. We note that the comparison to US dollar rates in the draft report only shows Australia behind France and Luxembourg because of the recent changes in the Australian dollar. It's not because France and Luxembourg have caught up in wage rates or that we've gone backwards; it's that the US-dollar rate has changed.

We're also very encouraged by the analysis of minimum-wage matters in the draft report. We are the most award-reliant subsector in the economy and we've got a really big stake, therefore, in annual wage reviews. We continually come under criticism and legal evidentiary argument in the Fair Work Commission over our submissions to the annual wage review. All we're attempting to do through those submissions is demonstrate what the impact of minimum-rate decisions or rate decisions, more broadly, have on our industry, and we continually get taken to task over the legal standing of the evidence that we're putting on in the Fair Work Commission.

We are very keen that an analysis of the type that you've undertaken through this inquiry and in the draft report is part of the minimum wage-rate annual rate review that's undertaken in this country. A legalistic approach to annual wage reviews really doesn't have a constructive outcome for sectors like ours.

We also have the highest apprenticeship to workforce ratio of any industry. The commentary and analysis around apprenticeship rates, particularly mature-age rates, is very important to our industry. As was noted in the draft report, numbers of mature-age apprentices have been crashing. We certainly agree that there needs to be work done in this area. We acknowledge that the Commonwealth has just established an apprenticeship advisory board to look at some of the policy challenges. However, we're convinced that the minimum rate of pay for mature-aged apprentices needs to return to parity with other apprentices, and, if additional support needs to be provided, it should be provided in some other way, through the welfare system, perhaps through a Restart allowance or something similar, but certainly not be latched to unrealistic pay rates because that certainly is stopping what was a bright spot in apprenticeship recruitment in mature-age apprentices.

We also just wanted to draw attention to, in the draft report, the analysis



in relation to award reliance. We really need to equate that to some of the discussion around agreement-making. For our business, making an agreement to effect penalty-rate changes, or whatever else, is a very difficult process for our small businesses, and that's the reason why our sector is so  
5 award-reliant. It's unrealistic to suggest that a small-business sector like ours can use an agreement-making process to effect changes to penalty rates; it really needs to be something that is achieved through the award system in a small-business sector like ours.

10 In the draft report, there's historical information used in relation to enterprise agreements to talk about the level of award reliance. We would note for the Commission that some of those statistics were taken at a time when a large number of individual agreements were used. I don't think  
15 they're cited in the data in the draft report but I would simply suggest that that needs to be taken into consideration when arguing the level of award reliance that was evident at that time. We had about 25 per cent of our workforce on individual agreements at that time. The reason those individual agreements were so predominant was the simplicity with which those agreements could be entered to and the security they provided, as the  
20 agreements were registered instruments.

**MR HARRIS:** Just to clarify that as you go, those have now reverted to more award arrangements.

25 **MR HART:** Correct. Yes. Then perhaps on to some of the discussion around particularly Sunday penalty rates. We certainly agree that rates for Sundays appear at odds with rates for times that are also important for social activities, et cetera, that are detailed within the draft report. We observe, in relation to those times of the week in which additional health risks may  
30 occur, that the night-time work arrangements certainly are mentioned as areas where there are health risks associated. We draw the distinction between that, though, and evening work, and there is no suggestion that evening work has the same sorts of health risks as night-time work does. We certainly appreciate the statement about social disability of working on weekends and  
35 that Sundays have no worse life balance or those working on Sundays feel no more rush than those on Saturdays. We believe this concurs with research that we've done independently, through I-view research that suggests that two-thirds of consumers agree that Sunday is no more inconvenient than a Saturday.

40 We note the discussion in the report about opening hours and the fact that they would most likely increase if the Saturday rate was applied to Sunday for our businesses. We certainly believe that is the case. We certainly also believe that, in terms of staffing ratios, businesses do under-  
45 staff on Sundays and do take staff offline much more readily on a Sunday than they do on other days of the week, because of the costs.

5 We refer to the comments in the draft report on the Jetty Research survey. We commissioned that survey and note the 3.15 additional people that we employed, that survey notes. We noted exactly the same shortfall in that survey as you did in the draft report; that is, the survey didn't detail specifically what sort of penalty-rate change would be necessary to create that employment impact. We did subsequent research, through an organisation known as Elections Australia. This research found that 60.9 per cent cited that applying the Saturday rate to Sunday was what they had intended when they were referring to penalty-rate reform.

10

**MS SCOTT:** Just to clarify here, John, Elections Australia - I just want to check, did that go back to the people you had originally surveyed or were they surveying a different group? Could just give us a bit more information around that?

15

**MR HART:** Yes. The Elections Australia survey audience was the same survey audience.

**MS SCOTT:** That's actually businesses in your industry?

20

**MR HART:** That's correct. Yes. Then we also looked at the groupings of that survey, to make sure they were as representative as the original Jetty Research survey. As I say, 60, 61 per cent, close enough, came back and said that it was the Saturday rate applying to Sunday that they had in mind. I guess, at that point we're in an environment where that was what we were talking about as penalty-rate reform, so that's not surprising, but we did want to close that loop on that piece of research.

25

30 Just to continue, a couple of observations. The analysis in your draft report in relation to New Zealand versus Australia, I thought, was incredibly constructive. To have 10.4 per cent more businesses open for 26.5 per cent more opening hours is quite a stunning sort of number but a similar number that Jetty has come up with in the work we commissioned.

35 We note in your draft report the dismissal of the link between Sunday penalties and business viability. We believe that that may be true in a pure market but we note that the market for restaurant meals is not necessarily a pure market and there are distortionary factors and it's not just that businesses would put their prices up and/or close as a result of the pressure that current Sunday rates provide. There are other market constraints, not the least of which being that we are in an internationally-exposed market and, as far as tourism is concerned, we need to have prices kept at a level that are internationally competitive, not just nationally competitive. There are also, of course, other factors in the market, as well.

45

**MS SCOTT:** Could you elaborate a bit more on those? Are you talking about little cafes being required to be open on Sundays in shopping centres?

Can you give us some sense of where it may not actually be economical to be open but for some reason you still decide to trade? Clearly, one of your other arguments is that a lot of businesses, for penalty-rate reasons, determine that it's unprofitable to trade and therefore they don't trade, so I'm just trying to work out who is this group that, when it's clearly against their cost pressures that day to trade, do trade. There are other factors at work, so I want to have an appreciation of what the other factors at work might be. What market are they going to lose by being closed?

**MR HART:** In the Jetty Research that I referred to earlier, and you've referred to in your draft report, there's a section that asks businesses why they open on Sunday. Less than 25 per cent say, because it's a profitable trading day. The number one response is, because their customers expect them to be open. Certainly, through a number of forums that we've addressed this issue in, most businesses say to us they have to be open; if they're closed on a Sunday and one of their regulars fronts up at the door, looking for a cup of coffee, they're going to go next door and they might lose that customer forever. It's really about providing a service to customers to ensure that their business is known as a business that is open and there to serve their customers' needs.

**MR HARRIS:** This is one of the really unusual things about the whole workplace relations system, isn't it, that what's characterised as the competition between employer and employee for different conditions is actually primarily in this area of penalty rates, having an impact on a third party that is not represented at all in the discussions, which is ultimately the consumer? We can see, can't we, in the data that we quoted, but others have got data as well which shows quite clearly, increasing interest in consumers, which we all know intuitively from our own behaviour in the economy, in consuming services on weekends, but the nature of the system doesn't provide any real representation - the workplace relations system doesn't provide any representation for them, equally as it doesn't really provide much representation for the unemployed, say, in the minimum-wage debate, which we've also made observations on.

Your point is one which says businesses are doing this because of not just through sheer altruism towards consumers, it's actually that "We want to be known to have been open and, thus, you can rely upon us. Don't walk six blocks around on Sunday morning and expect us to be open, find we aren't and therefore don't deal with us all." It's more a contribution of the overall nature of the business, is it not?

**MR HART:** It is. I guess there's a slight addition to that, which is, we also don't want you to go and walk around the corner and taste their coffee and find out that their coffee might be better, so you go there on Monday morning and Thursday as well.

- 5 **MR HARRIS:** Sure. There is a competition but it's - does the Fair Work Commission take this into account? You've put submissions in in these penalty-rate debates the Fair Work Commission currently - is there anybody representing consumers in the room, aside from the expectation that an employer might mention this in some circumstance when it suits an employer, or the employees might mention it in some circumstance when it suits their proposition? Does Choice turn up at the Fair Work Commission; is anybody asking consumers?
- 10 **MR HART:** Not to my knowledge, and, in fact, all of the evidence that I put on in my witness statement in relation to consumer response was taken out of my witness statement, on the grounds that it wasn't relevant to the matter.
- 15 **MR HARRIS:** That's extraordinary. So it's like the Fair Work Commission doesn't want to know about consumers?
- MR HART:** It's a matter of a very narrow terms of reference of the review around the industrial matters that are to be heard during the review process.
- 20 **MR HARRIS:** Would it be reasonable for me to characterise that as an intensely legalistic description of what's a far wider social issue?
- MR HART:** You should characterise it as you see fit, Mr Chairman.
- 25 **MR HARRIS:** Excellent. I think I see fit to answer that question anyway.
- MR HART:** You do.
- 30 **MR HARRIS:** It's just extraordinary. There is a clear issue - have you got to the end of this? I have a couple of things - - -
- 35 **MR HART:** Yes. I was simply going to make an additional comment at the end, saying it's refreshing to see a draft report that actually looks at these workplace issues from the perspective of an analysis of the issues, rather than this sort of strictly legal, adversarial approach that we see in the Fair Work Commission.
- 40 **MR HARRIS:** Public holidays, again, if I permit myself, which I will, an observation, it's remarkable there's been so little comment on, effectively, fettering the powers of governments to declare public holidays, for the purposes of imposing costs on business. It's not really been given very much attention at all. Part of the value in doing hearings is that we try and have this as a matter of public debate so it's not a shock when the final report comes out. You've endorsed the concept in the draft report. There is no other mechanism, is there, for addressing this question of public holidays
- 45 inside the Fair Work Commission process? You can't contract out of the obligation to pay people when state governments declare public holidays.

5 **MR HART:** That's correct. I guess this is something that's exercised our mind over a good period of time. The increased gazettals by states - and in fact probably the most damaging type of gazettal is the likes of the part-day public holidays that we've seen in South Australia, where in fact the definition of the part-day public holidays and the pay regime for those part-days means that they are in effect a full-day public holiday. So, not only is it the sort of expansion but, then, the sort of growth in the different types of public holidays that have been gazetted. We certainly know that very large numbers of businesses, of course, close during those days because it is not a profitable day for them to open.

15 **MR HARRIS:** To your knowledge, has there been any effort by state governments to, before they do declare public holidays, assess the costs of this trade-off, so that, before the decision is made, there would be some kind of awareness of the additional costs that might be imposed as a consequence of it?

20 **MR HART:** The most recent one, of course, being the Victorian public holiday on Grand Final Eve, which was subject to not only a regulatory impact process, or analysis, but, also, PwC did an analysis as to the cost of these additional holidays and found between a \$500 million and a \$1 billion cost overall, and yet the gazettal still continued. There are certainly a number of costings being done but it doesn't seem to deter the states from continuing to gazette these public holidays.

30 **MS SCOTT:** John, could I take you back, say, to the year 2000, I think I first met you back then, when I had some responsibility for matters relating to small business within the federal public service? I think you were advocating that your sector could be a growth sector in the economy but it was being held back by regulations. I just recently read that, finally, there's a possibility that in Martin Place we might actually have, on a regular basis, outdoor eating, and I was thinking how far things might have come, but, then, that had taken about 15 years from the last time we had our conversation.

35 Maybe 15 years is not very fast at all.

40 I guess I'm getting you to talk about the past and the future of your industry from a couple of perspectives. You've explained how it's a very strong growth sector at the moment. Yet, on the other hand, you are quite reliant on - have been reliant, I don't know if you still are, on 457s as an area to attract chefs and yet your sector has been growing over a sustained basis. Why is it that the sector can't anticipate, or hasn't been able to anticipate, further growth and therefore train its own chefs? What is in the nature of your growth industry that you haven't been able to, effectively, grow your own chefs? What is getting in the way and why do you have to rely on overseas workers? It seems to me that your sector is different, say, to the mining sector, which can have these sudden spurts of growth and then quite

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rapid decline. Your sector has been a growth sector for some time.

5       **MR HART:** I'll answer that in two ways, I think. The first is that it's simply the pace of growth that creates this problem. If you look at this projection out to 2019, where we're looking for close on 100,000 additional people required in our workforce, there is no way that we are going to get a local supply that anywhere near meets that sort of growth projection. We just simply cannot train up people locally and will not get the interest from local workers to work in an industry like ours to that sort of number. The growth in the past has not been of that order but has still been incredibly significant. It's really the underlying growth that means that it's very difficult for us to put in place sufficient local skills development to reach the types of numbers that we aim at.

15       Of that, though, there's also, to some extent, a necessity within our industry to attract those skills from offshore, particularly in the ranks of cooks. We have become an incredibly ethnically-diverse workforce by necessity. I mean, we need to have Thai chefs to be able to work in what is now, I think, the third-most-popular cuisine in the country. We need to have Chinese cooks to be able to continue to bring their skills to our bank of Chinese restaurants. To some extent, it's necessary for us to continue to bring in the latest bank of skills from the countries from which our cuisine is drawn and that will continue. In terms of, though, developing locals, we need to be able to do it in a number that we've never been able to keep up with, as you observe. There is also, to some extent, a reticence within the training system to fund skills development in industries like ours and retail, as they're regarded as sort of second-class industries. In the training regime of the last 10 years, the sort of mantra of "high skills good, low skills bad" has meant that we have not been the focus of skills development and, therefore, in the ranks of chefs particularly, not been able to attract sufficient funding through training systems to be able to have the skills development we've needed to occur.

35       **MS SCOTT:** Could you comment a bit more about what's happened with - we have heard this in other sectors but if I could get you on the record so we can do further research in this. Could you tell us a bit more about when the apprenticeship wage for adults came in - what impact it has? You've linked it to the sharp decline in adult apprentices. Could you comment on what that means in terms of people's capacity to change careers, or enter your sector at a different time, or move from unemployment to employment, and could you comment on why it was introduced? There probably is a clear rationale for it, and we'll do further research in this area, but could you comment on those areas, please?

45       **MR HART:** I'd first make the observation that the biggest area of growth for us before that decision was taken was of mature-aged apprentices, and, if there's any employment impact of the Master Chef phenomenon, it's an

interest from mature-aged people looking to career change into our industry. The only uplift we saw in the recruitment sense from that sort of phenomenon was in the ranks of mature-aged apprentices. That more or less stopped overnight as the third-year rate applied to first years in that decision that was taken by the Commission. We understand that there are different issues for mature-aged apprentices in their costs, their life stage and so on, but an award is a minimum-rate structure and the minimum-rate structure applies in an apprenticeship sense, fundamentally, to the productivity of those employees in the workforce. It's the extent to which that person is productive in a workplace sense, and a first-year apprentice is no more than 50 per cent productive in that workplace. To say that they're 80 per cent productive, that is, they're on the 80 per cent year-three apprentice rate, certainly doesn't reflect the skills that those people are bringing to the workforce, which is why we're suggesting that there's some other means of supporting those apprentices, and if that needs to be through the welfare system or some other means, then, so be it, but it shouldn't be reflected in the minimum-rate structure.

**MS SCOTT:** For transcript purposes, the adult rate applies at what age?

**MR HART:** The third-year rate applies from day one. So, first year, second year and third year for mature-aged apprentices are all paid at the third-year rate.

**MR HARRIS:** Doesn't this create a circumstance where, if you had a choice between an 18-year-old apprentice and a mature-age apprentice, you would, definitionally, presuming that they each had no practical experience, go for the cheaper employee, which would mean that you would favour the 18-year-old, which may be no bad thing - I'm not suggesting that's good or bad but do you know whether consideration was given to that by the Fair Work Commission in establishing this principle of paying mature-age apprentices a higher rate?

**MR HART:** My recollection of the statements made in the Fair Work Commission at the time was that there was a statement made that they didn't envisage any link between the rate structure and commencements. We certainly say that that has certainly not been borne out by the implementation, and the graph in your own draft report shows that that's - - -

**MR HARRIS:** The data does show a turndown. Whether it's linked to that or not is a different matter.

**MR HART:** I can't see anything else that it would be linked to, Chairman. The only thing in that observation is that, given the reference that Scott C made to the past, if we think about engaging apprentices, we would essentially take both the mature-aged apprentice and the young apprentice because we're in such a dire skills-shortage situation. Our businesses

basically need to take any apprentice that sticks their hand up. Our shortage is not of apprenticeship vacancies among employers. Our shortage, and the reason for our decline, is numbers of apprentices looking to get into an apprenticeship. I guess that goes to my point about the rate structures being a minimum structure. We need to have the flexibility to work within a minimum structure that reflects, in an apprenticeship sense, the productivity of those people in the workplace, so that, should employers want to reward the right people into the job, they have the capacity to do so. If the minimum encroaches heavily on the paid rate, then we don't have the capacity to pay money to attract the right people to work in our workplaces.

**MR HARRIS:** You didn't mention enterprise contracts in your overall position. You did show that you were a substantially award-reliant sector and, moreover, small business, and the concept of enterprise contracts that we put up was driven, as we pointed out in the report, by the fact that small-to-medium enterprises do not seem to have taken advantage of enterprise bargaining. I think you did comment on why that might be the case, and that was consistent with what we earlier had assessed in our draft report, but you didn't mention whether the enterprise contract would offer you the kind of possible benefits that we had in mind. We didn't recommend the enterprise contract quite deliberately because we were waiting to get assessment from people. Obviously, in the final report, that will either firm up or shrink, depending on commentary.

Have you had a chance to consider this or do you have a general perspective on whether the variations of flexibility, with the safeguards that we have in mind in the enterprise contract, would be a worthwhile potential proposition for your sector?

**MR HART:** We have, and we certainly believe that, whatever they might be called, an individual contract between the employer and employee is a good thing, to the point that I made about our previous arrangements. We had a very large portion of our workforce on individual agreements, when they were possible. We believe that the lack of take-up of individual flexibility agreements in our sector is a function of the reliability of that instrument; that is, because they're not in any way registered or approved. We're concerned about recommending them as a solution because we believe that our businesses need to be able to rely on the instrument that they use. We would suggest that any sort of individual agreement, individual contract, needs to be in some way registered or approved so that the reliability to the employer can be determined.

We're also keen - the first presentation this morning - to ensure that they are an agreement overall; that is, covering the field of both non-monetary and monetary terms within the employment relationship. On that basis, we would certainly support individual contracts, or enterprise contracts.



5       **MR HARRIS:** There's a big difference in our report between individual and enterprise. The enterprise contract was meant to be for a cohort of employees; for example, all of your wait staff could be on a revised arrangement. I'll take your comments as being more relevant to the IFA's side of things than the enterprise contract, I think.

10       **MS SCOTT:** John, in relation to your sector, I appreciate that you made the point earlier that, because of the small-medium-size nature of businesses, they're not interested in going down the route of enterprise bargaining. In your mind, given your experience at the practical level, for what sort of size of business does an EBA become a realistic proposition?

15       **MR HART:** I think, under the current arrangements, I'm not sure that we would recommend it for any size of business, to be honest. The Better Off Overall Test is such that we still recommend to all of our businesses, irrespective of size, to remain on the award. The process itself is just so fraught that we wouldn't expose any of our businesses, of any size, to it. Having said that, the concept of an enterprise agreement we, in the past, have recommended to businesses of over about 20 employees. We certainly see, 20 or have seen in the past, great value in those sort of medium-ish businesses going down the path and, even within the bounds of similar processes to what they are today, it was worth it for those sort of businesses, but under the current construct we wouldn't suggest it to businesses of any size.

25       **MR HARRIS:** You mentioned the small business Code for unfair dismissal and did say that you think - I want to get you to, on the record, if we can, endorse the idea that it may leave businesses exposed in the sense of believing they followed the Code but that was not necessarily a sufficient protection for unfair dismissals. This again hasn't really received a lot of 30 attention in the commentary we've seen publicly to date because - the Code, I think, when it was created, there was a lot of expectation that it would actually solve the problem. Then, across the whole group of changes, because we said "Remove the Code if you make the other set of changes that we have proposed," effectively, changes driven towards the idea of following 35 substance rather than form in unfair dismissals - would that form a set of changes which you think would make acceptance of the unfair dismissal system - would it lift acceptance of the unfair dismissal system as an important right for workers?

40       **MR HART:** Yes. Certainly we agree, and in fact I think we cited some case examples in our submission, of areas where the Fair Dismissal Code was leading employers to a sort of false sense of security. We certainly have a wide number of examples where businesses have believed that, on the basis of dismissing someone for theft, for example, they were in a safe harbour, yet 45 to find that the dismissal was then being tested on all sorts of procedural grounds. It certainly hasn't achieved its objectives in that way and, as I said earlier, having been part of the SBAG, or whatever it was called at the time,

that went through developing guidance materials and the nature of the Code itself, these things were front and centre in the development process and certainly part of the objective of the Code but certainly have never come home to roost. It's been very disappointing in that regard.

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I think the type of formulation that you've proposed in the draft report would address some of those discrepancies in the way in which the Code has been implemented. It's not all, though, a matter of procedural consideration overriding the practicalities of the areas that the Code was supposed to address. I'd just caution, some of the other areas where the Code provided protection to the small businesses need to be addressed or covered off as well in the suite of changes, and perhaps what we should do is come back to you on exactly which of those we'd like to see included on that list.

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15 **MS SCOTT:** That would be appreciated.

**MR HARRIS:** Yes. If you can - I'm going to take the principle of the Code being - creating this perception that, if you follow the Code, you're protected, then you're not - you presumably will give us advice then on something which doesn't again require a Code, because - I think we've come to a conclusion, but we're interested in people commenting on it, obviously, that the Code itself is not actually going to help solve this problem. It might have almost been a desirable thing to educate people that there are administrative processes which you should reasonably follow but it's certainly not going to get you out of the woods to keep some aspects and just delete others, is it?

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30 **MR HART:** The Code was a solution that was arrived at because of some undertakings that there wouldn't be changes to other parts of the unfair dismissal arrangements at the time. It was a solution to a series of undertakings that had been made. There are better ways of addressing it, as you say in the draft report. Certainly we'll just provide a list of areas that we think need to be considered, so that the Code approach doesn't need to be used.

35 **MS SCOTT:** I'm interested in drawing out your views on a section of our report, where it dealt with unfair dismissal, where we looked at reported incidences of unfair dismissal and then we looked at commentary on unfair dismissal and submissions received on unfair dismissals and so on, we also looked at studies, any studies we could find, here, overseas, and we offered  
40 the view that it may be the case, and some overseas studies have suggested this, that small and medium-sized businesses are very conscious of the risk of unfair dismissal, even if they haven't had much experience of being charged with unfair dismissal - in other words, it might be a case that perceptions run higher than the reality of it because they see reported cases of it or they hear  
45 from friends and colleagues of cases which seem to be irregular, or absurd, or aberrant. Where is unfair dismissal now in the pantheon of issues that your members raise with you? Was it a red-hot issue 10 years ago and is less

red-hot now, is it still uppermost in their mind, are there bigger issues that - where does it rate, for example, relative to penalty rates? You'd like to see reforms in as many areas as possible if there are valid grounds for them but we were just puzzled by - maybe it's because there's still a lot of go-away money that, by its very nature, is not recorded but I'd just like to get your sense of where it now is in the order of things.

**MR HART:** The first thing is, I think, we recorded in our submission that we think the numbers of unfair dismissals are drastically under-reported and that there is certainly a lot of payments of not even getting to go-away money, just exit payments that are made to make sure that businesses are protecting themselves. I'm not sure that those businesses would even characterise that as something they're doing to avoid unfair dismissal. I think they're now getting to a point where it's just characterised as an exit payment and something that they're doing to ensure a smooth exit by a particular employee from the business.

My sense is that the threat of unfair dismissal, as opposed to challenges on termination in other jurisdictions, is probably less of a standout now than perhaps it has been. The adverse action-type complaints, a whole range of other remedies that employers are thinking about are starting to take away from this sort of one standout on the horizon that's unfair dismissal. I think, to that extent it's probably less of a priority issue than it was in the past. I also think that employers have now become more conscious of their processes and perhaps it's something that the Code has achieved, and that is, just the knowledge of processes that the Code has stepped out, rather than being a sort of defence, has enhanced understanding as to what a fair dismissal process looks like, without testing it in a legal sense.

I think it's a combination of additional jurisdictions in that sort of termination area, a lack of publicity, if you like, around unfair dismissal as being the issue of the day, and some development of business process that's starting to treat termination in a more-careful way leads to it not being quite the issue that it was in the past. In terms of what are the issues, there's absolutely no doubt that, on our radar and in all of our benchmarking studies and so on, penalty rates is the number one issue.

**MS SCOTT:** Thank you for that.

**MR HARRIS:** I don't have anything more for you either. Is there anything that you'd like to get on the record before we break for 10 minutes?

**MR HART:** No, that's fine. Thank you very much.

**MR HARRIS:** Thank you very much for your time and effort and the following-up of the research, as well.

**MR HART:** Indeed. Thank you.

**ADJOURNED**

**[9.49 AM]**

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**RESUMED**

**[10.05 AM]**

10 **MS SCOTT:** Good morning, everyone. We're going to resume now. We have Klaas Woldring, who's going to present now. Klaas, for the record, could you identify yourself and indicate if you're representing your group or if you're an individual presenting to the Commission, please?

15 **DR WOLDRING:** I'm Klaas Woldring. I'm a retired academic from Southern Cross University, and I do not represent any particular sector, group or business, not even the university because I'm retired, but I find this topic very important and interesting and that's why I made a submission. I'd like to talk to this now.

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**MS SCOTT:** Thank you. Please proceed.

25 **DR WOLDRING:** The essence of my paper, my submission, is that we need to change the IR culture in Australia. I think this has been talked about much in the late '80s and '90s but it hasn't got very much further than talk and research and advocacy and so on. So, the political parties have not, basically, accepted what at least two dozen senior academics argued, that there should be much greater participation by employees in the decision-making processes of the businesses that they work in.

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I had a look at the draft report by the Productivity Commission about this inquiry and the tone of that provisional report is that the recent market performance does not suggest a dysfunctional system. On the face of that, it's relatively satisfying; one could say, "Steady as she goes." If it is meant as a warning against returning to WorkChoices version 2, it may be seen as a positive but, as a defence of the status quo, in my opinion, it lacks substance for other reasons, and that is what this submission is about.

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40 Workplace democracy is not an issue in this paper. All kinds of other things affecting productivity are but not workplace democracy. My question is, why not? This has been the case in so many countries in the world and a great deal of success has been introduced. Remarkably, the Productivity Commission does provide evidence that industrial action has been declining considerably after the introduction of enterprise bargaining in 1993. The graph that is presented there in the background paper shows that quite clearly. To my mind, I would think that enterprise bargaining is actually a first small step in workplace democracy. Even though it's a short period of

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time that that happens, it clearly has had an effect on diminishing strikes. So, I think that should be taken more seriously than in the past. It is a far-more important issue than most of the others to be examined now.

5       As far as I could determine, the Productivity Commission has actually never researched this aspect of workplace relations, and I say, Why not? Why should this not be an area of research for the Productivity Commission? The answer to that is that the Commission is part of the culture, of the existing culture, and gets requests from government and from the major  
10       parties, who say, “Examine this, examine that,” but not what we don’t want.

      It is heartening that the Productivity Commission has been asked to study industrial relations in OECD countries. We had to go back to the ACTU/TDC, Trade Development Commission, actually a tripartite mission  
15       to five European countries that resulted in the remarkable Australia Reconstructed report of 1986. That report had amazing, visionary and logical recommendations after studies of countries, particularly Sweden, for instance, Norway, I think, Austria and Germany and also the UK, which was not in that group but - as a contrast. The recommendations in that report -  
20       very enthusiastic and well-founded recommendations - were rejected by Bob Hawke. He said that, “It is not our culture.” That was his argument. “Yes,” he said, “it worked well in those countries but it is not our culture.” Cultures change. Sometimes cultures really have to change. Why should not look at that and add that to the package that we have here?

25       If Australia is to achieve greater workplace productivity - they talk about “Greater cooperation between management and employees, fairness” - very key word in Australia, “fairness” - “and balance is not enough, and will remain just that, fine words. “Both in the areas of workplace democracy and  
30       employee share ownership” - sometimes referred to as “ESS” or ESOPs” - “other countries have specifically legislated to provide institutional frameworks for participation and also for a range of financial arrangements to facilitate employee share ownership.”

35       Being co-owner of a business motivates employees in several ways. It means that they part-own their jobs. Race Mathews has recently written a book about this, “Jobs that we Own.” That is all about Mondragon and other such institutions where the workers indeed own their jobs. They part-own  
40       their job, particularly through a medium-size business - from Mondragon in Spain to Ricardo Semler’s Semco in Brazil - maybe you’ve heard of Ricardo Semler. He’s been here a couple of times, interviewed by the ABC, a remarkably successful employee-owned business, really. Ricardo was sent by his father to Harvard - in Brazil - and he came back after two years and said, “These people cannot teach me anything. What we do here is much  
45       better than what they teach,” and it’s a highly successful company, Semco.

      The evidence is simply overwhelmingly positive, especially when the two

practices, participation in decision-making and employee-share ownership, are combined. In terms of participation in decision-making, a large number of European countries have introduced legislation since the mid-50s and in most cases have widened the application of these Acts repeatedly, especially in German, the Netherlands, Scandinavian countries and others. I've been in Norway, I did my study leave in Norway in the late '80s, and for them it was just passé, you know; they said, "We're onto something else now - oil in the North Sea - but the employee participation scheme is all in place and we have no argument with that; it works well." There are plenty of examples in Europe.

Most recently, there has also been a very important report in the UK, the Nuttall report. The researcher, Nuttall, was here recently, in 2012, and explained how they are approaching ESOPs now, Cameron, the Conservative government, in the UK. For the most part, this has remained mostly of academic interest in Australia, with a few notable exceptions, for instance, Fletcher Jones and Staff, and Lend Lease, who got this going because the leaders of these organisations said this was a good thing to do, so, "Regardless of whether or not there is legislation, we'll do it," and it worked. And, of course, the Nelson report in 2000, called Shared Endeavours. In individual cases, the enlightened entrepreneurs' personal philosophies drove the development.

Most of the examples overseas, with some exceptions, for instance, John Lewis & Co, have been introduced following appropriate legislation. If the Australian Government employers organisations and unions are serious about progressing productivity in the workplace, as distinct from continuing customary adversarial tug-of-war exercises, effective legislation is what is required now. To just say, "This works" and giving a few examples, even best practice examples, have not really shown others to follow that. Frequently we said, "This is a best-practice example. Let's do this." That has not happened in Australia. We need effective legislation if this is to happen.

The Abbott government has draft legislation ready to relax tax arrangements - I think, actually, this started from July. These tax arrangements for employee-share programs, ESS, have been a concern for Australia, for start-up companies, since legislation was introduced by Labor in 2009. That legislation wasn't received all that well, really; it sort of curtailed the better reported higher salaried executives and didn't do very much for the employees, for the lower-salaried employees and wage-earners. In order to make this attractive, employee-share schemes, your investment as an employee in your organisation has to be at least as good as your investment elsewhere - actually, it should be better - for it to be attractive. That was not the case. I am not sure about the details of what's happening now but there are new arrangements which supposedly are going to encourage more employee ownership schemes.

5 There has been criticism, of course, of this by, for instance, Professor David Peetz of the Griffith business school, who said, in an article not long ago, this year, "If you do see benefits from share ownership on employee behaviour, it tends to be where those employees have had some role in decision-making as well." So, that combination is what creates the turbo force.

10 The success of participation, and certainly not only in IT start-up companies, came out of the extensive research done by the University of New South Wales in 2009, which was actually published in 2011. I have a copy of that here with me. It was very extensive research. The study group at the University of New South Wales published an excellent report, "Leadership, Culture and Management Practices of High Performing  
15 Workplaces in Australia" - not somewhere else, in Australia. The High Performing Workplaces Index it is called. What you see there is something quite remarkable. They have something like 60 indices to show what has effect on productivity and the top four all show participation by employees in all kinds of things, decision-making, skill formation; you name it, it's there.  
20 The four top indices are right at the top and all have participation in them.

This is an excellent report. My question is, why is this report not widely-read and distributed? It's there, it's been a massive - it's regarded as a major contribution by the university and the first since the Karpin inquiry in 1995.  
25 The Karpin inquiry into management in 1995 was a sort of milepost and since then we haven't had anything much, except this, and it's exactly about this particular aspect.

30 It's the combination of share ownership schemes and effective voice that provides a productivity boost in particular. I also refer to a Professor Joseph Blasi, who addressed a conference organised by the Australian Employee Ownership Association in Sydney, which is now called the EOA; it's changed its name. I was the secretary of this organisation for several years in the noughties. I'm still a member but I'm not the secretary any more. I know  
35 about this and Blasi is one of the top people in this field in the United States who we invited for this conference. That is also his message; it's got to be the combination - employee share ownership as well as participation in decision-making. That yields the highest productivity.

40 I am arguing that these sorts of things can be added to the Fair Work Act. Why not? Why should we not make this at least optional and encourage this by legislation?

45 Do unions need a new fighting fund, as I say, to protect their rights, and should they also campaign for more intensive participation in the business by adult employees who are well-educated and would want to exercise their democratic and economic rights in the workplace?

I've got a little bit here about the question of fair work and to what extent does the Fair Work Act, for instance, regulate salaries, incomes, of people in the workplace. You read, daily, that we have CEOs and senior executives having 50 to 100 times average employee rewards. What is fair about that and what are the political parties about that? Apparently nothing. The story is, not only in Australia but in most of the western world, that the inequalities of income are growing all the time.

The fact is that companies that have a high level of employee participation and also ESOPs - the income of the senior executives does not go through the roof and the reason for that is that these people who are co-owners have an interest in how this works in their organisation. That is a bonus that, at this stage, with so many people having very high salaries, is important. There is simply more transparency within such business organisations about executive rewards.

At the end of the paper, I'm talking about the Dutch Works Council Act. It's instructive to have a look at the Dutch Works Council Act. The latest version that I have seen is 2010. This is not a particularly radical Act, actually, in the European context, as it essentially provides a wide range of advisory, appeal and approval powers to enterprise councils. It does provide something that is lacking in Australia, where the notion of management prerogatives still seems to dominate the workplace culture. It prescribes compulsory consultation and negotiation within the workplace, not just for an enterprise agreement, but on a permanent basis.

*Management is expected to work with the employees in the Netherlands. The institution of an enterprise council for an enterprise with at least 50 employees is mandatory. Such a council shall be directly elected by the persons working in the enterprise, by secret ballot, from lists of candidates. The council may invite one or more experts, outside experts, to attend a meeting in connection with the discussion of a particular subject in the workplace. Such invitations may also be extended to one or more directors of the enterprise or to one or more outsiders. For a specified total number of hours per year, the entrepreneur shall give members of the council and its committees an opportunity during working hours, with full pay or remuneration, to meet in mutual consultation and to consult with other persons on matters relating to the performance of their duties and the purposes of acquainting themselves with the working conditions of the enterprise.*

This goes quite far. For instance, if there are mergers of some kind or other, the employees have the right to say, "What is actually happening? What are you doing? How is this going to affect us?" If the company wants



to establish branches outside, something that happens, of course, quite frequently nowadays, or wants to move the entire company to abroad, then the enterprise council can say, "Look, we would like to hear the details of this. What is this going to mean for us? How are we going to benefit from this? What is going to happen to our jobs? Will we get some sort of compensation?" These consultations are compulsory and a CEO cannot say, "Sorry, this is none of your business. It affects the shareholders but not the workers." Of course it affects the workers.

We've had situations in Australia where a company has decided to go some Asian country and the workforce that had been with them for I don't know how long and actually made the company name are simply shoved aside. That won't happen if there is a works council like in the Netherlands.

There are a number of other things that I will not go over which are in my submission.

This Act in the Netherlands started in 1971 and has been amended and expanded several times. The tripartite nature - this is an important point - of Dutch politics, with a government elected on a proportional electoral system, tends to give it a role of arbitrator between employers and employees. That is quite different from what we have in Australia. We have a two-party system, an adversarial two-party system, that is mirrored in the industrial relations system; it reinforces it. That's not the case in the Netherlands. In fact, what we have in the Netherlands is quite remarkable. In the last 20 years, on three occasions, government has been formed by the two major parties, who are actually opposing parties, the Labour Party and the so-called liberal party, the VVD, a fairly conservative party, because they are the only ones who can form a majority.

The kinds of things that we have here, the Westminster heritage but also more directly related to the electoral system - doesn't happen; in most European countries it doesn't happen. So, the governments are arbitrators and almost take the role, you could say, of the judiciary system and the arbitration system in Australia. This is not mirrored in the industrial relations system.

In Australia we see the adversarial mode of industrial relations and positions - the major party often as the representative of labour and capital. If Australia wants to move away from that dated adversarial political culture, major reforms of party and electoral systems would have to be contemplated as well.

I think I'll leave it at this.

**MR HARRIS:** Thanks, Klaas. In our report we did talk - it's an example, and I'm not necessarily suggesting you should have found it in there but we

5 did actually look into something relating to this. Admittedly, it was driven from the regulatory side. We interviewed Cochlear, a firm that does hearing implants. Because they have plants all around the world, they are quite familiar with the operation of - including the European system. One of their more-interesting comments when we out to see them was that the nature of - and I'm putting words in their mouth here. This is not a quote but the general perspective that was given to us is that the nature of the system in Australia, driven by regulatory structure, is such that, even if you wanted to operate a Scandinavian-style participatory - I'm not familiar with the Dutch model, 10 you've quoted it here, but they sound not, conceptually, too far different - where they had a plant, even if you wanted to operate that here, it wasn't likely to be viable because the workforce was not encouraged by its level of union representation to follow that model either. In other words, it wasn't simply an employer at fault here, it was that, on both sides of the tables, the 15 employers and the employees representatives didn't really like to have a participatory, democratic model. As I said, I'm not quoting them here but that's the most, if you like, recent example I can remember of somebody discussing this.

20 If indeed that's the case, that no party is keen on this, how could you see this model then adopted in Australia?

**DR WOLDRING:** I think that the existing culture is pretty strong, as you said, both on the employers' side and on the employees' side, not the unions' 25 side. The unions have always taken an extremely cautious attitude towards giving away some of their power to, say, works councils or a similar sort of organisations. What I'm saying is that this is not necessarily the best thing for Australia in terms of productivity and democracy. At the time that union membership was very high, 55 per cent, in the '70s, one could make a sort of 30 case that, yes, they were very representative of the workforce but the union membership, the union density, now in this country is around 17 per cent. Can the unions still make a claim that they are the real representative of the employees? I have some serious doubts about that.

35 As far as the employers are concerned, perhaps the employers should wake up to themselves. If they are interested in higher levels of productivity, then they should look to those countries, those very many countries, that in the last half-century have introduced these schemes. If they are true conservatives, they would say, "Well, let's just see what these other people 40 are doing and whether it works, yes or no," but, funnily enough, we don't hear much about that. If you want me to comment on this, I have to say, I find that incompetence.

45 **MR HARRIS:** I was more trying to draw out that you weren't, as you've now clarified, actually suggesting this was the problem of one party or another party; it's actually endemic within the system.

**DR WOLDRING:** Yes.

5 **MR HARRIS:** If I could switch to the employer side in terms of a question for you, we've had, for example, advice from the Business Council of Australia which says that they would like to reduce the level of involvement, via an enterprise bargain, of employees or unions in management decisions. So, there's equally a sort of doubt about this, but it all seems to centre on the nature of the workplace relations system. That is, both sides appear to be concerned at giving the other leverage via participatory, democratic workplace kind of behaviour.

10

**DR WOLDRING:** Yes, because they see the outcomes as a zero-sum gain, "What we've gained, you lose," and the other way around as well. I think this is a wrong philosophy but what industrial democracy, workplace democracy, is about, and also employee share - is that the total outcome of this is better for both parties.

15

**MR HARRIS:** Yes. You've quoted some examples which do suggest that and you've got your high-paying workplaces index in particular but, I guess the nub of my questioning is, if this is not going to rise naturally from either side, under the current system, then the implication of that is that you have to impose it in some way, which is the antithesis of, I would have thought, people taking great advantage of it. You've quoted the Dutch Works Council Act, which with I'm not familiar, but it appears to impose a mandatory sort of system, but it seems to be the antithesis of trying to encourage participatory activity by the workforce in managerial decisions and get the incentives right to do with productivity to then say, "Let's impose this by black-letter law." It seems to be the antithesis of it, anyway.

20

25

30 **DR WOLDRING:** Okay, but my question to you really is, the Productivity Commission, why is it that there has not been research by your Commission into the productivity of these kinds of schemes in other parts of the world? Is it because you take your orders from the major parties or do you have the right to say, "Let's look at this. Perhaps this is something for Australia"? There have been, of course, many researchers, many senior academics, in the last 20 years who have done exactly that, I can give you a whole list of them, but they got absolutely nowhere.

35

40 **MR HARRIS:** There is a wide number of topics in Australia that the Productivity Commission hasn't investigated because, in the end, even though we might leave the imagery of being a very large organisation, we're actually quite a small one and at any point in time we're engaged in inquiries for the government, which is our primary purpose and why taxpayers are paying us. We do have a research program. It's reasonably limited in its coverage and we haven't really gone, I guess, to this topic, as much as anything, simply because of the nature of other work, but it is pertinent to this current inquiry, the whole question of drivers for productivity in the

45

workplace relations field is pertinent, and your high-performing workplace index question is worthy of consideration by us in the course of developing the final report. While I can't tell you that we can conduct research ourselves into this, we can, at some point, against pressures of other work, but, certainly for this inquiry, it's an interesting point that you've raised and one that will be, I think, given further thought.

**DR WOLDRING:** Thank you.

10 **MR HARRIS:** Are there other things specifically that you would like to draw out for us here today?

**DR WOLDRING:** No.

15 **MR HARRIS:** I'm sorry, I haven't give you a chance to ask anything.

20 **MS SCOTT:** Klaas, I'm just interested in - I did read your paper. Thank you very much. In our earlier conversation, we were talking about the response to Australia Reconstruction. I remember reading that at the time and then, of course, basically, interest fell away very sharply. I'm interested in cultural attitudes. Australian businesses and Australians generally have been shown to be early adopters and adapters of technology, in industry and in consumer life, and have been quick to seize things. I mean, it doesn't matter whether it's introduction of particular products, like smart phones or  
25 Netflix or other products coming onto the market, people have been shown to take them up. I'm wondering - leaving aside the political sphere, businesses are interested in maximising profits, we think, maximising something - why you think, in the presence of what you see as solid evidence of opportunities to lift productivity and profitability, they haven't seized this. We have many  
30 German and Dutch firms operating in Australia - why they haven't introduced this model here in Australia, for example. We have a number of major firms from those countries that haven't operated this structure here - why that's the case. Why is it that, if things are so good, people haven't taken them up? I just wondered if it could be the case that they won't translate well here; I wonder if people have come to the view that they won't  
35 translate well here.

40 **DR WOLDRING:** I'm not so sure about this. Lend Lease, for instance, was run by Dick Dusseldorp. He wasn't actually a migrant; he came here to build aquadation(?) for the Snowy Mountains Scheme. Then, subsequently, he decided that perhaps he should stay, and started Lend Lease. He introduced, in Lend Lease, a degree of participatory democracy. He did that - quite obviously, as staff said and anybody who saw this happening, it was quite different than what happened in Australia, and it worked very well; Lend  
45 Lease was a great success.

**MS SCOTT:** Why haven't other firms taken it up? I'm looking for - for

example, we've had a number of - we'll take the appearance of Aldi in Australia. That doesn't seem to have introduced these types of approaches. You cite the example of Fletcher Jones, but, of course, it's had a demise. For every success story - you might have another - I'm just trying to work out why, if people have had such fantastic experiences with it and it's something that you think can be replicated in Australia, it hasn't been, leaving aside - you don't need legislation to introduce good ideas, you don't have legislation to say, "Buy a smart phone," so I'm interested in what you see is the impediment, aside from some other political reasons.

**DR WOLDRING:** I think the answer is the IR culture in this country, which is adversarial. It has diminished since enterprise bargaining started, clearly, but it's still there. We have not moved further than the '93 legislation of enterprise bargaining. I think the time has come, really, for governments to look at this, simply because it produces more productivity. We are in a phase where the economic wellbeing of the country may well be in danger. When that happens, we need to start talking about how we can do more with less.

**MR HARRIS:** I think, as I said earlier, your submission, particularly this "high performing workplace index" question, is worth us considering further in the final report. It still remains a conundrum - I think you mentioned earlier, I can't remember whether it was off the record or on the record, I think it was on the record, that, when these propositions were first put up, even in the '80s, the attitude of the then government to these - as you said, it's not our culture to take this sort of approach, and the question of cultural change and its drivers, via regulatory system - it's a very significant conundrum for public policy to decide how to undertake, if you could undertake, culture change via a regulatory structure.

**DR WOLDRING:** Yes. Perhaps, in closing, let me say that I'm delighted to hear that the new Prime Minister - one of the first things that he said was, "We have to explain to people what we are on about. We have to take the people in our confidence. We have to consult more," one of the first thing he said. That is exactly what this is about, consulting your staff, let them participate to the extent possible. That's what Dusseldorp did when he had industrial strife in his business; he rolled out the beer. He said, "Hello, what is the problem? Let's talk about this, what the real problem is. Come inside. It's not us and you and them. We're all together in this. Let's talk about this." That is what participation is about.

**MR HARRIS:** Thank you very much for today.

**DR WOLDRING:** Okay.

**MR HARRIS:** Let's make sure I'm on the right program. That would make this the Kingsford Legal Centre and Marrickville Centre next. Please come forward and swap over at the microphones. Once you've settled, if you could

identify yourselves for the record, please.

**MS NAWAZ:** Ms Maria Nawaz from Kingsford Legal Centre.

5 **MS VAN GENT:** Annette Van Gent from Marrickville Legal Centre.

**MR HARRIS:** Do you have opening comments that you wish to make?

10 **MS NAWAZ:** Yes, thanks.

**MR HARRIS:** Please go ahead.

15 **MS NAWAZ:** Kingsford Legal Centre is a community legal centre that provides advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas in Sydney. We have a specialist employment law service within our catchment area, as well as a New South Wales-wide specialist discrimination law service. We have previously acted for a number of clients, in unfair-dismissal conciliations and arbitrations and general protections complaints at the Fair Work Commission and the Federal Circuit Court. We provide advice on a wide range of employment law issues, including redundancy, disciplinary action, entitlements, dismissal and flexible work arrangements. In addition to this work, we undertake law reform and advocacy work, where we believe the operation of the law could be improved.

25 Last year we provided advice to 445 clients on employment law issues and 237 advices on discrimination law matters, a substantial proportion of which were discrimination in employment. Of these clients we advised in employment law matters in 2014, 55 per cent stated that they earned \$40,000 or less annually and 81 per cent of clients stated that they earn less than \$70,000 annually. Sixty per cent of our clients were born outside Australia, with many or little speaking no English, 5 per cent of our clients identified as being Aboriginal and Torres Strait Islander, and 14 per cent of our clients had a disability.

35 Our employment clinic services are predominantly the low-income and vulnerable sector of the community. Our experience suggests that in many cases the current workplace relations framework does not adequately protect the most vulnerable members of society.

40 We are here today in order to raise a number of issues in the draft report that we believe, if implemented, would have an adverse impact on access to justice for our clients. Of particular concern to us are the following recommendations in the report: unfair dismissal cases to be decided on the papers; any increase in lodgement fees; limits to unfair dismissal remedies - - -

**MS SCOTT:** Can I just suggest you might go a little bit slower? My note-taking is not as fast as that. I was up to “on the papers”.

5 **MS NAWAZ:** Any increase to lodgement fees; limits to unfair dismissal remedies in matters involving serious misconduct where the employer has made a procedural error; a good-faith requirement for general protections complaints; any caps on compensation for general protections complaints; exclusions for vexatious and frivolous general protections complaints at the Fair Work Commission stage; changes to penalty rates. The other issue we  
10 can provide information on is the situation of migrant workers, and we do support increased resourcing to the Fair Work Ombudsman in this area.

**MR HARRIS:** I’ve got those, but in a different order from you, in a thing you sent through a couple of days ago. I might just stick to this order that  
15 I’ve got here because it will make it a little easier for me, if not for you. Hopefully, it won’t make a lot of difference. On publishing information, you’re supportive of the recommendation to do that, so I can go past that.

Lodgement fees - what’s your basis for considering lodgement fees aren’t  
20 too low? It’s a pretty cheap option, really, isn’t it? I mean, it’s not really that much money for anybody.

**MS NAWAZ:** For a lot of our clients, a \$68.60 fee is actually a lot of money, and that’s the current fee structure. We see a lot of clients who are  
25 very vulnerable and at the stage where they are dismissed - face great financial strain, so we think sometimes the current lodgement fee does act as an impediment to people pursuing meritorious unfair dismissal claims and our view is that any increase to lodgement fees is going to restrict the number of people with meritorious claims actually accessing an unfair dismissal  
30 dispute.

**MS VAN GENT:** That would be our observation as well. Just to clarify, Marrickville Legal Centre is part of a network of community legal centres as well, along with Kingsford. We cover Inner-Western and South-Western  
35 Sydney and we also have a state-wide legal service that assists young people under the age of 24. Our employment practice is very similar to the one at Kingsford, so I won’t detail it, but our observations would be the same. Typically, the clients that we see are very low-income employees. Often they, at the time of their termination, have difficulties not only associated  
40 with the termination of their employment but also with underpayment of wages and entitlements; in other words, often they’ve been underpaid throughout the course of their employment or they haven’t received appropriate termination pay. They’re under significant financial pressure at the time that they’re terminated and, for them, a \$68 fee is significant and it  
45 is a real consideration in determining whether or not they’re going to proceed further with a claim. I personally have dealt with clients, particularly young workers, who, in our view, do have quite a legitimate unfair dismissal or

general protections claim and who have been deterred from pursuing that because of that cost, because of that cost at a time when they're particularly financially vulnerable.

5     **MR HARRIS:** Can you put a number of that? What percentage of clients - just a broad order of magnitude - would actually have been deterred, as in not lodged, despite your advice that they had a reasonable case?

10     **MS VAN GENT:** I can't put a precise number on it. I could say that, again, particularly for young workers, who are typically very, very low-income employees, there's been a significant proportion of for whom it's been a real consideration. I can't say, unfortunately, a precise number but certainly some who've been determined from doing so.

15     **MR HARRIS:** What do they then do, if you don't lodge an unfair dismissal case?

20     **MS VAN GENT:** They simply don't pursue the claim. They simply don't pursue the claim.

25     **MR HARRIS:** At that point they cease being your client and that's the end of it?

30     **MS VAN GENT:** That's the end of it.

35     **MR HARRIS:** You wouldn't refer them to the Fair Work Ombudsman? You've said they'd been underpaid, which is a differently matter entirely from unfair.

40     **MS VAN GENT:** Just to clarify, often in those circumstances they wouldn't be pursuing a matter in the Fair Work Commission. They frequently do become clients of ours, in terms of pursuing matters with the Fair Work Ombudsman because, of course, it doesn't cost anything to lodge a workplace dispute with the Fair Work Ombudsman. There's a mediation process which is very efficient and user friendly, so often they do pursue those avenues but, in terms of the unfair dismissal claim, often that isn't pursued.

45     **MR HARRIS:** I'll do mine, then Patricia will do hers. Hopefully, I won't create too much duplication or back-tracking. Dismissal on the papers, by the Fair Work Commission. We heard the other day that this is a tricky thing to achieve in law in any event. That notwithstanding, it may be possible to do so but you would have to, pretty much, provide a carve-out, if you like, from standard administrative law practice. That's plausible but it's unusual. I'm sure, from reading the report, you'll appreciate why we're interested in this area. Viewed from the perspective of not necessarily just frivolous claims but claims that are not, perhaps, subject to good advice beforehand, an



employer can be put in the position of quite a substantial time commitment, and we went through some examples - we did some investigation of our own with the Fair Work Commission's actual examples of this, with them.

5           Our attempt was to try and find some mechanism by which the Commission would be empowered to make judgments, because, after all, that's why it's there, so this would be discretionary choice rather than obligation, yet you're still concerned about this. Is it that, on balance, you think employers are just going to live with this, or is there anything better  
10           that you can come up with, then, as a mechanism for trying to address this issue?

15           **MS VAN GENT:** I think the concerns that we have about it are the ones that have been articulated in the material that's been provided to you. We see a lot of clients, again, particularly people from non-English-speaking background and younger people, who may have a good claim but have difficulty articulating that claim in writing on the paper. There may be something on a form which doesn't come across as being particularly strong but, in actual fact, there is a good claim there.

20           **MR HARRIS:** If they were dismissing on the papers, if it was a good claim, it would be obvious, wouldn't it, to the - - -

25           **MS VAN GENT:** No, not always, I'm sorry, I wouldn't say so.

**MR HARRIS:** Can you explain why?

**MS VAN GENT:** Simply because, if you've got a vulnerable - say you've got somebody who's got - and this is what we see a lot. Say you've got  
30           somebody who's got limited literacy in English or you've got somebody who has limited literacy generally, or a younger person who isn't particularly articulate, sometimes what they put on their claim form isn't a particularly good explanation or exposition of the claim but, when you actually speak to the person and draw them out about the issues, what emerges is something  
35           that actually does have some merit. I think that this is the difficulty of simply dismissing things - or the potential to simply dismiss things on the papers, is that it may actually exclude what are meritorious claims.

40           Were you wanting a set of suggestions around how this might be addressed in the other way?

**MR HARRIS:** The issue is still there and, obviously, it's affecting the credibility of the system. This is not - I think we're at pains to try and make clear in the report, unfair dismissal as a right of review seems a reasonable to  
45           have, so we're now talking about the practice of unfair dismissal and the poor practice within the current system. One of the apparent poor practices is that you can get taken a long way into the system for a case that really didn't have

merits. You're basing your comments to us, or the ones I've received, anyway, to date, as being - there are meritorious cases that otherwise won't be recognised. I'm trying to get you to look at the inverse and say, as well will have to, how then do you find a better way of ensuring that there isn't, if  
5 you like, a lot of credibility issues created by allowing cases to proceed much further than they probably should have, where, as we understand it, the Fair Work Commission has relatively little choice about doing that.

**MS NAWAZ:** I would say our view on that is that unfair dismissal law is complex and difficult to understand for the majority of workers. The workers  
10 we're talking about are vulnerable workers, who are particularly susceptible to unfair dismissal. In a dream world, everyone would have access to free legal advice and would then be told whether or not their claim had merit. For clients we do see, who come to us for advice on unfair dismissal claims, if we  
15 don't think there claims have merit, we're very clear on that. The problem we are really seeing here is that lots of people have claims with merit but are not aware of how to properly frame those claims in reference to the law. Our concern is that, if these matters are decided on the papers, people with meritorious claims will be excluded from accessing the system.

20 Our job and our experience is in being legal advisers to vulnerable clients. I don't know what another solution is in terms of dealing with applicants who go ahead with claims that are viewed as not having merit but, in saying that, I think the two-stage process in unfair dismissal, in first going  
25 to a conciliation conference, does in some way deal with this, with the fact that a circumstance conference is a form of alternative dispute resolution, it is not as expensive as proceeding to a hearing, there is no need for parties to be legally represented, in fact, you do have to seek permission to represent someone at an unfair dismissal conciliation. Staff conciliators are quite good  
30 in informing applicants and respondents about what unfair dismissal is under the law. At that stage, most applicants, should their claims lack merit, will become aware of it and may then take that on board and not pursue the claim to the hearing stage. I don't think that being able to exclude claims at the initial stage on the papers is a good way to deal with this issue.

35 **MS VAN GENT:** I think we'd echo those sorts of suggestions. The 21-day time limit does pose a bit of a problem for people because certainly it's been our experience as well that, if people get advice that "Right, this isn't really a very worthwhile claim, it's not really something that's going to go any  
40 further," then they are dissuaded from making the claim. A lot of people have difficulty, however, in accessing that advice within the 21-day period. The short timeframe, I think, does pose a problem and does in some ways encourage people to just put a claim in, even in circumstances where they're not sure whether it's meritorious. We see that a lot. We see sometimes  
45 people who've come in for advice after they've actually lodged a claim for Commission and they need advice about whether or not to continue with it. Sometimes the advice is, "Yes, you do have a meritorious claim; you can

proceed,” often it’s, “Well, this isn’t really an unfair dismissal, that’s not really the issue,” and they just continue from there. So, I think that that very short timeframe in terms of accessing information advice and putting in a claim does pose a problem.

5

I’d also sort of echo what Maria has said in relation to the conciliation process. It’s a one-and-a-half-hour telephone conciliation. It’s not, in our view, a very onerous process and it does assist in terms of weeding out, for want of a better term, claims that are meritorious and not - - -

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**MS SCOTT:** You’ll have an opportunity, if you wish, to read the testimony of individual employers and individual groups about unfair dismissal. One of the things they say is that, for them, an hour and a half or even three hours preparing for the hour and a half, is sufficient deterrence for them to actually proceed with the process, and therefore they resort to go-away money and therefore come away from the whole process - I appreciate that your clients also feel aggrieved by the system but they come away from the process with that sense that “That really wasn’t justice.” I think we made the point that conciliation can be sort of rough justice because you can’t really weigh up the - there are costs to both sides.

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Do you want to explore it further?

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**MR HARRIS:** No. I was just trying to get to something, really - the point is, there is a problem that’s affecting the credibility of the system here. No one really has ever disputed that. We’re trying to find a way by which we cannot eliminate people’s right to proceed but give the discretionary party - Fair Work Commission is the discretionary party - some greater ability to deal with a problem like this. I think, for us, doing nothing is not really an option here; we will have to come up with some kind of effective - simply because of the way it’s created this perception that unfair dismissal is a disaster - where in fact the reality is that data doesn’t really support that but the perception is equally important, so it has to be addressed by some kind of practical option.

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**MS SCOTT:** Just further to that, you made the comment on the way through your list of concerns about the draft recommendations - we always welcome comments on the draft recommendations whether they’re complimentary or not. You express concern about our focus on substance over form, certainly as it relates to unfair dismissal but also other matters. Could you talk about that because what we did there in that chapter was identify some examples, and we went back and actually looked at the cases, of things that - I’m not a lawyer, I’m disadvantaged here in this conversation - cases where there had been punch-ups at work, where there had been clearly serious misbehaviour and, yet, for procedural reasons, people had been - they had been successful in their unfair dismissal claim, even where Commissioners had noted that, if it hadn’t been for procedural aberrations, there certainly was a case for

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dismissal.

5        Could you comment on that because that goes to, I guess, just as I  
imagine you sometimes are aggrieved by people finding that the  
technicalities they don't win in cases - people are pointing out here the  
damage this is doing to, again, the credibility of the system. What we had  
suggested, admittedly, we're not lawyers, was that the Commission, which  
doesn't need to be anything more than a Tribunal in this case, look beyond  
10       the procedural matters to the substance of the case. Maybe you want to refer  
to the particular cases we actually dealt with but could you go to this issue? I  
guess, over time, if a system is under a credibility attack, over and over and  
over again, the danger is that it will fall.

15       Why do you want people doing cases when the substance of it would  
suggest that it doesn't have merit but they would win only on procedural  
matters?

20       **MS VAN GENT:** I think it's because - no doubt, Maria will have examples  
of this as well but I think that it's because sometimes procedural irregularities  
in the way that somebody's employment is employment is terminated do  
pose a significant issue. Maybe I can sort of explain it best by way of a case  
example. We had a client, this was a vulnerable client, a recent migrant,  
non-English-speaking person, who'd been working in a warehouse, had his  
employment terminated in circumstances that imposed a kind of procedural  
25       irregularity, so there was no evidence that he'd engaged in anything like  
serious misconduct but his employment was just terminated summarily.

**MS SCOTT:** That's not exactly what I'm actually asking.

30       **MS VAN GENT:** If I could continue the answer.

**MS SCOTT:** I'm actually asking for a case where the substance is that the  
person would be dismissed.

35       **MS VAN GENT:** Maybe we're speaking at cross-purposes.

**MS SCOTT:** I think so.

40       **MS VAN GENT:** I think, in circumstances where - if you're saying there  
were things like if there was conduct that amounted to gross misconduct at  
work, like physical violence at work - - -

**MS SCOTT:** That's the case we use.

45       **MS VAN GENT:** The advice that we would be giving would be that that is  
gross misconduct, that would warrant summary dismissal, but I think that  
there are a lot of other examples where somebody has not engaged in conduct

amounting to gross misconduct, so there hasn't been something that's warranted a summary dismissal. Effectively, what's occurred, though, is that they have been summarily dismissed, there has been a procedural irregularity in the way that they've been dismissed, and that that does constitute an unfairness. It is harsh and unjust in those circumstances to terminate somebody.

**MR HARRIS:** Therefore the substance is proven. Your example says, if there's no procedural problem - imagine there is no law that allows you to argue procedural matters. Still the person was unfairly dismissed. We're talking about the procedural element. You are referring, really, to the lack of evidence that suggests someone was fairly dismissed.

**MS VAN GENT:** There might be circumstances, as there were in that case that I started talking about, where there had been performance issues, so the employer was not entirely - there were performance concerns but they hadn't been properly articulated to that employee. In other words, there hadn't been a process of performance management prior to termination; there had just been termination. There had been a procedural irregularity, there were procedural issues in the way that the person had been terminated. Given the opportunity to go through a performance-management process, so being informed about what the performance-management issues were, being given the opportunity to improve, the person would be able to maintain their employment. I'm not sure if I'm articulating - - -

**MR HARRIS:** I think we do understand what you're saying. My view is, it's not really pertinent to the point. The point is, imagine, as I said, there is no such thing as a procedural problem in this particular - no such thing as a procedural law, sorry, in this particular case; still, on the merits, the person may have had some performance issues but they didn't amount to justifiable dismissal. Therefore, the absence of a procedural law is actually not really relevant to that case.

In the report we used an example but the other day a different one came up, the Sydney ferry driver. We're in Sydney. Here is a Sydney ferry driver who is under the influence of some substance and crashes a ferry into a dock and that puts transport safety potentially at risk, I suppose. Still, because of procedural issues, as I understand it from the example, the person wasn't originally capable of being dismissed and yet, on appeal, it was clearly, obviously, established that they should have been. I think that's right anyway - I haven't got the example fully to mind. In that particular case, where procedural issues are being used to protect what otherwise looks like a justifiable dismissal, it just seems a very odd way of seeing the law set up.

**MS VAN GENT:** I think, again, the example that you're giving is a situation where somebody has engaged in something which is really serious gross misconduct. What we see are situations where somebody may have

had performance issues, maybe they're not performing their job 100 per cent and they've had their employment terminated, whereas, if there had been a correct procedure, if they had been properly informed by their employer, "Look, you have these employment issues. You need to improve your performance, otherwise you're going to be terminated from your employment," they may have been able to maintain their employment. That's the example that we see more commonly.

**MS SCOTT:** I understand. We'd welcome your response, if you have the time, to box 5.7 in the draft report. We give specific cases, and I'll just read one at the moment, *Sheng He v Peacock Brothers & Wilson Lac v Peacock Brothers* (2013) FWC 7541. This case involved dismissals after two employees punched one another in the head in an argument. The two employees were dismissed after a brief investigation by management. The FWC accepted that the employees' conduct was a valid reason for dismissal but that management's failure to follow procedural fairness, such as seeking corroboration from witnesses and offering translation services, was sufficient to deem their dismissal unjust, unreasonable and therefore unfair. The employer was required to provide compensation to the dismissed workers.

There are examples like that, and people present them to us over and over again, where - if you had a system that had greater capacity to weigh up the substance of the matter and not be held almost as a victim to the procedure, that would actually give a better outcome. I appreciate you're giving us other cases where in fact the substance of the thing is that, if the right procedure had been followed prior to dismissal, in some cases, months earlier, and performance issues had been addressed in a more systematic fashion, it would never have reached a dismissal case. These are cases which, I think, warrant wider consideration and we would welcome your views on that. If you've got a response now, that's fine, but maybe we should move on then to your other concerns.

**MS NAWAZ:** I'd just like to add that the heart of unfair dismissal law and in considering whether a dismissal has been harsh, unjust or unreasonable, involves considerations of procedural fairness. I can understand, in cases with serious misconduct - yes, there have been some outcomes where it does not look, to a non-lawyer, that that is an acceptable outcome, it would not look to many lawyers that that is an acceptable outcome but the danger, I think, of removing procedural safeguards, any of them, from the unfair dismissal law, is that it dilutes the protections in there, and they are in there because of the inherent power imbalance between the employer and employee.

**MR HARRIS:** It's not just, if I can, about lawyers and non-lawyers. It's actually about the entire workplace relations system's credibility in this specific area of law, that anecdotal examples continue to drive a perception problem and, because of that, you get these swings in the political judgments

being made of unfair dismissal continuously. What we are trying to do with this report is address things in an objective fashion, as far as we can, and say - instead of one political entity favouring one set of participants and the other shifting it back the other way, one of the genuine problems here, and this appears to be a genuine problem, is that the ability to use procedural defect as a way of otherwise invalidating a fair dismissal, a legitimate dismissal, exists. How would you address that? We will have to come up with a solution and, if you don't have anything to offer, that's fine, it's not your obligation, but we have to ask everybody this because we will have to come up with a solution, or else you risk this possibility that you leave it simply to the political process, which moves one way and a couple of years later moves back the other way.

For the same purpose, I want to ask you about compensation caps for general protection matters. You want to leave it uncapped. This seems hard to rationalise. Tell me why it must remain uncapped.

**MS NAWAZ:** The reality is, in the majority of cases we do - in unfair dismissal, there's a maximum 26 weeks available. We don't ever get anywhere near that, even when our employees have very strong cases. In general protections matters, yes, it's true that it's an uncut jurisdiction, but the reality is, again, we don't ever get extensive, huge amounts of compensation, even in meritorious matters. And the reason for this is that the majority of complaints do settle at the conference stage, so I think it's around 80 to 85 per cent of complaints do settle at the conference stage, even where our clients have very, very strong complaints.

Under the law in terms of general protections, going on to the Federal Circuit Court, if they don't accept a settlement at conciliation, it is a big risk and the reason that it is a big risk for our clients is often if it's a general protections case involving a dismissal, they're under financial strain. Going to court is very expensive. Even if you have free legal assistance in order to represent you at court, the lengthy wait for your matter to be heard, compounded with the risk that if you go to court you might not be successful, often leads our clients to accept settlements at conference that may be a lot lower than what they would get should they proceed on to court.

The reality is that an uncapped jurisdiction in the Fair Work Commission at the Federal Circuit Court and Federal Court is also consistent with the operation of discrimination provisions under the other Federal Discrimination Act, so under the Race Discrimination Act, Age Discrimination Act, Disability Discrimination Act and Sex Discrimination Act. We regularly advise and appear for clients in discrimination matters, both across the Fair Work jurisdiction and in the Commonwealth jurisdiction under these other Acts, and what I always advise clients is, whatever compensation amount you get is likely to be quite low. It's not going to reflect the effect that the discrimination has had on you. Our clients in Fair

Work conciliations generally receive maybe between six to 12 weeks of pay. So it's not huge amounts.

5       **MR HARRIS:** So would a cap at that level, then, simply not alter the situation at all, but create the perception that it wasn't uncapped and therefore, you know, this again, it's a credibility kind of problem. It basically says, well, if I can't get unfair dismissal - or I've got the choice of going to either jurisdiction, either part of the Act, I'll go to the part of the Act that has no capping because I think my case is, you know, I've got appalling  
10       behaviour, and so you're actually attracting people to use the general protections versus use the standard provisions?

15       **MS VAN GENT:** That certainly hasn't been our experience. Certainly, when we're advising a client as to which type of application to bring, it's an assessment as to where their matter more clearly fits within the law in terms of whether it's an unfair dismissal or a general protections claim. I haven't advised anyone or had anyone elect one or the other depending on the amount of compensation that they might receive. Our experience has been very similar to that at Kingsford where, really, even in circumstances where  
20       there clearly has been unfairness in the way that somebody has been dismissed and they've been really, really adversely affected by it, the amount of compensation that they've received is quite small.

25       **MR HARRIS:** I was thinking if the grounds were on either case; have an unfair dismissal and you've also, in the past said nasty things to me because I'm a union official, you know, so which one do I go to, and the answer is, I go to the other one, uncapped one versus the capped one because I've got greater - - -

30       **MS VAN GENT:** Again, in circumstances like that - so there are other factors that I think influence that election, so influence that decision whether to pursue an unfair dismissal or a general protections claim. In my experience, it hasn't been the amount of compensation that might be available because, realistically, what people achieve in a general protections  
35       claim isn't that much more than what's achieved in unfair dismissal.

40       In circumstances like that, our experience has been that the issue tends to be more a procedural one, so whether or not people want to be pursuing a claim which can ultimately be determined by the Fair Work Commission or whether they want to start a general protections claim and face the possibility that they'll have to initiate proceedings in the Federal Circuit Court if it doesn't resolve at conciliation. That's really the more influential factor than the amount of compensation.

45       **MR HARRIS:** Right. Just one other thing on general protections, on reading the law, it looks like you could advise yourself on unfair dismissal, and as you say, stick a form in and hope without advice, but general



protections, I mean, it would be the case, would it, that you'd rarely get anybody who goes through the general protections process who isn't legally advised? Or do you get people who do that anyway?

5       **MS NAWAZ:** We see a lot of clients who lodge and then are advised by the Fair Work Commission to go to a community legal centre for advice. I think general protections - I think unfair dismissal law is actually hard to understand for most people and I think general protections law is incredibly difficult to understand for most people. Even if you just look at the  
10       application form at Fair Work, you have to elect which general protections provision you're going under and most people don't have an understanding of what misrepresentation or undue influence means, so they are not aware of how to best frame their claim under the law.

15               What we see is sometimes people will go for a general protections complaint over an unfair dismissal complaint because of the eligibility criteria. So unfair dismissal is much more limited in scope. For example, it doesn't apply to casual employees. Minimum employment periods apply, it doesn't apply to prospective employees. So this might be a reason why  
20       people elect to go under general protections. A lot of people do make general protections complaints without legal advice, and I assume they have a lot of difficulty correctly framing their claim. It is a big difficulty, it's a big - you know, it's very difficult to get free legal assistance in the employment law space and it's very difficult for people to frame their claims, let alone be -  
25       most people, I don't think, are aware that a compensation cap doesn't exist in general protections.

              My other comment on that is that the judiciary has generally taken a very restrained approach in the awards they make in this jurisdiction. While  
30       compensation is available for economic loss and also for damages, so hurt, stress and humiliation, you generally have to have medical evidence of psychiatric harm to be awarded anything in terms of general damages. I think the fact that it is an uncapped jurisdiction isn't really playing into our clients' decisions, from what we've seen.

35       **MS VAN GENT:** No.

**MS SCOTT:** It might be more towards the big end of town, I think, I suspect. Okay.

40       **MR HARRIS:** Yes, you wanted to put some comments there?

**MS SCOTT:** Yes, I do. Two issues I'm keen to explore; migrants, who work with migrants, and clearly, we're very interested in what can be done  
45       because there's evidence of abuse out there. Now, you give an example of Sam the baker, 150,000 unpaid, the Fair Work Ombudsman said it would not pursue the matter, saying it was up to Sam to take his employer to court.

Could you tell us what the outcome - I assume that's not Sam, an imaginary figure, it's Sam, a real person?

**MS NAWAZ:** Yes.

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**MS SCOTT:** Can you tell us the outcome there?

10 **MS NAWAZ:** Yes. So this matter came to us when Sam had finished up working at this particular company which had underpaid him for a number of years. So, under the law, you can only - the time limit for entitlements claims is six years. So even though he'd been underpaid for eight years, he'd only be able to claim back for six years' worth of wages. It was a very complex matter because transitional provisions applied, different awards applied over this period, community legal centres are under-resourced and some of us are not great at math. So it's very difficult to do these calculations. We did the calculations, we lodged a complaint to the Fair Work Ombudsman. They do have the power to prosecute, however, they don't prosecute that many cases every year.

20 We were concerned this was a systemic issue because Sam had told us that there were many colleagues of his who had been working in the same situation, being underpaid. We did raise that this was a systemic issue with the Fair Work Ombudsman, and they declined to prosecute. So what they did was they issued a notice of complaint resolution and they said, "Yes, we think it's likely that a debt exists here. The employer should provide payslips and should pay Sam his entitlements, but the Fair Work Ombudsman will be taking no further action in this matter. Should you not be paid, you can elect to go to court yourself."

30 So this is in the letter that goes to both the employee and the employer and I think the problem here is that many employers are aware that a client such as Sam does not have the resources or capacity to pursue this matter. So what we ended up doing in this matter was we drafted the pleadings to go to court, attached them to a letter of demand. We'd sent previous letters of demand which had not been responded to. We got a settlement and it was a very low settlement amount, but Sam just - we didn't have the evidence, we didn't have payslips, it was going to be a very difficult claim to prove. The employer ended up, I think, paying 20,000 and Sam accepted that, and that's 12.5 per cent of what he was owed.

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So you don't get good outcomes in these matters where you don't have the capacity to pursue it, and the reality is, community legal centres don't have the capacity to pursue every one of these claims and there's no other free legal assistance out there.

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**SPEAKER:** Access to justice report - - -

**SPEAKER:** We have provided a report to the government - - -

**MR HARRIS:** Yes, a report on access to justice, if anybody wants to pay any attention to this issue. Yes.

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**MS SCOTT:** Sorry, last topic and I appreciate we're probably eating into lunchtime, I want to take a different tack altogether; internships. You're relatively young lawyers, so I'm not looking now at your current work, but your experience as relatively young lawyers, and you must have colleagues and so on, we're struggling, I think it's right to say, with this issue because people tell us that internships are now taken for granted in many fields and internships - I'm not talking about internships where work is unpaid. So it can provide excellent opportunities for career learning and advancement and training on-the-job, and I appreciate, I think, that your own organisation has students from the law faculty of New South Wales participating with you - I don't know if they're paid or not - but we're just getting very conflicting messages about - very little evidence, by the way - about abuse or non-abuse in this area.

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Because in some areas, we're hearing that people are working for six months and there's almost like a turnover of people. People start with the hint that they might be getting work at the end of six months, but in fact, it becomes free labour for the enterprise. In other cases, it might lead to something. So I'm interested in your views on that. Maybe we won't have much time to explore it today, but you know, if you could send us an email, we'd be very keen to get your views, but do you have any instantaneous reactions? It's chapter 19, I think, in our report.

25

We certainly make the distinction between people who are doing on-the-job placement which involves anything related to their course, so we're not talking about work experience. I'm talking about something that's often after they've had a qualification and there's a notion that someone's working, may or may not lead to work.

30

**MS NAWAZ:** I think, first, I'll just clarify. So Kingsford Legal Centre is part of the faculty of law at the University of New South Wales, and we take the students in clinical legal placement.

35

**MS SCOTT:** Right. Yes, thanks.

40

**MS NAWAZ:** So they get taught and supervised and get course credit. They don't get paid, but I think that is a very different setup, as in they're really getting something out of it and developing their professional skills. I think that the problem with some so-called internships arises when the intern is not getting the benefit of it, but it's the employer that is getting the benefit of free labour. So if an intern is doing, for example, practical legal training which is required to become admitted as a solicitor, many law students will

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go and find a placement to work for free for 80 days to meet this requirement, but they're meant to be supervised and learn specific skills on-the-job, and they're meant to be getting something out of it.

5 I think those sorts of placements are very commonplace and of course, everyone would like to be paid, but you know, this isn't always an option. I think there's a huge problem with it where companies who can afford to pay workers, instead of employing workers, rely on interns and those interns are not necessarily getting anything out of that internship to develop their skill  
10 set and improve their employability in the sector, and I think extended internships, for example, three to six months to a year, sometimes are seen to be becoming the norm in the legal sector because of the lack of jobs available for graduates, and I think it is a very big issue and I think it needs to be regulated.

15 **MS VAN GENT:** We'd really agree with that. So Marrickville Legal Centre, we're not affiliated with a university, but we do take a lot of students who want to complete their practical legal training, so they come and they volunteer for up to 75 days to complete that requirement. We're really  
20 careful about making sure that in the course of that internship, they learn the things that they're supposed to learn. We don't give any guarantee of ongoing employment, but anecdotally - and we also have people who come and volunteer for us a couple of hours a week as well.

25 Anecdotally, we've heard of a lot of situations where people have been doing that, doing that practical legal training component with sometimes private organisations, so not just the not-for-profit sector, but private organisations where they've been doing that kind of a placement and they've been required to do administrative tasks or things that don't really relate to  
30 their career or isn't really furthering their learning. So I think it is definitely an issue and I think the only way forward is greater regulation. So like the practical legal training system where there are specific requirements that need to be met around the placement, otherwise the placement can't be continued. I think that that's the way forward, really.

35 **MS SCOTT:** I guess if young lawyers who are trained in law have difficulties in this area, I'm sort of wondering how people who don't have that skill set cope in other circumstances. But it's a conundrum, because people can always walk, can't they?

40 **MS VAN GENT:** They can.

**MS SCOTT:** They can always - they can walk.

45 **MS VAN GENT:** I think that's a really, really good point, because I think, yes, certainly it's a problem within the legal sector, but then we have people who have come through - because we've got our youth legal service and a lot

of our clients are under the age of 24, we've got a lot of people who have come through and they've done a training period or a trial period or an internship with an organisation with a view to becoming employed, and then essentially no paid employment has emerged at the end. Essentially, what they've had is a situation where basically they've just been used for free labour, sometimes for up to a year and nothing has eventuated.

**MS SCOTT:** Thank you.

**MR HARRIS:** Well, if you have a case like that, an identified case, we'd be interested in that because we haven't even really got too many cases. We've just got general commentary that internships are growing and there's scope for exploitation. So if you, by the sound of it, have actually had a client or clients, for an identified basis, we would be very interested in those. Again, just by email would be great.

Now, I should thank you very much for your time today, because we've chewed into United Voice a bit and I'm going to have to apologise to United Voice for chewing into theirs, but we'll probably use a bit of our lunch for United Voice to catch up. Thank you very much for all your efforts, and really, for your contribution, too, because being able to have a debate with, if you like, third parties rather than people who are the active participants on their side of the table is actually - you're quite important to us, more important than you perhaps may realise, so thank you very much.

**MS VAN GENT:** Thank you.

**MS NAWAZ:** Thank you.

**MR HARRIS:** United Voice, I think, as I said, is next. I think we owe you 10 minutes, so I'll try and give it back to you. Can you identify yourself for the record, please?

**MS SCHOFIELD:** I'm Jo Schofield, the National Secretary of United Voice.

**MR HARRIS:** Jo, maybe you could start off and when your colleague joins you, she can do the identification.

**MS SCHOFIELD:** Okay, yes. First of all, we want to thank the Productivity Commission for the opportunity to speak about the impact of the draft report, that it would have on United Voice members. We will be preparing a formal submission in response that will canvass several of the issues in the draft report, but we did want to touch on a few of them this morning. Just a bit of background, United Voice is a union with about 120,000 members. We represent, amongst others, workers in the hospitality industry who are, I guess, front and centre in your report, but as well as that,

early childhood educators, cleaners, aged care workers, paramedics, security guards, the list goes on.

5 As a union, our members come together to support and assist one another with the single principle of job security, decent pay and a fairer society. Many of our members, irrespective of the industry in which they work, work odd hours and at weekends, and a large number, including many in the hospitality sector, are low paid and award-reliant, and that distinguishes us from many other unions in that a number of our members in  
10 cleaning and hospitality are award-reliant, so we very much rely upon the award system to a greater extent than many other trade unions who have more access to enterprise bargaining than we do.

15 Many make close to the minimum wage, or only a few dollars above it, and many work in jobs that are insecure in contracting industries and some work two or three jobs to earn a living wage and support their families. We canvassed our members extensively about the sorts of issues that are raised in the Productivity Commission report and about the workplace relations framework. We did that in 2012 and '13, where we had conversations with  
20 30,000 of our members to ask them essentially how their life was going, how their job was going, what issues were important to them. We heard again and again our members were concerned that their wages are not keeping up with increased costs of living. They told us they were falling behind, they have little optimism for the future and they say it's hard to keep up with even basic  
25 costs of living.

It's for that reason that United Voice strongly opposes any proposal to cut penalty rates or change the structure of the minimum wage, and indeed, today and in our written submission, we would like to ask the Productivity  
30 Commission to retract its recommendation to reduce penalty rates. Penalty rates are a well-deserved compensation for working unsociable hours and missing time off with family and friends. For many of our members, penalty rates are also a critical part of their household income, and we estimate that that makes up to 30 per cent of income for households. Cuts to penalty rates  
35 mean cuts to some of the lowest-paid workers in our economy and I think that this is really important. The evidence that we're preparing and presenting to the Fair Work Commission this week and over the next few weeks unequivocally shows that our members in hospitality are amongst the lowest paid in this country, and that's with penalty rates.

40 If you remove those penalty rates, it is going to exponentially increase the hardship that those households and those workers are facing. It would take money out of the pockets of those who can least afford it and it means less money to spend on rent, on bills, on groceries, and less money being  
45 spent in local businesses. We think it's a spectacular display of short-sightedness that some of the industries that have been campaigning for cuts in penalty rates will stand to lose the most if hundreds of thousands of workers

have cuts in their wages - hospitality, retail and tourism - because much of additional or discretionary expenditure occurs in those industries and I observe, too, that spending in the restaurant sector has increased by 36 per cent over the last few years.

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Cuts to wages at times of economic downturn will immediately impact spending in those sectors, as I've said. Our members don't have large amounts of discretionary income. Any reduction would have dire consequences for them and their households, as I stated. Often, the penalty rates component of people's wages makes up for payment for the necessities, not necessarily for pleasures such as seeing a movie or taking the family out. As well, the effect that cuts on penalty rates would have on individuals, much of the Australian community is right on side with this. Eight out of 10 people in a recent poll that was undertaken believe that if you work on the weekends, it's justified that you earn a little bit more for that because you are giving up time with your family and with your community.

So there's widespread support for the existing regime of penalty rates and concerns, widespread concerns, about the impact that any reduction would have, and that's not just coming from within our union, it's coming from across the community. Concerns around penalty rates are very much clustered with other concerns our union has about casual and insecure work and lowering standards of living among the low-paid. Our members, like many Australians, can't afford any more attacks on their wages and working conditions. The Commission's suggestion that the growth of the minimum wage should be slower in times of economic downturn not only impacts some of the most vulnerable workers in our country, it will actually hurt the economy.

Low paid workers tend to spend a greater proportion of their income on goods and services and less on savings, so an increase to the income of these workers immediately stimulates the economy through increased consumption. There's also a link between minimum rates of pay and other rates of pay in the award, as the Commission would understand and a link between minimum rates of pay and rates of pay that are struck in enterprise agreements. That's why the penalty rates and minimum wage structures should remain as they are. The changes to the workplace relations framework suggested by the Commission would hurt those who can least afford it and take much needed consumer spending out of our economy.

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I have with me United Voice New South Wales member, Mary Quirk who will talk about her experience as a hospitality worker and what a cut to penalty rates would mean for her.

**MR HARRIS:** Mary, since we didn't get you to do it at the start, can you just identify as you go in, just say, "I'm Mary Quirk", and - - -

**MS QUIRK:** Yes. My name is Mary Quirk and I work in hospitality.

**MR HARRIS:** Please, proceed.

5     **MS QUIRK:** Will I read my statement, yes? Sorry, that's why I had to get  
my glasses. Okay. I'm a proud member of my union, United Voice, and  
thank you for the opportunity to speak to the Commission today. I'm here on  
behalf of hundreds of thousands of Australians, including United Voice  
10     members and other hospitality workers across the country who will be greatly  
affected by some of the proposals being discussed here today. I work at  
Coledale RSL as a full-time bar supervisor, it's a small club, and I am their  
only full-time employee. I tend the bar, I supervise and train and coordinate  
the staff. I look after the gaming machines and I have worked at the club  
15     since 1980. I work a 38-hour week, I have fixed days in the roster, my days  
are Sunday through Wednesday and I don't work Saturdays unless there is a  
shortage of staff or a special function, and I don't do much regular overtime.

I have worked Sundays for the last 25 years. It's the club's busiest day  
and I am paid penalty rates for my Sunday work. It is a very important part  
20     of my income. Except when I'm on holidays or sick, I haven't had a free  
Sunday for about 25 years and I have missed out on a lot of time with my  
family and friends as a result of that. I'm a Roman Catholic and I'm not  
deeply devout, but it is an important part of my life. I do go to mass at  
25     Christmas and Easter and occasionally on Saturday evening, or for personal  
reasons, if I'm sad or having troubles. My family attends church on a  
Sunday. I would love to be with them, but I'm at work. I have a large  
extended family, 17 nieces and nephews, and they're all Catholic. There are  
regular religious functions like communion, confirmation and christenings.  
I've missed out on a lot of those.

30     On the occasions where I have missed my Sunday work, I've been  
asked to be a godparent, I can't do it very often because I lose a lot of  
income. The sick leave is paid at ordinary pay, so if I call in sick on a  
Sunday I would normally be paid the penalty rates, I lose up to \$160 for that  
35     day. Both my parents are now deceased. Because I work every Sunday, I  
haven't spent any Mother's Days or any Father's Days with them while they  
were alive. I didn't actually didn't realise that when they were alive, but  
once they were dead, it kind of really hit me, which is a bit shocking. When I  
think about it, the only positive impact of my Sunday work is the money. It  
40     is important for our household budget. I live with my partner Brian and he's  
a contract gardener. He earns between \$50 to \$800 a week. It varies with the  
seasons and availability of work and that's why my income is so important  
and why the extra I earn on a Sunday is essential.

45     There have been times where we struggled financially. Brian did used  
to be a coalminer. He was injured in 2010 and he lost his job. We had to sell  
our house and we rent. Even with the Sunday penalty rates, we juggle money



because we got into some difficulties with the credit cards when we couldn't pay our mortgage when he was put off. I am having difficulty making ends meet, so if my Sunday rates were cut to Saturday, it would certainly push our income to the edge. It's a small club, Coledale RSL, and it would be difficult for me to make up my pay. I don't know how the hours could even be available. I'd have to take work from casuals. This wouldn't really be fair because I already have the full-time position and fixed hours.

I have worked my whole life and I am very worried about how I'm going to cope financially if the Sunday penalty rates are cut. I came here today because I want you to know that the proposal to cut the Sunday rates to Saturday rates would have a real impact on my life and the lives on many other hardworking Australians like me, and thank you for listening.

**MR HARRIS:** Thank you for making an effort to come along. We've had a number of your colleagues at different hearings so far.

**MS SCHOFIELD:** Yes, of course.

**MR HARRIS:** And the stories are important. When you finished up, Mary, you were saying it's a reduction in the Sunday rate that's the proposition here. I think some of the comments we've otherwise heard at different points in time, and I think possibly some of yours, Jo, were about elimination of penalty rates which is not the proposition that's in front of us. So I agree that there is a reduction in pay on Sundays that's proposed in our recommendation. I just think, for the record, I ought to be clear. The proposition isn't that there will or won't be a penalty for weekend work, so for example, on your 80 per cent Australians agree that people should get paid a bit more for working on weekends, well, we agree. The only thing we're disagreeing over is the price, how large it is.

So we haven't argued at all against having a penalty rate for unsociable hours.

**MS SCHOFIELD:** And just in response to that, our comments that go to the impact of the cuts are very clearly premised on the recommendation that the Productivity Commission - - -

**MR HARRIS:** Sure. Sure.

**MS SCHOFIELD:** - - - has made and the impact of that change in the Sunday rate.

**MR HARRIS:** Okay, that's good. Thank you for that. I wanted to ask you, because I think it might have been you, Mary, that said this, but it might have been Jo. I've got a note down here. "Hundreds of thousands of workers affected." We are very interested in knowing the affected numbers of

workers because we're going to try and do some analysis of - well, like cost benefit, we'd like to know what the costs are and we'd like to know what the benefits are, and so we're going to try and do some analysis, if we can, in that area, but the data is reasonably poor on numbers of workers who are primarily dependent on Sunday work, and so I have asked each of the unions that have come to present, and we have had - I should thank you for doing that - we have had good cooperation from unions in terms of presenting.

We've asked, if you have data, even partial data, about how many of your members, for example, are primarily Sunday workers, we'd be interested in being able to access that information. If we can't, in the end, make enough of a good story about it, obviously we're not going to public analyses in the final report that we think is not accurate, or insufficiently accurate, so this is a sort of request without a promise to be able to use it, but if we can get decent information, we'd like to be able to clarify what the cost is in terms of the number of people who are affected, and if indeed, there is no increase in employment, therefore, that's a reasonably clear cost, and if there is an increase in the employment, we'll try and estimate that and put that in there as well.

Although, I did note your comment, Mary, which is you would otherwise, if you had to make it up by hours, you'd be taking hours off other people, effectively, which may not be desirable from your perspective. The other thing could I comment on is, you work in a club. Clubs Australia put in quite a good submission for us, that's an - just thanking them for their submission. You might have noticed it's quoted quite a few times in the report. It's actually very good because it got down to the nub of quite a few of these details. Is your club - this is a sort of guess - the kind of entity, though, that's doing well and might be interested in paying above-award rates, or is it the kind of club, and the Clubs Australia submission does show there's not - big differences, not doing so well and if the rate was statutorily - or might not be, if it was reduced by the Fair Work Commission, would stick on the minimum rate?

This is this question about whether over-award payments are likely to be maintained or not. So in the case of your club, are they doing well enough that they might actually maintain the - - -

**MS QUIRK:** No, it's a small club.

**MS SCOTT:** And you're on awards now?

**MS QUIRK:** I'm on awards, yes.

**MS SCOTT:** Exactly the award?

**MS QUIRK:** Yes.

**MS SCOTT:** Nothing more? Can I just check - - -

5 **MS QUIRK:** No, I do get a little bit extra on my award, yes, because I do some extra things.

**MR HARRIS:** But it's in return for - - -

10 **MS QUIRK:** Yes.

**MS SCOTT:** But can I just check, you're not covered by an enterprise bargaining - - -

15 **MS QUIRK:** No, I'm not.

**MS SCOTT:** You're on the award?

**MS QUIRK:** Yes, I am.

20 **MS SCOTT:** Plus something else?

**MS QUIRK:** Yes.

**MR HARRIS:** Yes.

25 **MS SCOTT:** Okay, great.

30 **MR HARRIS:** Because that's, again, of interest because as you know, even say in New Zealand where penalty rates were taken away, lots of employers still pay penalty rates themselves. They so choose to do in order to retain staff and that sort of thing. This will all go to our analysis, if we can do it, about what we think the net impact of such a change like this is likely to be.

35 **MS SCHOFIELD:** But we would have concerns about a two-tier workforce wherein people doing the same work across different establishments - I know that happens through enterprise bargaining, but when you're talking - it does happen now, but that's not premised on lowering the minimum standard. What you're saying is that you would lower the Sunday rate in some establishments that were struggling.

40 **MR HARRIS:** Or I'll put it in my terms, and you can agree with me. A well-off club might pay a higher rate than a less well-off one.

45 **MS SCHOFIELD:** As they do now.

**MS SCOTT:** As they do now.

- 5       **MR HARRIS:** But that's my point, and Clubs Australia are making it pretty clear that some of them do go through big enterprise bargains. That's why it was a really good submission, it covered all array, and particularly in this workforce area which is probably one of the more higher profile ones in terms of potential changes to workplace relations arrangements. It is a very good (inaudible) that you brought along, so thank you for that. Did you want to have anything - - -
- 10       **MS SCOTT:** I just want to clarify, I guess in your role as the bar manager and trainer and all sorts of other tasks, you work from Sunday to Wednesday, and Mary, do I take it, then, there's another person who works the Thursday to Saturday shift?
- 15       **MS QUIRK:** They're spread across the other casuals that can do when they can do it and we have quite a few students.
- MS SCOTT:** All right. I think that's probably enough, that's probably clarified my matter.
- 20       **MR HARRIS:** This may be - - -
- MS SCHOFIELD:** Sorry, can I just reply to the question about data, because as you would be aware - - -
- 25       **MR HARRIS:** Yes. Data we're really interested.
- 30       **MS SCHOFIELD:** - - - we're running substantive proceedings in the Fair Work Commission where there's an application similar to this one. Mary is one of dozens of witnesses who are giving evidence for the union in those proceedings, and in our formal submission, we will provide you with a link to that material because we think it will be very valuable. What we intend to do is to summarise and attach some of the expert evidence. One of the pieces of expert evidence that we're relying on does go to the issue of the cost impact of penalty rates on household income. I'm not sure if it distinguishes to the level of between Saturday or Sunday rates, but it is quite ground-breaking data and we would be happy to provide that expert - - -
- 35       **MR HARRIS:** Well, it may well have the numbers of people, you see, and that's what we will be looking at.
- 40       **MS SCHOFIELD:** It does have the numbers of people.
- MR HARRIS:** The numbers of people who are affected by - in other words, people who - and maybe you haven't - because I think the Fair Work Commission proceedings are a bit different to - - -
- 45       **MS SCHOFIELD:** Yes, yes. Yes.

**MR HARRIS:** I'm not 100 per cent sure about that, but I know you've got an evidentiary process going with them, too.

5 **MS SCHOFIELD:** Yes.

10 **MR HARRIS:** So we're very interested in trying to identify better the size of the group that might be affected for this purpose, because I mean, our stuff is pretty transparent. We will put up there - if we think there's a cost for our recommendation, we'll put up the cost and we won't try and gild the lily, but our problem at the moment is trying to identify with sufficient accuracy the group of people affected, because as we point out, I think a third of the workforce now works either Saturday or Sunday on some occasions, which is it's a pretty big number and that goes to our overall point, which says there's a lot of change in workforce matters generally, that weekend work is now much more common.

20 But breaking that one-third of the workforce down into so who regularly works Sunday and then who regularly works Sunday in the kinds of industries that you, as you say, you're a very clear representative of a chunk of employees in that area, that's what we have to try and do for the purposes of this proposition that we have in place. It will also help us decide if, as you say, whether we've made a proposition that's not really workable because then we'd like to try and assess employment generation, and that's what I want to ask you about, because you've quoted John Quiggin here as suggesting that changes in penalty rates may lead to changes in patterns of employment, but are unlikely to have much effect on aggregate employment in the café and restaurant industry, and you've given us a source for that and it's in a four-year award process so I presume that's some time in the last couple of years.

30 **MS SCHOFIELD:** Yes, it is. That's actually current.

35 **MR HARRIS:** That's current, is it?

**MS SCHOFIELD:** That's a report that's been tendered and is publicly available and we will attach that to our submission for you, that full source.

40 **MR HARRIS:** So we are obviously going to make some assessment and try and look at this question of how much employment there might be and so I was going to ask you if that's an old one, where I can get it, because you've got a date here, but if it was already - anyway, but that's on public record now, I assume that's what this FWC means?

45 **MS SCHOFIELD:** Yes. Yes, it is.

**MR HARRIS:** Do you have any recollection yourself of the basis on which Quiggin would have come to this conclusion?

5 **MS SCHOFIELD:** It's a substantive piece of evidentiary research, so off the top of my head - and there are others, we have other expert witnesses who have made similar findings, that the - well, there is a nebulous link, I think, in many economists' eyes between cuts in minimum wages and the extent to which employment will be created, and that goes to the minimum pay issue, but you can't extrapolate that to a point where you say a cut in penalty rates  
10 will actually have a positive employment impact, and what we're seeing in the Fair Work Commission proceedings is employers trying desperately hard to demonstrate that link between increased employment and cuts in penalty rates and the material that they are presenting is significantly lacking in credibility.

15 **MR HARRIS:** So we're going to try and have a go at this, not for your purposes, but for our own, in terms of public policy. That's why I'm interested in if he's come to a firm conclusion, presumably he's got some basis for that, "unlikely to have much effect on aggregate employment in the  
20 café and restaurant industry" seems a pretty broad statement, so we'll definitely do some analytical examination of that.

**MS SCHOFIELD:** Yes. Okay.

25 **MR HARRIS:** This question of employment, you referred a number of times to the minimum wage and I guess you might have noted our recommendation wasn't simply on the minimum wage, that in times of downturn, some greater attention be paid to limiting the increase in the minimum wage, it was actually attention to the position of the unemployed.  
30 So this was the prospect of people continuing to gain employment in a period of economic downturn. I don't know whether you intended, by making that comment to - offering your comment on that general issue, but we are actually interested, again, in employment patterns such as they might be in evidence in that area. I think the Fair Work Commission has done some  
35 work of its own, but we're hoping to encourage people to do a bit more work, if we can.

I appreciate that you'll have limited resources and you're tied up in a Fair Work Commission inquiry, but we are actually interested in that  
40 proposition as well.

**MS SCHOFIELD:** Yes. We will address that in our formal submission in detail.

45 **MR HARRIS:** Okay. Thank you for that. I didn't have anything terribly much more on the ones that you put forward in the pieces of paper that we've got today. Do you have - - -

5 **MS SCOTT:** I've got two quick questions, or maybe not quick. Mary, can I just check, your hours, you said you work Sunday to Wednesday, are they the same hours each day or do you have a longer shift on Sunday because it's the busiest day?

**MS QUIRK:** No, I do nine and a half each day.

10 **MS SCOTT:** All right, each day, standard, right. I guess my question now is to you, Jo. We're very interested in the issue of exploitation of all workers, but also the issue of exploitation of migrant workers. Given the breadth of your sector, would you have a comment that you'd like to make about migrant workers, and I'm particularly interested in what either your union has done, is proposing to do, but also any suggestions that you have for what  
15 could be changes that could either be made to the activities of the Fair Work Ombudsman or changes to the structural arrangements relating to visas or information that could be given to certain visa class holders. I don't know where you want to go with your solutions, I'm not trying to direct you in any particular area, but I'm very keen to hear about what you either have, are or  
20 think others should be doing.

**MS SCHOFIELD:** Well, we work closely with the Fair Work Ombudsman around issues of exploitation, particularly in the cleaning industry, but also in  
25 hospitality and we find that migrant workers are a particularly vulnerable group, so we welcome the recommendation that's in the draft report to give additional resources for investigation and audits to the Fair Work Ombudsman, and we also welcome your acknowledgement that migrant workers are in a vulnerable position in the labour market. That's certainly our experience, particularly in the cleaning industry. We're finding  
30 increasingly international students and others are working in ways that are not always consistent with their visa classes and employers are using that, getting them to work more than 20 hours and then either not paying them or threatening them, you know, shifting them onto cash-in-hand employment unless they keep quiet about it.

35 We're finding a dramatic increase in CBD cleaning of those sorts of practices. We did a report in Melbourne focused specifically on international students and we found that most of them were being underpaid by an estimated \$15,000 a year. So the work that the Fair Work Ombudsman does  
40 in these sectors is really important and very valuable to us and we want it to continue. We think there needs to be greater cross-agency cooperation in enforcing visa conditions, so we deal with the Fair Work Ombudsman in one respect, Immigration in another respect, and we think that there could be a more coherent policy around visa workers. We also strongly support labour  
45 market testing for 457 visas. We think they have a place in our economy, but they do need to be balanced with an obligation to create employment in local areas, particularly in areas of high unemployment and the Productivity

Commission has noted that increasing employment is an issue that you're interested in.

5 I think what we find, though, is that jobs, sometimes 457 visas are used because of an intransigence of employers to increase pay or job quality, so visa workers often do jobs that are not always acceptable to local workers and that's because they're often not firmly grounded in what our legal standards and minimum conditions are.

10 **MS SCOTT:** Thank you. Jo, I'm very interested in the - I think you said "survey", I'm sorry, my hearing is a little imperfect today - this survey that suggested that people being underpaid \$15,000 a year. Could you tell us what happened as a result of that? Were you able to take individual cases to the Fair Work Ombudsman, was it all anonymous? I mean, of course, I understand that's a principal problem, that because of concern about losing their visas or being sent back home, that people won't necessarily - they might well even appreciate they're being underpaid, but don't feel they're in a position to then take it further. Could you talk about that for a minute, and then I've got about four other questions related to that.

20 **MS SCHOFIELD:** Yes, sure. Well, we did an audit in Melbourne CBD and we published the findings. Yes, well we went out and organised buildings and found international students, and there's a report which we can attach or reference in our - I think we will reference it in our submission, it's called "Dirty Business" that actually uncovers some of these practices. So, sorry, what was the second bit of your question?

30 **MS SCOTT:** What happened as a result there? So you went through the buildings, you found that, lo and behold, people were not getting the right pay. Did you then go and - what happened next? Was there any restitution or did people say, "Please don't take this matter any further, I'm worried about losing my visa"? What happened?

35 **MS SCHOFIELD:** Look, it was an operation conducted by our Victorian branch, so I will get some further advice from them. My understanding is that there was some follow-up, but what it did lead to, I know, is the union employing some international students to work with us, to help organise and to find others, and we've done a similar thing in New South Wales, because we find that different migrant groups are subject - are here. Like, for example, in cleaning in Sydney, there's a number of Nepalese workers at the moment, so we work with the Nepalese community and we have people who work with our union to help tackle some of the issues that those workers face.

45 **MS SCOTT:** Can I just check, Jo, that's very interesting, your comment on the areas where they're drawing labour from, would these Nepalese workers be coming here under faux 457s, or are they coming here as under the student category or is it a working holiday, do you know what - - -



**MS SCHOFIELD:** Student category, primarily.

5 **MS SCOTT:** Primarily. Okay. Are they coming here through the use of labour hire companies or are employers engaging them directly?

**MS SCHOFIELD:** I'm not sure, but I can find out.

10 **MS SCOTT:** Okay. We'd be interested in that aspect, any insights you have into that.

**MS SCHOFIELD:** Yes. Yes.

15 **MS SCOTT:** We have been told in some other cases that labour hire firms have been used and certainly some of the evidence in the public domain suggests that labour hire firms are often utilised. Sometimes it can be hard for the Fair Work Ombudsman to chase labour hire companies if they've disappeared into the woodwork. Anyway, we're thinking about that aspect as well.

20 **MS SCHOFIELD:** Yes.

**MS SCOTT:** All right. So in terms of, I can see there's action that your own union has or can take, and there's action that the Fair Work Ombudsman can take. Just on the issue of your suggestion about close work between the two agencies, Immigration and border - - -

25 **MS SCHOFIELD:** Yes.

30 **MR HARRIS:** Border force.

**MS SCOTT:** I had to think about it. One suggestion that's come to us is that a closer cooperation can actually deter reporting. On the other hand, I can see why people are keen to uphold visa requirements. Could you comment on that? It's a fine balance, isn't it? Some groups like FECCA have suggested to us that in fact encouraging that link can actually deter reporting of it, the investigation of it and then the successful prosecution of abusive employers. Your views?

35 **MS SCHOFIELD:** Possibly. I mean, I'm not proposing that as a model to find people who are working under visas, you know, in breach of their visa requirements because often people are doing that for reasons that they need to make the money to live or that they're fulfilling their employer's wishes. So we're asked a lot in our union to work to find workers who are working beyond their visa classes and we prefer to put the focus on employers who are often encouraging or mandating that sort of practice. There is a very interesting model that was developed in relation to labour trafficking, I think

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through the Federal attorney generals under the former Labor government, that some of that work is continuing with the current attorney general, where a sort of high-level working group was set up of cross-agency organisations and key stakeholders; unions, church and faith groups.

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That was a really useful model, I understand, in getting some understanding of working across agencies to deal with some of the policy issues and policy inconsistencies, frankly, because the Fair Work Ombudsman might take a different approach to the one that Immigration would take.

10

**MS SCOTT:** Thank you. We have heard of the Taskforce Gadina(?) so we are pursuing that. Thank you very much for that.

15

**MR HARRIS:** Okay. I want to ask, in our report, we looked contracting arrangements.

**MS SCHOFIELD:** Yes.

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**MR HARRIS:** We proposed on the one hand that in enterprise bargains, there should be no restrictions on employers being able to use them, of any form at all, and that's an extension of really what is a broad proposition now, which says there shouldn't be very much restriction, but consultation, et cetera, is still potentially used. And on the other hand we were saying but where it appears that sham contracting could be developing, the test seems to be quite a difficult one to demonstrate, that an employer was actually aware that contracts were a sham. So we proposed altering the test, from being the quite exceptional or difficult to prove recklessness test, to more of a reasonable person test.

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So we see both of those as a way of improving contracting arrangements in employment. The sector that you cover has historically had some of the abuses of sham contracts. I think I have a notion of cleaning, although I'm going on memory here rather than data, so tell me if there's something different, but do you have a view on that? It wasn't in the original notes we got back from your quick responses, but I'm assuming you're going to have a view on contracting arrangements - - -

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**MS SCHOFIELD:** Yes, we will, and I know we will be addressing that in our submission. We're seeing sham contracting everywhere. We're seeing it in cleaning where it's been for a long time, but we're seeing it across the board as well, even in manufacturing where there's - you know, supply chains, labour supply chains are really becoming more and more opaque, where a single labour hire company might be contracting out to another, so there is a very murky chain of employment practices that are creeping in, even to more traditional parts of our economy and sector and that concerns us.

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**MR HARRIS:** Have you got an example where it's creeping in?

**MS SCHOFIELD:** We can probably - - -

5

**MR HARRIS:** Just the sector is fine. Obviously, we're not trying to deal with - - -

10 **MS SCHOFIELD:** Yes. No, we can provide an example to you, I can't recall the specific one, but it was a manufacturing plant in Victoria, so I'll dig that out. I know the Commission is talking about limiting the rights of workers under enterprise agreements to - - -

15 **MR HARRIS:** We're sort of looking at it as a restraint of trade. If the mechanism that you've chosen to see yourself employed in is this particular one, why should someone else say, "No, no, no, because you've used that mechanism, I don't want to see you employed." On the other hand, we don't want to see the contracting arrangement become so exploitable that it leads either to these migrant worker kind of arrangements, which it can lead to, or  
20 frankly, just general exploitation of the kind where people are given a piece of paper, told that this is their employment arrangement and in fact, it's utterly inconsistent with what their employment arrangement really is.

25 **MS SCHOFIELD:** Yes.

**MR HARRIS:** So you want to try and fix both. If you're going to say no restraint on utilisation of different forms of employment over here, you want to be sure that one of those is not an exploitable one.

30 **MS SCHOFIELD:** Yes.

**MR HARRIS:** So that's our view of how we're trying to continue to do reform in this sector, but make sure there's balance, you know, workplace relations as a sector, but make sure there's balance.

35

**MS SCHOFIELD:** And it would require far greater regulation of labour hire agencies than currently exists, in my opinion. As well as that - - -

40 **MR HARRIS:** Well, that's a proposition, too, that we've heard, that they should be licensed.

45 **MS SCHOFIELD:** Yes, yes. And as well as that, I mean, particularly in the security industry which is an industry that is very worrying, that there are these sorts of employment practices because it provides an important safeguard to the public, but we see a lot of sham contracting, independent contracting, in the security industry as well which is difficult to regulate and address. So you know, from time to time, provisions in the New South

5 Wales Act around deeming, deeming for subcontractors, have been very useful in actually establishing what were genuine subcontracting arrangements and what were shonky or sham contracting arrangements. I think without some sort of deeming provision where somebody, whether it's the primary contractor or the employer, has to take responsibility for what's happening in the chain, without that, there is absolutely no way to have any confidence in a measure such as the one that's being proposed.

10 **MR HARRIS:** Yes. And there's a degree to which the black letter law can't solve those problems. It comes down to a question of corporate social responsibility.

**MS SCHOFIELD:** Yes, and enforcement.

15 **MR HARRIS:** Corporations take an interest in who is actually providing their labour arrangements.

**MS SCHOFIELD:** We would like them to take more of an interest, but that can be the case.

20 **MS SCOTT:** It's interesting that people also suggested that to us, in terms of exploitation of workers and exploitation of migrant workers, you know, whether corporate responsibility can be sheeted home to the firms, even if there is a series of intermediaries in between. Anyway, it's a difficult issue.

25 **MS SCHOFIELD:** Yes, yes.

**MR HARRIS:** Okay. I don't think we have anything else from here. Do you have anything else from your side of things?

30 **MS SCHOFIELD:** No. I guess I'm curious about the recommendation - going back to the Sunday rates - about why the Commission chose to limit that proposal to hospitality and retail workers, bearing in mind that these are the lowest-paid workers in our economy and that such a measure would have a harder impact on those groups than many other higher-income earners.

35 **MR HARRIS:** Sure. There's a number of grounds in the report, so the one I'd think is easiest to put across is the one used in general public comments, where once the Sunday rate was struck in these set of industries as a deterrent from work, we did not want people in retailing or restaurants - and I'm old enough to remember when we didn't want - you know, when pubs were restricted about what they could do on weekends and things like that, to the food, but over time, over many decades, the structure of the Australian economy, and in particular, in this of industries, the kinds of services the consumers expect now on weekends is such that we shouldn't have a deterrent to work on weekends.

5 So the question is, is a pay rate that was struck when we wanted to  
deter work on weekends still appropriate when we don't want to deter work  
on weekends, and that's why it was this set of industries, whereas for  
example in the case of the emergency services workers, the community  
attitude has never changed. The community attitude from day one, circa  
when Federation started 115 years ago, whatever, we wanted emergency  
services workers available 24/7 and we were prepared to pay them the  
generic rates across seven-day weeks to ensure that they were available. So  
substantially, it's this question of why are we still charging a rate which is  
10 designed to deter work. And that's why we think there is a logical link to the  
fact that if you are paying a rate that is designed to deter work, you're  
probably stopping some employment taking place and so this is this trade-off  
between employment.

15 That's why we're quite interested, though, in other people's  
propositions, including that's why I asked you about Prof Quiggin, in  
examining this issue further, but that's the logic for why this particular sector,  
we didn't want to deter work. We don't think we want to deter work as a  
society any more, and therefore, we should get the price right. That's not to  
20 say there's no penalty rate on weekends. It was always to say there will be -  
under our proposition, there'll be a weekend penalty rate rather than a  
Saturday rate and a Sunday rate; there'll be a weekend rate.

25 **MS SCHOFIELD:** Okay. Thank you.

**MS SCOTT:** Thanks.

30 **MR HARRIS:** Thanks very much for your time. We're going to have lunch  
and then I think, for those who are waiting in anticipation, we have the  
Australian Chamber of Commerce and Industry, so don't go away.

**ADJOURNED**

**[12.11 PM]**

35

**RESUMED**

**[1.06 PM]**

40 **MR HARRIS:** I think we have the Australian Chamber of Commerce and  
Industry, correct? Could you guys identify yourselves, please, for the  
purpose of the record?

45 **MR CLANCY:** Richard Clancy, Director of Workplace Relations and  
Alana Matheson, Deputy Director of Workplace Relations for the Australian  
Chamber of Commerce and Industry.

**MR HARRIS:** Thanks for coming along. Do you have opening statements or comments you'd like to make?

**MR CLANCY:** Yes, please.

5

**MS SCOTT:** Just relax about the microphones. They're just for transcript purposes. You're right, you won't be able to hear - you won't be amplified for the audience, but I'm sure they'll - - -

10 **MR HARRIS:** So if you wish to play to the audience, turn and speak directly to them and gee them up there.

**MS SCOTT:** Or you can raise your voice.

15 **MR CLANCY:** I'll see how I go. The Australian Chamber made detailed submissions to the Productivity Commission Inquiry into the Workplace Relations Framework in March 2015. We were guided by the Productivity Commission statement, that it's task involved going beyond evaluating the current system, to consider the type of system that might best suit the  
20 Australian community over the longer term. The Australian Chamber supports several statements of principles in the draft report, however, we believe that many recommendations could have gone further. For example, the Australian Chamber endorses the following principles articulated by the Productivity Commission.

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First, the Fair Work Act, and sometimes the Fair Work Commission, can give too much weight to procedure and too little to substance leading to compliance costs, and in some cases, poor outcomes. Secondly, it is not only the direct participants in the system who have a stake in it. For example, the  
30 choices of people to become self-employed are strongly influenced by the alternative wages and conditions that they could receive by being an employee. There are also more than 700,000 unemployed whose job prospects are affected by the system. And thirdly, people are confused by the system and some parties that should have a bigger voice in it, consumers, the  
35 unemployed and under-employed, have marginal influence.

There are unquestionable inefficiencies, remnant unfairness, some mischief and absurd anachronisms. In this messy context, there is an understandable tendency to imagine that there must be a much neater and coherent system and that it would be desirable to start with a clean slate. The  
40 Australian Chamber, however, disagrees with the Productivity Commission's conclusion that despite sometimes significant problems and an assortment of peculiarities, Australia's workplace relations system is not systematically dysfunctional. It needs repair, not replacement. The Australian Chamber  
45 believes there are aspects of the system requiring more fundamental reform and supports the statement the chairman of the Commission made in a speech

to CEDA on 14 August, “That is not to say we would start from here if we were designing a workplace relations system. We would not.”

5 In our initial submission, the Australian Chamber emphasised that we cannot simply look at what we have, but must instead look for what we need. In advocating this, the Australian Chamber does not seek a completely deregulated system. The inclusion of employee protections and a safety net of terms and conditions of employment are supported. However, the system is unnecessarily adversarial. This detracts from the reality that the system  
10 stakeholders share aims that underpin national prosperity and living standards. The Productivity Commission has stated an improved workplace framework must involve decision-making that is not unnecessarily beholden to precedent or to dated labour market structures.

15 It must rely much more on evidence as a basis for its future direction, including information on the relevance of new developments in labour relations. The Australian Chamber agrees, but it is reasonable to query and reinvestigate prevailing views, rather than simply assuming the past is innocent unless found guilty. The Productivity Commission has recognised  
20 the wisdom of this approach in its draft report. The foundations of the workplace relations system remain relevant for ensuring the system caters for all stakeholders, including those outside the system. However, those foundations that contribute to the inefficiency, unfairness and absurdity ought not be preserved simply because they have always been there.

25 It’s been further observed by the Productivity Commission that in its roughly 900 pages, the Fair Work Act covers most aspects of the way in which parties should deal with each other in their employment relations, and in setting a variety of minimum standards. An extensive body of common  
30 law sits beside the statutory framework. The workplace relations framework is overly-complex. This inquiry has presented an opportunity to consider the extent to which aspects of the system impose on the relationship between employee and employer. Any recommendation to continue such an aspect should depend on the extent that such an imposition is proven to be necessary  
35 and effective.

The Australian Chamber is encouraged that many of our suggested reforms have been reflected in draft recommendations. As to the draft  
40 recommendations, we support the recommendation that Sunday penalty rates for cafes, hospitality, entertainment, restaurants and retailing be aligned with Saturday rates. We are pleased the Productivity Commission has identified areas where the system could be more flexible. This includes incorporating award terms that permit an employer and employees to agree to substitute a public holiday for an alternative day and exploring the use of preferred hours  
45 clauses. The proposals to make bargaining more accessible for small businesses, including by addressing problems associated with individual flexibility agreements made under the current laws are welcome.

5 We support the reintroduction of a global no disadvantage test to replace the better off overall test. We endorse the exploration of a new type of enterprise contract because it could offer a viable alternative for SMEs provided it is not layered with prescription and compliance obligations. We welcome recommendations to limit the capacity of agreements to restrict the use of flexible forms of labour which the Productivity Commission has noted are, in spirit, contrary to competition laws. There are sensible changes recommended that deal with industrial action, including the prevention of strike first/bargain later tactics, harsher penalties for unlawful industrial action commensurate with the significant damage it causes to the enterprise concerned and the broader economy, and stand-downs in cases of aborted action.

15 The recommended shift in focus to substance over process in key areas such as unfair dismissal claims and enterprise agreement making is sensible and entirely justifiable. This answers key concerns raised by the Australian Chamber and we are pleased that many of our suggested reforms for the unfair dismissal laws are in the draft recommendations. The recommended cap on damages for general protections regime is supported, but our objection to the existence of a regime remains. The Australian Chamber believes that aspects of the system still need to be challenged, including the continuation of modern awards in their current form. The creation of a minimum standards divisions within the Fair Work Commission and suggestion that it review and vary awards has merit, but the Australian Chamber advocates a simplified and more flexible safety net achieved by a period of transition.

30 In the interim, changes to the legislation will be required to underpin its function. For example, the Australian Chamber supports broader penalty rate reform that includes other industries and public holidays, however, the framework must provide an effective mechanism for such reform. The principles underpinning minimum wage setting: minimum wages must function as a genuine safety net that includes consideration of the interests of the unemployed and under-employed. The absence of an unfair dismissal exemption for small business. The Australian Chamber will continue to advocate for an exemption from the unfair dismissal laws for SMEs with fewer than 20 employees because there must be greater encouragement to hire our youth, unskilled workers and long-term unemployed.

40 The general protections laws which are overly-broad, confusing and duplicative should be repealed and the pre-Fair Work Act, freedom of association protections and unlawful termination provisions restored. The regulation of workplace bullying: workplace bullying must be condemned and prevented, but there is already a Work, Health and Safety regulatory regime in place to respond to workplace bullying. Repealing the additional overlapping workplace relations regime will remove complexity and confusion. The absence of bargaining frameworks within - bargaining



options within the framework. The option of the enterprise contract is worth exploring, but must be part of a broad sweep of agreement-making options that include individual statutory agreements, employer/employee enterprise agreements and employer Greenfield agreements.

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Right of entry: a return to the 2007 rules is required. Finally, the standards underpinning a global no disadvantage test must be rationalised. In particular, the common standards should be reflected in legislative minimum standards and to the extent that awards are to continue to apply, they should be limited to industry-specific content and should not address matters contained within legislated minimum standards.

In summary, the Australian Chamber believes Australia must continue to strive for the type of system that might best suit the Australian community over the longer term. Despite the absence of some of our fundamental reform proposals from the recommendations in the draft report, we have not abandoned them. We'll continue to advocate for their adoption, but in the interim, we endorse the recommendations in the draft report that would improve the workplace relations framework.

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**MR HARRIS:** Okay, thanks very much for that. Do you want to start?

**MS SCOTT:** Thank you very much for your presentation. A number of people have presented to us over the course of the inquiry since the draft report, and they have gone to areas where they think we've made an error in law or they think we've misunderstood something. Other people have simply restated their case, and I guess maybe I'll get you to go to the first issue. Is there anything in the report where you think we've made sort of like an error? I mean, people have identified possibly there's one or two things we've got wrong. Clearly, we unfortunately understated the power of the FWO in relation to some of the migrants' powers, that's sort of encouraged that we got that wrong, people have set us straight on that.

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Is there something in our draft report that you think falls into the category of absolutely must change because it's an error?

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**MR CLANCY:** In terms of whether we put it in the category of an error, we have spent some time analysing the recommendations that you've made in relation to the Fair Work Commission and we could address some comments to that?

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**MS SCOTT:** Yes, that would be useful.

**MR CLANCY:** So we took the view in our draft - in our initial submission that there is a role for the institution, it plays a useful role in dispute resolution, but the important thing is that it discharges its functions according to the statute so that that's an important principle. Now, if the statute was to

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change as a result of this process, it would be incumbent upon the institution to reflect those changes in its approach. In terms of your draft recommendation 3.1 for the minimum standards division, we're not adverse to that. We believe that may have some merit and provided it was  
5 accompanied by the underpinning objects of the Act that would guide its functions, also being changes in ways that are reflected in our submissions.

**MS SCOTT:** Right, okay.

10 **MR CLANCY:** In some ways, we don't see this as being a radical reform. We characterise it as somewhat incremental, if you consider that the current legislation provides for expert panel members and on a five-year term, as it turns out, and that the qualification stated in the legislation for expert panel  
15 members are not unlike what's in the draft report, and we also make the point that a specialist body has previously been charged with setting the minimum wage and award rates of pay, being the Fair Pay Commission. So in that sense, we think there is merit in exploring it, but the key would be the powers that it would have and the objects that would guide those powers in terms of, say for example, the dealing with awards and the rationalisation of award  
20 content, and that's related to other things we can address today, but that's just a rider on that.

This will be in a reply submission, but there would be perhaps other ways to amend the existing Act to expand the powers of expert panels to  
25 undertake some of the things, if a less-radical proposal was contemplated. You could amend some sections of the Act to expand what expert panels could look at and what the composition of Full Benches could be for those functions. As to draft recommendation 3.2 which deals with the tenure of members of the Commission, again, we'd probably see there being a  
30 distinction there. Expert panels, we accept that some tenure would be appropriate and indeed, it would answer one of the issues you called out in the report that said you need to freshen up the approach and bring different perspectives into it. That could be achieved.

35 We don't support, however, five-year terms or a fixed term for members of the Commission that would be exercising other functions, the quasi-judicial functions, and in our reply submission, we will have an analysis of how that's been considered previously, the tenure of quasi-judicial members of tribunals, and so we will go to that in some detail, but we  
40 - - -

**MS SCOTT:** Just to pause there, there are tribunal terms that are fixed in other areas. Would you be able to say briefly why it wouldn't be appropriate? I mean, I can understand why you might not think five years is  
45 appropriate, but you're going for no fixed term?

**MR CLANCY:** Yes.

**MS SCOTT:** So someone could be appointed at 40, for example, and work through to, say, 65?

5      **MR CLANCY:** Yes.

**MS SCOTT:** Are you amenable to the recommendation about review of performance?

10      **MR CLANCY:** No.

**MS SCOTT:** Right, okay. So someone comes in at 40 and you don't think - most people perform very well, some people don't; you'd be comfortable, then, for that person to continue on in the organisation for maybe 25 years?

15      **MR CLANCY:** Yes, well, we think that that comes down to the quality of the appointment in the first place and you simply shouldn't put people on who, on merit, don't warrant appointment. I think, for us, it comes down to a range of principles and we'd be concerned about governing for the exception in this setting. We think - these are some of the principles that guide our approach. The exercise of duties of a quasi-judicial involves resolving different and often highly-contentious questions of policy, fact and law, and it goes without saying that workplace relations is an area that has historically been a contentious area.

25      Concern about reappointment, either by a government of the day or an opposition aspiring to government should never be a factor in decision-making. In order to attract the highest calibre of candidates for these offices, the security of tenure is required. In our view, requiring office-holders to reapply for their jobs every five years would act as a powerful disincentive to a pool of candidates, and there are conventions that weigh against former members appearing before a body upon which he or she served. Sometimes there's a time limit on that, but that would have implications for the sort of candidate that you'd attract because one would think that if you had had a career as an advocate or a lawyer or someone who's worked in the jurisdiction, to cut off your opportunity to work, resume work in that jurisdiction, would knock out a pool of candidates.

30      As to the merit-based performance review, our concern with the recommendation as it's framed is that if it's coming from the same panel that makes the appointments, it seems to us that the criteria to be a person who makes the appointments on that panel is that they don't necessarily have a background in the jurisdiction or the framework. Now, that shouldn't be the only factor, but if you're then assessing someone's performance in the exercise of the functions within the jurisdiction and the framework. We think that's a deficiency and it would leave the president in an invidious position where they will probably be bringing the most insight into someone's

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performance, apart from what people could gain from decisions on the public record, which again, is an unhelpful way to necessarily assess someone's performance.

5           So and that's a dynamic that doesn't exist elsewhere, as far as we can make out, where the president would be put in that position. But you know, as we said at the outset, it's for those members that are exercising the quasi-judicial functions that we think the longstanding practice in the jurisdiction that is held for its entirety is appropriate to maintain.

10           **MS SCOTT:** So on this matter, you're very clearly going with established practice?

15           **MR CLANCY:** Yes.

**MS SCOTT:** Okay. But you're conscious that in other areas where people are undertaking quasi-judicial arrangements, you know, fixed terms are not uncommon.

20           **MR CLANCY:** Yes, and look, there's a range of Commonwealth tribunals. It was looked at and the inquiry that we've referred back to which was done in 1989, looked at the range of Commonwealth tribunals and the tenure there and weighed up all those sort of considerations. We think that in this area of policy, it's still appropriate to maintain that security of tenure.

25           **MS SCOTT:** Thank you.

**MR CLANCY:** We did note, and again, we'll go to this in detail in our reply submission. We were a little bit confused about the distinction that seemed to be made between some current members of the tribunal as judicial officers and others that are not, and on our reckoning, just with the current composition of the tribunal, there could actually be more than the three or so that you've identified. Our understanding is that if a person was a member of the Australian Industrial Relations Commission as a presidential member, on the inception of Fair Work Australia and then the Fair Work Commission, that that status was maintained through transitional legislation.

40           Now, if that's the case, we could be wrong on that, but if that's the case, you'd have as many as 10 current members in one category, some other current members who might be, under the proposed model, performance-reviewed, and then new members, and we don't know how that works as a dynamic.

45           **MR HARRIS:** Well, you could simplify it by putting them all on the same basis, if you're going to change the law.

**MR CLANCY:** You certainly could, but that wouldn't be a change that we would support.

5 **MS SCOTT:** Well, we'd welcome your comments. We have had comments from others on that, so it would be good to compare your commentary and the others we receive, so thank you for that.

10 **MR CLANCY:** That's all right. We will also have comments on the appointment process which will be in it, but again, we believe that that should fall with the government of the day, as is the current arrangement. We don't resile from it, both sides of the equation can improve in that regard. There are a lot of historical considerations - - -

15 **MR HARRIS:** How do you expect them to improve?

**MR CLANCY:** Well, I think the first thing - the first principle should be that a balance should be resumed, and once - - -

20 **MR HARRIS:** One for each side?

**MR CLANCY:** Well - - -

25 **MR HARRIS:** We know that's stopped. Both sides of politics say the other has not observed that.

**MR CLANCY:** Yes, well, we'll go to that in some level of detail. Our assertion would be that it was probably observed up until 1991.

30 **MS SCOTT:** Other people put different years on it, but I'll write it down, 1991.

**MR CLANCY:** Yes, and if you analyse the appointments made under the Keating government, that was where imbalance started.

35 **MR HARRIS:** But you see, once you get into the he said/she said, how do you get back?

40 **MR CLANCY:** Well, in our view, you get back by resuming a balanced position and then committing to maintaining that balance. There's no other way - - -

**MR HARRIS:** But you're not proposing any legislative change to induce that, you're proposing that, "Goodness, start again."

45 **MR CLANCY:** Well, if - - -

5       **MR HARRIS:** We're doing public policy design here, so you see, we can't get away, in a Productivity Commission report, with saying, "Here are some broad principles and good luck with that." Certainly we can in some cases where it's impossible to do a design at all, we've done some reports like that and they tend to get not very well received, so the pressure is on us primarily to come up with a design. I can't see that wishing it were so is going to help.

10       **MR CLANCY:** Well, if we go to the detail of the appointment process that you've put up - - -

15       **MR HARRIS:** Yes, by all means critique it, but we need an alternative, if you want to restore some form of balance, but more importantly than that, other linkage that we have in mind here is cultural change within the institution. Now, if you don't change the people that rule the institution, you're not going to change the culture.

20       **MR CLANCY:** Yes. Well, if I go to the appointment process, it's not dissimilar to what was foreshadowed by the previous government when they came into government which involved having input from various stakeholders. So if I can go to that. "The policy was the minister responsible for employment, industrial relations, will only be able to make an appointment after completing the following processes: a shortlist of candidates will be scrutinised by a panel comprising a senior official from the Department of Employment, Industrial Relations who will chair the panel, a senior official from the Public Service Commission, a senior official from each State and Territory Department of Industrial Relations that wishes to participate. The minister will be required to consult with the opposition spokesperson for industrial relations and the head of Fair Work Australia prior to making any decision about appointments recommended to Cabinet."

30       Now, that was quite a - not dissimilar to what you've put - - -

35       **MS SCOTT:** Well, not very close, because I think we would draw the comparison to the ACCC process.

**MR CLANCY:** Sure, but - - -

**MS SCOTT:** Now, that doesn't necessarily involve - - -

40       **MR CLANCY:** But this involved input from the States, input from the Public Service Commission - - -

**MS SCOTT:** Well, that's a difference there.

45       **MR CLANCY:** Yes, departmental - so - - -

**MS SCOTT:** That's a difference there.

**MR CLANCY:** All right. But - - -

5 **MS SCOTT:** Do you want to keep going, Richard? I could point them all out, if you like?

10 **MR HARRIS:** You see, we're hardened enough in designing as to know that officials can do or say what they like, it will make no difference whatsoever to the ministerial appointment. So what you've got is consultation as an obligation there, whereas something which says the States will be involved in picking the people and then the people will put up the recommendation, so there's people on a panel, is actually a loss of control, we have no doubt about that. There's a loss of control by the Federal minister until the appointment process comes to him or her. That's a big difference from the consultation right.

20 Now, we certainly did no modelling on the previous government's policies and obviously by the sound of it, they didn't implement them anyway, but we think if you're going to change the nature of, as I said, the institution, you're going to have to change the nature of the people who are appointed to it. Otherwise, if the primary process persists, you get people who are of the culture being appointed by the culture. It's pretty much what you've got today.

25 **MR CLANCY:** Look, I think we'll have a disagreement on the process.

**MR HARRIS:** Sure.

30 **MR CLANCY:** I think the other point that we would make is this; and it goes back to the - and you've reflected it in the draft report and it is that it's also the legislation that is delivered to that institution.

**MR HARRIS:** Correct. Absolutely.

35 **MR CLANCY:** And while you've got legislation that, if you take the unfair dismissal jurisdiction, for example, and we've highlighted this extensively, where form can triumph over substance - - -

40 **MR HARRIS:** We'd change them both.

**MR CLANCY:** Yes.

**MR HARRIS:** That would be our - - -

45 **MR CLANCY:** So - - -

**MR HARRIS:** But we'd do both.

**MR CLANCY:** Yes, yes.

5       **MR HARRIS:** And more than that, because I want to get to your other black  
letter law changes but the reason we are - well, I guess - no, we are  
collectively, I think, agreed on this. Part of the reason you want to change  
the nature of the appointments process is because we would then rely upon  
those parties that were relatively newly-appointed to the minimum standards  
10       division to deal with this question of improvements to awards which you  
have also focused on. So we had a, if you like - this is a model which is how  
do you change the institution and encourage it to address the issue. I guess  
the alternative, by the sound of it, you're going to get to this, is "I wouldn't  
change the institution" for whatever reason, "I want to change the law."  
15       Because you did, in your opening remarks, talk about altering awards  
effectively by legislation.

**MR CLANCY:** Well, in that - and you'll recall our model for a reform  
safety net - - -

20       **MR HARRIS:** Yes. No, I'm not saying there'll be no safety net, I'm just  
saying some things would disappear, but they would disappear by legislative  
fiat rather than by effectively review processes managed by the Commission.  
So that, we would say, is quite a big difference - - -

25       **MR CLANCY:** Yes.

30       **MR HARRIS:** - - - between our draft report and what I understand to be  
your proposition. One of the inherent difficulties with that is identifying  
exactly what you'd take away in black letter law out of an award, and on our  
own examination of the contents, the general contents of awards, (a) it's quite  
difficult to cover the entire waterfront. Shall we take all rostering out of  
awards, and the answer is, in some cases, it's apparently - I'd like you to  
comment on this, some cases, rostering is actually probably there as a  
defence for employers. Other cases, it's there as a defence for employees.  
35       Taking rostering away seems to me to leave them, one or other either,  
depending on what kind of industry you're in, how much power you have,  
how concentrated the levels of competition are, all that kind of stuff, more  
exposed.

40       So identifying what you'd like to take away by black letter law will be  
quite important in this and we would welcome people's comments on that. I  
know I've previously asked the Business Council of Australia, for example,  
to specify exactly the same thing, not so much talk in terms of the broad  
principle, which we understand, but the practical implementation because if  
45       we're to frame a recommendation around it, we will have to say, for the  
benefit of the Commonwealth government, "Use this legislation to change  
this activity."



**MR CLANCY:** Yes.

**MR HARRIS:** So, yes, I'd like you to comment on that, if you could.

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**MS MATHESON:** So I think we have been receptive to the concept of a minimum standards division that would operate in conjunction with a reformed set of objectives. We are conscious that a composition of that minimum standards division might look more akin to an expert panel that sets wages, so we're receptive to that type of recommendation, so a variety of skill sets would be present on that expert panel, including people capable of some robust economic analyses to underpin that function as well.

10

So to that end, there are certain, I suppose, areas of imbalance within the current awards objective, one of those being, of course, an overt requirement to pay compensation for people who are working on weekends, which we would suggest - or additional compensation, I should say - might be an anomaly when considered against the broader framework and the changing nature of, I suppose, our sources of economic activity. Rather than having an object of that nature, we would prefer that perhaps there's some reframing of the objects of modern awards to make sure that they don't exist as a barrier to the efficient structuring - - -

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**MR HARRIS:** The objects of the modernisation process you would change, and I do remember that from the original session, and I think we did go with that, I think, in penalty rates, anyway. But never mind, keep going. No, I understand that kind of black letter law variation.

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**MS MATHESON:** Of course, there are some good recommendations coming out of the report in terms of how the minimum standards division would conduct its activities against a reform set of objectives that reflected that type of principle. So we would support the concept of having rigorous research to identify trade-offs and to be required to articulate exactly how decisions are reached, as well as the consequences for those decisions. So some of the analysis that we've - or some of the comments that we've drawn in our initial submission relate to the fact that awards effectively set a standard of regulation that's akin to what might be ratified in the NES or Fair Work Act, but yet there's an absence of a robust regulatory impact assessment or statement of that nature.

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You know, we do think there is some opportunity to look at, for example, the employment impacts associated with various decisions made by the tribunal, and that applies in the context of the awards as well as minimum wage setting as well. So from that, I suppose we would have one perhaps area of disagreement that we'd call out and the Productivity Commission has suggested perhaps the more systematic analysis of the Fair Work Commission of common issues in awards, such as weekend penalty rates,

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leave loadings, and might pave the way for further consolidation in the National Employment Standards.

**MR HARRIS:** We link the change in personnel and structure to that - - -

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**MS MATHESON:** Yes, and look, but we do see some opportunity for reform of the National Employment Standards in the longer term, but where we would exercise some caution is where the awards are to co-exist with the National Employment Standards, we do think that there should be some separation. The overlay and overlapping nature of those two standards does create a level of confusion and complexity, and you know, under our proposed model, the National Employment Standard - or the legislative minimum standards would be framed in such a way that they're non-prescriptive, they're capable of being applied in the workplace and are matters that you cannot trade away or vary, but the award content, to the extent that it was to remain during a transitional period or otherwise, would reflect industry-specific content based on robust evidence suggesting that those matters are necessary for that particular industry's operation and more efficient, effective operation.

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So that's the sort of, I suppose, principles that are underpinning our submission.

**MR HARRIS:** Can you break that into an example kind of area? Because if I understand it rightly from what you've said, the NES is not prescriptive, but it's descriptive. It says you have a right to, I don't know, annual leave.

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**MS MATHESON:** That's right. So the method in which, for example, annual leave accrues might be subject of some conjecture at the moment. There is some degree of complexity of how accruals and things like that work in the context of compressed working weeks and irregular, if you like, working hours. So I think in our submission, once you - you get to a set of minimum standards, it would prescribe, for example, you have four weeks' annual leave, but wouldn't try to stipulate precisely how that might - - -

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**MR HARRIS:** Whether your penalty rates are included in your payment while on leave, for example, and you'd leave that to the award or enterprise bargain to determine? That's an example that's come from the mining industry that - - -

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**MS MATHESON:** Yes, yes.

**MR HARRIS:** If that's a wrong example, tell me it's wrong, and do better.

**MS MATHESON:** It would depend on whether or not we're working off, I suppose, a hybrid model of what we would like and what's existent, or whether we're looking at our - - -

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**MR HARRIS:** No, your preferred model, we're looking at your preferred model.

5     **MS MATHESON:** So in our preferred model, it would be non-prescriptive because it would sit alongside, I suppose, a framework that may not include a raft of additional conditions by force of legislation or award regulation. They'd be there as a consequence of bargained outcomes, and to that extent, you know, if the parties were to I suppose offer higher rates of pay or matters  
10     beyond what was the award minimum, you know, there would be like some supplementation possible.

15     **MS SCOTT:** You can always go above the award, so really, I imagine you're interested in negotiating the possibility of less-generous NES; is that what you are heading towards?

20     **MS MATHESON:** Not necessarily a less generous NES, but as I said, a less prescriptive NES, so a codification of core standards that could be built upon through the bargaining framework. Where there is confusion is, as I said, where the award seeks to deal with matters specifically addressed in the National Employment Standards. I mean, we're currently in proceedings at the moment that is - it's disputing whether or not annual leave loading as an example is payable on termination of employment and that's a confusion that has been existent as a result of some - - -

25     **MR HARRIS:** And just on that one, then, your preference is that awards or enterprise bargains determine whether leave loadings are paid on termination on annual leave that's paid out, rather than the NES determines that?

30     **MS MATHESON:** That's correct.

35     **MR HARRIS:** Okay. So it's what I might call a paring back of the NES to the base concept and then allowing negotiated arrangements, whether they're negotiated by a commission reform process or whether they're negotiated directly by an enterprise bargain - - -

40     **MS MATHESON:** Yes.

45     **MR HARRIS:** - - - to be the determinant.

50     **MS SCOTT:** Sorry, could I just, so just for clarity, because other people will listen to your testimony.

55     **MS MATHESON:** Sure.

60     **MS SCOTT:** Because you agreed with Peter saying paring back the NES terms and conditions, but you also said in answer to my question, no, you

weren't seeking to reduce the NES, I'm just looking for a bit of clarity on this one.

**MS MATHESON:** Yes.

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**MS SCOTT:** Are you reducing the safety net of the NES; yes or no?

**MS MATHESON:** To contextualise, in terms of quantum there are probably some matters that are worthy of further discussion, so an example, how many public holidays might form part of the NES, might be a matter of broader discussion. That having been said, the matters contained within the NES are as reflected in our submission and you'll note there that we are not expressly taking any of the matters - - -

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**MR HARRIS:** They're all there.

**MS SCOTT:** Yes, sure. All the headings are there.

**MS MATHESON:** That's right.

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**MS SCOTT:** So headings stay - - -

**MS MATHESON:** But what sits within those headings - - -

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**MS SCOTT:** Right, that's the next set of words I - - -

**MS MATHESON:** What sits within, we would look at perhaps some reform, to reduce the level of prescription. Now, we wouldn't, for example, tinker with things like - or we're not proposing to tinker with things like having four weeks' annual leave, in terms of the quantum, but as to the context within the NES that wraps around annual leave, we might give that some further consideration.

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**MR HARRIS:** Okay.

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**MS SCOTT:** Just to clarify, context that wraps around?

**MS MATHESON:** Yes, the core minimum standards, so - - -

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**MS SCOTT:** In plain English, how would you describe that to the person in the street?

**MS MATHESON:** So stipulating things like the manner of accrual would be a matter of prescription that we would seek to remove.

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**MS SCOTT:** Okay.

**MS MATHESON:** But we would, you know, as I said, not look to tinker with the concept that, you know, a permanent employee is entitled to four weeks' annual leave.

5 **MS SCOTT:** Got you. Thank you. Thanks for the clarification.

**MR HARRIS:** Right. And if we look further at this, so in our draft report we said, look, everyone seems reasonably happy with the NES, so you'd say, well, in principle, but not necessarily in practice?

10 **MS MATHESON:** In practice, that's a fair assessment.

**MR HARRIS:** Okay.

15 **MS SCOTT:** Well, yes, in practice, you actually want to change it?

**MS MATHESON:** Yes.

**MS SCOTT:** Yes. You want to pare it back.

20 **MR HARRIS:** Not taking away what I might call the primary content, but you're saying you'd like increased flexibility.

**MS MATHESON:** Yes.

25 **MR HARRIS:** So here's an interesting angle to this, isn't it? There have been conflicting submissions in the first round from largish employers about whether we should have more or less in black letter law. I'm going to say, on this particular issue, you're keen to have less in black letter law and more in a negotiated arrangement.

30 **MS SCOTT:** And awards.

**MR HARRIS:** Now, if I can try and put your position versus another employer group without being terribly specific, there's also a desire to take out things out of enterprise bargaining, make enterprise bargaining cover relatively few, certainly less arrangements that are currently covered.

35 **MS MATHESON:** Yes.

40 **MR HARRIS:** So somehow we're going to have to, potentially, if we're to consider this, marry both because you are, by definition, adding something into enterprise bargaining that currently is determined in the NES, are you not? That would be your preferred proposition. It's got to go into enterprise bargaining or to a modernisation process. I guess the common ground might be - or disappears entirely and it's in none of the above, which would be a

45 third arrangement, but presumably, for clarity, not what you're proposing?

**MR CLANCY:** A third arrangement being - - -

5       **MR HARRIS:** Disappear entirely. Eliminate it from the NES and not added into matters pertaining that could be negotiated in an enterprise bargain. That's a third pathway.

**MR CLANCY:** No, I don't understand.

10       **MS MATHESON:** No.

15       **MR HARRIS:** So you would allow a matter removed from the NES and this breadth of description, if I can call it the breadth rather than the principle, you would allow that to become a matter pertaining, to be capable of negotiation in an enterprise bargain?

**MR CLANCY:** Yes, if something had, for example, been an award term - - -

20       **MR HARRIS:** Well, in awards, it's hard to get rid of them other than via a direct process which presumably is going to be done in the Fair Work Commission.

25       **MR CLANCY:** Yes, but - - -

**MR HARRIS:** I'm sticking with EBs because EBs - - -

30       **MR CLANCY:** Okay. But if we went down that path of removing - if we went down that path with awards where you move away from the award system, that is not to say that parties bargaining an enterprise agreement could not include an award term in that agreement.

35       **MR HARRIS:** No, I know, but I guess I'm trying to draw to your attention the fact that we have two quite - while may not be conflicting, yet they've got capability of being conflicting positions. One is to shrink stuff that's covered by the EB, the other is to possibly I'll stick with my terminology, pare back the NES, but eventually allow those things to go into the EB, so it expands the EB arrangements. It may not expand them in anything other than a trivial sort of form, I'm not trying to overly-dramatize what the actual item is that shifts, I'm just looking to conceptually adding things to the EB appears to be, 40       for some employers, a problem, apparently because in the past they have negotiated things that they now find are uncomfortable and so we're stuck here with two positions.

45       I won't call them "conflicting" because I can make them both work entirely by making the condition disappear, but I don't think that's what you're proposing - - -

**MR CLANCY:** No.

**MR HARRIS:** - - - and I wouldn't want you to be mischaracterised.

5

**MR CLANCY:** On matters pertaining, we had a view that - and speaking to some of your recommendations, I'm thinking particularly of the restriction on labour hire or - - -

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**MR HARRIS:** Yes.

**MR CLANCY:** Yes. Now, that accords with our view on matters pertaining, but I don't think our position is to say that matters pertaining can't include things that came from the NES, or if that's what you're asking.

15

**MR HARRIS:** No, that's what I'm asking. I just want to be sure because, as I said, we have another proposition which is shrink it to a bare minimum, things that are relevant to EBs.

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**MS SCOTT:** Well, it's actually you'd be expanding it.

**MS MATHESON:** So shrinking the?

25

**MR HARRIS:** Taking away numbers of things that are currently capable of being negotiated in an enterprise bargaining, which means effectively reducing matters pertaining to a bare minimum.

**MS MATHESON:** Right.

30

**MR HARRIS:** I don't know what the bare minimum is, we've asked - I sort of do conceptually know what it is, but I've asked for details, so I'm not going to be able to specify it here today, but you see, that's the proposition in front of us. That's not to say obviously different groups of employers will have different views, well, that's hardly surprising. I just want to be sure that I understand your proposition. I did the same with them. It looks like it's a sort of torturing process, but it's not, it's to make sure that I don't go away from here with a misimpression and that our people who are going to develop work, starting from the moment you speak here today, don't go away and start work on a different impression.

40

**MR CLANCY:** Yes.

45

**MS MATHESON:** Sure. Look, our fundamental proposition is that matters relating to the employment relationship, in terms of setting terms and conditions of employment, should be overwhelmingly determined through enterprise bargaining.

**MR HARRIS:** Fine, yes.

**MS MATHESON:** So that leads into the premise of our structure, where we'd have - - -

5

**MR HARRIS:** You like EBs and have found them generally useful and it would be better to have more things that were flexibly negotiated between the parties than were mandated by a black letter law, as a principle.

10

**MS MATHESON:** Yes.

**MR HARRIS:** As a principle, that's not a black and white statement.

15

**MS MATHESON:** That's a fair reflection. What we would say about EBs, though, is that they probably - the structure that we have within the system currently doesn't provide sufficient options to enable small business access to bargaining or to reflect the reality of a number of work places.

20

**MR HARRIS:** Yes. I think you endorsed at least the concept of an enterprise contract. Am I off time again?

**MS SCOTT:** We might pause for a second.

25

(Housekeeping discussion)

**MR HARRIS:** So just on principle, enterprise contracts sound all right to you, you said, although you were a little - you didn't say you were concerned, but I'm going to assert as a consequence you are a little concerned to ensure that it doesn't get a lot of compliance activity bound to it.

30

**MS MATHESON:** Yes.

35

**MR HARRIS:** Conceptually, we were trying to minimise that, but not eliminate it, by a transparency device. We were trying to say we'll make it transparent to the ombudsman and effectively that allows the ombudsman to quickly ring up before somebody does something and say, "You know, this doesn't look real good. Maybe you should rethink it", but beyond that, it wasn't meant to be - it was really a compliance activity that was driven between the employee and the employer after that. In other words, "You promised me this, you didn't deliver it, I'm going to go back to the award", I would call that an employee/employer compliance arrangement. As long as you deliver what you said, I agree to it. Presumably, I'll stick with it.

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45

**MS MATHESON:** Yes. One of the issues that we've identified is a desire for small business employers of certainty of compliance, for certainty of compliance.



**MR HARRIS:** Yes.

**MS MATHESON:** And there are some problems, I suppose, within the design of enterprise contracts that might make that goal - - -

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**MR HARRIS:** And you can properly give us clear statements where you think this is a problem?

**MS MATHESON:** We're still exploring, actually, the concept of how we might help, I suppose, to achieve that level of certainty in terms of the assessment process - well, an assessment process and an approval process, and we're developing that thinking at the moment ahead of filing tomorrow.

10

**MR HARRIS:** Well, even if you take a couple of more days, that's all right. It would be better to get good advice on this, than timely advice, I think.

15

**MR CLANCY:** Small business want to know what they have to pay, they want to know when people need to turn up, how they can roster them, but where we would - and where we go to regulation, is they shouldn't become another short-form of an award, necessarily but we'd probably go for a longer period of operation.

20

**MR HARRIS:** Yes, that's good to know. We weren't actually trying to limit the period to the 12 months. Some people have assumed that the 12 months is a sort of end point. 12 months was the review date.

25

**MR CLANCY:** Okay, right.

**MR HARRIS:** 12 months was the point at which - this was a right for the employee to say, "Well, after 12 months experience with this, you know, you lied to me, but instead of going to the Fair Work Commission and running a contest, I just want to go back to the award and I'll be quite happy." It wasn't a cessation point. We are open to a period for an enterprise contract and would appreciate advice on what the period should be.

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35

**MR CLANCY:** Yes. We'd probably adopt the position that if this is an agreement-making option, and it is going to be assessed against the same safety net as other agreement-making options, then it should be capable of having the same term as - - -

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**MR HARRIS:** Quite.

**MR CLANCY:** That goes to that question of giving the employer and the employee that certainty for the period of time it's in operation.

45

**MR HARRIS:** I might suggest, I don't when we're going to get our transcripts up, but from Adelaide the other day, we had quite a good

exchange with the Winemakers Federation and their complexities of awards and their interest in the enterprise contract which is - there was a long, possibly boring, I don't know, exchange between me and them about how this thing might actually work, which if we've got the transcript up in time, it's probably worth you having a look at.

**MR CLANCY:** Yes.

**MS MATHESON:** I think the challenge sort of underpinning the agreement-making process, though, in terms of small business access is the foundation that underpins it as well, so against what aspects with a no disadvantage test, for example, be applied. In our view, a simpler safety net will better deliver certainty of compliance for those who are bargaining around such a safety net, and we've reflected that in the model that we've put forward. We very much had in our mind sort of the end users of instruments like awards and small businesses take up the lion's share in terms of employers who are required to apply them.

We've also given some consideration to people who are paid pursuant to awards and have noted your comments as well, that they tend to be, I suppose, less-skilled relative to other employees, those who are award-reliant, and I suppose in setting a floor against which bargaining can occur, or a safety net, if you like, we are conscious not to make that floor overly complex so as to, I guess, drive a level of apprehension around dealing with that floor from a small business perspective and result in perhaps poor compliance outcomes because of the confusion that it creates. But furthermore, we also don't want that floor to be constructed in a such a way that it might impact the employment prospects of those who are typically award-reliant, and that might include those who are low-skilled, youth, perhaps people more vulnerable in the labour market like the long-term unemployed.

So we are very much conscious that some reform, if you like, of the safety net underpinning agreement-making in any form does need some reconsideration. We will reflect that in our response.

**MS SCOTT:** Can I just ask, for my assistance, you want a more streamlined NES?

**MS MATHESON:** Yes.

**MS SCOTT:** I mean, is a word that you might find more comfortable, and then you're happy to have more detail in EBAs and you want less detail in awards, but where people don't - no, I've got that wrong?

**MR CLANCY:** Detail in EBAs, we're happy to have terms in EBAs that are bargained in by the parties by agreement.

**MR HARRIS:** Sure.

5 **MS SCOTT:** Yes, optional, but to the extent that things aren't in the NES, are they falling away to nothing or they're going to be in EBAs? And for workers who aren't covered by an EBA, and in fact, are reliant on the awards, you want more streamlined awards.

10 **MS MATHESON:** Yes.

**MS SCOTT:** So I guess what I'm interested in, they're not any more in the NES? You're following me?

15 **MS MATHESON:** Yes.

**MS SCOTT:** They could be in the EBA, subject to successful negotiation, and they're not in the award as a consequence of coming out of the NES, they've disappeared, for some people.

20 **MR HARRIS:** If they're totally award-dependent.

**MS SCOTT:** If they're totally award-dependent.

25 **MR CLANCY:** Yes.

**MS SCOTT:** You need to specify exactly what those things are, please, in your submission. Do you understand what I'm saying?

30 **MR HARRIS:** Or at least enough areas that we can go to it. This is our problem with doing design here, and some people in commenting, not, I might say, actual employers, but some other people have said, "Oh well, this is all very non-specific reform from the Productivity Commission." In fact, we've tried very hard to be very specific and where we couldn't be specific, we didn't have a wild swing, but for a final report, we're going to have to be  
35 specific in some areas which we know are still unsatisfied; we have unsatisfied customers on both sides of the proposition here, so we're interested in trying to satisfy those customers with an analysis of their propositions. We just need enough to analyse, so some specificity would be great.

40 **MS MATHESON:** If we can the point that our model is perhaps a very different model to what we have now, in the sense that we are rationalising terms and conditions with a view to encouraging and fostering bargaining at the workplace. So to be able to precisely prescribe what conditions will  
45 remain, which new ones will be created, which ones will fall away is a difficult task without knowing the circumstances of the enterprise.

**MR HARRIS:** And that's, by-the-by, our point. If you go back in the transcript you'll see, as I observed earlier, just taking the removal of rostering.

5 **MS MATHESON:** Yes.

10 **MR HARRIS:** In some circumstances, some businesses and their industries would say, "This is not advantageous to me, the specification of rostering in awards, I want to have it removed." In other circumstances, employers would say, "We want rostering in there because this is our way of managing and controlling our business." If we use the black letter law provisions to remove rostering from awards, we are actually disadvantaging some people and advantaging other people, and on balance, it's a very hard transaction to work out net benefit, which is why - and we will go down that path of trying to say, "Well, on balance, is there net benefit here?" So I'm not tagging your proposition with that, I'm just showing you why it's really important to be somewhat specific.

20 We have to be able to then say, if we're to advance the concept, that we think it will work this way, and generally speaking, we need this next bit, too, the disadvantaged parties will be X and the advantaged parties will be Y, and the Y is substantially outweighing the X and therefore, we think the Australian national economy will benefit from this.

25 **MS SCOTT:** Yes. I don't think I would be persuaded if somebody suggested that I should rationalise something, if they couldn't then tell me what I was rationalising.

30 **MR CLANCY:** Well, the conceptual comparison is the New Zealand system, where you have a Minimum Standards of Employment Act or something to that effect, and our model is essentially the subject matter of the - or let's call it the topic, is annual leave, personal carer's leave, all that are in the NES, and I think we've added in one to do with rest breaks. The additional component of the safety net are those minimum rates of pay, the base ordinary rates of pay from the award system.

**MS SCOTT:** Okay, thank you for clarifying that.

40 **MR CLANCY:** And then what builds a contract of employment or an agreement beyond that is what the parties then bargain in. And looking at, for example, the New Zealand agreement maker template that you've cited in the report, I haven't hopped on to use it, I don't know whether it is possible to hop on and use it.

45 **MR HARRIS:** Yes, it is.

**MR CLANCY:** You probably can, but it strikes me that if it's coming from that framework, it would be a user-friendly type of a piece of software because of the nature of their safety net, and then you can build beyond that. I did have a question for you, though. You addressed it, but it didn't seem that you formed a concluded view, that with an enterprise contract and other agreement-making options, was there a final ruling-out of individual statutory agreements as had previously accepted, if there was going to be a no disadvantage test and a safety net?

**MR HARRIS:** No, no, I don't think we've said very much at all on individual agreements. We've proposed some improvements to IFAs.

**MR CLANCY:** Yes.

**MR HARRIS:** And obviously if employers are willing and able to develop their own common law contracts, they've got that option as well, for what I would call individual agreements, and in the case of a micro employer that uses the enterprise contract, if we firm up on that, and only has one employee, well it, by definition, is an individual agreement, but that, I would say, is a reasonably rare event in the overall suite of people who are likely to use models like the enterprise contract. You'll see it's designed much more for people who have multiple employees. But beyond that, we haven't really gone anywhere on the idea of individual agreements.

We're happy to receive propositions on what needs to be improved or what needs to be removed but I think again in the first round of submissions, what we got from people is generic statements rather than something with enough specificity for us to, with confidence, recommend it to government. That's what we're interested in. If you want to advance an idea today, that's great, or if you want to come back with some more written versions, that's great, too.

**MS MATHESON:** I think underpinning the concept that employers, small business employers, would probably like certainty of compliance, we are looking at a - we would support the introduction of a statutory individual agreement. One of the problems that we've identified as remaining with individual flexibility arrangements, although the recommendations do make some recommendations that would affect incremental reform, in our view, is that regulation will continue to be existent in a multiplicity of sources, so the practicality of a small business having to navigate - - -

**MR HARRIS:** Correct.

**MS MATHESON:** - - - national employment standards, the awards, alongside an individual flexibility agreement which, in their view, may or may not pass a test underpinning that is perhaps not, for us, a satisfactory outcome.

**MR HARRIS:** No, no, I think I see where you're going.

5 **MS MATHESON:** Yes. So simplicity is driving some of our recommendations because we are sensitive of the needs of small business.

**MR HARRIS:** Yes, and the design of the enterprise contract was designed for - - -

10 **MS MATHESON:** Yes.

15 **MR HARRIS:** - - - groups of employees to solve that very problem, that you won't need to know the interactions, you'll merely need to be able to show what you varied and allow the regulatory to look at it but not opine upon it unless the regulator so chooses, so it's voluntary choice for the regulator to take a step or not. Anyway, that's useful. Thank you very much for the day. We've gone over time, but it was still a very useful discussion and we'll try and make it up for the next person. So thanks for your time.

20 **MR CLANCY:** Thank you.

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

25 **MR HARRIS:** And the next is, is it Unions New South Wales? Am I now in the right order? Yes, I am, Unions New South Wales. I was calling you guys at 10 o'clock and you weren't here, I was very disappointed. No, I had the wrong batting order. Once you settle, if you guys could identify yourselves for the record? For what it's worth, the microphones are for our recording, they don't help the audience hear you, so your point to go

30 emphasis on, and you want the audience hear, turn and look and look at them. We'll hear anyway, but - - -

**MR LENNON:** Thank you.

35 **MR MOREY:** Thanks.

**MR LENNON:** Mark Lennon, Secretary of Unions New South Wales.

40 **MR MOREY:** And I'm Mark Morey, Assistant Secretary, Unions New South Wales.

**MR HARRIS:** Thanks for coming along and having the same first name. It will make it easier, Mark and Mark. You've got an opening statement?

45 **MR LENNON:** Yes. Thank you, Commissioner. So I think the first thing I'd like to place on record is I note with some interest some of the key points, and welcome some of the key points in the report, in particular of course the

fact that you comment that the system is not dysfunctional. It needs repair, but not replacement, and I think one of the problems with the workplace relations/industrial relations in this country for the last 25 years has been that we seem to - or there's this myth perpetrated that our system is somehow  
5 unique, which it is in some of its aspects, but that somehow makes it dysfunctional, and it's certainly not the case, and I welcome your remarks in that regard.

Also the fact that this is a system that has been in place, what, in the  
10 last 24, almost 25 years now, we've had unprecedented economic growth, 25 straight years of economic growth, and if there's been a problem with the IR system, then you would have thought that would have been an impediment to that level of growth, and you note also in your remarks about it has helped with - or the labour market flexibility is relatively good by global standards,  
15 so we welcome that as well. I just wanted to comment on the issue of minimum wages and it seems to me that we see time and time again people coming forward that we need reports of various types, including from the OECD, that we need as a nation a minimum wage, it should be part of our labour market or our labour legislation.

But this question is, how high is too high, and yet, we never quite reach a landing on that, but it has been part of the culture of this country that we have a relatively high minimum wage as part of our - in a sense, it's been part of going back to the glory days of the Australian settlement. Now, I know  
25 that's long since gone, but it would always concern us if there's moving away from the concept of a minimum wage being a decent liveable wage to one that is a very basic wage. I note your comments about complementary benefits such as - policy, sorry, that provide work benefits such as, in the US system, of the earn income tax credit - - -

30 **MR HARRIS:** Well, wider than the US.

**MR LENNON:** Yes, understand that.

35 **MR HARRIS:** I mean, it's the first most celebrated version, but I think there's 20-odd countries - - -

**MR LENNON:** Yes, yes. I accept that, Commissioner, I'm just going to that but the point being there that we would always argue that the workplace relations system, to the best of its ability, should be able to provide  
40 appropriate wages and conditions without having to rely on improving conditions for workers by a legislative fiat which that practice would bring into place.

45 **MR HARRIS:** It would depend on legislative structures, yes.

**MR LENNON:** And the last thing I just mention before we go to - is of course, we have concerns about a number of elements to do with penalty rates on Sundays and things, but I'm sure our other union - as I know, our other union colleagues have addressed a number of those issues, but the  
5 concept of the enterprise contract, I congratulate you on some innovative thought, but it certainly has posed more questions for us than answers and we'd be happy to try and work that through. But the key elements we've come forward today, specifically from Unions New South Wales, is the question with regard to migrant workers and we've provided a submission, I  
10 don't intend to speak to it in detail, the issue of internships, and that's something that Unions New South Wales, just by dint of our position here in Sydney, has come across and had a lot of work to do with, and of course, the issue of access to arbitration.

15 Now, I'm happy to place on record upfront, when it comes to questions of arbitration I'm a child and a product of the New South Wales Industrial Relations system, where compulsory arbitration, up until - well, it's still there in the system to a degree, but primarily until 2005/6 was the preeminent way of settlement of industrial disputes here in New South Wales, and for the  
20 reasons we've outlined, we believe to agree the ability of people to unilaterally access arbitration remains important, and I think so in particular, and this is a personal sentiment, Commissioner, is in regard to when you're moving from a service sector economy away from an industry economy, just the nature of the workforce and the structure of the workforce I think makes  
25 arbitration even more important.

I'll leave my opening remarks there, and I don't know if Mark - - -

**MR HARRIS:** Okay. Do you want to start with migrant workers, since you  
30 said it was a preeminent issue for you?

**MS SCOTT:** Yes, I welcome it, yes. Thank you very much for your overview response to our draft report. We especially welcome input on migrant workers, that's an area that we are genuinely trying to get as much  
35 information as possible. We have a chapter on it in the draft report, but we are looking for responses. I'm interested in your propositions in relation to your suggestions 3 and 4, the third one, for the transcript, that head contractors and final customers of a supply chain employing workers on temporary work visas should be held legally accountable, so we are interested  
40 in that.

And the fourth one, which relates to lifting the restriction on paid employment hours, I think it's the hours that you're referring to there. The Commission has done recent work on services exports and is looking at  
45 migrant visa arrangements at the moment in a commissioned work, so we haven't had an opportunity to consult with other commissioners on this topic, but I would like you to speak to both your three and four proposals. I mean,



at the moment, some of the restrictions on working hours apply because they're meant to be students. I'm interested in what you think could be the consequences of lifting those hours.

5           On the other hand, the fact that they are limited gives the employer, if they seek to exploit the workers, an upper hand in the whole issue. So could you talk to those, please?

10           **MR LENNON:** Sure. With relation to the issue number 3, clearly, it's not just in the context of migrant workers, but you will have seen many times over recent years, and there have been changes to the legislation and things of that nature, where the nature of and structure of work practices has meant that it is very difficult often, particularly in, as you know, industries such as textile, clothing and footwear, to, for a variety of reasons hold, shall we say, 15 the employer responsible and it is a very complex system of subcontracting to subcontractor, and ultimately, we believe the best way in those circumstances to make sure that someone is held responsible is it would be that the head contractor, who basically has control over the process - that's the issue, who has control over the process, and that's the issue there, where they can - 20 where it's discovered that in the supply chain there has been illegal or abusive treatment of workers.

          It's no different to what we've argued before; where can people be held to account, and if you're going to undertake a major contractor and you're 25 then going to subcontract out part of that, then we believe that you should be held responsible, whether it be the case, in this instance, with migrant workers, or whether it be the case where people are in a particular industry such as building or textile, clothing and footwear.

30           **MS SCOTT:** So in relation to that, I just want to clarify what you would term head contract, because it's got "Head contract/final customer." So let's imagine we're dealing with, I don't know, a strawberry farmer who takes workers who might be interested in the whole harvest trail, but uses a labour hire company to obtain fruit-pickers on a seasonal basis. It turns out that the 35 labour hire company is underpaying workers, might even have a contrived arrangement where it looks like their payslips are right, but in fact, the payslips are a false arrangement where workers are in fact required to pay half the money back or whatever.

40           Are you saying to me that the labour hire firm is ultimately responsible, or are you saying that the farmer should be ultimately responsible for the fact that the workers could be underpaid. I just want to get clarity on that.

45           **MR LENNON:** It's a question of where the contract stops. So depending on the circumstances of the particular arrangement. In the one you're suggesting, off the top of my head, I'd say that the person who's got to deliver the product, the strawberries, is the farmer. So then they contract out

how the labour is going to be employed to the labour hire firm, who in some instances, as you know, may then subcontract again.

**MS SCOTT:** Right, okay.

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**MR LENNON:** But ultimately come up to the chain is, who is responsible for delivering the product, and on the face of what you said, I would have said the producer of the product which would be the farmer.

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**MS SCOTT:** I had thought of arguments both sides on this. I might test out the arguments with you because they're still running around in my mind. On the one hand, let's take the case of, I don't know, a producer of chickens, processed chickens. Some of the accusations are that people there have been on student visas, but in fact working well in excess of the maximum hours. Now, there might be labour hire companies involved, there could even be multiple labour hire companies involved. But I would have thought a manager would have a bit of a sense that Mark was there at 7 o'clock in the morning and lo and behold, he's there at 7 o'clock at night, and lo and behold, he's there at 9 o'clock at night.

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So they may well think that's unusual, persons working that long.

**MR LENNON:** But not this Mark, he works very hard.

25

**MS SCOTT:** Yes. On the other hand, you could imagine a situation where a farmer wants to get on with their business and doesn't want to have to think, "I mean, I hired a labour hire firm to take on that role and now you're telling me, regulator, that I've actually got to be all over the labour hire firm, working out what they're doing, even if they're actually issuing dodgy payslips." In my mind, I can see - - -

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**MR LENNON:** Sorry, my answer to that is, well, as soon as they've stepped through the door, right, with the WH&S legislation as it stands, you've got to be all over them straight away anyway, in terms of safety, so what's the difference? I mean, I think there's a good example there, too. The legislation for Work, Health and Safety talks about a person conducting a business or undertaking and their responsibility in that regard, and in a sense, it's not quite like a head contractor, but there's a change - the change in structure of the workforce means that those who have ultimate responsibility is definitely changing from the traditional employer/employee relationship.

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I think, to me, the Work, Health & Safety legislation is a directional point toward the future.

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**MS SCOTT:** Just staying on this topic because I'm sure we're going to go many other ways, what about the experience of labour hire firms disappearing and then phoenix-ing and rising again. Do you have any views

about how that could be addressed, or are you basically saying, don't worry about phoenix-ing because we'll get the ultimate employer anyway?

5 **MR LENNON:** We have been very concerned, Commissioner, about phoenix-ing, particularly in the building industry and we've had a number of reports in that regard, the Collins report of recent times here in New South Wales went to the building industry, so we certainly wouldn't be running away from any attempts to try and prevent phoenix-ing in any industry in any way, shape or form.

10 **MS SCOTT:** Okay. Just then drawing your attention back to the other part of my first question, which was your recommendation, I can see how it helps the position of exploited migrant workers, to lift the limit on the hours of work, but what do you think that's going to do to the credibility or the status of our student visa, if effectively it becomes a back door to full-time work, or do you think we've already got that?

20 **MR LENNON:** Well, we have a leeway, no doubt. I think you would clearly have to focus on the primacy, the reason for the person being in the country is study, and we wouldn't shy away from that, but at the moment, as we've seen with the recent reports on TV and elsewhere, clearly the restriction on working hours is open to abuse. If we want to regulate students, what we're saying is - and their stay here in Australia, if that's the purpose of the exercise, then the best way, we believe, to do that is through the actual whether they're undertaking the study as they said they would. We think that's a better vehicle. Surely, yes, there may be a problem of course, and people may be concerned about students working too long compared to others, but I think if, like, all students, if they're here as students, whether they're here permanently or whether they're visiting, there will always be restrictions on the hours they can work that are self-imposed because they've got study to undertake.

30 **MS SCOTT:** Okay. Thank you.

35 **MR HARRIS:** This access to unilateral arbitration which you've referred to, so currently in the Commonwealth legislation, in the Fair Work Act, it's a pretty limited set of circumstances, as you've noted, where you can actually get now an arbitrated decision from the Fair Work Commission and as we're hearing this morning, the threshold is apparently quite high, although for some people who work in the Public Sector field, apparently that threshold may not be so high, we have examples in the report, so it's a bit - well, it certainly - let's assume for the sake of argument it's a very high threshold to get to unilateral arbitration. Do you want to reduce the threshold for particular sectors? That's the way I've taken your proposition here.

45 You talk about those subject to - most subject to arbitrary and unilateral treatment at work. So I'm considering that to be a sort of sectoral proposition

rather than an all employees would naturally have the right to call for unilateral arbitration after, I don't know, a couple of weeks of negotiation with an employer. I don't think you're going that far. I think you're doing something less, and I'm trying to work out how much less.

5

**MR LENNON:** I think, Commissioner, what we're saying here is that we would say everyone during the life or term of an agreement should have access to unilateral arbitration. The model, as it works at the moment, that there can be built into an agreement, as you know, a mutual agreement to access arbitration, clearly those who are in a stronger bargaining position can do so. I think we just make the point in our submission that those who are in a weak bargaining position would never be able to get to that stage of having access to arbitration by way of mutual agreement.

10  
15           Therefore, it's more important for them, but we would say, no, if we're arguing about access to unilateral arbitration during the term of an agreement, it would apply across the board.

**MR HARRIS:** Okay. So that makes it a legislative provision that applies across the board. It's like a national employment right?

20  
**MR LENNON:** Yes. That's right. As it was here in New South Wales for a hundred years.

25 **MS SCOTT:** That's right.

**MR LENNON:** The most productive economy in the state, in the country.

30 **MR HARRIS:** As you know, the Productivity Commission, whenever anybody says that, we go and look for cause and effect and we can spend many chapters on such a thing; I'm sure you're not asking us to do that.

**MR LENNON:** I'm not asking you to do that.

35 **MR HARRIS:** He says with wild optimism, so let's not go there. But I just want to clarify, so you're not proposing a sectoral shift, you're not going to leave with some parties the ability to do this through enterprise bargaining, so let's just leave it at that. You're saying everybody should have this right and it's a revised - I can't really call it a National Employment Standard because  
40 it's not quite the way the NES focuses. It's a revised right that goes into the Fair Work Act which says - so stick with my little thing about after a period of disagreement, so what kind of threshold is there before somebody can trigger this?

45 **MR LENNON:** Well, I think if you look at what we're saying, we're saying through the term of life of the agreement. Now, American colleagues, just one example, would of course call it grievance arbitration. Now, of course,

in their context it's done by way of mutual agreement during the contract agreements that they have. We would say that if there is dispute during the life or term of an agreement or other industrial instrument, there should be the ability of the party who is aggrieved to take that to arbitration and do so -  
5 have that right enshrined and not have to have it as part of the agreement in the first instance.

**MR HARRIS:** And do you think there should be a right of arbitration in the Fair Work Commission, or you're prepared to consider the proposition that  
10 there a lots of dispute resolution counsellors out there who can probably do just as good a job?

**MR LENNON:** Well, our, of course, submission would be that we have a Fair Work Commission, we have the independent umpire. That would be the  
15 appropriate vehicle. If parties agree, in an enterprise agreement, mutually agree to use some other vehicle, then so be it, but we would say that for the unilateral arbitration, the vehicle should be the Fair Work Commission.

**MR HARRIS:** So they'd become like the default provider, but if an EB specifies a different provider, that provider would be the provider?  
20

**MR LENNON:** I'm not advocating that should be the case, but it's free for parties to decide if they wanted to have some alternative mechanism.

**MR HARRIS:** No, no, I'm just trying to find some boundaries here of the concept, that's all, because you may have a longer submission but I've got a couple of paragraphs and it's - - -  
25

**MR LENNON:** I understand, yes.  
30

**MR MOREY:** In Newcastle, a number of the large construction projects up there, they negotiated in an arbitrator which was in fact the New South Wales Industrial Relations Commission as part of their dispute settling procedure.

**MR HARRIS:** I see. So effectively you couldn't use - I had in mind a counsellor, but you're saying there are other institutions that could be used, too.  
35

**MR MOREY:** Yes.  
40

**MR HARRIS:** Okay. Understand that.

**MS SCOTT:** What about critics who would say you just want to walk back down the time tunnel, back to a system where in effect everyone's got the option to run off to the Fair Work Commission to sort out things, rather than  
45 resolve the issues through negotiation.

**MR LENNON:** We would always encourage, of course, that if there are issues in a workplace, grievances, that they be dealt with in the workplace in the first instance. But again, we're not in a perfect world and we can't readily always reach agreement, and therefore we believe there should be access to arbitration as your ultimate ability to try and resolve disputes. I think it's more - personally, I think it's more relevant now than ever because of the move towards a service sector economy away from an industrial economy. The concept of the old days, when there's a dispute or a grievance, out the gate, it's gone, to a large degree, putting aside the limits under the Fair Work legislation under industrial action anyway.

People just want to get on with the job and if there's an issue that's arisen and it can't be resolved quickly, they want a vehicle to be able to resolve it quickly and effectively. I think it's ironic, too, and I might stand corrected here, but if you look at, say, commercial contracts where they've sort of also looking at, rather than taking matters to courts itself, they're looking at more and more use of arbitration in that domain as well. I think it's just part of where society is trending.

**MS SCOTT:** Okay.

**MR MOREY:** But also the Fair Work Commission itself has become more legalised in recent years. Going back, it was more a field where people would turn up without lawyers, there would be conciliation and mediation from the commissioners or the judges and things were worked out there. The starting point, currently, appears to be that everyone turns up with a gaggle of lawyers and everyone argues about being represented and having access to that. So I think the big problem is that we've turned it into a legal process in the sense of it's full of lawyers, and once you involve the lawyers, nothing usually gets sorted out quickly and there needs to be a winding back to that conciliation sort of process and that arbitration process that the commission previously undertook.

**MR HARRIS:** And would one of the drivers be here as well, though, that in some areas there are quite a lot of enterprise bargains and therefore, presumably this option is available to be negotiated. In other areas of the economy, there aren't any and absent something, I guess, provided by the award, there isn't anything that would enable that to occur. Now, of course, without an enterprise bargain you don't have a period in which there is no strike action, as it were, so I guess you've always got that option, but is it driven by that? Is it driven by the dichotomy of some areas have enterprise bargains and this can be developed, and some don't?

**MR LENNON:** Well, yes, but we also make the point that I think not every enterprise agreement has a proper vehicle that we'd be satisfied with, but I think the important thing is they need, as a right - as we say, it's a right for the sort of universality of having your grievance addressed by an independent

tribunal, regardless of whether there are enterprise agreements in place or not. We think it's a fundamental right for all workers to have redress and have that redress before a third party.

5      **MR HARRIS:** Did it come up in award modernisation?

10      **MR LENNON:** We've been arguing, I think you'll find the union movement has been arguing about access to arbitration particularly during the life of agreements for some time, Commissioner.

10      **MR HARRIS:** Right. I was asking the question, I was trying to really work out whether the Fair Work Commission has already ruled itself on this and said, no, it's not acceptable for some reason that I - I don't know.

15      **MR LENNON:** Perhaps we'll take that one on notice. I'm not sure myself, we can take that one on notice.

20      **MR HARRIS:** Yes. I'd be interested to know whether anyone had an opinion because I see where you're going. I guess the question with something like this is you don't know what else it triggers. I don't, anyway, because I'm not an expert in arbitration law, so I was just interested in some background on it.

25      **MR LENNON:** I think, as my colleague said, the other point is before arbitration, there's always the step of conciliation, so it's not a question of straight into adversarial proceedings. It would be a vehicle - it's happened in the past where a first attempt would be to try, with the help of a third party, resolve the differences, see if the differences can be resolved by way of conciliation.

30      **MR HARRIS:** Okay. Have you got anything else on that specific sub?

**MS SCOTT:** No.

35      **MR HARRIS:** Are there other points that you guys would like to make here today?

**MR MOREY:** Just in relation to internships.

40      **MR HARRIS:** Yes, sorry. We skipped over, because migrants, and then I went to mine, so internships; go.

45      **MR MOREY:** Internships. Well, our experience recently, it's a growing field or a growing area of employment, I think is the best way to put it, where young people are placed in positions where they have to take on unpaid positions in order to access permanent paid positions. The issue that keeps coming up is that young people who are exploited, there isn't a mechanism

for where they go to complain. The Fair Work Ombudsman has done some work around these things, but there are no actual structural provisions or an entity by which young people can actually make complaints. The initial agreement that most young people enter into around internships is that there is some potential for full-time employment at the end, so they tend to remain quiet and soldier on in adverse conditions at times.

The initial promises made about the type of work that they will be doing and the experiences they will be provided with don't eventuate, but again, the carrot is then held over the head, "Well, if you say anything or do anything, you're not going to get a job here and we'll black-ban you throughout the whole industry." So there is a need for some body, a body or a part of Fair Work Ombudsman or someone to be in a position to field those sorts of calls, address them, and then address them with the employers who are exploiting young people in that way.

**MR HARRIS:** So you wouldn't see this as being better resolved with an explicit statement? I mean, I guess if I'm the ombudsman where we're doing everything - quite a few things here to expand the ombudsman's activities. If we add another one to them, I guess it's got a resourcing and an investigation implication and maybe it does fit there, but the other option, if you were to do something here, is to have a statutory limit on the period of an internship, for example, because the egregious examples, to the extent we can find them which is pretty limited, so I wouldn't say we've got an evidence base yet that would be sufficient to make that proposition I just put forward a reality, but we're looking for evidence.

But the ones that have been alluded to are not just a week's unpaid employment prior to the start, but they are many months of unpaid employment which, if that were the primary factor in the end that we were trying to limit, you could limit it by statute. I'm not saying you should, because as I said, the evidence base is yet to be there, but that's a different proposition and one that might involve a lot less work for the FWA.

**MR MOREY:** Well, the issue for us is by the time we find a young person who's been through that, they've actually left that position and they really don't care anymore, it's sort of gone. In the limited cases where we've tried to run cases around getting some wages or recompense, again, the young person has tried, there's no real sort of forum because you're arguing that there is an actual employment contract where people are exploited, but everyone says, "No, no, no, this was just an internship" and therefore - - -

**MS SCOTT:** Yes, it's just training.

**MR MOREY:** Yes, there's training, there was no expectation to be paid. That's the problem. One of the things we propose is a code of conduct around which employers and employees adhere to. At least there is a



5 mechanism in place by which both parties understand what the expectations are, and indeed, time-limiting that experience and the commitments at the end of it would be explicit. But again, you need some mechanism by which, when those conditions are breached, you can actually have some sort of recourse.

At this point, there is no recourse on any employer who's churning through young people through the provisions of internships.

10 **MR HARRIS:** No, but there's also limited guidance on what is acceptable.

**MR MOREY:** Absolutely.

15 **MR HARRIS:** I mean, you have a code so I can see how you could contradict what I'm about to say, but if viewed from an employer perspective, if someone is willing to work for you for nothing and it does not appear to you to be an unreasonable thing because you're giving them training experience and there is otherwise no guidance to say what's acceptable and what's unacceptable, then you can see yourself falling into  
20 this sort of almost by default.

**MR MOREY:** Universities have been using it in a structured way for many years, whether you're looking at social ed degrees, nursing degrees, there are structured processes in place by which this occurs. There are expectations  
25 that the learning and the work being done is meaningful, it's not just licking envelopes and packing boxes, and so there is a framework that currently exists in higher education around how these things are actually managed and looked at. The difference there is that there is an ability for those people to intervene in placements which are meaningless and are not providing what it  
30 started out at the beginning of those placements.

We're saying internships, is a fraudulent expectation is being provided to young people that they will get paid employment at the end of it, once they've done some free work period, and I think that expectation in there and  
35 how we manage that and the expectations placed on businesses around how they manage what they're doing, a strong message at least needs to be set. Whether that's a code of conduct or some other mechanism, I don't know, but there needs to be some ability to come back to employers who are consistently doing this and be some penalty for their behaviour.

40 **MS SCOTT:** We did say in the draft report that we thought in this day and age of social media that people could easily get online and say, "I've recently been at X and Y Enterprises and I did go there on the expectation that I was going to be given some training, but I'm very disappointed how it's all  
45 worked out" and then someone else makes the same statement about how disappointed they were, and maybe over time, the message will get out. But certainly the Fair Work Ombudsman has a sureness that they're doing work

in this area, but people volunteer to go to these places, they think they're getting training and then of course it comes down to are they getting training or not?

5           You can't necessarily stipulate it has to be part of the tertiary course because often graduates come out and then they want to get into a particular exciting field and they feel that what they need to do is show their interest and their - - -

10       **MR HARRIS:** It's beyond just tertiary graduates. Again, by anecdote, the entertainment industry uses a lot now. It's a very sexy place to work. The idea that you can be an intern and an assistant to the assistant to the producer, you know, it's very attractive, but of course, you're not being paid and then how long will you keep doing this and it's all a buzz, but it's only by the end, 15 this is the thing, it appears to be the common factor, is it's only at the end that you realise it wasn't what you thought it was. During that, even for quite a few weeks or even months you might imagine that you're not just potentially going to get a job, but certainly gaining experience that says move to another part of the industry and you don't want to shut off that possibility of getting 20 useful work experience, which is why in the end a lot of the problem appears to be one about the torn - - -

**MR LENNON:** Yes, that's right. It's work experience or work, is the question?

25       **MR HARRIS:** Yes.

**MS SCOTT:** Yes. Well, in the absence of - we're not going to data in this area, I don't think, if you've got some real life examples?

30       **MR HARRIS:** Is your code online or can we get your code otherwise?

**MR LENNON:** We can forward a copy of that.

35       **MR HARRIS:** Yes. If you can either send us a copy or just tell us where we can get it down offline, that would be great.

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

40       **MR HARRIS:** Okay. Appreciate, again, your time.

**MR LENNON:** Can I just say, one last remark, you mentioned how the role of the Fair Work Ombudsman seems to be expanding. I'm happy to say that the trade union movement, as we once did, was part of the regulator of 45 enforcement of the laws of this land and we continue to think that we should continue to play such a role, making sure of course that, as always, we're properly accredited and trained, but I think that's one thing that we should

consider to help with the enhancement of the laws. We've done it here in New South Wales over many years, particularly when it came to Work, Health & Safety and we don't think it should be any different when it comes to Fair Work legislation.

5

**MR HARRIS:** Okay. Thank you very much. Now I think we're going to do five minutes for a cup of tea.

10

**ADJOURNED**

**[2.40 PM]**

**RESUMED**

**[2.51 PM]**

15

**MR HARRIS:** Could you guys identify yourselves, please, for the record?

20

**MS ASHBY:** My name is Suzanne Ashby, and with me is my colleague, Scott Cooper. We're from the CCER, and just very briefly, we are an employer organisation, New South Wales. We represent Catholic employers. Most of our employers work in the social services sector, education sector and I've forgotten the third one.

25

**MR COOPER:** Social computing services.

30

**MS ASHBY:** Yes. And parishes in general, not for profits. So we certainly welcome this inquiry and an opportunity to comment on some key elements of the workplace relations framework, and of course, we do that in our capacity as an employer organisation, very much balanced with the principles of Catholic social teaching in mind as well, which I think makes us quite an interesting organisation. We'll be filing a supplementary submission to the inquiry tomorrow, but today, we wanted to take this opportunity to talk about particularly one recommendation which is draft recommendation 5.1.

35

That's the recommendation that suggests that the Australian government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal applications on the papers prior to commencement of conciliation, or alternatively, to introduce more merit-focused conciliation processes. That's actually, we very much welcome this recommendation because it does actually come from an original submission that we made to the inquiry and it actually incorporates the proposal - - -

40

**MR HARRIS:** I think we might have quoted you in the relevant chapter.

45

**MS ASHBY:** You did, and in fact, you enclosed our flowchart in the report, so we were very pleased to see that. So we wanted to elaborate particularly on that today, and in that recommendation, there are two alternative

proposals. We've given them further thought and of the two alternatives within the draft recommendation, we consider that the reform that would most effectively advance the fundamental purpose of the legislation and to remedy what we see are the deficiencies currently in the unfair dismissal conciliation process, would be to implement the redesigned merit-focused conciliation process. So we'll make a few comments about the strike-out applications on the papers, but we'll deal with that at the end because we don't support that element of the recommendation.

So what we thought we'd do is just give you a brief overview, and then we'd be very happy to have some discussion about that. Just very briefly, just to reiterate, I guess, the problem as we see it, is we are concerned, as an employer organisation, that the practice of go-away money is very real and does occur as an outcome of unfair dismissal conciliations. We do see claims that we believe don't have any merit, or lack substance. Often, they don't have reasonable prospects of success, they're vexatious or they are instigated for the purposes of settlement. For commercial reasons, often our members will pay some kind of settlement.

But having said that, we want to emphasise that we very much do support a robust protections for employees against arbitrary dismissal, of course, and the right of redress for genuine unfair dismissal. We do think, though, that because of the ease of filing an unfair dismissal claim and the guarantee of conciliation which arises from that, that essentially every applicant who files an unfair dismissal claim, regardless of the merit or jurisdictional objections to that claim, gets a free kick at a settlement, and that's our sort of major concern.

We've given some further consideration to how a merit-focused conciliation process might work in practice, and in our submission, what we will be doing is focusing on two key areas. One is to provide some practical recommendations for how the processes might work - might be reformed to provide greater emphasis on merit and substance, and the idea with that is to give both applicants and respondents better tools to make claims and defend claims, but also to give Fair Work Commission conciliators the necessary tools that they need to better explore the merits and substance of a conciliation claim.

We also have looked at, the other part of our original proposal was for conciliators to issue an opinion about whether a case was without sufficient merit and we also got some further proposals on that. So what I'll do is get my colleague, Scott, to just take you briefly through those.

**MR COOPER:** Thanks, Sue. We'd firstly like to clarify that CCER's concern with the current system and advocacy for reform in this area is not about - or it's not a complaint about the performance of the conciliators that are employed by the Fair Work Commission. In our experience, conciliators

generally perform their role in a professional, respectful and efficient manner, but they do so within current parameters. We consider that a more effective model would be a hybrid facilitative/advisory model, which we'll explain, in which there's identification by the conciliator of agreed and disputed facts, and how the Fair Work Act and the case law may be applied if the case does not settle and proceeds to arbitration before the Fair Work Commission.

Our recommended model will be to assist the conciliator to focus the parties on the merits of their respective positions and this is very different to the current process which does little more than provide a forum for the passing of settlement offers, but without any real inquiry or facilitated discussion into the merits of each claim. An impediment to merit-focused conciliations within the current framework is the absence of an effective, upfront filter which enables the parties and conciliators to gather the necessary information to consider the substance of the claim. So in short, the main problem is that conciliators don't, at the moment, have the information they need to carry out a more merit-focused conciliation.

So we've had a look at the whole process and thought about how we could sort of come up with the practical recommendations to give effect to recommendation 5.1 and specifically the flowchart is figure 5.7 on page 234, if I can take you to that as well. The fundamental problem that we think is that the form F2, the unfair dismissal application at the start of the process, does not capture in clear and concise terms the case the applicant is bringing because it doesn't refer to the specific factors the Commission is required to consider in determining whether a dismissal is harsh, unjust or unreasonable.

We propose that the solution is better use of technology through the development of a new software program with a tailored questionnaire for the initial unfair dismissal application and a similar format for the employer response as well. The forms - and we go to this in our supplementary submission - would provide concise information or request concise information in response to specific questions that are tightly anchored to each of the elements of the statutory test for unfair dismissal. These elements at the moment are incorporated into a list of plain English factors in section 387 of the Fair Work Act.

Now, for the purpose of formatting this questionnaire, the factors in section 387 we think can be organised into three main parts; the first being whether the employer had a valid reason for dismissal, the second being procedural fairness, and the third being mitigating factors which tend to focus on whether the dismissal is disproportionate or harsh in the circumstances. The kind of - and this is an important point into what we're trying to achieve - information intended to be captured by this questionnaire is conceptually similar to pleadings in more formal jurisdictions, as opposed to evidence which is only filed at arbitration.

For clarity, though, we do not propose that the parties should be required to draft anything like the formality of strict pleadings. Instead, what we're proposing is that the parties are simply required to provide concise, plain English responses to specific questions in the form which elicit relevant information and which creates the shell for their application and the employer response which flows from that. We've considered a number of issues here. One issue is the workload of the Fair Work conciliators.

Now, to avoid excessive and irrelevant material being filed, we propose that there should be limits on the amount of information that can be inserted into relevant fields, and potentially limits on the number and type of attachments that can be submitted with the form. In a supplementary submission, and I know you don't have the benefit of this and it might make it a bit clearer, but we attach, or we've had an attempt at a draft sample questionnaire for consideration. The purpose of this is only to provide a guide or a bit of a practical snapshot of what the eventual design might look like.

What we do propose, though, is that's a starting point and our actual proposal is that the program will be carefully designed in consultation with experienced practitioners and Fair Work Commission members, and of course, training on the back of that as well for Fair Work conciliators. So how would this help conciliators focus on the merits of cases in a new merit-focused conciliation process? Now, in a practical way, the intended purpose of the new software program is to give conciliators concise and cogent information to enable them to identify the key legal and factual issues in dispute, and then to use that framework to explore the issues with the parties at the conciliation.

By focusing on the merit and substance of the parties' case, they can then play a more active role in assisting the parties to understand their respective strengths and weaknesses of their cases. We say, and this is also incorporated into figure 5.7, the flowchart which we support, the parties will still get the opportunity to turn their minds to settlement. Settlement won't be abolished, that's not the proposal, however, the difference will be that this will be done in the context of a more robust discussion of merits. At the moment, the problem is a disconnect between merit and settlement.

We think that the process that we have proposed will better expose vexatious claims, or those that lack substance, that really shouldn't be made in the first place. We also think that the questionnaire should be designed to assist conciliators prepare for and conduct each conciliation in a quick and responsive way, without imposing excessive workloads on them; also, undermining the overall efficiency and also the informality of the system which people do like, and we think the best way to make the process as efficient as it can be is concise questions anchored to the test, and also limits to the amount of information that can be provided as well.

5           The final point we want to make about the new software, this idea for a  
new software program and the role it plays in conciliations is more a broader,  
public policy point, and that's by requiring the parties at the front end of the  
process to concisely particularise their claims against the specific criteria for  
an unfair dismissal. Through that, we think, you will increase the awareness  
of both applicants and respondents of what statutory unfair dismissal actually  
means. This, combined with more merit-focused conciliation, will assist to  
bridge the gap which has been identified by the Productivity Commission,  
10       between perceptions of the system and the reality.

15           We think this is particularly important for parties who we understand  
would be unrepresented at the early conciliation stage in a lot of  
circumstances. If you compare this to the current situation where the  
application only elicits unstructured comments on why an applicant believes  
their treatment is generally unfair and the employer response, in essence, is  
well, what's your response to that? The problem with this is that particularly  
for parties that encounter the system for the first time, they might perceive,  
especially employers, the system as tilted in favour of applicants or that  
20       unfair dismissal laws are too subjective or just bad because the process hasn't  
educated them on what it actually means.

25           From a public policy perspective, any negative misconceptions we  
think would undermine the integrity of the current system and prevent basic  
awareness of the principles and the purpose for unfair dismissal in the first  
place. Before we conclude, we'd like to briefly touch on two further issues  
which, again, relate to draft recommendation 5.1 and figure 5.7. Sue  
mentioned before, one of these issues is the written opinion post the  
conciliation, which we've given further thought to, and then after I finish on  
30       that, Sue will then briefly outline our views on the alternative proposal within  
draft recommendation 5.1 and that's about or regarding striking out  
applications on the papers.

35           In terms of the conciliator's written opinion, and this is all in the  
flowchart in 5.7 - one thing we've considered is if the conciliator is required  
by the legislation to issue an opinion after every conciliation that does not  
settle, what that means in effect is that there'll be two opinions. One opinion  
is that a claim is not without sufficient merit, another outcome would be that  
the claim is without sufficient merit. The first one of those might be  
40       interpreted by the parties as meaning that the claim has merit and this is  
problematic because it might be perceived as meaning that their claim is  
likely to succeed at arbitration and it might embolden the applicant to take  
their case there when perhaps they shouldn't.

45           That's not the intent of what we're proposing. So to address this  
problem, in terms of the perception, we think that it would be better for the  
legislation only to require the conciliator to issue an opinion in the event that

they feel, based on the better particulars from an improved online form and the merit-focused conciliation, that a claim is without sufficient merit. Only in those circumstances would they issue the written opinion.

5      **MS SCOTT:** Sorry, say that again, Scott?

**MR COOPER:** Our view is that only in circumstances where the conciliator has formed the view that a case is without sufficient merit will they issue the opinion, but not in the alternative.

10

**MS SCOTT:** I understand.

**MR COOPER:** That may be misinterpreted.

15      **MS SCOTT:** Thank you.

**MR HARRIS:** So just in terms of steps, you're sacked, you're unhappy, look it up online, there's a questionnaire which contains some guidance. While you probably should go and get legal advice, you don't, you fill in the revised form which links to the questionnaire and links to the specific grounds that would normally be considered the primary factors in determining this matter. If you can't fill the form out because you don't qualify on one or more of those grounds, you maybe can submit, but because you've got no claim on one of those grounds, that helps the conciliator decide not so much on the papers, but on the grounds, that you probably don't have merit.

20

25

The employer gets notified, fills out the same kind of form or something - I don't know whether it's the same kind of form, it doesn't really matter - fills out something with the same intent, that the employer puts their position against the primary factors, it makes it convenient for the conciliator who is handed the task, then considers that. I would still call that "on the papers", for what it's worth, but don't let that stop you recommending the structure, that will just probably enable some other people, who don't like the concept of on the papers, that somehow the process is still being ignored.

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I would still say that meets the primary requirement which is that there's some kind of sieving at the outset rather than some kind of - or rather than no real sieving and an immediate move into a process which at least involves employer time and/or the need for legal advice and all that kind of thing. In other words, you wouldn't rule out legal advice, but it's plausible in the circumstances for this kind of system to do some self-sieving almost - - -

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**MR COOPER:** Correct.

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**MR HARRIS:** - - - via the well-designed electronic mechanism that you have in mind.



5 **MS SCOTT:** I know you want to say more, but isn't it the concept of the self-sieving that helps? Because we've had all sorts of responses to this recommendation. As you'd expect, some people saying it's wonderful, some people saying it's potentially unconstitutional, and I think on the unconstitutional, people have suggested we have a bit of caution because the conciliators are staff members of the Commission and they're trying to reach a settlement rather than charge the matter on the papers, so anything that's judging the matter on the papers may well have to be done by - - -

10 **MS ASHBY:** A tribunal member.

15 **MS SCOTT:** Correct, and then something that seems to be going closer to the role of quasi-judicial officer probably has to be done by a quasi-judicial officer.

20 **MS ASHBY:** Which is why very much when we looked at it's not a strike-out on the papers and it's not supposed to be a quasi strike-out on the papers, but it's very much about helping an applicant to better think about, I guess, what happens during the process of their dismissal and were there reasons, and you know, were they given an opportunity to respond by their employer? Did they go to a meeting? Were they able to bring a support person? To elicit that kind of information that is not always, frankly, apparent in the applicant claims that we've seen. That obviously gives - it's much more  
25 tightly tied to the statutory elements that they need to meet, to meet the test of an unfair dismissal, but it gives the employer that information to respond to and to agree with or to counter.

30 But we still say that a conciliator would still - they would have that information, but that there would still be a conciliation process that would occur.

35 **MR HARRIS:** On the papers for me was your last point, which is that an opinion is issued as to whether or not the information provided suggests that the thing is without merit. So that, to me, is still, at that point, as an employer, you have not had to commit anything more than the time of filling out the form. You may have decided to go and get advice; equally so may the employee, but the bottom line is that the system doesn't require you to do that, but once you're called in, as it were, to a structured process, you've got  
40 both the time commitment and the potential representation commitment and inherently, you're involved in a process where the advice will be, if only based on perception, it's better to settle.

45 That's the inherent problem, it seems, from the way this process has generated. Once you are in the room down at the Commission - - -

**MS SCOTT:** Or on the phone.

**MR HARRIS:** - - - or the equivalent, yes, the advice is all skewed, as you understand it, towards the only way to get out of here is to pay some money. Even if you think you're right and even if you're passionate and all that, you look at what your advisor is thinking and your advisor is thinking that as well. Everybody is thinking, how do I get out of this? And so the perception is a reinforcement of a wrong judgment or possibly wrong judgment. That's inherently why you try and deal with this sort of issue. It's never going to be perfectly solved, but you would think you've got to deal with the perception problem and in some way, you've got to set up a threshold which says, "Well, at that point, you're not talking about settlement. At that point you're talking about make your case."

Someone will actually look at it without calling you into that step in the process that obliges you to start thinking about, "How do I settle" because of this go-away money sort of concept that's now attached to the whole unfair dismissal.

**MS ASHBY:** I mean, you're absolutely right. I think the pressure will always be on just to make it go away because the process itself, even if you streamline it and make it more efficient, for most people, it's reasonably confronting, it's time-consuming, it's resource-consuming, even for our members with our representation, so I think there's an inherent conundrum about how do you kind of make the process better to start with? But at least, I guess, perhaps if nothing else, it would focus both of the parties in terms of sort of the key elements of what's being claimed or what's being argued, and it may mean that some applicants do sort of self-select out more when they look at it and maybe realise that they haven't really met the test.

A lot of people won't necessarily be aware of that even through a redesigned process, I would suspect. They'll still have a general grievance about obviously being dismissed. It might mean for some employers that they are less inclined, we think, to pay the money if they do start to see that the particulars of a claim that's been made are not really there, particularly if there's been a more robust, I guess, discussion with a mediator on the phone talking to the parties together and separately, which might mean, I guess, that for some employers, they're less-inclined to make that commercial decision. Whether it would then discourage some applicants to go on and press for a hearing, it's hard to know.

**MR COOPER:** It may also mean that when cases do settle, if an applicant's case is weak, the case might still settle for primarily commercial reasons, but it might settle for less, given that the conciliator has had a little bit more of an active role and to try to sort of sift through the merits of the case and the positions of both parties as argued, and the conciliator can then play a more active role. Similar more so to in the human rights jurisdiction, there is a little bit of a different model where there is more of a focus - I mean, of

5 course they still talk about resolution or settlement, but there is a little bit more of a focus on also dealing with, well, what are the disputed facts and, based on what's argued, if that's the way the evidence comes out at a hearing, who may have the stronger case or the weaker case, and that can help the parties understand where they're at.

10 Also, we think it reinforces the whole point of having the law in the first place and it reinforces the integrity of the system. At the moment, there is a problem about the merit - - -

15 **MR HARRIS:** That's the core of this, that the more you allow apparent ways of making this go away, the more you allow for that to occur, the more you attack the principle, not deliberately, but you attack the principle of having an unfair dismissal because it looks like a system that's very inherently exposed to that, whereas in practice, we try and point out the number of cases is actually relatively small and the impact on people's preparedness to employ appears to be relatively small. You've got an argument because you've got two different sort of sources of information on that, but one of them appears to be quite strong.

20 Notwithstanding all that, unfair dismissal has a bad name because of this mechanism that says, "I can't get a fair hearing if I'm an employer. I am always going to be brought into a process where it is better to pay money than to argue the merits of my case." If you provide a step which says the merits of my case will be considered, you provide an incentive for people to have greater confidence in the system. Not a guaranteed outcome, it's just a step that isn't there at the moment.

30 **MS ASHBY:** And hopefully to remove - I mean, there's always emotional responses from both sides in these situations as well, and hopefully you can enable people to take a step back from that. You won't eliminate it, but it might assist. You're quite right, with a written opinion, I think we have really sort of struggled, to go how would you do that without creating false perceptions, or as Scott said, emboldening perhaps applicants who shouldn't be emboldened. That's a difficult one.

40 **MR COOPER:** Just one last point on written opinion. We've thought about the phrase "without sufficient merit" and we'll talk about this in the supplementary submission, but we think that the better phrase might be, or the choice of words might be "lacking in substance." That way, the conciliator doesn't have to sort of measure the degree of sufficiency by using that words. "Lacking in substance" just might be a simpler phrase that's easier to understand, rather than "without sufficient merit".

45 **MS ASHBY:** And even with that opinion, you wouldn't be prevented from going on to - - -

**MR HARRIS:** No, no.

**MR COOPER:** That's right. So it's not a strike out in that sense, but it's a signal.

5

**MS SCOTT:** I think that will overcome, I'm hoping, the potential constitutional dilemma. You might well have given a very strong hint to someone that you're pushing water uphill, but on the other hand, you haven't ruled out their capacity to go further if they are absolutely determined and see it as their right to do so. Anyway, I'm no constitutional lawyer, but we'd welcome your - just one quick question. In relation to the Human Rights Commission, this work on the - I think you mentioned the word - I've written down "mediator" but I don't know whether you did actually use the word "mediator", it might have been Sue, but in relation to focus on what are the disputed facts, is that work undertaken by a Commissioner of the Human Rights Commission, or is that able to be undertaken by staff?

10  
15

**MR COOPER:** I think the title, and correct me if this is wrong, but I think their titles are "investigator/mediator", as opposed to - - -

20

**MR HARRIS:** It's not commissioner. I've actually been - - -

**MS ASHBY:** I understand them to be staff.

25

**MR HARRIS:** - - - interrogated.

**MR COOPER:** When you look at the Human Rights Commission's material, this is a document says, "Understanding and Preparing for Conciliation" and what does the conciliator do and some of the points there talk about trying to find ways of resolution and settlement, the normal things, but it also says that "While the conciliator does not decide who is right or wrong, the conciliator can provide information about the law and how the law may apply to the complaint." What we are suggesting is essentially just replicating that slightly more hands on approach in the unfair dismissal telephone conciliations.

30

35

**MS SCOTT:** Yes.

**MR COOPER:** So it's not just about passing offers irrespective of whether the claims is strong or weak on its face, but at the same time, not having sort of a quasi-hearing and I suppose avoid that constitutional concern about striking out applications on the papers - - -

40

**MS SCOTT:** Yes.

45

**MR COOPER:** - - - whereas in the merit-focused conciliation process, it's only an opinion. It's about the message value of the opinion. That might be

a relevant factor in costs hearings that might happen afterwards, but they're not summarily dismissing applications.

5       **MS SCOTT:** Thank you very much for that. That's very good clarification.  
I suppose the advantage of your steps through is that it may address concerns  
about the frivolous and vexatious. It may also address concerns that - you  
used the phrase, Sue, it's a one-way bet, you know, pay your \$68.80 and  
there's every chance that you're going to get some money out of it. The third  
10       thing is that this is an area where we think it's a fertile area to be farmed by  
people who are interested in sort of pursuing - basically ambulance chasers,  
people who are pursuing cases on the basis that if they do enough of them,  
they'll do quite well out of it.

15       All right. I think that's clear. In relation to, though, the problem of the  
commercial reality of go-away money, how do you see the messaging - I  
suppose over time the messaging would occur back to employers, because at  
the moment, even a 90-minute phone call with a lawyer sitting at your side,  
maybe spent an hour looking at your paperwork before, would probably  
20       mean that you'd be interested in a couple of thousand dollars of settlement  
even before the phone call. How would you overcome that issue?

**MR COOPER:** You mean parties getting legal advice and paying legal - - -

25       **MS SCOTT:** Yes?

**MR COOPER:** Well, this, our proposal wouldn't stop that. Our proposal is  
about whether you're represented or not, how do you ensure that the  
conciliation process has regard and actually focuses on the merit of the claim  
rather than just, as par for the course, just going straight to passing off as  
30       irrespective of whether the claim has merit, doesn't have merit, whether the  
applicant has put any sort of effort into the form and rest of it. So by means  
does it make the system perfect, but at least it focuses more on the substance.

35       **MS ASHBY:** It might also mean that those respondents get better advice  
from their representatives, perhaps, too, if there are better particulars that are  
available, in the same way that obviously we represent our clients, now we  
do that for free as part of their membership, but we quite clearly, when an  
applicant makes a claim, if we think that there is some sound basis to their  
claim, we'll give frank advice to our clients about whether we think  
40       settlement is a reasonable proposition and what the quantum might be. So  
perhaps while it won't eliminate an employer wanting to sort of deal with the  
matter commercially, I think there's better information perhaps that they  
might get from their legal representative and also their own understanding of  
what they might be exposed to. But I think you wouldn't know that until  
45       there was a new system in place.

**MR HARRIS:** That's fine.

**MS SCOTT:** Am I right in thinking, Sue, that your organisation covers 180,000 employees, would that be right?

5 **MS ASHBY:** That's across Australia, I think, yes.

**MS SCOTT:** Maybe I've got your other organisation confused with this.

**MS ASHBY:** Yes.

10 **MR COOPER:** Yes, we've got that in our submission, so yes, 180,000 employees in health, aged care, education - - -

**MS ASHBY:** So working for Catholic employers across the country.

15 **MS SCOTT:** So 180,000. It wouldn't be the case you'd have numbers on your rate of claims for unfair dismissals? That's one of the things we were searching for. You're obviously a large employer, you obviously follow the - you wouldn't have - - -

20 **MS ASHBY:** Unfortunately, we don't have that sort of data. It's even very difficult for us to get data on how many employees our employers cover across the State, so - - -

25 **MS SCOTT:** All right. I always live in hope.

**MR HARRIS:** We also ask for the data.

30 **MR COOPER:** We represent employees in these claims, but we're not - our members are not absolutely inundated with unfair dismissal claims, I think it's fair to say, even though they come and when they come up, represent them, but - - -

**MS ASHBY:** I'm sure there's the same percentage across - - -

35 **MR COOPER:** We're not inundated every day with - - -

40 **MR HARRIS:** Just the great value in getting somebody like you to help us with this, though, is like I was saying to some other people from the legal centres this morning, you're sort of like a third party in the process, you're not actually the employer, nor are you representing the employee, but you see the consequences of how the system operates, so you are some of our best witnesses for this purpose.

45 **MR COOPER:** Thank you.

**MR HARRIS:** Anyway, appreciate your assistance and your assistance with the report, the draft, when it was first being put together.

**MS ASHBY:** Thank you.

5

**MR HARRIS:** Thank you very much.

**MS SCOTT:** Thank you very much for your contribution.

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**MR HARRIS:** Now I think we have the Australian Catholic Council for Employment Relations. As soon as you're right, if you could identify yourself for the purposes of the record.

15

**MR LAWRENCE:** Yes. My name is Brian Lawrence, I'm the Chairman of the Australian Catholic Council for Employment Relations.

**MR HARRIS:** Thank you, Brian.

20

**MR LAWRENCE:** We have filed a submission back in March and then a supplementary one in April, 9 April. The supplementary submission was filed following our filing of submissions in the Fair Work Commission for the annual wage review of 2014/2015. The submission that we filed in March was primarily concerned with minimum wages and the work of the Fair Work Commission in regard to minimum wages. We've taken quite an active role in minimum wage cases for some years. I've been personally involved since 2003, and in that time I've drafted submissions and on most occasions I've appeared in the wage cases. That's both in the Industrial Relations Commission, the Fair Pay Commission and the Fair Work Commission.

25

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We've written quite a bit on this over a period of time and I suppose it might be said that we've since tried to identify the big picture or the big issues that are involved in the setting of minimum wages, from the point of view of what the purpose of a minimum wage is, what's the object of a safety net. The legislation says that the focus is on the setting of a safety net, having regard to a number of factors, which include the needs of the low-paid and relative living standards. In the March submission, we concluded the submission with a couple of paragraphs which I'd like to read because they set the scene for what I want to say today.

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ACCER submits that any policy proposal in regard to minimum wages has to be tested and considered by reference to its impact on the common good and the protection of workers and their families against poverty and social exclusion. The best way out of poverty is a job that pays a living wage. This task cannot be undertaken unless and until an assessment is made of the needs of workers and their families and an assessment is made of the actual and minimally acceptable relative living standards of those workers

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and their families who depend on the lowest minimum wage rates. They are entitled to be treated fairly and to live in dignity.

5       The kind of objectives in those passages that I've just read out cannot  
be supplied by wages alone in a developed and globalised economy. There  
are two realities that must be addressed in the formulation of a fair and  
sustainable wages policy. First, wages have to be supplemented by transfer  
payments, and second, governments need to promote employment by  
carefully scrutinising the non-wage costs of business. The first of these tasks  
10       requires the consideration of the balance between the public purse and the  
wage packet in the support of families.

15       It is clear that, at least in the foreseeable future, the public purse cannot  
provide for all the needs of the dependents of low-paid workers with family  
responsibilities, and that their wages must have a component for the support  
of dependents. Second, like the first, requires an acceptance that the cost of  
job creation and the maintenance of employment is a task of government  
based on a fair tax system where burdens and benefits are shared according to  
capacities and needs. To reduce wages to unacceptable levels in the hope of  
20       creating and maintaining jobs is morally unacceptable because there are other  
ways in which employment can be promoted and protected.

25       Now, they're the passages that conclude our submission and they come  
out of our reflection on the issues that we've been dealing with over a period  
of time. Can I just illustrate where we've travelled in this time. In the  
document that I've just passed up, which I'll explain in a moment, we can see  
- and there's a pink tab there, perhaps, Commissioners, if you turn to that  
pink tab, you'll see at page 145, just past the pink tab, at table 28, this is a  
table that sets out the disposable incomes of families over the period of  
30       January 2001 to January 2015. Well, it's more than families because it  
covers individuals as well, and they're families in which there are two  
children.

35       Because the transfer payments to a sole parent are the same as the  
transfer payments to a couple family with the same number of children, the  
disposable income is the same. That is, whether you're a sole parent on the  
national minimum wage with two children or you're a couple with one parent  
staying at home to care for the children, the disposable income in January  
2015 was \$961.70, and if you go back across that row, you will see,  
40       Commissioners, the make-up of that amount. There's a column there for the  
national minimum wage net, that is after tax, \$581.11. So if you're a single  
person on the national minimum wage, working full-time, that's what you got  
per week, \$581.11. If you were in those two situations I mentioned, the  
family, sole parent or couple parent family, \$961.70.

45       Now, the transfer payments in January 2015 at that time were 39.6 per  
cent of disposable income. It's a very significant percentage. The same



family, that is, a couple with two children - a couple with two children - in 1973 received only 7.7 per cent of their disposable income from transfers. So for a family, transfer payments have gone from 7.7 per cent of income to 39.6 percent. That shows a massive increase in the role of government in the support of dependents. Just by a bit of common sense, you can see the 39.6 per cent is not enough to support all of the dependents in that couple plus two children family, but it's a fair proportion of it. A fair proportion of the dependents are supported by the taxpayer.

So the balance between the public purse and the wage packet in the support of families has changed dramatically in the time in which I've been working, and a lot of that had to do with the Poverty Commission which operated in the early 1970s under the chairmanship of Prof Henderson, because he laid out, his and his other commissioners laid out a policy and you will remember, Commissioners, that there was originally a proposal for the Whitlam government to respond, then subsequently it was the Fraser government that came in with some significant increases in family payments, and then the Hawke government increased them.

Generally speaking, there's been an increase over a period of time and you can track the proportion over that period of time if you go back to the data on family payments. It's probable - well, it's inevitable, I think - that that proportion will go down. That figure of 39.6 per cent is based on the school kids bonus which is just over \$23 a week in that \$961.70. The school kids bonus disappears at the end of 2016. The table, and the income, also includes family tax benefit part B which is being proposed for abolition for school-aged children. When I say school-aged children, I mean the family tax benefit part B will not apply to families where there is no child in the pre-school years. So once the youngest child gets to school, then it will go.

These calculations are based on children being in the 8 to 12 bracket. We have to take certain age groups because the amounts vary, but we've taken here the 8 to 12 ages. So family tax benefit B will reduce if that legislation goes through and that will be just over \$52 a week out of the \$961.70. Now, that's being held up in the senate and we don't know at this stage what's going to happen to it. So that's why I say we've probably reached the peak with our 39.6 per cent. I should just explain that the calculations here are the same calculations or are based on the calculations that have been used by the Fair Pay Commission and the Fair Work Commission in its research since 2008; they've done this each year.

We've made use of that basic work because instead of looking at photos each year, so to speak, we've prepared a graph over a period of time and we've filled in the detail, so that's our contribution to this process. So we think there's quite a strong economic argument for reducing the wage component and increasing transfer payments because it means that the wage packet has less work to do. Back in 1973, it was framed in a way where it

was meant to supply for the needs of a family and virtually all the needs, certainly the great majority and one of the things that was said then was, because of various developments that took place, that there needed to be less emphasis on wages and more on transfer payments. You might say, if you  
5 take a longer view of the matter, if you were to look over the last 100 years and look at it in fairly simplistic terms, a hundred years ago it was the tariff system that enabled us to provide jobs and look after the needs of families, to some extent, in which case the costs were borne by the consumers, at least, but now with a globalised, more globalised economy, it's the taxpayer through  
10 transfer payments that meets that particular demand.

One of our complaints about what has happened over the last 20 years, certainly over the last 15 years, is that the wages component has dropped too far and the transfer payments haven't gone up enough, and that's despite  
15 transfer payments going up significantly. You can do the calculations, and I've done them, but I haven't got them at my fingertips, between 2001 and 2015; there's not all that much difference between 2001 and 2015 in terms of transfer payments. I think the figure is something like it's gone up from 35 per cent to 39 per cent of disposable income.

Now, there's a view around that during the Howard years when there was a lot of money in the federal budget that family payments went up enormously. Well, of course they did, but they didn't hit these particular  
20 families. What happened with family tax benefit A and B was that the eligibility was extended into higher income groups so the great bulk of the extra expenditure went to middle - well, to other than low income families and that was perhaps partly driven by politics, but it was also in part driven by the view that the effective marginal rate of taxation was too great and so the idea was to change the taper, so instead of being operating over a small  
25 level, it operated over a long level, the long income range.

So we think that's really the critical issue. Our concern or our focus has been with families and we say when you've set up a system for a safety net, the system shouldn't be diverted by or too diverted by the unusual cases,  
35 but it should be sufficient for the ordinary cases, the expected cases. So when legislation says there's to be a safety net that's sufficient for people to live a decent life, and I know the legislation doesn't say that, but if you summarise it as meaning that, then you have to say, well, how do you measure what a decent life is? You'll see some indication as to how you do  
40 it. And secondly, who are you talking about? What families are included?

Well, you wouldn't say it has to be predicated on the basis of seven children in a family, but we say in the ordinary expected cases, it should be two. So we give a lot of attention to sole parents with two children and  
45 couple parent families with two children and as a result of that, we calculate what their position is relative to, in particular, the relative poverty line.

**MS SCOTT:** Brian, do you have both parents working, one parent working part-time, one working full-time? What split do you do there?

5 **MR LAWRENCE:** No, this one here is, with a couple parent family, 100 per zero, staying home looking after the children.

**MR HARRIS:** One parent working?

10 **MR LAWRENCE:** Yes. You can do the calculations, and in fact, there are some in the material as put out by the Fair Work Commission. They do break that up. They'll give, for example, what would happen if each was working half-time. Now, this of course leads into questions as to almost  
15 normative judgments about what people can expect if they have one parent staying home to look after the children. Our answer to that is that the second parent shouldn't have to work in order to get out of poverty. If the second parent wants to work or they can make arrangements to work, then it shouldn't be just to get out of poverty, but something more than that.

20 So that's how we put it, but you do have arguments around that and uncertainty, but you haven't got a decent platform for a debate about that until you get the statistics. Now, you'll see in the material that I gave you that there's a graph over on page 147, and then an update which the update comes as a result of the most recent ABS publication on household income and income distribution. It was released on 4 September, and this shows that  
25 there's quite a significant shortfall in terms of a 60 per cent poverty line for the couple with two children and there's a poverty gap there, at the national minimum wage level, of \$116.76 per week.

30 Now, obviously there will be debate about whether the 60 per cent relative poverty line is an applicable one or a reference point that has utility. One of the things we've done in the submission is to look at the position of pensioners and we've calculated what the position of pensioners is relative to the 60 per cent poverty line. At page 149, what we've done there at table 31 is to look at those same three families, couple parents with two children, and  
35 looked at where they are in respect of the median, and you'll see that a couple on the aged pension have got a standard of living, by using these equivalent scales, of course, that's higher than the national minimum wage dependent family.

40 So we've used these pension groups to provide some sort of comparison, but we'd say ultimately, where you choose to place families or where you choose a range, what the range is that you try to set the families at or individuals at, depends on research and we haven't got enough research in this country to be confident about it. There's some good work that's been  
45 done by the Social Policy Research Centre on budget standards. That's current being updated and we think that would be quite useful, but we may get to the point, just for argument's sake, where we can see that perhaps

60 per cent of median or 60 to 63 per cent of median might be appropriate to meet the reasonable needs of working families.

5           There might be some reason to expect that pensions will be a little less  
than that for one reason or another, but we hope that the data will enable as to  
identify this and use this as a guide. So that's where we're at with the  
poverty line. Could I just explain, that book that I've given you has got  
10 chapters. Chapter 9 was ACCER's submission to the minimum wage case  
this year, and it had attached to it eight chapters, which are the first eight  
chapters of this book.

**MR HARRIS:** So the other way around?

15           **MR LAWRENCE:** Yes. So the book is eight chapters, then comes the  
submission, chapter 9, and then because this was put out in June, we've got  
chapter 10 which is a response to the decision and I'm not going to take you  
to what we said about the decision. If I think there's anything of relevance to  
that, I'll put it in the document to be filed tomorrow. But that's where we're  
20 at in relation to that sort of analysis and how we're trying to get a better idea  
on measurements as to how these families and individual workers will relate  
to the rest of the community.

25           Our position on the wages transfers mix is not fixed. That is, if  
transfers were sufficient to look after the needs of dependents, fine. Then  
you might concentrate on looking at a single person, but we haven't got to  
that stage yet. We haven't got to the point where transfers are sufficient to  
look after the needs of dependents, and so for that reason, wages have to take  
into account support of dependents and we think the way the budgetary  
outlook appears to be unfolding, there will be more work to be done by  
30 wages in the future.

35           **MR HARRIS:** Can I ask you, you read our draft report where we comment  
in this area, so you'll be conscious of the fact that we identified, I think with  
reasonable clarity, that the minimum wage is very poorly targeted at the least  
well off workers. In other words, as a tool for addressing who is above and  
below the poverty line, it doesn't do much of a job because the distribution of  
families that include a minimum wage earner is right up and down the  
spectrum and although it is the most substantial element of the worst-off  
people's income who are working, it's also a very substantial element of  
40 middle income earners on a family basis earnings.

45           So to say that the wages system should carry the burden of the poverty  
end of the spectrum is also to say, and we should give the same benefit to  
people right along the income spectrum because the minimum wage is  
distributed even up to the highest decile. There's a few workers in the  
highest decile who are minimum wage workers. So it doesn't seem to be  
very well targeted, and I guess that's our - we haven't actually, as you know,

found against the minimum wage, but one of the things we find is, and it goes specifically to the point you're making, but we didn't even write it up as a finding or anything, but it's reasonably obvious that if you are trying to address poverty, the minimum wage is not a great tool in terms of targeting.

5

**MR LAWRENCE:** Yes. Well, they say it's one instrument and that term has been used for a long time, and at one stage the Industrial Relations Commission said, "We accept it's a blunt instrument, but it's the only instrument we've got."

10

**MR HARRIS:** So we looked at other instruments and with respect to whenever that decision was made, obviously they didn't or those instruments weren't really very well considered, probably because they weren't under the control of the Industrial Relations Commission. But we're not in that same game, so that, as a threshold, wouldn't be a binding factor as far as we were concerned, the fact that they had no instrument under their control that they were able to deal with shouldn't mean that in dealing with poverty - so it's not actually dismissing dealing with poverty, it's just saying is the minimum wage a good weapon, and it looks like a pretty ordinary one.

20

Not to say if you had nothing else, maybe you should use it, but we've looked at earn income tax credits and they don't make a great case in themselves either, by the social welfare system which, as you point out, has become increasingly a mechanism for assisting the least well off in society, at least carries the great benefit that it is very good at targeting, some people say we're the best in the OECD, the best in the developed world, at targeting to the least well off. Now, I guess that's arguable, but if you had a choice, and we have a choice in this kind of process, of saying is the wages system the right way of addressing the least well off, or is the welfare system.

30

We don't have to make a finding on that, but if you were, on the information available to us, you'd probably go down the path of saying you should be using the welfare system.

35

**MR LAWRENCE:** The welfare system can be more targeted and it's a way in which you would shift the support, the cost of the support for the dependents, from the wage packet to the taxpayer, from the employer to the taxpayer. There's some opposition in some areas to that. You'll get it particularly in the US where people say why should Walmart be transferring costs for their employees from themselves to the taxpayer, because that's how they crystallise the issue. But I think in Australia we don't have that argument.

40

**MR HARRIS:** We're not quite at that point, no.

45

**MR LAWRENCE:** No. But in 1954, the Australian Catholic Bishops put out a Social Justice Statement, in which they referred to the difficulties that

were being experienced in the setting of the national wage, for the basic wage, and they said that it wasn't sufficient to look after families and proposed that there be a different system in which the costs of dependents would be paid for out of public funds and that the rate of pay would be the rate of pay for a single person. You know, a single person's rate of pay. So we're not opposed to that, it seems to be the way in which you would go. You would target need and you would have a proper way of assessing what need is and you'd pay for that out of the federal budget.

But unless and until you get to that point where the needs are being targeted, the wage packet has got a job to do. It's still carrying a load. Now, what we know is, from 1973 to 2015, the load that the wage packet has had to carry has dropped enormously and so in a sense, the wage increase back in 1973 was a very blunt instrument, one might say, for dealing with the issue, but it's become a little bit more targeted as it's had less work to do over the years to support workers with family responsibilities. So our point would be unless and until transfers have got to the stage where you can say they are sufficient, then the wages have to do something and this is even if it turns out that some of the beneficiaries of the minimum wage increases are not in need of that support.

Not all workers need a safety net rate of pay because they're in different situations, but some really do and we looked at the number who really do need a safety net, and if you turn over to page 156, so this is table 32, we took this material, this data, from the 2011 census, and we looked at the people who were under what was roughly the 60 per cent relative poverty line and we found that there were quite a few low-income families in single income families living in poverty. But of course, there are a lot of people on a minimum wage, whether it be the national minimum wage or an award rate of pay, who are living in high income households, as you say, and they could be the children of the well-to-do middle class or there might be a second parent working who happens to be on the minimum wage.

We say that's no reason to reduce the standard of living to something less than poverty for the people who really need it. They don't need it, the sons and daughters of surgeons don't need the support, but the fact that they don't need the support is no reason for denying the support of a safety net, a proper safety net, for the people who really do need it; the low paid, the people with less skills, the people who are the most marginal in the workforce. If the community says, well, it's just too expensive, we think there's a better way of targeting this, so all right, well at that point, change the system, increase the transfer payments.

We used to have, going back to the early 2000s after that work was done by the five economists, we had employer groups coming along and saying, "Don't give a pay increase because there are better ways of targeting

the needs of the low paid, better ways of targeting the needs of the families.” It’s a blunt instrument, this wage increase. They came along, several years, they don’t say it now, but they used to, but they never went along to the Federal Treasurer and said, “We want an increase in the transfer payments.”

5 So unless and until you get these employers who are running this sort of argument, that would deny the poorest people a decent standard of living, unless they’re prepared to go along and argue for increased welfare payments, increased transfers, then I think we shouldn’t be diverted by that argument. We have to look after the people who are in most need.

10

**MR HARRIS:** I think, on moral grounds, your position is very clear, and as you know, we did look at all options that we could possibly envisage and we can’t recommend anything better than what I would consider to be improvements of a quality kind to the current system. As you know, I think

15 you mentioned in passing, where they’re interested in the position of the unemployed and believe they should be better represented in these decision-making processes, and that’s a job really that the Commission needs to take on for itself because I can’t really expect, and I don’t think - I’m sure you do comment on this in your submissions, but it seems unreasonable to expect third parties to carry the burden and our overall proposition is the

20 Commission should start doing this research for itself and shouldn’t take up resources necessarily able to therefore consider this.

Because that is part of the overall group. I mean, your own data shows

25 this. You have, in that last table you drew our attention to, the employed as clear participants in this level of families below the poverty line. So it just seems inherent that this work should be better done. Where that leads the Commission, as you know, our proposition is in downturns, you should consider the unemployed more actively. I note your proposition is the

30 reverse and we’ve also heard from others today that income and spending rates are very important in downturns too, but doesn’t alter the possibility of dealing with it through a different mechanism in the same way that you’ve just described. It’s just that that trade-off needs to be made very explicit in one form or other.

35

If you’re going to deal with the least well-off in our society, you need to either continue to exploit the wages system or you need to provide an alternative to the transfer system. People can argue what’s the legitimate level, if you like, of support, but the principles of you must use mechanisms

40 of one kind or another I think are pretty straightforward, really.

**MR LAWRENCE:** Yes. I certainly wouldn’t like to give the impression that we’re preoccupied with the position of the employed to the detriment of the unemployed because you know, the unemployed need to be identified and

45 given every support, but that concluding part of the passages that I read out about moral acceptability, that is a line that’s taken from something that the Australian Catholic bishops have said, it’s almost in exactly the same terms

as what the Catholic bishops of England and Wales have said, and it's basically the same position as taken by the church generally throughout the world.

5           That is, it's morally unacceptable to try to reduce the level of  
unemployment by reducing the living standards of the most marginal  
workers, and it's morally unacceptable because in our society there are other  
ways of doing it, other ways of dealing with the costs of labour and other  
ways of promoting job opportunities. It's a responsibility for the community  
10 as a whole, not low-paid workers, so that that's why we say you really need  
to look at taxation levels, transfer payments. For example, I think it's 9 per  
cent of the national minimum wages goes off in tax, in income tax. If you  
were looking at a sensible arrangement, I suggest this is an easier one to  
grapple with than the earned income tax credit, you would be looking at some  
15 way to reduce the tax component on the national minimum wage which  
would have the effect of enabling some sort of trade-off in the wage  
adjustments over a period of time.

20           **MR HARRIS:** The problem with both EITC, which I'm very interested in,  
and we've looked closely at and/or changes in the tax arrangement is of  
course you have to be employed for the tax system to be relevant to you.

25           **MS SCOTT:** Brian, just on your graph in relation to disposal incomes and  
the safety - sorry, the poverty line, have you calculated it for your - we had  
the previous discussion with your sister organisation, about the fact that the  
Catholic sector employs 180,000 workers and they go over a vast range of  
sectors. Have you calculated what it would cost your sector to put all  
employees of Catholic sector on the levels that you recommend?

30           **MR LAWRENCE:** No, we haven't. We're just in the process of starting a  
national survey to find out how many employees we've actually got because  
we don't know, and we're trying to find out in what sectors they're  
employed, how many are in them, what their award rates of pay are, or if  
they're on the awards or some other arrangement, we don't know, but I think  
35 it's fair to say that there would be very few, very, very few, who would be on  
the national minimum wage or close to it, and the reason I say that is that -  
well, perhaps I'll just go back a step.

40           We've been arguing in the Fair Work Commission that there should be  
incremental increases so the national minimum wage moves up to the base  
rate of pay for cleaners, which is \$42 or so above the national minimum  
wage. We've said that gap should be closed over a period of time. The  
reason that happens to be the figure that is the rate of pay, or it's very close to  
the rate of pay, under the Miscellaneous Award after you've been there for  
45 three months, right. So there are very few awards that have a rate of pay  
between the national minimum wage and that cleaners' rate, or the C12 rate  
which is the one we'll be using here for the table, the second of the tables.



Very few award rates between those two that Catholic employers would be bound by.

5 So we don't think the movement of the national minimum wage up to the cleaners' rate would affect Catholic employees.

10 **MS SCOTT:** But maybe I'm misunderstanding your piece of paper, I'll have to read more, but here it says a C12 dependent family - I see, it's a family of four fell into poverty, but a family of two doesn't fall into it?

**MR LAWRENCE:** No.

15 **MS SCOTT:** No, no, sorry, family of four, it was your family of four that was - - -

**MR LAWRENCE:** Yes, the family of four too. So - - -

**MS SCOTT:** But it says C12 dependent family of four fell into poverty.

20 **MR LAWRENCE:** There is an important question here and that is, even if all Catholic employers were paying no less than the cleaners' rate, would the workers and their families be in poverty, that is, if they were supporting a dependent spouse and children. Well, they would be, according to these figures, and that raises an important question, and it needs to be addressed  
25 and so although we're confident that there are very few, very, very few between the national minimum wage and the cleaners' rate, that doesn't avoid the issue. Because there's still the question of whether the cleaners' rate is sufficient.

30 **MS SCOTT:** All right. Thank you for that clarification, I appreciate that.

**MR HARRIS:** Thank you for your evidence here today. Thank you for bringing along the data, too. You get double thanks if you bring data, any and all data is valuable. So we're at the point now where anyone who has  
35 managed to persist throughout the day and would like to make a comment who hasn't registered to do so, now is your opportunity. Otherwise, if I have no people busting the door down to get on the record, we're adjourned until we turn up in Ipswich next Monday. Thank you very much.

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**ADJOURNED AT 4.06 PM UNTIL  
MONDAY, 21 SEPTEMBER 2015**